Manitoba Law Reform Commission

UPDATING THE ADMINISTRATION OF SMALL ESTATES IN MANITOBA

Consultation Report

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CONSULTATION REPORT

Comments on this Consultation Report should reach the Manitoba Law Reform Commission ("the Commission") by **October 30, 2017.**

The Commission encourages you to provide your thoughts, comments and suggestions concerning this aspect of Manitoba's law. Please refer to the provisional recommendations identified in this report, and any other matters you think should be addressed.

Please submit your comments in writing by email, fax or regular mail to:

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The Commission assumes that written comments are not confidential. You may submit anonymous written comments, or you may identify yourself but request that your comments be treated confidentially. If you do not comment anonymously, or request confidentiality, the Commission may quote from or refer to your comments in its Final Report.

Alternatively, you can participate in an anonymous online survey in connection with this Consultation Report. A link to the survey can be found on the Commission's homepage at www.manitobalawreform.ca.

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Please note that the information provided and provisional recommendations made in this Consultation Report do not necessarily represent the views of those who have so generously assisted the Commission in this project.

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GLOSSARY

Administrator:	A person appointed by the Court to handle the estate if the testator does not name an executor in their will, or no will exists.
Beneficiary:	A person named in a will to receive some of the estate.
Estate:	After a person's death, their assets and liabilities make up their estate.
Executor:	A person named in a will to carry out the terms of the will.
Letters of Administration:	Documents issued by the Court authorizing an administrator to deal with an estate.
Personal Representative:	General term used to describe both administrators and executors.
Probate:	The Court process of proving that a will is valid and administering the estate under supervision of the Court.
Testator:	A person who has made a will.

CHAPTER 1: INTRODUCTION

Every Canadian province and territory has laws and procedures in place that govern how an estate is to be administered after a person's death. In Manitoba, *The Court of Queen's Bench Surrogate Practice Act* ("*The Surrogate Practice Act*")[1] governs the administration of estates, whether there is a will or not. The rules in place serve to protect estates from fraud and mismanagement. The ordinary process for obtaining probate carries with it legal and administrative costs as well as time and administrative burdens. But what happens in the case of relatively small estates, where the costs associated with administering the estate may be disproportionately high compared to the value of the estate? In these cases, the estate available for distribution may be depleted. Alternatively, the personal representative for the estate may choose not to administer the estate at all.

In 1938, the Legislative Assembly of Manitoba adopted a practical solution to this problem, which was to create a separate stream for the administration of small estates.[2] This separate stream, known as the summary administration of small estates, was designed to be much simpler and less costly than the regular procedure. In order to be eligible for this simplified process, the value of an estate must fall within a monetary limit prescribed by statute. The current limit is $10,000 and includes both personal property and real property.[3]

This Consultation Report considers possible amendments to improve the legislation and procedure related to the summary administration of small estates under *The Surrogate Practice Act*. The primary area addressed is whether the monetary jurisdiction should be increased.

This project is part of a wider Commission initiative entitled *Access to Courts and Court Processes*, which identifies specific legislative amendments that can be made to improve access to court processes and promote the efficient administration of justice in Manitoba. While the Commission recognizes that the changes proposed in this report only address one aspect of a large and multifaceted access to justice problem, the recommendations, if implemented, would allow more people to access the simplified process for the administration of estates where the value is small enough that the ordinary cost of estate administration renders the act impractical. Although there are many identified barriers to accessing the justice system, it is well established that the cost and complexity are two such barriers.[4]

Chapter 2 of this Consultation Report describes the administration of estates under *The Surrogate Practice Act* with a focus on the summary administration of small estates. Chapter 3 discusses the approaches taken to deal with small estates in other Canadian jurisdictions.

[1] CCSM c290 [*The Surrogate Practice Act*].
[2] *The Surrogate Courts Act*, SM 1937-38, c 11.
[3] *The Surrogate Practice Act*, *supra* note 1, s 47(1).
[4] See *Hryniak v Mauldin*, 2014 SCC 7, [2014] SCR 87 at para 1.

Chapter 4 explores the need for reform and makes provisional recommendations to improve and update the summary administration of small estates in Manitoba.

CHAPTER 2: BACKGROUND

When a person dies, it can be said that the person has died either testate (having made a valid will) or intestate (not having made a will at all or having an invalid will.) In either situation, laws are in place to deal with the deceased person's affairs, such as collecting the person's assets, paying any debts, including taxes, and distributing the remainder of the estate. Probate is the term used to describe the court process establishing the validity of a will, if there is one, and a personal representative's authority to act on behalf of the estate.

The Surrogate Practice Act governs the administration of wills and estates in Manitoba. It gives the Court of Queen's Bench jurisdiction over all testamentary matters and causes.[5] In order to formalize the administration of the deceased's estate, someone must apply to the Court of Queen's Bench for either a Grant of Probate or Letters of Administration. Probate is granted in the case of a valid will, and administration is granted in all other cases, upon the application of the appropriate person. In the case of relatively small estates, there is also a simplified procedure known as the summary administration of small estates.

The purposes of probate, administration and the summary administration of small estates are: (1) to validate the will, if there is one; (2) to establish the authority of the estate representative (also known as the executor in the case of probate, the administrator in the case of administration, and generically the personal representative) to receive the deceased's assets and otherwise administer the deceased's estate according to the will or rules of intestate succession law; (3) to provide a shield for estate representatives from liability; (4) to provide a public record of estates for interested persons; and (5) to educate to some extent estate representatives of their responsibilities.

According to statistics provided by the Court of Queen's Bench Registry - Probate Division,[6] grants of probate are the most common type of grant, letter or order granted:

QB Registry Filings	2014	2015	2016	Jan 1-Mar 31 2017
Grants	**2738**	**2827**	**2680**	**671**
Letters of Administration	**547**	**512**	**560**	**156**
Letters of Administration with Will Annexed	**94**	**83**	**87**	**37**
Section 47 Orders	**216**	**212**	**215**	**52**
TOTAL	**3595**	**3634**	**3542**	

[5] *The Surrogate Practice Act, supra* note 1, s 6. Pursuant to s 1, "matters and causes testamentary" includes "...the granting of probate of wills and letters of administration of estates of deceased persons having property in the province, and the revocation thereof, and all matters and causes relating thereto or arising therefrom."
[6] Statistics provided by Sandra Prairie, Court of Queen's Bench Registry, 26 April 2017.

Although the statistics are not available, a comparison of Queen's Bench Registry filings and Vital Statistics registered deaths suggests that the majority of estates do not go through a formal probate process. According to Vital Statistics, in the 2014/2015 fiscal year, 10,981 deaths had been registered compared to fewer than 4,000 grants, letters or orders. Similarly, in 2015/2016, 10,513 deaths had been registered while fewer than 4,000 grants, letters or orders had been issued.[7] Although there may be reasons why estate administration may not be required for some deaths, such as death of a minor, it is reasonable to assume that many estates do not go through any formal administration process.[8]

The following section will provide background into the procedure for probate, administration and the summary administration of small estates in Manitoba.

1. Probate

The procedure for probating a will is prescribed in the *Court of Queen's Bench Rules* ("QB Rules"), Rule 74.[9] In order to have a will probated, the executor must make a Request for Probate to obtain a Grant of Probate from the court, which is needed in order for the executor to deal with the assets and debts of the deceased person.[10] It typically involves a lawyer collecting information from executors and financial institutions before preparing the Request for Probate. Additional documents such as Letters of Direction and Transmissions for real property or financial assets may also be required, depending on the nature of the estate. Next, the Request for Probate, together with the probate fees, is filed with the court for review by a judge. The judge, if satisfied with the information, will issue a Grant of Probate.

The ordinary procedure for probating a will under *The Surrogate Practice Act* carries with it legal and administrative costs as well as time and administrative burdens. Probate fees are the fees paid by the executor to the provincial government upon submitting the Request for Probate or Administration. *The Law Fees and Probate Charge Act*[11] establishes the fees payable for the administration of estates in Manitoba. For estates over $10,000, the fees are calculated at $70

[7] Manitoba, *Vital Statistics Agency 2015/2016 Annual Report* at 16, available online: <https://vitalstats.gov.mb.ca/pdf/2016_vs_annual_report_en.pdf>. Note that a precise statistical comparison is not possible with the information available, since the court registry information is based on the calendar year while the Vital Statistics recorded death statistics are for the fiscal (April 1 to March 31) year.

[8] This conclusion is consistent with findings in other Canadian jurisdictions. For example, see Law Reform Commission of Nova Scotia, *Probate Reform in Nova Scotia* (March 1999) at 41. Available online: <http://www.lawreform.ns.ca/Downloads/Probate_FIN.pdf>. "Comparing the number of deaths with the number of estates opened each year, it appears that only approximately 30% of Nova Scotia estates are formally probated" at 41.

[9] *Court of Queen's Bench Rules*, Man Reg 553/88 [QB Rules].

[10] *Ibid*, Rules 74.02(1).

[11] CCSM c L80.

plus $7 for every additional $1,000 or fraction thereof.[12] For an estate valued at $25,000, for example, the probate fee would be $1,750.

Personal representatives to an estate will often retain a lawyer to assist with probating the will or administration of the estate. The QB Rules provide what types of services can be claimed by lawyers for fees payable, such as: receiving instructions and providing advice; reviewing the will; preparing the required documents to obtain probate or administration of the estate; filing documents with the court; assisting the personal representative in settling debts; preparing documents for land transfers; and advising and assisting the personal representative in distributing the estate property in accordance with the will or intestate succession provisions.[13] The legal fees associated with probating a will are governed by the QB Rules, which sets out the following formula:

- 3% on the first $100,000, or portion of that amount, of the total value of the estate, subject to a minimum fee of $1,500;
- 1.25% on the next $400,000, or portion of that amount, of the total value of the estate;
- 1% on the next $500,000, or portion of that amount, of the total value of the estate; and
- 0.5% on the total value of the estate over $1,000,000.[14]

For an estate valued at $25,000, for example, the legal fee would be $1,500 plus disbursements. Taking into account both probate and legal fees, the cost of administering an estate valued at $25,000 would be approximately $3,250.

The rules also provide that legal fees are reduced to 40% of the fees reproduced above if the executor is a trust company, the Public Trustee, or a lawyer who is acting as both the executor and the lawyer.[15]

Note that in addition to the legal fees set out above, there may be additional fees the lawyer is entitled to receive for services such as appearances in court, keeping and preparing the accounts of the personal representative or where the estate is above average in terms of complexity.[16]

2. Letters of Administration

Administration orders are granted by the Court of Queen's Bench Probate Division to appoint a person or persons to administer a deceased person's estate. Letters of administration orders are typically made when there is no will, and the appointed person will administer the estate

[12] See Schedule to *The Law Fees and Probate Charge Act, ibid*.
[13] QB Rules, *supra* note 4, Rule 74.14(8).
[14] QB Rules, *ibid*, Rule 74.14(6).
[15] QB Rules, *ibid*, Rule 74.14(7).
[16] QB Rules, *Ibid*, Rule 74.14(9).

according to intestate succession laws, although administration orders may also be used when there is a will but the court must appoint a person or persons to administer the will (known as letters of administration with will annexed.)[17]

Although there are some differences, for the purposes of this report the procedure for obtaining an administration order is similar to the procedure for probating a will.

3. Summary Administration of Small Estates

In addition to probate and administration, the Legislative Assembly of Manitoba has enacted a simplified process to deal with relatively small estates. In the case of small estates, the cost of obtaining probate or administration was seen as so costly and the process so arduous as to induce the government to provide a simplified procedure, known as the summary administration of small estates.

The summary administration process was added to *The Surrogate Courts Act*[18] in 1938. The original monetary limit was $300 and the process applied only to personal property. The monetary limit was subsequently increased to $1,000 for all property in 1968,[19] followed by an increase to $5,000 in 1983.[20] The most recent increase took place in 1996, where the limit was increased to $10,000.[21]

The Surrogate Practice Act allows the court to dispense with probate or administration in estates valued at $10,000 or less, whether there is a will or not.[22] Pursuant to Section 47(1), the court may issue an order for distribution of the estate according to the law:

> **Summary administration of small estates**
>
> 47(1) Where it appears to the court that the total value of all the property of a deceased does not exceed $10,000, so far as can be reasonably ascertained, the court, without the grant of probate or administration, may order that the personal property be paid or delivered to such person as the court directs, to be disposed of by him as the court directs in
>
> (a) paying the reasonable funeral expenses;
>
> (b) paying the debts of the deceased; and

[17] See *Surrogate Practice Act, supra* note 1, s 1: "Administration refers to all letters of administration of property of deceased persons, whether with or without the will annexed, and whether granted for general, special or limited purposes."
[18] SM 1937-38, c 11.
[19] SM 1968, c 14.
[20] SM 1982-83-84, c C290.
[21] SM 1996, c17, s 2.
[22] *Surrogate Practice Act, supra* note 1, s 47(1).

> (c) paying over any balance in accordance with the terms of the will, if any, or to the next of kin, or if there is no next of kin or if none can be conveniently found, paying over the balance to the Minister of Finance to be credited to the Consolidated Fund;
>
> and may order that the real property be vested in such person as the court directs and that the proceeds therefrom be disposed of as provided in clauses (a), (b) and (c); and any such order dealing with the real property shall be conclusively deemed to be an order made under section 176 of *The Real Property Act*.

Subsection 47(3) clarifies that, in cases where section 47(1) applies, the provisions of the Act dealing with probate or administration do not apply.

QB Rule 74.15(2) deals with summary administration of small estates. The procedure is much simpler than obtaining probate or administration. It directs that a person may swear an affidavit requesting an order pursuant to Section 47 of *The Surrogate Practice Act*, in order that the person may administer the property of the deceased.[23] (Note, however, that the court has discretion in whom to appoint as administrator[24] and the administrator must be a Manitoba resident.[25]) The administrator of the estate must fill out a form for Request for Order under Section 47 (74BB) and an Order under Section 47 form (74CC), as provided in the QB Rules.[26] The person who fills out the forms is required to identify themselves and their relationship to the deceased, as well as some other information related to the deceased's surviving next of kin, if applicable. The form includes a declaration that the property of the deceased does not exceed $10,000 and the applicant must describe the real and personal property that the estate includes. The document must be signed in front of a Notary Public or Commissioner for Oaths. If there is a will, it must be attached to the application as an exhibit.[27]

The cost of getting a Section 47 Order is minimal; the filing fee is $70.00. The procedure is not complicated and can be done without the assistance of legal counsel, although the applicant will still need to have their signature witnessed by a Notary Public or Commissioner for Oaths, so the process still requires the applicant to take the added step of identifying an appropriate person to witness their signature.

All applications (regardless of type) are filed with the Court of Queen's Bench, Probate Division and undergo the same review. When an application is filed, a Deputy Registrar will review it for compliance with the QB Rules, *The Surrogate Practice Act*, and applicable directives. Next, it

[23] If there is no will, *The Intestate Succession Act*, CCSM, cI85, sets out the priority of claims to an estate.
[24] *Surrogate Practice Act, supra* note 1, s 14.
[25] *Surrogate Practice Act, supra* note 1, s 7(1).
[26] QB Rules, *supra* note 4, Forms 74BB and 74CC.
[27] The Community Legal Education Association (CLEA) provides a step-by-step guide for the procedure under section 47 of the *Surrogate Practice Act*. Available online: http://www.communitylegal.mb.ca/wp-content/uploads/Estates-Under-100001.pdf.

will be forwarded to a Court of Queen's Bench General Division judge or rejected and returned. The judge will review the application and either grant the order or reject it.

CHAPTER 3: OTHER CANADIAN JURISDICTIONS

There is considerable variation in the administration of small estates in Canada. This section will briefly review the procedures in other Canadian jurisdictions.

1. Specialized Procedures for Small Estates

Saskatchewan and the Northwest Territories are the only other Canadian jurisdictions that have specialized court procedures for small estates.

(a) Saskatchewan

Saskatchewan's *Administration of Estates Act*[28] provides for a simplified process for small estates.

Section 9(1) of the Act provides:

> Disposal of property under certain amount without grant
>
> 9(1) On the application of any person interested, which may be made ex parte unless a judge orders otherwise, a judge may, without granting letters probate or letters of administration, order that the personal property of a deceased person be paid or delivered to a person named by the judge to be disposed of by that person as the judge directs and in accordance with subsection (2), where:
>
> (a) the deceased owned no real property in Saskatchewan that will pass through the estate; and
>
> (b) the value of the personal property of the deceased does not exceed the amount prescribed in the regulations.

The monetary limit is currently $25,000.[29] Saskatchewan's process for small estates applies only to estates where the deceased owned no real property, as opposed to Manitoba's process, where the value of the estate can include real and personal property. Similar to Manitoba, there is no requirement to give notice to beneficiaries or creditors.

Although the simplified procedure under Section 9 applies only to estates where the deceased owned no real property, the *Administration of Estates Act* also provides assistance in cases where estates are small but do contain real property. Section 7 of the Act provides that, in the case of

[28] SS 1998, c A-4.1, ss 9(1).
[29] *Ibid*; *The Administration of Estates Regulation*, RRS c A 4.1, Reg 1, s 8.2. The monetary limit was increased from $5,000 to $25,000 in 2008, at which point the limit was moved from the Act to the regulations (see *The Administration of Estates Amendment Act, 2008*, c 2, s 9.)

estates below a certain monetary limit (currently $15,000 as per the regulations[30]), the local registrar will assist in completing probate or letters of administration:

> Duty of local registrar re documents
> 7(1) On the request of an individual described in clause (b), the local registrar shall prepare the necessary papers leading to a grant of letters probate or letters of administration, as the case may require, and the bond required, if any, and administer the oaths where:
>
> (a) the value of the estate of the deceased person does not exceed the amount prescribed in the regulations;
>
> (b) letters probate or letters of administration are sought by an individual who:
>
> (i) is a resident of Saskatchewan; and
>
> (ii) is a person, other than a creditor, entitled to seek letters probate or letters of administration; and
>
> (c) the individual who makes the request provides the material required by the local registrar and pays the fee prescribed in the regulations.
>
> (2) When letters probate or letters of administration are granted in an estate where the value of the estate of the deceased person does not exceed the amount prescribed in the regulations, the local registrar shall endorse the letters probate or letters of administration with the notation prescribed in the regulations.[31]

Where Section 7 applies, probate or letters of administration is still required, but the local registrar can prepare the documents, meaning no application for probate or administration needs to be made.

The *Administration of Estates Act* also empowers the public guardian and trustee to administer estates under $25,000 without a grant, even where there is real property.[32]

(b) Northwest Territories

Northwest Territories very recently enacted a simplified procedure for the administration of small estates. On January 31, 2017, the *Estate Administration Rules*[33] introduced a new procedure under Part 1, Division 1. Section 10 provides:

> **10.** (1) In this rule, "small estate" means an estate of a deceased if the net value of the estate reasonably appears to be less than $35,000.

[30] *The Administration of Estates Regulation, ibid*, s 8.1(1).
[31] *Administration of Estates, supra* note 28, s 7.
[32] *Administration of Estates Act, ibid*, ss 44.1.
[33] NWT R-123-2016.

(2) A person other than the Public Trustee may, instead of applying for a grant, apply to the Court for a declaration that an estate is a small estate.

(3) A person other than the Public Trustee who applies for a declaration that an estate is a small estate shall complete and file with the Clerk

(a) an Application for Declaration of Small Estate in Form 2; and

(b) a Memorandum and Affidavit in Support of Application for Declaration of Small Estate in Form 3.

(4) If the Court is satisfied that an application made under this rule is in respect of a small estate, the Court may declare that the estate is a small estate and order that the applicant

(a) is authorized to administer the estate of the deceased; and

(b) may use any of the property in the small estate to

(i) pay reasonable funeral expenses,
(ii) pay the debts of the deceased, and
(iii) pay any remaining balance to those entitled under the terms of the will, or if there is no will, to those entitled under the *Intestate Succession Act*; and

(c) do any other thing under these Rules that would be required of a personal representative in respect of an estate.

The procedure under the Northwest Territories' Act applies to estates with a net value of $35,000 or less. Similar to Manitoba, this simplified procedure applies even where the estate contains real property. Proceeding under this provision will not result in a grant of probate, but will result in a court order that will have the same effect as a grant.

2. **Other types of Simplified Procedure**

In Alberta, the *Public Trustee Act*[34] provides that the Public Trustee may take possession of and administer small estates where no one has been granted probate.[35] This simplified process is only available if the estate does not contain real property and it is valued at less than the prescribed limit, which is currently $10,000.[36] The *Public Trustee Act* also allows the Public Trustee to take

[34] SA 2004, c P-44.1.
[35] *Ibid*, s 13.
[36] *Ibid*; *Public Trustee General Regulation*, AR 241/2004, s 2.

possession of and administer estates of up to $75,000[37] where no one else has been granted probate.[38] The procedural requirements under this provision are more onerous. Under both these provisions, there is no obligation on the Public Trustee to undertake the administration of any small estate so it only applies if the Public Trustee elects to administer an estate.

Similar provisions that allow the Public Trustee to administer small estates can be found in New Brunswick,[39] Nova Scotia,[40] Newfoundland and Labrador.[41]

In 1999, the Law Reform Commission of Nova Scotia published a report entitled *Probate Reform in Nova Scotia*. In the report, the Law Reform Commission rejected the notion of using monetary limits as criteria for a simplified procedure for the administration of estates, arguing that monetary values may not accurately determine whether or not an estate is simple. Instead, the report recommended that estates should proceed through the probate system as a contentious estate, a non-contentious estate, or entirely outside the court system.[42] Subsequent to the publication of the report, a new *Probate Act*[43] was enacted in Nova Scotia.

3. No Specialized Small Estate Procedure

Both Ontario and British Columbia do not have a simplified process for the administration of small estates. Interestingly, law reform agencies in both provinces have recommended that such a process be implemented.

(a) Ontario

In 2015, the Law Commission of Ontario ("LCO") released a Final Report on *Simplified Procedures for Small Estates,*[44] which recommended a procedure similar to Manitoba's and Saskatchewan's for estates valued up to $50,000, including both real and personal property.[45] In the report, LCO considered whether the eligibility for summary administration should be based on complexity of the estate or on a monetary limit. It concluded that "[v]alue is relative and other factors such as the type of assets and the number and identity of beneficiaries may impact the

[37] *Public Trustee General Regulation, ibid*, s 3(1).
[38] *Administration of Estates Act, supra* note 34, s 16.
[39] *Probate Court Act*, RSNB c P-17.1, s 20.
[40] *Public Trustee Act*, RSNS 1989, c 379, s 16.
[41] *Public Trustee Act*, SNL 2009, c P-46.1, s 13.
[42] Law Reform Commission of Nova Scotia, *Probate Reform in Nova Scotia* (March 1999) at 41-42. Available online: <http://www.lawreform.ns.ca/Downloads/Probate_FIN.pdf>.
[43] SNS 2000, c 31.
[44] Law Commission of Ontario, *Simplified Procedures for Small Estates*, (2015). Available online: http://www.lco-cdo.org/en/small-estates-final-report.
[45] *Ibid* at Chapter VIII.

cost of probating the estate […] a bright line monetary eligibility limit for a small estates process best balances the goals of accessibility and legal protection."[46]

The LCO provided four reasons for recommending $50,000 as the monetary limit for eligibility:

1) Considering that the cost of legal fees to obtain probate in Ontario is between $1,000 and $5,000, a $50,000 limit would be ample to capture almost all estates for which cost poses an obstacle.[47]
2) A $50,000 limit would be low enough to discourage large estates from using estate planning strategies to fit within the small estates process. The LCO considered that, in most cases, the legal costs involved in restructuring a large estate to fit within a $50,000 limit would likely exceed the potential savings.[48]
3) A $50,000 limit would capture most vehicle transfers while excluding most real estate in Ontario. The LCO concluded, however, that estates containing real property should not be excluded from the small estates process.[49]
4) A $50,000 limit is in line with monetary limits in other similar contexts in Ontario, such as the *Estate Administration Tax Act*,[50] where the amount of tax payable increases from 0.5% to 1.5% where the estate is more than $50,000.[51]

To date, the Law Commission of Ontario's recommendations have not been implemented.

(b) British Columbia

In British Columbia, the provincial government chose not to bring into force a procedure for the administration of small estates which was included in its recently enacted *Wills, Estates and Succession Act*.[52] The British Columbia Law Institute (BCLI) published an interim report which recommended that procedure for the administration of small estates be available for estates valued at $50,000 or less having no real property.[53] In discussing the reason for recommending the monetary limit be set at $50,000, the interim report explained that this figure represented "the value of a typical small estate in which the assets might consist of a motor vehicle, a modest bank account, and some personal property of relatively negligible value."[54] In considering whether to include estates containing real property, the report noted that British Columbia's *Land*

[46] *Ibid* at 23.
[47] *Ibid* at 23.
[48] *Ibid*.
[49] *Ibid*.
[50] Estate Administration Tax Act, 1998, SO 1998, c 34, Sch.
[51] *Ibid*, s 2(6).
[52] SBC 2009, c 13.
[53] British Columbia Law Institute, *Interim Report on Summary Administration of Small Estates*, Report No 40 (2005)[BCLI Report]. Available online: http://www.bcli.org/sites/default/files/Summary_Administration_Small_Estates_Interim_Rep.pdf.
[54] *Ibid* at 27-28.

Title Act[55] precludes real property registered in the name of a deceased person from being transferred by a personal representative without a grant of probate or administration. Therefore, if estates containing real property were to qualify, then amendments to the *Land Titles Act* would be required. Regardless, the report noted that, given the level of land values in British Columbia, very few estates would be excluded if the monetary limit were set at $50,000.[56]

Although the recommendations from the interim report were originally adopted in Part 6, Division 2 of the *Wills, Estates and Succession Act*, Division 2 ultimately was not brought into force. Instead, the provincial government chose to enact new probate rules that allow two options for filing an application for an estate grant where there is a will: a short-form affidavit for simple estates and a long-form affidavit for complex estates. Interestingly, the monetary value of the estate is not a factor in determining whether an estate is simple or complex. Some requirements for the short-form affidavit for simple estates include whether the executor is named in the will and if there is no evidence of a later will.[57]

Note also that, while some jurisdictions do not provide a summary administration process, some jurisdictions, such as British Columbia, will waive probate fees if the value of the estate does not exceed a certain amount.[58]

[55] RSBC 1996, c 250.
[56] BCLI Report, *supra* note 53 at 28.
[57] *Supreme Court Civil Rules*, BC Reg 168/2009, Part 25.
[58] *Probate Fee Act*, SBC 1999, c 4, s 2(2).

CHAPTER 4: NEED FOR REFORM

The Commission has considered the current law in Manitoba and elsewhere in Canada as it relates to the administration of small estates under Section 47 of *The Surrogate Practice Act*. In the Commission's view, Manitoba is ahead of many other Canadian jurisdictions in terms of adopting a legislative scheme that allows those administering small estates to do so without the more costly and onerous requirements of probate or administration. The Commission is not proposing any sweeping changes to Manitoba's procedure for administering estates or suggesting that Manitoba should consider other models; rather, in the Commission's view, the procedure is simply in need of updating to reflect the rising value of estates in the province since the Act was last amended.

The Law Commission of Ontario's report on *Simplified Procedures for Estates* notes:

> The goal of any simplified procedure for small estates is to strike a balance between the legal protections afforded in the probate process with the affordability and accessibility to ensure that small estates will be administered, and, if administered, will not be unduly diminished.[59]

The Commission agrees with this statement on the need to strike a balance between the goals of accessibility, efficiency and affordability on the one hand and ensuring the legal protection of estates from mismanagement and fraud on the other.

With these goals in mind, the Commission makes the provisional recommendations noted below.

1. Increasing the Monetary Jurisdiction

The primary issue identified by the Commission is the need to increase the monetary jurisdiction of Section 47 of *The Surrogate Practice Act*. The monetary jurisdiction has not increased since 1996, when the limit was increased from $5,000 to $10,000.[60] In the Commission's view, reform is appropriate to bring the monetary limit in line with the current reality of administering estates in Manitoba.

If the monetary limit under Section 47 were increased, it would enable a greater number of estates to be captured under the simplified process. It would recognize the fact that, in many cases, the cost of administering an estate is disproportionate to the size of the estate and may unduly deplete the estate to the point that it is impractical to go through the probate or administration process at all. Considering this provision was introduced because the cost of obtaining probate or administration was seen as costly and onerous relative to the size of some

[59] LCO Report, *supra* note 44 at 1.
[60] SM 1996, c17, s 2.

estates, it appears that Section 47 is no longer capturing many of the estates it was intended to serve.

The Court of Queen's Bench, Probate Division has advised that it does not track estate values, therefore it is not possible to state with certainty the number of estates which are valued above the $10,000 but still low enough to result in disproportionate costs associated with probate or administration compared to the value of the estate. The Commission has heard anecdotally of many instances of estates valued somewhere in the range of $10,000 and $20,000; if a modest estate contains a vehicle but no real property, it is reasonable to conclude that it would not be captured under Section 47.

In recommending an increase to the monetary limit under Section 47, the Commission is aware of the concern that too high a monetary limit could potentially expose more estates to mismanagement or fraud; Section 47 Orders do not carry the same legal protections as the ordinary procedures for obtaining probate. However, this must be weighed against the argument that some relatively small estates above $10,000 are being dealt with informally or abandoned because of the cost and more onerous procedural steps required, so if the monetary jurisdiction of Section 47 were increased, those estates would at least go through the summary administration process rather than no process at all.

It is important to keep in mind the balance that must be struck between the goals of accessibility, affordability and efficiency on the one hand, and legal protections on the other. In the Commission's view, the current laws swing too far in the direction of requiring more estates to go through probate or administration at the expense of accessibility and affordability for relatively small estates. In making this conclusion, the Commission notes that the inflation rate since 1996 (when the limit was increased) has resulted in an over 46% increase, meaning that goods valued at $10,000 in 1996 would now be worth close to $15,000.[61]

The Commission also points out that the two other Canadian jurisdictions that provide for the summary administration of small estates have much higher monetary limits compared to Manitoba. Saskatchewan's limit is $25,000[62] and the Northwest Territories' limit is $35,000.[63] This discrepancy between Manitoba's limit and the other two Canadian jurisdictions suggests that reform is appropriate to put Manitoba on par with other Canadian jurisdictions that provide summary administration.

The Commission does not propose any changes regarding the eligibility of estates containing real property, as is the case in Saskatchewan. Section 47(1) expressly provides that any order dealing

[61] Based on the Canadian average annual rate of inflation at 1.84% between 1996 and 2017. See Bank of Canada Inflation Calculator, available online: < http://www.bankofcanada.ca/rates/related/inflation-calculator/>.
[62] *The Administration of Estates Regulation*, RRS c A 4.1, Reg 1, s 8.2.
[63] *Estate Administration Rules*, NWT R-123-2016, s 10(1).

with real property shall be conclusively deemed to be an order made under section 176 of *The Real Property Act*,[64] meaning the registrar must treat the Section 47 Order as a court order.[65]

The Commission stresses the importance of increasing the monetary limit under Section 47 as a way to further accessibility and efficiency objectives and does not want this recommendation to be overshadowed by a discussion on specific dollar amount. Therefore, the Commission does not propose a specific monetary limit and instead simply highlights the need for an increase.

Provisional Recommendation #1: The monetary jurisdiction of the summary administration of small estates under *The Court of Queen's Bench Surrogate Practice Act* should be increased.

In making the recommendation to increase the monetary jurisdiction for the summary administration of small estates, the next question is whether Section 47 of the Act should be amended to reflect this value, or whether the Act should simply be amended to allow the monetary limit to be adjusted upward by regulation.

The Commission notes there are some practical advantages to allowing the monetary limit to be adjusted upward by regulation as opposed to fixing the monetary limit under statute. Experience suggests that additional increases to the monetary limit will be needed in future. Accordingly, the Commission recommends that Section 47 should be amended to allow the monetary limit to be adjusted upward by regulation to allow for maximum flexibility.

Provisional Recommendation #2: Section 47 of *The Court of Queen's Bench Surrogate Practice Act* should be amended to allow the monetary limit for small claims to be adjusted upward by regulation.

[64] CCSM c R30.

[65] Section 176(1) of *The Real Property Act* provides that "[i]n a proceeding respecting land, or in respect of a transaction or contract relating thereto, or in respect of an instrument, caveat, memorial, or other entry affecting land, the court may, by order, direct the district registrar to cancel, correct, substitute, or issue, a certificate of title, or make an endorsement or entry on any instrument, or to do or refrain from doing any act, or make or refrain from making any entry necessary to give effect to the judgment, or order of the court."

2. Other Issues

The Commission would like to hear from legal practitioners, community groups, those with practical experience in estate administration and anyone else who wishes to submit comments on the provisional recommendations contained in this Consultation Report. Additionally, the Commission is interested in hearing about other issues related to Section 47 of *The Surrogate Practice Act* not mentioned in this report and will consider whether additional recommendations should be made.