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Unique Aspects in the Management of Aboriginal Estates

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Introduction

The law respecting Aboriginal estates is quite convoluted and nuanced. A practitioner with a typical practice involving non-Indian clients should be aware of a number of potential pitfalls when dealing with Indian estates and wills matters.

Background: Division of Powers

The essential starting point for any discussion is the Constitution. Under the division of powers, the provinces are responsible for estate and testamentary matters under s. 92(13) "Property and Civil Rights in the Province". However, the federal government is responsible for "Indians and Lands Reserved for Indians" under s. 91(24) of the *Constitution Act, 1867*. As such, Indian estates and wills are under the exclusive legislative jurisdiction of Parliament.¹

Indian Act Estate Provisions

Sections 42 to 50.1 of the *Indian Act*² (the "Act") and the *Indian Estates Regulations* (the "Regulations") are the primary enactments governing the testamentary affairs of Indians.³ Sections 42 and 43 of the Act provide that all jurisdiction and authority in relation to "matters and causes testamentary" is exclusively vested in the Minister to be exercised in accordance with the Act and Regulations. Matters and causes testamentary under the Act have been held to refer to the descent of property and the administration of estates including the grant and revocation of probate of wills and administration and incidental matters.⁴ These provisions provide the Minister of Indian and Northern Development (the "Minister") with quasi-judicial authority to make decisions related to a deceased Indian's estate and will.

Provincial laws that are inconsistent with the Act and the Regulations do not apply. However, provincial laws relating to estates and wills that are not inconsistent with the Act may be applicable through referential incorporation under section 88 of the Act.⁵

Indian Act Estate Provisions Apply Only to Indians Ordinarily Resident on Reserve

Parliament has declined to impose the *Indian Act* provisions on those Indians who live on land which is not reserve or Crown land pursuant to section 4(3) of the Act.⁶ The Act provisions only apply to status Indians⁷ (not Inuit or Métis) who are "ordinarily resident"

on reserve or Crown land. Section 4(3) only requires an Indian to be ordinarily resident on a reserve, not any particular reserve.⁸ Ordinarily resident does not mean that the deceased had to have been living on reserve (or Crown land) at the time of death; that the person normally resided on reserve (or Crown land) is sufficient. The Minister will examine all of the material circumstances to determine whether the deceased was “ordinarily resident” on reserve or Crown land including the customary mode of life of the person concerned and the presence and intention of the deceased to remain in residence on reserve (or Crown land).⁹

The Act permits Indian bands to establish their own membership code (s.10) which may mean that some First Nation members of a band are not Indians. When the Minister does not have jurisdiction over the estate of a deceased Indian, all matters relating to the Indian’s estate are dealt with in accordance with estate law of British Columbia, with the exception of reserve land transfers.

Administration and Probate Under the *Indian Act* Process

Sections 42 and 43 of the *Indian Act* and the *Indian Estate Regulations* provide for the administration of Indian estates including the grant and revocation of probate of wills, administration, and appointment of a personal representative. The administration of the Indian’s estate proceeds through the Minister and Indian and Northern Affairs Canada (“INAC”) as opposed to provincial probate court. The Minister has the authority to act as executor or administrator, or approve someone else to act.¹⁰ INAC policy is to ensure that executors or family members of the deceased have the same rights and opportunities to control their own affairs as individuals in provincial jurisdiction.¹¹ INAC policy is to act as the administrator of last resort. INAC will only take on the administration of an estate when there is no heir or legal representative of an heir, or nominee of either, who is willing and able to take on the estate administration.¹²

Wills Under the *Indian Act* – Section 45

Indian wills are governed by the *Indian Act* and not by the wills legislation of the province.¹³ However, most of the rules of construction and drafting of wills can be equally applied to the wills of Indians.¹⁴

The provincial law formalities with respect to execution of a will do not apply to Indian wills.¹⁵ The Minister may accept as a will any written instrument that was signed by an Indian in which he indicates his wishes with respect to the disposition of his property on death.¹⁶ As a practical matter, if you are faced with an Indian client who may or may not be found to ordinarily reside on reserve, it would be prudent to draft a will to ensure that it meets the provincial law formalities with respect to execution of a will, as the provincial law formalities will satisfy the *Indian Act* requirements.¹⁷ The intention of the testator may also be stated in the will itself with respect to his or her ‘ordinary residence’.

Indian wills are not of any legal force or effective as a disposition of property until the Minister has approved the will or a court (which the Minister has consented to have act) has granted probate.¹⁸

Voidance of Wills Under the *Indian Act* – Section 46

The Minister may declare a will of an Indian void, in whole, or in part, on six grounds under section 46(1) of the Act:

- (a) duress or undue influence;
- (b) lack of testamentary capacity;
- (c) the terms of the will impose undue hardship on persons for whom the testator had a responsibility to provide;
- (d) the will attempts to dispose of reserve land contrary to the interest of the band or to the *Indian Act*;
- (e) the terms of the will are vague or uncertain; or
- (f) the terms of the will are against the public purpose.

The Minister's powers to change the will are very limited, if the Minister finds: (a) the will to be wholly void, the Indian will be deemed to have died intestate; (b) if the will is only partially void, any gift effected shall be deemed to have lapsed.¹⁹ The Minister cannot create new provisions or reword the will.²⁰ Arguably, a broader class of persons can apply for relief than under the provincial *Wills Variation Act*,²¹ but there is a requirement that the applicant show undue hardship and that the testator had a responsibility to provide for the applicant which is a significantly different standard than the provincial *Wills Variation Act*.²² The Minister will be closely scrutinized by a court when this section is imposed in a manner which limits the testamentary freedom of an Indian.²³

Intestacy Under the *Indian Act* – Section 48

Section 48 of the Act contains the scheme for the distribution of property in an estate for which the Indian is deemed to have died intestate or where there is no will, in detail, which may be summarized as follows.²⁴

1. If the net value of the estate is:
 - (a) less than \$75,000, the surviving spouse or common law partner gets the entire estate;
 - (b) more than \$75,000, the surviving spouse or common law partner gets the first \$75,000;
 - (i) if there is one child, the surviving spouse or common law partner receives half the remainder, with the remaining portion going to that child;
 - (ii) there is more than one child, the surviving spouse or common law partner receives one-third of the remainder, with the remaining portion being divided equally among the children; and
 - (iii) if a child has predeceased the deceased and has issue, the issue will receive the child's share.
2. The above scheme may be altered at the Minister's discretion.
3. If the deceased had no spouse, children, or grandchildren at the time of death, the next heirs in line are:

- (a) parents;
- (b) sisters and brothers, or their issue in their place; and
- (c) next of kin of equal consanguinity.

4. If there is no relative closer than a brother or sister, then reserve land vests in Her Majesty for the benefit of the band.²⁵

Anyone who is legally adopted or adopted according to Indian custom is treated as if he or she is related by blood to the adoptive relative.²⁶

Challenging Decisions of the Minister Under the *Indian Act*

The Minister's exercise of his discretionary powers with respect to Indian estates and wills is subject to judicial review in Federal Court. An appellant has two months from the Minister's decision to initiate a judicial review in Federal Court (s. 47, Act).²⁷

Disputes Regarding Indian Estates – Federal Court or Provincial Superior Court?

The Minister's jurisdiction over "matters and causes testamentary" under sections 42 and 43 of the Act does not amount to jurisdiction over all matters relating to Indian estates.²⁸ The provincial superior courts have jurisdiction over proceedings based on contract, trust, *quantum meruit*, default of duty against executors and administrators of Indian estates including those appointed by the Minister which is not ousted by the provisions of the *Indian Act* because the issue is not one of a testamentary matter.²⁹ However, only the Minister has the power to remove a personal representative of an Indian's estate (s. 43(a)).

As a practical matter, a party to a dispute regarding an Indian estate needs to determine whether the dispute involves a matter or cause testamentary which must be brought in Federal Court with respect to a decision made by the Minister in exercise of the jurisdiction or authority conferred on him by the *Indian Act*, unless the Minister has transferred his jurisdiction to a provincial superior court.

Transfer to Provincial Superior Court by the Minister

Under section 44 of the *Indian Act*, the Minister may transfer or refer a matter to provincial superior court. Sections 44(1) and (3) state:

- (1) The court that would have jurisdiction if a deceased were not an Indian may, with the consent of the Minister, exercise, in accordance with this Act, the jurisdiction and authority conferred on the Minister by this Act in relation to testamentary matters and causes and any other powers, jurisdiction and authority ordinarily vested in that court.
- (2) The Minister may direct in any particular case that an application for the grant of probate of the will or letters of administration of a deceased shall be made to the court that would have jurisdiction if the deceased were not an Indian, and

the Minister may refer to that court any question arising out of any will or the administration of any estate.

- (3) A court that is exercising any jurisdiction or authority under this section shall not without the consent in writing of the Minister enforce any order relating to real property on a reserve.

Where the Minister has consented to the transfer of his jurisdiction under section 44(1), the court is authorized to exercise not only the Minister's jurisdiction and authority under the *Indian Act*, but also "any other powers, jurisdiction and authority ordinarily vested in that court". Heirs, beneficiaries, and executors may all request that the Minister transfer his jurisdiction to provincial superior court.

In particular, if the estate is likely to be involved in litigation, has significant off-reserve assets, personal or real property, or has assets that require specialized expertise to administer then INAC encourages heirs or beneficiaries to request that the Minister consent to a transfer of his jurisdiction.³⁰ An advantage of a transfer of the jurisdiction from the Minister is that court procedures with which a lawyer is familiar become available to the estate including access to discovery and interlocutory applications which would be advantageous if there is expected to be contentious estate issues.³¹ Alternatively, the *Indian Act* process may be quicker than the court process and the Minister does have greater expertise with respect to devise of reserve land.³²

Once the Minister has made the order consenting to a transfer of the jurisdiction over an estate, the *Indian Act* continues to be the applicable law. The court may apply the common law including seeking the assistance of judicial precedents considering the testamentary disposition by non-Indian persons.³³

There is an issue as to whether the Minister has any remaining authority or jurisdiction left upon consent to the transfer of his jurisdiction and authority to the court under section 44(1). INAC's position is that notwithstanding the transfer of jurisdiction to the provincial superior court that the Minister retains jurisdiction over the Estate. This position has not yet been tested in court. However, the Minister may refer issues and questions to provincial superior court under s. 41(2) but still retain jurisdiction over the estate.

Reserve Land

The legal title to reserve land is held by the Crown in right of Canada for the use and benefit of a band.³⁴ The type of land 'ownership' under the *Indian Act* that an individual Indian can have to reserve land is based on the statutory regime set out in the *Indian Act*.³⁵ Section 20(1) of the *Indian Act* states:

No Indian is lawfully in possession of land on reserve unless, with the approval of the Minister, possession of the land has been allocated to him by the council of the band.

Thus, the possession of reserve land can be allocated to an individual Indian by a Band Council Resolution ("BCR"), but the Minister must approve. Once possession is

allocated, the Minister may issue a Certificate of Possession (the "CP").³⁶ The CP is the highest form of individual ownership of reserve land and is evidence that an Indian is in lawful possession of particular land in a reserve. A CP holder can bring a proceeding to enforce their interest including against other band members and the Band Council for trespass on their land.³⁷ Interests in reserve land including CP can be found by searching the Indian Land Registry System.³⁸

Who can Inherit Interests in Reserve Land

Due to the special nature of reserve land and the *Indian Act's* regime of preserving the Indians' land base, there are limits on the descent or devise of interests in reserve land which affects who can inherit the CP interest. An Indian has the same testamentary freedom as other Canadians, except where the *Indian Act* expressly takes away that freedom.³⁹

People who are "not entitled to reside on a reserve" cannot acquire a right to "possession or occupation" of land in that reserve under a will or on intestacy (section 50(1), *Indian Act*).⁴⁰ An individual must be a member of the same band with which that particular reserve land is associated in order to be eligible to inherit the CP reserve land interest. It is insufficient that an individual is merely a registered Indian or a member of a different band. Band members may include non-Indian persons, since some bands have control over their own membership, but this circumstance is rare.⁴¹

The *Indian Act* sets out what occurs with respect to heirs or beneficiaries that are not band members and cannot inherit the CP reserve land interest; in particular, section 50(2) states:

Where a right to possession or occupation of land in a reserve passes by devise or descent to a person who is not entitled to reside on a reserve, that right shall be offered for sale by the superintendent to the highest bidder among persons who are entitled to reside on the reserve and the proceeds of the sale shall be paid to the devisee or descendant, as the case may be.
(emphasis added)

The sale of the reserve land interest must be approved by the Minister (section 50(4)).

Where no tender is received within six months, or such further period as the Minister may direct, when the reserve land interest is offered for sale, the reserve land interest reverts back to the band free from any claim on the part of the heir, subject to the discretion of the Minister to the heir of payment from the funds of the band for permanent improvements (section 50(3)).

INAC has developed a section 50 sales policy with respect to the proper method of obtaining and evaluating bids for the purpose of sale of CP reserve land interests.⁴²

The law with respect to section 50 is evolving and despite the mandatory wording in section 50(2) regarding the sale of the release land interests, INAC's policy has recently changed with respect to the requirements of a section 50 sale in certain circumstances.⁴³

If the heirs or beneficiaries to an estate are a mix of band members and non-band members, INAC will determine whether a fractional CP reserve land interest will be offered for sale, or, if an alternative to a section 50 sale is possible.

An alternative to a section 50 sale is possible if the assets of the Indian estate can be divided while adhering to the proportional scheme of distribution required by the will or section 48 of the *Indian Act*. By exercising discretion, the executor or administrator may be able to fulfill the terms of the will or the requirements of section 48 of the *Indian Act* by dividing assets such that band members take reserve land and non-band members take other assets. For example, in a case where the net estate assets consist of \$100,000 cash and a CP of reserve land valued at \$100,000 and there are 4 heirs or beneficiaries (2 of whom are non-band members), each entitled to a $\frac{1}{4}$ interest in the estate, it is permissible for the estate administrator/executor to give each non-band member heir \$50,000 cash, and give the 2 band members each a $\frac{1}{2}$ interest in the CP reserve land.⁴⁴

The above is a simple example. This is a complicated area of the law and there are other circumstances where a section 50 sale may not be necessary.⁴⁵

Reserve Land Exception – Minister Retains Authority Over Transfer of all Reserve Land Interests

The Minister retains authority over the transfer of all reserve land interests to beneficiaries or heirs, even though the Minister may lack jurisdiction over the estate. The Minister has an overriding discretion to approve or disapprove of transmission of the interests in reserve land, under section 49 of the *Indian Act*.

A person who claims to be entitled to possession or occupation of lands in a reserve by devise or descent shall be deemed not to be in lawful possession or occupation of those lands until possession is approved by the Minister.

First Nations Land Management Act Lands – Tsawout First Nation

The *First Nations Land Management Act* (the "FNLMA")⁴⁶ empowers a First Nation to assume control over land management of their reserve land from INAC and the Minister. The FNLMA does not apply to a band's reserve land until the First Nation has enacted its own land management code and it has been certified under the FNLMA.⁴⁷ Local First Nations which are moving under the FNLMA towards implementing their own land management code include the Tsawout, Songhees, T'Sou-ke and Beecher Bay First Nations. To our knowledge, only the Tsawout First Nation has enacted its own Land Code.

The implications of the Tsawout First Nation Land Code on Indian estates and wills is beyond the scope of this paper. However, reserve land interests are subject to the

applicable provisions of the land management code. A land management code must include the general rules and procedures applicable to the use and occupancy of reserve land including any interests or rights in reserve land held pursuant to section 20(1) of the *Indian Act* or pursuant to the custom of the First Nation, and the procedures that apply to the transfer, by testamentary disposition or succession of any interest or right in reserve land.⁴⁸ As such, if you are dealing with a Tsawout First Nation member with respect to an Indian estate or wills matter, its Land Code must be consulted. However, it is important to note that the majority of estate provisions of the *Indian Act*, including sections 42 to 48 and 50(1) to (3), continue to apply.⁴⁹

Modern-Day Treaties

The implications of modern-day treaties are beyond the scope of this paper. However, the modern-day treaties being negotiated under the BC Treaty Commission process must be examined as they will affect First Nation members' estates and wills under the *Indian Act* and provincial legislation. For example, the Nisga'a Treaty has various provisions which impact upon its members' estates and wills.⁵⁰ Of note is the recent Maa-nulth Treaty which applies to various First Nations on Western Vancouver Island.⁵¹

It is safe to say that any lands provided to a First Nation under the modern-day treaties, including their existing reserve lands, will no longer be subject to the *Indian Act* or be "lands reserved for Indians" within the meaning of the *Constitution Act, 1867*.

Conclusion

In sum, there are significant differences between provincial laws dealing with wills and estates and the legislation governing Indians ordinarily resident on reserve. Practitioners advising aboriginal people need to be familiar with the *Indian Act* and the *Indian Estates Regulations* as well as the common law to effectively represent aboriginal clients.

¹ See *A.G. Canada v. Canard*, [1976] 1 S.C.R. 170.

² *Indian Act*, R.S.C. 1985, c. I-5 (the "*Indian Act*").

³ *Indian Estates Regulations*, C.R.C. 1978, c. 954; Under sec. (2)1 of the *Indian Act*, "estate" includes real and personal property and any interest in land.

⁴ *Lafrance Estate v. Canada (Attorney General)*, [2002] O.J. No.112 (S.C.J.) varied but not on this point; [2003] O.J. No. 1046 (C.A.).

⁵ See Roger D. Lee, "Estates under the Indian Act", published in Aboriginal Practice Points, paper dated 2007, CLE website, sec. III, B. Applicability of Provincial Legislation in the Indian Act Process.

⁶ 4(3) *Indian Act*: Sec. 114 to 122 and, unless the Minister otherwise orders, sec. 42 to 52 do not apply to or in respect of any Indian who does not ordinarily reside on a reserve or on lands belonging to Her Majesty in right of Canada or a province. The Minister may pursuant to this section assume jurisdiction over an estate of a deceased status Indian who was not ordinarily resident on a reserve or Crown land at the time of their death by order. However, such an order would only occur in rare circumstances - See Sherry Evans updated by Susan A. Willis, "Aboriginal Estates: Policies and Procedures of INAC, BC Region", published in Aboriginal Practice Points, paper dated April 1, 2007, CLE website, sec. I, B.

⁷ Sec. 2(1) *Indian Act*: "Indian" means a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian.

⁸ *Earl v. Canada (Minister of Indian and Northern Affairs)*, [2004] F.C.J. No. 1094 (T.D.) at para. 24.

⁹ For example, "ordinarily resident" on reserve has been found to include: an Indian who was living off reserve to receive medical attention in a long-term care facility as this was found to be not a customary mode of life, but rather a special residence due to illness; and a person who lives off reserve to go to work or school temporarily with the

intention to return to the reserve; see *Earl v. Canada (Minister of Indian and Northern Affairs)*, [2004] F.C.J. No. 1094 (T.D.) at para. 24; *A.G. Canada v. Canard*, [1976] 1 S.C.R. 170.

¹⁰ See section 43 *Indian Act* and the *Indian Estates Regulations*.

¹¹ See Evans updated by Willis, "Aboriginal Estates: Policies and Procedures of INAC, BC Region", *supra*, at sec. II.

¹² See Evans updated by Willis, "Aboriginal Estates: Policies and procedures of INAC, BC Region", *supra*, at sec. II, A4, B3.

¹³ However, provincial laws relating to estates and wills that are not inconsistent with the *Indian Act* may be applicable through section 88 of the *Indian Act*. See Roger D. Lee, "Estates under the Indian Act", *supra*, at section III, B.

¹⁴ Roger D. Lee, "Wills for First Nations Persons", published in Aboriginal Practice Points, BC CLE paper dated April 1, 2007, CLE website, sec. I.

¹⁵ *Indian Act*, section 45(2) and section 15 of the *Indian Estates Regulations*.

¹⁶ *Indian Act*, and *Indian Estates Regulations*, *ibid*.

¹⁷ *Indian Act*, and *Indian Estates Regulations*, *ibid*.

¹⁸ *Indian Act*, section 45(3).

¹⁹ *Indian Act*, section 46(2).

²⁰ Roger D. Lee, "Wills for First Nations Persons", *supra*, at sec. III, D.

²¹ *Wills Variation Act*, R.S.B.C. 1996, c. 490.

²² Roger D. Lee, "Wills for First Nations Persons", *ibid*.

²³ *Pronovost v. Canada (Minister of Indian Affairs and Northern Development)*, [1985] 1 F.C. 517 (C.A.); Roger D. Lee, "Estates under the Indian Act", *supra*, at sec. III, D.

²⁴ Roger D. Lee, "Wills for First Nations Persons", *ibid*.

²⁵ *Okanagan Indian Band v. Bonneau*, 2002 BCSC 748 aff'd 2003 BCCA 299.

²⁶ Section 2(1) *Indian Act*, definition of "child"; Roger D. Lee, "Wills for First Nations Persons", *ibid*.

²⁷ *Francis v. Canada*, [2000] 4 C.N.L.R. 99 (F.C.T.D.).

²⁸ *Sampson v. Gosnell Estate* (1989), 35 B.C.L.R. (2d) 125 (C.A.) – matter of contract, not a testamentary matter; See also *Cameron v. Canada (Minister of Indian and Northern Development)*, 2001 FCT 484 (T.D.).

²⁹ J. Woodward, *Native Law*, (looseleaf, updated), (Toronto: Thompson Carswell, 1994) at page 360.

³⁰ See Evans updated by Willis, "Aboriginal Estates: Policies and procedures of INAC, BC Region", *supra*, at sec. I, D.

³¹ Roger D. Lee, "Estates under the Indian Act", *supra*, at sec. III, A.

³² Roger D. Lee, "Estates under the Indian Act", *ibid*.

³³ *Johnson v. Pelkey*, [1997] B.C.J. No. 1290 (S.C.) at paras. 99-104; *George Estate v. Gabriel*, [2009] B.C.J. No. 282 (S.C.) at 86.

³⁴ *Indian Act*, sec. 2(1) definition of "reserve" and sec. 18.

³⁵ *Indian Act*, sec. 20-27; See also *Indian Estates Regulations*, sec. 12.

³⁶ *Indian Act*, sec. 20.

³⁷ *Watts v. Kincolith Indian Band Council*, [2000] F.C.J. No. 470 (Fed. T.D.).

³⁸ *Indian Act*, sec. 21; However, note that the Indian Lands Registry is a notice registry and there may be unregistered interests that will affect the reserve land.

³⁹ Sec. 45(1) *Indian Act*: Nothing in this Act shall be construed to prevent or prohibit an Indian from devising or bequeathing his property by will; *Pronovost v. Canada (Minister of Indian Affairs and Northern Development)*, [1985] 1 F.C. 517(C.A.).

⁴⁰ The class of people not entitled to reside on reserve can be different from the class of people not entitled to possession of reserve land. For example, under a band bylaw pursuant to section 81(1)(p.1) of the *Indian Act*, a band member may be unable to reside on reserve, but still be able to possess reserve land; See Roger D. Lee, "Wills for First Nations persons", *supra*, at sec. C, 1.

⁴¹ *Indian Act*, sec. 2(1), definition of "member of band"; Roger D. Lee, "Wills for First Nations persons", *supra*, at sec. C,

1.

⁴² Revised INAC sec. 50 policy dated June 4, 2009.

⁴³ Personal communication with INAC; Revised INAC section 50 policy, *supra*.

⁴⁴ Revised INAC sec. 50 policy, *supra*

⁴⁵ See for example, Roger D. Lee, "Wills for First Nations persons", *supra*, at sec. C, 1; Revised INAC section 50 policy, *supra*.

⁴⁶ *First Nations Land Management Act*, S.C. 1999, c. 24.

⁴⁷ *First Nations Land Management Act*, *supra*, s. 15.

⁴⁸ *First Nations Land Management Act*, *supra*, s. 6(1)(b)(ii) and (c).

⁴⁹ *First Nations Land Management Act*, *supra*, s. 38.

⁵⁰ See Roger D. Lee, "Wills for First Nations Persons", *supra*, at sec. C, 2.

⁵¹ See the Maa-nulth Final Agreement - The Maa-nulth First Nations is composed of the following First Nations: Huu-ay-aht; Ka:'yu:'k't'h/Che:k't'ies7eth'h'; Toquaht; Uchucklesaht and Ucluelet.