

ABORIGINAL PRACTICE POINTS

Wills for First Nations persons

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Key Points

- Most rules of construction and drafting of wills apply equally to the wills of First Nations persons. However, the *Indian Act* creates some major differences.
- If an Indian is “ordinarily resident” on a reserve or on Crown land, his or her will is governed by the *Indian Act*. If an Indian is not “ordinarily resident” on a reserve, the laws of the province in which he or she lives at the time of death will apply.
- Under the *Indian Act*, the usual formalities required for valid wills—such as two witnesses present and signing after the testator in the testator's presence—do not need to be followed. However, the formalities should still be met whenever possible.
- Section 48 of the *Indian Act* sets out detailed intestacy provisions.
- Under the *Indian Act*, people who are not entitled to reside on a reserve may not acquire title to land on a reserve under a will or on an intestacy. The date for determining whether an heir is entitled to reside on a reserve is the date of distribution of the estate.
- The class of people not entitled to reside on a reserve can be different from the class of people not entitled to possession of reserve land. The position of Indian and Northern Affairs Canada is that only band members are entitled to inherit the right to possession or occupation of reserve land; therefore, a person must be a member of the band with which the reserve land is associated to be eligible to inherit the right to possession.
- If an heir is not entitled to reside on a reserve, his or her share must be sold and the sale proceeds paid to him or her. The heir may choose to relinquish the interest in favour of the remaining heirs or to release and assign the share to a member of the band, in which case the sale is unnecessary. This is an evolving area of the law, and parties may want to contact Indian and Northern Affairs Canada if a s. 50 circumstance arises.
- It is not clear whether reserve land may be sold by the personal representative to satisfy debts of the deceased owed to non-First Nations persons.
- Treaties that are in place may affect Aboriginal wills under the *Indian Act* and provincial legislation. For example, the Nisga'a Treaty deals with standing, the devolution of cultural property, and wills variation actions.
- The Minister has limited power to change the deceased's will by declaring provisions or the entire will void if the will would cause hardship on persons for whom the testator had a responsibility to provide.
- If no executor is willing to act or there is no will, Indian and Northern Affairs Canada will write to the beneficiaries telling them they can apply to administer the estate. An administrator must be appointed, even where the estate is of nominal value.

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I. Introduction

Most of the rules of construction and drafting of wills can be equally applied to the wills of First Nations persons. However, some significant differences arise from the *Indian Act*, R.S.C. 1985, c. I-5, that should be kept in mind. (The federal government is working to modernize the *Indian Act*. Readers can watch for legislative developments on the website of Indian and Northern Affairs Canada at www.ainc-inac.gc.ca.)

II. When does the Indian Act apply?

An Indian is defined under the *Indian Act* as a person who is registered as an Indian or is entitled to be registered as such under the *Indian Act*. A detailed analysis of who might be entitled to be registered is beyond the scope of this text (see J. Woodward, *Native Law*, for some analysis).

If an Indian as defined (an “Indian”) is “ordinarily resident” on a reserve or Crown land, he or she is governed by the *Indian Act*. If an Indian is not ordinarily resident on a reserve or Crown land, the laws of the province in which he or she lives at the time of death will be applied. The Minister of Indian and Northern Affairs Canada (the “Minister”) can order that the *Indian Act* applies to an Indian not ordinarily resident on the reserve (*Indian Act*, s. 4(3)). However, such an order is rare, and occurs only if the heirs or beneficiaries request federal jurisdiction and if other specific criteria are met.

III. What are the significant differences?

A. Formalities

The formalities of execution for Indians’ wills are governed by the *Indian Act*, not provincial wills legislation. Section 45(2) of the *Indian Act* states:

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, C.R.C., c. 954, states:

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.

On this basis, it is clear that the normal formalities (that is, two witnesses present and signing after the testator in the testator's presence) need not be followed. However, good practice suggests that, whenever possible, the formalities should be met.

Provincial laws relating to wills and estates that are not inconsistent with the *Indian Act* may be applicable (s. 88 of the *Indian Act*), although there is some question of whether the provisions of the *Indian Act* form a complete testamentary code that would preclude the application of provincial laws (see R.D. Lee, "Estates under the Indian Act", in this *Aboriginal Practice Points* collection).

B. Intestacy provisions

Section 48 of the *Indian Act* sets out the intestacy provisions in detail, which may be summarized as follows:

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) if 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 can 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 appears to vest in Her Majesty for the benefit of the band. However, this area of the law is unclear, and the position of Indian and Northern Affairs Canada is that nieces or nephews may not inherit an interest in reserve land through an intestate estate.

The definition of "child" includes children born out of wedlock. Section 48 was amended effective September 4, 2001, by the *Modernization of Benefits and Obligations Act*, S.C. 2000, c. 12. Among other changes, the word "widow" was replaced by the word "survivor", defined as a surviving spouse or a common law partner "cohabiting with the individual in a conjugal relationship, having so cohabited for a period of at least one year" (*Indian Act*, s. 2(1)).

Anyone who is legally adopted or adopted according to Indian custom is treated as if he or she were related by blood to the adoptive relative. There must be a finding of adoption by custom before that child can inherit.

C. Testamentary freedom

1. Reserve land

It is beyond the scope of this paper to describe the intricacies of the reserve land system. However, it is necessary to have some knowledge of this area to understand the issues, and thus we will attempt a brief description.

“Allotment” refers to the decision of a band council to grant exclusive individual rights of possession over a parcel of reserve land. Such a decision must conform with ss. 2(3)(b) and 20 of the *Indian Act*, and it results in a Certificate of Possession (the “Certificate”) being issued by the Minister. The Certificate is the equivalent of a “location ticket” under previous legislation.

When an individual band member is in possession of reserve lands under a Certificate, the rest of the band members lose their collective right to occupy that portion of the reserve, and (subject to zoning and certain other bylaws) the individual may occupy and develop the land without interference by the band council or the other band members.

A Certificate of Possession is evidence of an individual band member’s right to possess particular land in a reserve. It is possible that a First Nations person may lawfully be in possession of land on a reserve without having a Certificate.

A Certificate of Occupation is a type of probationary possession where the Minister withholds approval of a Certificate of Possession, but authorizes the band member to occupy the land temporarily. It may prescribe conditions of use and settlement that are to be fulfilled by the band member before the Minister provides a Certificate of Possession.

Under s. 50 of the *Indian Act*, people who are “not entitled to reside on a reserve” may not acquire title to land on a reserve under a will or on an intestacy. The relevant date for determining whether the heir is entitled to reside on a reserve is the date of distribution of the estate, not the date of death of the deceased.

The class of people not entitled to reside on a reserve can be different from the class of people not entitled to possession of reserve land. For example, under a band bylaw pursuant to s. 81(1)(p.1) of the *Indian Act*, a band member might be unable to reside on a reserve, yet still be able to possess reserve land. The position of Indian and Northern Affairs Canada is that only band members are entitled to inherit the right to possession or occupation of reserve land. Therefore, an individual must be a member of the band with which the reserve land is associated in order to be eligible to inherit the right to possession. It is insufficient that an individual is merely registered or a member of a different band. Band members may include non-Indian persons, since some bands retain control over their own membership—though such an inclusion is rare.

If, at the date of distribution of the estate, the heir is not entitled to reside on a reserve, then his or her share must be sold and the sale proceeds paid to him or her in accordance with s. 50 of the *Indian Act*. If the heir chooses to either relinquish that interest in favour of the remaining heirs or release and assign the share to a member of the band, then a s. 50 sale is unnecessary. The right to relinquish or release and assign interests to other band members is an evolving area of the law, and affected parties may wish to contact Indian and Northern Affairs Canada when a s. 50 circumstance arises.

It should also be noted that it is not clear whether reserve land may be sold by the personal representative to satisfy debts of the deceased owed to non-First Nations persons. The definition of

“estate” includes any interest in land. If the position were like the position under provincial law of general application, one would expect that debts of the estate would be satisfied from the sale of such interests. However, ss. 29 and 89(1) of the *Indian Act* provide complete protection from seizure or execution of reserve land during the lifetime of the debtor. One would not expect death to fundamentally change the nature of the debtor-creditor relationship so that reserve property would be sold to satisfy debts.

2. Cultural artifacts

Consideration should be given to treaties that are in place and may affect Aboriginal wills under the *Indian Act* and provincial legislation. For example, the Nisga’a Treaty provides that:

- the Nisga’a Central Government is given standing in any proceeding in which the validity of the will of a Nisga’a citizen, or the devolution of the cultural property of a Nisga’a citizen, is at issue, including any proceedings under British Columbia wills variation legislation;
- the cultural property of a Nisga’a citizen who dies intestate will devolve in accordance with Nisga’a law;
- the Nisga’a Central Government may commence an action under British Columbia wills variation legislation with respect to the will of a Nisga’a citizen that provides for a devolution of cultural property that is inconsistent with Nisga’a laws or customs;
- in proceedings to which the above apply, a court will consider any evidence and representations concerning Nisga’a laws and customs relating to the devolution of cultural property; and
- the definition of “cultural property” includes:
 - communal interests in Nisga’a lands, or assets owned by the Nisga’a Central Government;
 - ceremonial regalia and similar personal property associated with a Nisga’a chief or clan; and
 - other personal property that has cultural significance to the Nisga’a Nation.

D. Wills variation

Section 46(1)(c) of the *Indian Act* allows the Minister to change the deceased’s will if the unchanged will would cause hardship on “persons for whom the testator had a responsibility to provide”. Note that a broader class of persons can apply for relief than under the provincial *Wills Variation Act*, but there is a requirement that the applicant show hardship.

The Minister’s power to change the will is very limited; the Minister can only declare select provisions of the will or the entire will void, and cannot rewrite specific provisions of the will.

It is also unclear whether the provincial *Wills Variation Act* would apply, although it seems unlikely (see R.D. Lee, “Estates under the Indian Act”, *supra*).

E. If there is no executor

If no executor is willing to act or if there is no will, Indian and Northern Affairs Canada will write to the beneficiaries telling them they can apply to administer the estate or transfer jurisdiction. INAC will then select an administrator from among those who apply or those who are nominated by the beneficiaries. The heir (no will) or beneficiary (will) with the largest interest in the estate will be presumed to be the person most likely to faithfully carry out the administrative duties, and will generally be given preference. An Indian and Northern Affairs Canada estates officer will be appointed only as a last resort, if nobody applies or if the applicants are unsuitable. INAC policy requires that an administrator be appointed in the case of every death, even where the estate is of minimal value.