

ABORIGINAL PRACTICE POINTS

Estates under the Indian Act

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Key points

- The *Indian Act* and the [Indian Estates Regulations](#) provide the framework for dealing with the estates of First Nations people. The Minister of Indian and Northern Affairs Canada has authority to make decisions regarding a deceased Indian's estate and to act as the administrator of last resort, similar to a public trustee.
- The *Indian Act* provisions apply to "matters and causes testamentary" when the deceased is a status Indian who was "ordinarily resident" on reserve or Crown land. In determining where an Indian was ordinarily resident, INAC will look at all material circumstances, including the deceased's intention and the purpose of his or her residence off-reserve, especially if the purpose is temporary with an intention to return to the reserve.
- Provincial superior courts can have jurisdiction over issues that are not testamentary in nature but arise from contract or breach of trust.
- If an estate matter is covered by the *Indian Act*, a request can be made to the Minister to transfer the proceedings to the provincial superior court. Although the *Indian Act* procedure can be faster, it lacks some pre-trial procedures, such as discovery of documents and parties, that the court system offers.
- Parliament's jurisdiction over Indians and lands reserved for the Indians clearly includes testamentary matters. It is less clear whether the *Indian Act* framework necessarily excludes all provincial legislation. Some case law suggests that only provincial legislation that is inconsistent with *Indian Act* provisions will be excluded. However, it has also been suggested that the *Indian Act* is a complete code, in which case provincial wills and estates legislation would not apply at all. This issue remains unclear.
- Provincial statutes dealing with the formalities of execution need not be followed for an Indian's will to be valid.
- The Minister has a limited power to change a deceased's will if it would cause hardship on persons for whom the testator had a responsibility to provide.
- Section 48 of the *Indian Act* sets out rules for intestate succession. If the estate is not more than \$75,000, the whole estate goes to the survivor (spouse or common-law partner). If the estate is more than \$75,000, the first \$75,000 goes to the survivor and the remainder is shared between the survivor and the deceased's children and/or other relatives. The Minister may direct that the survivor has the right to occupy reserve land that was occupied by the deceased. Any interest in reserve land vests in the Crown for the benefit of the band if the nearest of kin of the intestate is more remote than a sibling.
- To protect reserve lands, the *Indian Act* testamentary regime ensures that no person has an unqualified right to inherit land on a reserve. The Minister has discretion to grant approval of any disposition of reserve land. Reserve land cannot be left to a person who is not a member of the band in which the reserve land is associated.
- Section 44 of the *Indian Act* allows the Minister to transfer jurisdiction over an Indian's estate to a court for all purposes, or to refer to a court a question arising out of a will or an estate over which the Minister retains jurisdiction.

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I. The Framework under The Indian Act

Sections 42 through 50 of the *Indian Act*, R.S.C. 1985, c. I-5, and the Indian Estates Regulations provide the legislative framework for dealing with First Nations peoples’ estates. Under ss. 42, 43, and 46 of the Act, which are particularly relevant to the issues discussed in this chapter:

42 (1) Subject to this Act, all jurisdiction and authority in relation to matters and causes testamentary, with respect to deceased Indians, is vested exclusively in the Minister and shall be exercised subject to and in accordance with regulations of the Governor in Council.

(2) The Governor in Council may make regulations providing that a deceased Indian who at the time of his death was in possession of land in a reserve shall, in such circumstances and for such purposes as the regulations prescribe, be deemed to have been at the time of his death lawfully in possession of that land.

(3) Regulations made under subsection (2) may be made applicable to estates of Indians who died before, on or after September 4, 1951.

- 43 Without restricting the generality of section 42, the Minister may
- (a) appoint executors of wills and administrators of estates of deceased Indians, remove them and appoint others in their stead;
 - (b) authorize executors to carry out the terms of the wills of deceased Indians;
 - (c) authorize administrators to administer the property of Indians who die intestate;
 - (d) carry out the terms of wills of deceased Indians and administer the property of Indians who die intestate; and

- (e) make or give any order, direction or finding that in his opinion it is necessary or desirable to make or give with respect to any matter referred to in section 42.

46 (1) The Minister may declare the will of an Indian to be void in whole or in part if he is satisfied that

- (a) the will was executed under duress or undue influence;
- (b) the testator at the time of execution of the will lacked testamentary capacity;
- (c) the terms of the will would impose hardship on persons for whom the testator had a responsibility to provide;
- (d) the will purports to dispose of land in a reserve in a manner contrary to the interest of the band or contrary to this Act;
- (e) the terms of the will are so vague, uncertain or capricious that proper administration and equitable distribution of the estate of the deceased would be difficult or impossible to carry out in accordance with this Act; or
- (f) the terms of the will are against the public interest.

(2) Where a will of an Indian is declared by the Minister or by a court to be wholly void, the person executing the will shall be deemed to have died intestate, and where the will is so declared to be void in part only, any bequest or devise affected thereby, unless a contrary intention appears in the will, shall be deemed to have lapsed.

These provisions set up a system in which the Minister of Indian Affairs and Northern Development (the “Minister” and “INAC”, respectively) is given the quasi-judicial authority to make decisions related to the deceased Indian’s estate and to act as the administrator of last resort, similar to a provincial Public Guardian and Trustee. In practice, the estate is handled by the department officials at the regional level, although certain decisions (relating to ss. 4(3), 43(e), 46(1), and 46(2)) would be made by the Deputy Minister in Ottawa. The Minister also has the authority to transfer authority to a provincial superior court (s. 44).

One writer has suggested that there are three reasons for a separate system for estates under the *Indian Act* (see Robert A. Reiter in *The Fundamental Principles of Indian Law* (Edmonton, First Nations Resource Council, 1990)):

- (1) Preservation of the Indian land base demands a limitation on the descent or devise of interests in reserve land; otherwise non-band members could acquire possession of reserve land and whittle away the reserve land base.
- (2) The Crown has a fiduciary obligation to preserve the estates of reserve resident Indians, incompetent Indians and minor Indians. The rationale for this is that these estates are held in trust by the Crown.
- (3) The Crown-Indian relationship, evidenced in treaties and the Royal Proclamation of 1763 and codified in the *Indian Act* administration of their estates, presupposes the wardship of the Indians by the Crown.

See also S. Evans, “Aboriginal Estates—Policies and Procedures of INAC, BC Region”, published in the “Aboriginal Practice Points” area of the CLE website at www.cle.bc.ca.

II. When Does the Indian Act Apply?

Once it is understood that Indian estates may be treated differently, how does one tell when the *Indian Act* provisions apply?

A. Is it a “Matter and Cause Testamentary”?

The first inquiry should be whether the matter in dispute arises from “matters and causes testamentary” as set out in s. 42 of the *Indian Act*. The British Columbia Court of Appeal

considered this issue in *Sampson v. Gosnell Estate* (1989), 35 B.C.L.R. (2d) 125, affirming [1985] B.C.J. No. 841 (QL) (S.C.). In that case, the daughter of the deceased had worked and cared for him without pay, in exchange for his promise to leave everything to her once he died. He died intestate. The administrator appointed by the Minister refused to acknowledge the daughter's claim, proposing instead to distribute the estate equally among the children as required for an intestacy under the *Indian Act*. The daughter started an action in the British Columbia Supreme Court, asking for a declaration that her agreement with her father was valid and binding. The administrator took the position that the court did not have jurisdiction because the case was properly within the realm of the Minister. Toy J. disagreed with the administrator's position, and the administrator appealed.

MacDonald J.A., writing for the Court of Appeal (at 129), agreed with Toy J., relying on *Re McElhinney; Standard Trusts Co. v. McElhinney*, [1929] 3 W.W.R. 664 (Sask. C.A.). MacDonald J.A. quoted the following passage from *Re McElhinney* (an inquiry into an executor's account on the basis of wilful default):

The matters in question are not, and never have been considered to be, "matters and causes testamentary"; and among [the matters] are to be found proceedings against executors and administrators for wilful default or for breach of trust. So that it is wrong to conclude, from the language of the *Surrogate Courts Act*, that jurisdiction is conferred upon these Courts in all matters relating to estates ...

MacDonald J.A. concluded that the court's jurisdiction over the case was not ousted by the provisions of the *Indian Act* because the issue was not a testamentary matter but rather an issue of contract.

See also *Cameron v. Canada (Minister of Indian Affairs and Northern Development)*, 2001 FCT 484, where an action for unpaid child support and a claim for damages for injuries for abandonment, abuse, and neglect were found not to be a testamentary matter.

Sampson v. Gosnell Estate highlights the need to carefully consider whether the dispute involves a "matter or cause testamentary". For example, it appears that actions for breach of trust or contract do not fall within the regime under the *Indian Act*, and should be pursued in a provincial superior court; however, only the Minister has the power to remove a personal representative of an Indian's estate (s. 43(a)). If there is a risk of duplicate proceedings, a party should consider asking the Minister to transfer the entire matter to the provincial superior court pursuant to s. 44.

B. Was the Deceased "Ordinarily Resident" on a Reserve?

The next threshold question is whether the deceased was a status Indian who was "ordinarily resident" on reserve or Crown land. If the deceased was not "ordinarily resident", the provisions of the *Indian Act* will not apply unless the Minister makes an order pursuant to a special application under s. 4(3)).

"Ordinarily resident" does not mean that the deceased had to have been living on a reserve at the time of death; it is sufficient that he or she normally resided on the reserve. For example,

if an Indian took a summer job off the reserve and was not living on reserve land when he or she died, the deceased would still be considered to be “ordinarily resident” on the reserve (see *Canada (A.G.) v. Canard*, [1976] 1 S.C.R. 170, reversing (1972), 30 D.L.R. (3d) 9, affirming [1972] 4 W.W.R. 618). However, in most cases INAC will consider that an individual living off reserve at the time of death was not ordinarily resident on reserve. In the absence of obvious on-reserve residency, all of the material circumstances will be taken into consideration, including the intention of the deceased. Thus, if a deceased was living off reserve at the time of death for the purpose of obtaining medical treatment, to further his or her education, or to obtain employment, but at all times intended to return to the reserve to live, INAC would likely (though not necessarily) find that he or she was “ordinarily resident” on a reserve at the time of death. The determination is normally made by a case officer at the regional level.

III. Proceedings under The Indian Act

Once it is clear that the case is within the process set out by the *Indian Act*, it is necessary to determine whether it should proceed through the Minister or whether a request should be made to transfer the proceedings to the provincial superior court. The route chosen can dramatically affect the remedy available.

A. General Considerations

The *Indian Act* process has some advantages; often it is quicker than the court process, and the Minister’s office will likely have greater expertise with respect to the devise of reserve land. The process also has drawbacks. When the Minister determines contentious estate issues, normal pre-trial procedures, such as discovery of documents and discovery of the parties, are not available. In a contested proof in solemn form or wills variation action, the lack of discovery may pose a significant problem. In addition, the normal ability to obtain medical records of the deceased by way of interlocutory application may also become difficult.

Although the Minister is not bound by precedent, the Minister must obey the rules of natural justice in exercising discretion in this area. The Minister must assume that an Indian has the same testamentary freedom as other Canadians (*Pronovost v. Canada (Minister of Indian Affairs and Northern Development)*, [1985] 1 F.C. 517 (C.A.)). If a party feels the Minister has not made the right decision, then he or she has the right to appeal (s. 47), but the appeal can only be heard by the Federal Court and must be brought within two months of the decision.

Care must be taken when setting out the grounds for challenging the Minister’s decisions . If a party is challenging the jurisdiction of the Minister (for example, arguing that the person was not “ordinarily resident” on a reserve) or the validity of the will, then the party must ensure that he or she does not attorn to the jurisdiction of the Minister by virtue of challenging the validity of the will under s. 46(1) (see, for example, *Earl v. Canada (Minister of Indian and Northern Affairs)*, 2004 FC 897).

B. Applicability of Provincial Legislation in The Indian Act Process

Under s. 91(24) of the *Constitution Act, 1982*, Parliament has the authority to make laws with respect to “Indians, and Lands reserved for the Indians”. It appears well settled that testamentary matters and causes fall within the scope of s. 91(24), and in particular the

Supreme Court of Canada has found that Parliament can exclude the authority of the provincial courts to appoint an administrator of a deceased Indian's estate (*Canada (A.G.) v. Canard*, supra).

However, it is less certain whether all provincial legislation is excluded, given that s. 88 of the *Indian Act* states:

88 Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or the *First Nations Fiscal and Statistical Management Act*, or with any order, rule, regulation or law of a band made under those Acts, and except to the extent that those provincial laws make provision for any matter for which provision is made by or under those Acts.

In *Re Williams Estate* (1960), 32 W.W.R. 686 (B.C.S.C.), Lord J. found that the provisions of the *Indian Act* regarding distribution of property on intestacy did not form a complete code, and that in order for a provincial statute to be excluded there had to be some inconsistency. At 687, he said:

... the test is inconsistency which to my mind means something which is at variance, or incompatible, or contrary. Fry, L.J. put it succinctly in *In re Knight and Tabernacle Permanent Building Society*, [1891] 2 Q.B. 63, 60 L.J.Q.B. 633, at 636, when he said that the inconsistency connoted must be one:

... so at variance with the machinery and procedure indicated by the previous Act, that, if that obligation were added, the machinery of the previous Act would not work.

An appeal was taken to the House of Lords, [1892] A.C. 298, 62 L.J.Q.B. 50, where Lord Halsbury, L.C. said at 302:

If the two provisions may stand together I am unable to follow the argument that the one is inconsistent with the other, and the whole argument depends upon the word 'inconsistent' in the later statute. It is obvious to inquire, where is the inconsistency if both may stand together and both operate without either interfering with the other?

Lord J.'s position should be compared to Dickson J.A.'s reasons in the Manitoba Court of Appeal decision in *Canada (A.G.) v. Canard* at 16:

Section 42 *et seq.* constitute a comprehensive testamentary code in respect of Indians. It was plainly the intention of Parliament, in enacting those sections, that provincial legislation on the subject of wills, devolution of estates and surrogate procedures applicable to others would not apply to Indians or to the administration of their estates unless the Minister so directed.

This statement was not explicitly endorsed, nor overruled, by the Supreme Court of Canada in *Canard*. . Given that *Re Williams Estate* was decided before the Supreme Court of Canada decision in *Canard*, it is unclear whether ss. 42 to 50 of the *Indian Act* and the Indian Estates Regulations form a complete code that seals off any entry of provincial laws.

C. Proof in Solemn Form

I. Formal Requirements

Section 45(2) of the *Indian Act* states:

(2) The Minister may accept as a will any written instrument signed by an Indian in which he indicates his wishes or intention with respect to the disposition of his property on his death.

Section 15 of the Indian Estates Regulations states:

15 Any written instrument signed by an Indian may be accepted as a will by the Minister whether or not it conforms with the requirements of the laws of general application in force in any province at the time of the death of the Indian.

Between the two provisions, it is clear that compliance with provincial statutes addressing the formalities of execution, such as the need for witnesses, is not needed in order for an Indian's will to be declared valid. See *Bernard Estate v. Bernard* (1986), 23 E.T.R. 15 (N.B.Q.B.).

2. Undue Influence and Capacity

Under s. 46(1)(a) and (b) of the *Indian Act*, the Minister has the power to declare a will void if he or she is satisfied that there was undue influence or that the deceased did not have capacity at the time of execution.

D. Voidance of Wills

Under s. 46(1)(c) of the *Indian Act*, the Minister has a limited power to change the deceased's will if it would otherwise cause hardship for "persons for whom the testator had a responsibility to provide".

It is interesting to note that there is a requirement to show hardship—something that is not required under the British Columbia *Wills Variation Act*, R.S.B.C. 1996, c. 490. It also appears that a wider range of people can apply for relief under s. 46(1)(c) than under the *Wills Variation Act*.

However, the Minister's remedial powers are restricted in comparison to those of the court under the *Wills Variation Act*. The Minister can only declare select provisions of the will or the entire will to be void; the Minister cannot create new provisions or reword the will. If a provision of the will is declared void, the gift lapses; if the entire will is declared void, the estate goes as on an intestacy. The people entitled to receive on an intestacy are described in s. 48 of the *Indian Act*.

It is not clear whether the *Wills Variation Act* may still be applied as a law of general application, given s. 88 of the *Indian Act*. There have been no cases directly on point, but it appears that the *Wills Variation Act* is inconsistent with s. 46(1)(c) of the *Indian Act*. The *Indian Act* specifically gives the Minister power to deal with a situation where a dependant is not adequately provided for, although the powers are not as broad as those under the *Wills Variation Act*. If provincial legislation was allowed to apply it would render s. 46(1)(c) impotent. The two statutes cannot operate concurrently unless a portion of the will is declared void.

The decision of the Minister will also be closely scrutinized by the courts if it appears that the powers under s. 46 were used to impose limits on the testamentary freedom of Indians (see *Pronovost v. Canada*, supra).

E. Intestacy

Section 48 prescribes the rules for intestate succession under the *Indian Act*:

48 (1) Where the net value of the estate of an intestate does not, in the opinion of the Minister, exceed seventy-five thousand dollars or such other amount as may be fixed by order of the Governor in Council, the estate shall go to the survivor.

(2) Where the net value of the estate of an intestate, in the opinion of the Minister, exceeds seventy-five thousand dollars, or such other amount as may be fixed by order of the Governor in Council, seventy-five thousand dollars, or such other amount as may be fixed by order of the Governor in Council, shall go to the survivor, and

- (a) if the intestate left no issue, the remainder shall go to the survivor,
- (b) if the intestate left one child, one-half of the remainder shall go to the survivor, and
- (c) if the intestate left more than one child, one-third of the remainder shall go to the survivor,

and where a child has died leaving issue and that issue is alive at the date of the intestate's death, the survivor shall take the same share of the estate as if the child had been living at that date.

(3) Notwithstanding subsections (1) and (2),

- (a) where in any particular case the Minister is satisfied that any children of the deceased will not be adequately provided for, he may direct that all or any part of the estate that would otherwise go to the survivor shall go to the children; and
- (b) the Minister may direct that the survivor shall have the right to occupy any lands in a reserve that were occupied by the deceased at the time of death.

(4) Where an intestate dies leaving issue, his estate shall be distributed, subject to the rights of the survivor, if any, per stirpes among such issue.

(5) Where an intestate dies leaving no survivor or issue, the estate shall go to the parents of the deceased in equal shares if both are living, but if either of them is dead the estate shall go to the surviving parent.

(6) Where an intestate dies leaving no survivor or issue or father or mother, his estate shall be distributed among his brothers and sisters in equal shares, and where any brother or sister is dead the children of the deceased brother or sister shall take the share their parent would have taken if living, but where the only persons entitled are children of deceased brothers and sisters, they shall take per capita.

(7) Where an intestate dies leaving no survivor, issue, father, mother, brother or sister, and no children of any deceased brother or sister, his estate shall go to his next-of-kin.

(8) Where an estate goes to the next-of-kin, it shall be distributed equally among the next-of-kin of equal degree of consanguinity to the intestate and those who legally represent them, but in no case shall representation be admitted after brothers' and sisters' children, and any interest in land in a reserve shall vest in Her Majesty for the benefit of the band if the nearest of kin of the intestate is more remote than a brother or sister.

(9) For the purposes of this section, degrees of kindred shall be computed by counting upward from the intestate to the nearest common ancestor and then downward to the relative, and the kindred of the half-blood shall inherit equally with those of the whole-blood in the same degree.

(10) Descendants and relatives of an intestate begotten before his death but born thereafter shall inherit as if they had been born in the lifetime of the intestate and had survived him.

(11) All such estate as is not disposed of by will shall be distributed as if the testator had died intestate and had left no other estate.

(12) There is no community of real or personal property situated in a reserve.

(13) and (14) [Repealed, R.S., 1985, c. 32 (1st Supp.), s. 9]

(15) This section applies in respect of an intestate woman as it applies in respect of an intestate man.

(16) [Repealed, R.S., 1985, c. 32 (1st Supp.), s. 9]

“Survivor” is defined in s. 2(1) of the *Indian Act*, in relation to a deceased individual, as his or her “surviving spouse or common-law partner”. A “common-law partner” is defined as “a person who is cohabiting with the individual in a conjugal relationship, having so cohabited for a period of at least one year”.

A controversy has developed in recent years regarding the interpretation of ss. 48(6) and (8) of the Act, and whether the right to inherit reserve land stops at brothers and sisters or extends to nieces and nephews. This area of the law is unclear. See, for example, *Wilson v. Bonneau (sub nom. Okanagan Indian Band v. Bonneau)*, 2002 BCSC 748, affirmed 2003 BCCA 299, leave to appeal dismissed [2003] S.C.C.A. No. 356 (QL), where the court agreed with the Band’s argument that the right to inherit did not extend to nieces and nephews, and that the land reverted to the Band.

F. Real Property’s Special Status

One of the policy reasons for creating a separate testamentary regime for Indians is to protect reserve land (as discussed in the first section of this material). In accordance with this policy, no person has an unqualified right to inherit land on a reserve. Section 49 of the *Indian Act* states:

49 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 the possession is approved by the Minister.

The Minister’s discretion in granting approval under this section is governed by an obligation to obey the rules of natural justice, and the assumption that an Indian has the same testamentary freedom as other Canadians (*Pronovost v. Canada*, supra).

Even where the Minister grants the authority to deal with the estate to the court under s. 44, the Minister has the final say as to the reserve land’s disposition (s. 44(3)):

(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.

It is important to note that reserve land cannot be left to a person who is not a member of the band in which the reserve land is associated. A person who is not a member of the band is only entitled to proceeds from sale, as set out in s. 50 of the Act:

(1) A person who is not entitled to reside on a reserve does not by devise or descent acquire a right to possession or occupation of land in that reserve.

(2) 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.

(3) Where no tender is received within six months or such further period as the Minister may direct after the date when the right to possession or occupation of land is offered for sale under subsection (2), the right shall revert to the band free from any claim on the part of the devisee or descendant, subject to the payment, at the discretion of the Minister, to the devisee or descendant, from the funds of the band, of such compensation for permanent improvements as the Minister may determine.

(4) The purchaser of a right to possession or occupation of land under subsection (2) shall be deemed not to be in lawful possession or occupation of the land until the possession is approved by the Minister.

This section is strictly applied, as seen in *R. v. Devereux*, [1965] S.C.R. 567, except in a few circumstances. For example, if the non-member heir or beneficiary obtains membership in the band prior to the distribution of the estate, INAC policy is that the individual would be entitled to receive the right to possession of the land.

This area of law is evolving and estate interests may seek clarification of these issues before the courts in the future. As a result, affected parties may wish to contact INAC when a s. 50 circumstance arises.

IV. Reference to the Court

Under s. 44 of the *Indian Act*, the Minister may transfer or refer an estate matter to the court which would otherwise have jurisdiction. Section 44 states:

44 (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.

An exercise of authority and jurisdiction by a court under s. 44(1) is a transfer of jurisdiction over an estate for all purposes. This is distinct from a s. 44(2) transfer or referral of a question arising out of a will or an estate over which the Minister retains jurisdiction. In the former case, the Minister retains no authority over the estate. In the latter, the court merely appoints an executor or administrator and/or addresses a specific question raised about a will or the administration of an estate retained under the Minister's jurisdiction.

Once the matter has been transferred or referred to the court, it raises a question of which law is to be applied. Should it be the *Indian Act* ("the jurisdiction and authority conferred on the Minister") or should it be the provincial legislation ("any other powers, jurisdiction and authority ordinarily vested in that court"), or both?

In *Johnson v. Pelkey* (1997), 36 B.C.L.R. (3d) 40 (S.C.), affirmed as to costs 1999 BCCA 348, Baker J. was asked to determine whether a will should be pronounced in solemn form or declared to be void. In making that determination, Baker J. had to decide whether the court could have recourse to the common law and provincial enactments governing wills and estates, or whether the *Indian Act* comprised a complete code. After noting that s. 44 of the *Indian Act* was not in issue in *Canada (A.G.) v. Canard*, Baker J. said, at 61:

Where the consent to transfer has been given, section 44 authorizes this court 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 this court.

At the very least, in interpreting and applying the provisions of s. 46 of the *Indian Act*, the court may, in my view, have recourse to the common law and seek assistance from judicial precedents considering testamentary dispositions by non-Indian persons.

These comments lend support to the position that, once the Minister grants consent to the transfer, the court is entitled to apply provincial legislation. If the court adopts such a position, it is unclear which law the court should apply if there is a conflict between the provincial enactments and the *Indian Act*.

When an action is commenced against deceased persons, the deceased's estate can be named even where no personal representative has been appointed at the time. Under the *Indian Act* and the Indian Estates Regulations, a personal representative is deemed to be in existence (see *Frank v. King Estate*, [1988] 2 W.W.R. 559 (Alta. C.A.)).