THE HONOUR OF THE CROWN AND INDIAN SUCCESSION AND INHERITANCE LAW IN CANADA: FIDUCIARY PROTECTION OR CREEPING RE-APPROPRIATION OF ABORIGINAL PROPERTY?

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Subsection 91(24) of the *British North American Act* gave the Federal Government exclusive jurisdiction over "Indians, and lands reserved for Indians". From this authority Parliament legislated the *Indian Act*,[1] the ("Act") which, *inter alia*, established a regime governing First Nations property rights including the possession of reserve lands, wills, the distribution of property on intestacy and the administration of aboriginal estates for aboriginals who reside on reserves. The Minister of Aboriginal and Northern Development, the ("Minister"), exercises what has been described by the Supreme Court of Canada as "a discretionary and supervisory jurisdiction" over on-reserve testamentary law. This discretion is vested in the Minister rather than in the courts.[2]

All jurisdiction in relation to matters and causes testamentary with respect to a deceased *Indian* is "vested exclusively" in the Minister.[3] The *Indian Estates Regulations*[4] and ss. 42 to 50.1 of the Act lay out the regulations and laws governing aboriginal wills and how the property of "Indians" who ordinarily reside on reserve land is distributed on death. The Minister has a quasi-judicial function with regard to decisions that are tied to the validity of "Indian" wills, estate administration, estate litigation and the testamentary transfer

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1. R.S.C. 1985 c. I-5.
2. [1976] 1 S.C.R. 170, 52 D.L.R. (3d) 548, [1975] 3 W.W.R. 1 (S.C.C.) (reasons of Martland J.).
3. Section 42(1).
4. C.R.C. 1978, c. 954.

of the possession of band lands.[5] However, while federal jurisdiction over wills and estates has been transferred to signatory First Nations under some of the modern treaty agreements that provide for testamentary rights independent of the Act, the jurisdiction of First Nations to make laws relating to wills and estates is not recognized under the Act.[6] Of those First Nations that are treaty signatories the signatories have largely deferred to provincial laws to govern their rules of succession.[7]

As *Indian*[8] estates fall under the Federal Government's mandate unlike non-aboriginal succession law, the knowledge base required to serve First Nation communities is unique. This paper will seek to address some of the testamentary issues on reserve First Nations' face. The paper will address:

1. who specifically falls under the Minister's exclusive testamentary jurisdiction;
2. the law concerning the testamentary transfer of the possession of band land;
3. the impact of the *Family Homes on Reserves and Matrimonial Interests or Rights Act*,[9] the ("*Family Homes Act*"), on Aboriginal estate administration and litigation;
4. the intestacy provisions under the *Indian Act*;
5. the Minister's authority and discretion under the Indian Act; and
6. whether the provisions of the *Indian Act* form a complete testamentary code or whether the application of provincial laws and the common law can be coextensive with the act.

The distinction described in this paper between how *Indian* and non-aboriginal peoples' testamentary freedoms are recognized by the Federal Government is important. As demonstrated in this paper the government exercises a disproportionate and arguably prejudicial level of control over the testamentary freedom of aboriginal peoples and the administration of their estates.

5. Section 49.
6. Sixth Report of the Standing Committee on Aboriginal Affairs and Northern Development, May 2014, 41st Parl., 2nd Sess., chaired by Chris Warkentin at p. 2.
7. *Ibid.* at p. 2 at footnote 4.
8. Whenever *Indian* is used in this paper it refers to the definition of *Indian* in ss. 1 and 5 of the *Indian Act*.
9. S.C. 2013, c. 20.

Who specifically falls under the jurisdiction of the Minister for the purposes of succession under the Act?

Before addressing the mechanism of the Act's testamentary provisions and reviewing the exclusive authority of the Minister over all "matters and causes testamentary", it is important to understand who does and does not fall under the Minister's purview.[10] Section 4(3) of the Act states that "unless the Minister otherwise orders, ss. 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 the Crown". Whether the Act applies turns on whether the individual ordinarily resides on reserve lands.

"Ordinarily Resident"

Dickson J.A. (when he sat on the Manitoba Court of Appeal) summarized the case law surrounding the term "ordinarily resident". He interpreted ordinarily reside to mean the "customary mode of life" of the person concerned, and contrasted the customary mode of life with special or occasional or causal residence. He further cited case law for the proposition that the term ordinarily resident connotes residence in a place with some degree of continuity and apart from accidental or temporary absences. Finally, Justice Dickson approved the definition that ordinarily resident means where a person has his ordinary or usual place of living.[11]

Justice Beetz of the Supreme Court of Canada approved of Dickson J.A.'s explanation of ordinarily resident and then considered "ordinarily resident" in the context of s. 77 of the Act. Section 77 stipulates the rules governing band elections and who is eligible to vote. Justice Beetz used these rules to facilitate the interpretation of "ordinarily resident" and emphasized that the determination must be made with reference to all the factors of the case and that the place of ordinary residence is generally the place that has always been or had been adopted as the place of habitation or home of the individual.[12]

In *Earl v. Canada*[13] the Federal Court considered the meaning of the term "ordinarily resident" yet again in the aboriginal testamentary context. In *Earl*, the deceased had been a lifetime resident of the Okanagan Indian reserve. As his health deteriorated

10. Section 42(1).
11. *Canada (Attorney General) v. Canard* (1972), 30 D.L.R. (3d) 9, [1972] 5 W.W.R. 678, 1972 CarswellMan 69 (Man. C.A.).
12. *Supra*, footnote 2 (reasons of Beetz J.A.) at pp. 16-18.
13. 2004 FC 897, 256 F.T.R. 84, 132 A.C.W.S. (3d) 1 (F.C.).

he was found to be mentally incompetent by a court and moved to a health care facility that was off the reserve. In his will he left none of his assets to his daughters. The Minister appointed one of the testator's sons as the executor. The daughters appealed the Minister's administrative decision to the Federal Court, arguing that the deceased did not reside on the reserve at his death and, therefore, the Minister had no jurisdiction to probate the will. In rejecting the daughter's appeal, Justice Martineau cited *Canard* and held that the term "ordinarily resident" means "residence in the customary mode of life of the person as opposed to special or occasional or casual resident . . . [R]esidence in a medical facility is not a customary mode of life but rather is a special residence".[14]

In the recent decision of *Dickson (Estate) (Re)*,[15] Justice Gower of the Yukon Territory Supreme Court ruled on a situation similar to that faced by the court in *Earl*. In *Dickson*, an aboriginal who was ordinarily resident on a reserve was moved off reserve when his health declined and he had to be placed in a health care facility. The court applied the case law in *Canard* and *Earl* and found that "residence in a medical facility is not a customary mode of life, but rather a special residence".[16]

Of course, regardless of whether an aboriginal lives on or off a reserve, the Minister always has the final say with regard to the transfer of possession of reserve land.[17] Section 49 of the Act states:

> 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.

In addition to issues surrounding residence, the Minister's jurisdiction is triggered only where the issue is in relation to "matters and causes testamentary".[18] This jurisdiction has been interpreted to "repose in the minister all authority over wills and their probate in respect of Indians when ordinarily resident on the reserve".[19] This includes matters and causes relating to the grant and revocation of probate of wills, administration, and the resolution of issues tied to the construction of the will.[20] The jurisdiction extends beyond that of a mere surrogate court and includes the powers of a superior court.

14. *Ibid.*, at paras. 23-24.
15. 2012 YKSC 71, 226 A.C.W.S. (3d) 605, [2012] Y.J. No. 146 (Y.T. S.C.).
16. *Ibid.* at para. 45.
17. Section 49.
18. Section 42(1).
19. *Morin v. Canada*, 2001 FCT 1430, 43 E.T.R. (2d) 79, [2001] F.C.J. No. 1936 (Fed. T.D.) at para. 51

Matters tied to contracts and trusts are outside the jurisdiction of the Minister. Allegations of breach of trust are to be brought to a provincial court as the Minister's authority that is derived from ss. 42, 43 and 46 does not cover the administration and litigation surrounding a trust or the enforcement of a contract.[21]

The Law Concerning the Testamentary Transfer of the Possession of Band Land

On-Reserve First Nations are restricted in their ability to transfer a possessory interest in reserve land. Under the Act, band members cannot transfer certificates of possession to non-band members. There can be no transfer of a certificate of possession on any possessory devise even between band members without the approval of the Minister.[22] Where a band member devises under his will his possessory interest in reserve land to a non-band member the possessory right cannot be transferred to the band member. Instead the possessory right is auctioned off by the superintendent to the highest bidder among persons entitled to reside on the reserve. The proceeds of the sale shall be paid to the devisee or descendant.[23] Where the devise is to a band member the Minister must still approve the transfer.[24] Under s. 50(1) a person who is not a band member cannot obtain a right to occupy or possess any of the band's reserve land.[25]

Where no tender is received within six months or such further period as the Minister may direct, the right to possession shall revert to the band free from any claim of the non-member devisee subject to payment at the discretion of the Minister to the devisee from the funds of the band.[26] Even where the Minister has exercised his discretion under s. 44(2) and transferred a probate matter to be adjudicated to a provincial court instead of by the Minister, the court that is hearing the matter "shall not" enforce any order relating to land on a reserve without the written consent of the Minister.[27]

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20. *Ibid.* at paras. 45-51.
21. *Sampson v. Gosnell Estate* (1989), 57 D.L.R. (4th) 299, [1989] 4 C.N.L.R. 162, 32 E.T.R. 164 (B.C. C.A.)
22. Section 24.
23. Sections 18(1), 20, 24, 25, 28, 49, 50.
24. Section 49.
25. *Songhees First Nation v. Canada (Attorney General)*, 2003 BCCA 187, 225 D.L.R. (4th) 680, [2003] 2 C.N.L.R. 375 (B.C. C.A.) at para. 26.
26. Section 50.
27. Section 44(3).

Where the Minister exercises his discretion in deciding to approve or not approve a devise of the possessory interest in land under a band member's will to another band member, the Minister's discretion is constrained by the rules of natural justice.[28] The Minister in deciding whether to approve a testamentary transfer of possession in band land between band members must recognize that "Indians enjoy the same testamentary freedom as other individuals".[29] Where possible, the testamentary autonomy of First Nations should be recognized.

Section 50 of the Act governs what should happen to band land where it has been devised to a non-band member or where through the laws of intestacy it would pass to a non-band member. These provisions are interpreted strictly by the courts and the Minister.[30] In *R. v. Devereux*[31] the Supreme Court of Canada ruled on whether a non-band member who had been left band land under a will could continue to have possession over the land. The defendant was legally in possession of reserve land under a 10-year lease granted to him by the Crown. The land was devised to him by the will of a band member who held a certificate of possession over the land under the Act. After the termination of the lease he received a government permit permitting him to stay on the land for an additional two years. The Supreme Court ruled that after the permit period ended the defendant could only receive the proceeds generated from the sale of the possessory right in the land and could not continue to live there.

The purpose of s. 50 of the Act is to permit the band "to preserve land with the defined members of the Band and to redistribute land amongst its members for the preservation of interests of Band Members as a whole".[32] Section 50 ensures that "reserve land remains in the hands of band members and at the same time gives effect to the will of the testator or indeed band members. Accordingly the Minister must verify that the purchasers of the land in a s. 50 sale are, indeed, band members".[33]

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28. *Pronovost v: Canada (Minister of Indian Affairs & Northern Development)* (1984), [1985] 1 F.C. 517, [1986] 1 C.N.L.R. 51, [1984] F.C.J. No. 259 (Fed. C.A.), Marceau J.
29. *Ibid.*; see reasons of Pratte J.
30. Zandra L. Wilson, "Wills and Estates of Indians: The Indian Act in Review" (1993), 13 Est. & Tr. J. 129.
31. [1965] S.C.R. 567, 51 D.L.R. (2d) 546, 1965 CarswellNat 349 (S.C.C.).
32. *Okanagan Indian Band v. Bonneau*, 2002 BCSC 748, (*sub nom.* Wilson v. Bonneau) 216 D.L.R. (4th) 210, [2002] 4 C.N.L.R. 155 at para. 85 (B.C. S.C. [In Chambers]), affirmed 2003 BCCA 299, 227 D.L.R. (4th) 240, [2003] 3 C.N.L.R. 160 (B.C. C.A.), leave to appeal refused (2004), 344 W.A.C. 158 (note) (S.C.C.)

When trying to understand what exactly is devised when a band member makes a testamentary dispossession of his or her possessory right in band land the statements by Marceau J.A., of the Federal Court of Appeal in *Pronovost v. Canada*[34] are helpful. Band members who have a possessory right over land and the buildings which they have erected on it have more than a life interest in the land. The Minister's refusal to grant the devise of the possessory right cannot be regarded as preventing the transfer of any testamentary right since such a refusal by the Minister is cause for the auction of the possessory interest and the payment of the proceeds to the devisee.[35]

The Impact of the Family Homes on Reserves and Matrimonial Interests or Rights Act on Aboriginal Estate Litigation and Administration

Section 50 of the Act may work an injustice to a spouse of a band member who is not a band member and would therefore lose the possessory interest in the matrimonial home. Under the strict provisions of the Act, only a band member may have possession over the land. In contrast, other provinces provide non-titled spouses a possessory interest in the matrimonial home.[36] In response to this unfairness and other issues facing spouses of on-reserve band members, Parliament passed the *Family Homes on Reserves and Matrimonial Interests or Rights Act*, the ("*Family Homes Act*").[37] The *Family Homes Act* attempts to shield surviving spouses from some of the adverse effects of the *Indian Act*. The provisional rules provide that the surviving spouse or common-law partner has an automatic right to occupy the family home for a minimum of 180 days following the death of their spouse or partner.[38]

The Intention of the *Family Homes Act* is to:

> [P]rovide for the enactment of First Nation laws and the establishment of provisional rules and procedures that apply during a conjugal relationship, when that relationship breaks down or on the death of a spouse or common-law partner, respecting the use, occupation and possession of family homes on First Nation reserves and the division of the value of

33. *Songhees Indian Band v. Canada (Minister of Indian Affairs & Northern Development)*, 2006 FC 1009, [2007] 3 F.C.R. 464, [2006] 4 C.N.L.R. 292 (F.C.) at para. 27.
34. (1984), [1985] 1 F.C. 517, [1986] 1 C.N.L.R. 51, [1984] F.C.J. No. 259 (Fed C.A.).
35. *Ibid.*
36. *Family Law Act*, R.S.O. 1990, c. F.3, s. 19.
37. S.C. 2013, c. 20.
38. Section 14.

any interests or rights held by spouses or common-law partners in or to structures and lands on those reserves.[39]

The *Family Homes Act* stipulates that title to reserve land is not affected by the *Family Homes Act*.[40] The *Family Homes Act* applies to spouses and common law partners if at least one person is a First Nation Member *or Indian*.[41] The Act provides First Nations with the power to enact their own laws that apply respecting the use, occupation and possession of family homes on its reserves and the division of the value of any interests or rights held by spouses or common-law partners in or to structures and lands on its reserves. Until First Nation's draft their own laws the *Provisional Federal Rules* as stipulated under the Act govern.[42]

Under the *Provisional Rules* a spouse may claim survivor rights and interests to the family home and other matrimonial interests under the statute rather than under a will or ss. 48 to 50.01 of the *Indian Act*.[43] A survivor has to make a court application within 10 months after their spouse or common-law partner dies under s. 36 of the *Family Homes on Reserves and Matrimonial Interests or Rights Act* to avail themselves of the benefits under s. 34 of the Act.

Under s. 34 of the *Family Homes Act*, upon the death of a spouse or common-law partner the survivor is entitled, on application made under s. 36, to an amount equal to one half of the value, on the valuation date, of the interest or right that was held by the deceased individual in or to the family home and to amounts classified as matrimonial interests.

The valuation date for spouses is the earlier of:

(i) the day before the day on which the death occurred,
(ii) the day on which the spouses ceased to cohabit as a result of the breakdown of the marriage, and
(iii) the day on which the spouse who is now the survivor made an application to restrain improvident depletion of the interest or right in or to the family home and of the matrimonial interests or rights that is subsequently granted . . .

The valuation date for common-law partners is:

39. Section 4.
40. Section 5.
41. Section 6.
42. Section 12.
43. Overview of Estates Management, National Forum on the Technical Aspects of Matrimonial Real Property (June 17-19, 2014) prepared by the Ministry of Aboriginal Affairs and Northern Development Canada. See also ss. 34 and 35 of *Family Homes on Reserves and Matrimonial Interests or Rights Act*, S.C. 2013, c. 20.

(i) the day before the day on which the death occurred, and
(ii) the day on which the common-law partner who is now the survivor made an application to restrain improvident depletion of the interest or right in or to the family home and of the matrimonial interests or rights that is subsequently granted.[44]

The term matrimonial interest includes interests and rights other than to the family home and include interests:

(*a*) that were acquired during the conjugal relationship;
(*b*) that were acquired before the conjugal relationship but in specific contemplation of the relationship; or
(*c*) that were acquired before the conjugal relationship but not in specific contemplation of the relationship and that appreciated during the relationship.

Much like Ontario's *Family Law Act*, it excludes interests or rights that were received from a person as a gift or legacy or on devise or descent, and interests or rights that can be traced to those interests or rights.[45]

The entitlement is not a conveyance of title but a monetary payment. Notably, s. 34 takes into consideration any amounts the spouse has contributed to the band property in deciding the amount to award the surviving spouse or partner.[46] In addition, there are slightly different criteria when considering how much a reserve member spouse or partner is paid compared to a non-member surviving spouse or partner.[47]

If a payment is ordered by a court under s. 36, after the matrimonial share is distributed the remainder of the estate will be distributed to the remaining heirs or beneficiaries as per the will or s. 48 of the Act. If the court decides after the death of the spouse or common-law partner that an amount is payable under ss. 30 or 36 of the *Family Homes Act*, the survivor may not take under the deceased's will or under ss. 48 to 50.1 of the Act with respect to a matrimonial interest or right in the family home.[48] On application by a surviving spouse, partner, executor or administrator, a court may vary the terms of a testamentary trust under the will so that the amount that is payable to the spouse or partner under the Act may be paid.[49]

44. *Ibid.*, at s. 34(6).
45. *Ibid.*, s. 2(1); see "Matrimonial Interests or Rights".
46. Sections 34(2)(b)(ii) and 32(3)(b)(ii).
47. Compare s. 34(2)(c) and 34(3)(c).
48. Section 37.
49. Section 36(4).

With regard to the estate administration of a band member's estate, s. 38(1) of the *Family Homes on Reserves and Matrimonial Interests or Rights Act* states:

> 38. (1) Subject to subsection (2), an executor of a will or an administrator of an estate must not proceed with the distribution of the estate until one of the following occurs:
> (*a*) the survivor consents in writing to the proposed distribution;
> (*b*) the period of 10 months referred to in subsection 36(1) and any extended period the court may have granted under subsection 36(2) have expired and no application has been made under subsection 36(1) within those periods; or
> (*c*) an application made under subsection 36(1) is disposed of.
>
> (2) Subsection (1) does not prohibit reasonable advances to survivors or other dependents of the deceased spouse or common-law partner for their support.
>
> (3) When there are two survivors a common-law partner and a spouse with whom the deceased individual was no longer cohabiting and an amount is payable to both under an order referred to in section 36, the executor of the will or the administrator of the estate must pay the survivor who was the common-law partner before paying the survivor who was the spouse.

Executors should not make a distribution within the first 10 months of the death of the testator without the consent of the spouse or partner in writing.

Under the *Family Homes Act*, any proceeding brought under s. 36 prevents the distribution of the estate until the spouse's claim to the matrimonial property under s. 34 is disposed of. However "reasonable advances" to surviving spouses, partners or dependents for their support is permissible.[50] An application under s. 36 is made to a superior court judge in the province of the reserve band. Notably, the provisions of this new Act have courts more involved in estate litigation when it comes to determining spousal rights than under the *Indian Act*, where the starting point for any adjudicative determination is the Minister.

Intestacy Provisions under the Act

Section 48 of the Act governs the intestacy provisions of aboriginals living on reserve land. Unfortunately, as the majority of First Nations living on reserves do not make wills and therefore die intestate, these provisions are particularly significant.[51] Where the

50. Section 38(1).

on-reserve individual dies intestate, under s. 6 of the *Indian Estates Regulations* the superintendent will forward an application for administration to the Minister, who will appoint an administrator to administer the deceased's estate.[52] Heirs who are entitled to inherit under the *Intestacy* regime may apply to the Minister to be appointed as administrator.[53] This is different from the regimes in other provinces, where the next of kin may apply to the court for a certificate of appointment of an estate trustee without a will.

When administering an intestate estate much like a testate estate for an on-reserve individual, the administration process will not begin until the Minister has notice of the death. As soon as the notice of death is received the superintendent can take an inventory of the assets of the deceased and may act in the capacity of the administrator to safeguard the deceased's assets.[54] Ultimately, the Minister has a wide discretion in the appointment of an administrator. He may authorize whoever is seen fit to administer the property of the deceased and may give any "order, direction or finding" that in the Minister's opinion "is necessary or desirable to make or give with respect to any matter or cause testamentary".[55]

The following is a summary of the main features of the intestacy rules that are stipulated under s. 48:

- If the net value of the estate is: (a) less than $75,000 the surviving spouse or common law partner will receive the entire amount; (b) more than $75,000, the surviving spouse or common law partner will receive the first $75,000;
- If there is only one child then the surviving spouse or partner will split the remaining proceeds after the $75,000 in half with the child.
- If there is more than one child then after the $75,000 share is paid to the spouse or partner, the spouse or partner will

51. Sixth Report of the Standing Committee on Aboriginal Affairs and Northern Development, May 2014, 41st Parl., 2nd Sess., chaired by Chris Warkentin, at p. 4, citing Aboriginal Affairs and Northern Development, *Evidence*, 2nd Sess., 41st Parl. (Andrew Saranchuk, Assistant Deputy Minister, Resolution and Individual Affairs sector, Aboriginal Affairs and Northern Development Canada).
52. *Indian Estates Regulations*, ss. 3 and 11.
53. Sherry Evans and Susan A. Williams, "Aboriginal Practices Points, Aboriginal Estates: Policies and Procedures of INAC, BC Region" (Continuing Legal Education Society of British Columbia, April 1, 2007) at p. 9.
54. *Indian Estates Regulations*, ss. 3 and 4.
55. *Indian Act*, s. 43(c), (e).

receive one-third of the remainder and the rest will be divided among the children equally.

- If a child has predeceased the deceased and has issue, the issue will receive the child's share.
- If 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 surviving spouse or common law partner shall go to the children. The Minister can also direct that the surviving spouse or common-law partner have the right to occupy any lands in a reserve that were occupied by the deceased at the time of death.
- 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, and where any brother or sister is dead then the children of the deceased brother or sister shall take the share their parent would have if living. Where the only people alive are children of deceased brothers and sisters they shall take per capita.[56]
  c. Next of Kin of equal consanguinity.[57]

Section 46(6) of the Act states:

> 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.

Section 48(8) of the Act has been the center of litigation surrounding the entitlement of nieces and nephews on intestacy for reserve land. Section 48(8) states:

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56. This is different when compared to other provinces regimes. In Ontario under the *Succession Law Reform Act*, R.S.O. 1990, c. S.26, s. 47(4) states:
> Where a person dies intestate in respect of property and there is no surviving spouse, issue or parent, the property shall be distributed among the surviving brothers and sisters of the intestate equally, and if any brother or sister predeceases the intestate, the share of the deceased brother or sister shall be distributed among his or her children equally.

57. Summary taken from Roger D. Lee, "Aboriginal Practice Points, Wills for First Nations Persons" (Continuing Legal Education Society of BC, April 1, 2007), and *Indian Act*, s. 48.

> 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.

In *Okanagan Indian Band v. Bonneau*,[58] the British Columbia Court of Appeal analyzed the issue of when a person dies intestate and his closest living relatives at the time of his death are nephews and nieces. Do the nephews and nieces have the right to possession of the reserve land under s. 46(6) or does it vest in the Crown for the benefit of the band pursuant to s. 48(8)? The British Columbia Court of Appeal upheld a trial court that ruled the right of possession vests in the crown if the deceased's brothers and sisters are dead. The Court of Appeal stated:

> In the result, by operation of ss. 48(8), in all circumstances where the estate devolves to next-of-kin, an interest in reserve land is excepted if the next-of-kin is more remote than a brother or sister of the intestate. In those cases, the interest in land reverts to the Crown for the benefit of the band. It follows, in our view, that the chambers judge answered the question correctly.[59]

As leave to the Supreme Court of Canada was dismissed and there has been no further appellate case law to challenge the ruling of the British Columbia Court of Appeal, it would seem that under the intestate regime nephews and nieces cannot inherit the possessory interest in band land. This is different from the rest of Canada where distributions on intestacy follows consanguinity and there is no distinction for land.

Formal Validity of First Nation Wills

Subsection 45(2) outlines the formal requirements for a will of a First Nation individual living on a reserve. The subsection 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.

The formal requirements of wills under the Act are minimal.[60] The Minister may accept as a will any document signed by an "Indian"

58. 2003 BCCA 299, 227 D.L.R. (4th) 240, [2003] 3 C.N.L.R. 160 (B.C. C.A.), leave to appeal refused (2004), 344 W.A.C. 158 (note), 208 B.C.A.C. 158 (note) (S.C.C.).
59. *Supra*, at para. 49.

that indicates his intentions with regard to the testamentary disposition of his property. Where s. 45 of the Act is in conflict with the validity requirements of provincial legislation the Act, prevails. Section 15 of the *Indian Estate Regulations* 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.

The effect of the regulation when combined with s. 45(2) of the Act has led to the conclusion that the Act has "the effect of overriding any provincial legislation which stipulates the need for formalities in the making of a will".[61] In interpreting the testamentary provisions, s. 45 of the Act does not confer power on the Minister but instead makes express that "Indians may devise or bequeath property by will". The purpose of s. 45 "is to make certain the rights of Indians, not grant power to the Minister".[62] However no will under the Act is of any legal force until it is approved by the Minister.[63]

Despite provincial legislation not applying to s. 45 of the Act, it would still be prudent for First Nation will drafters to comply with the provincial statue that governs wills validity. In the event the First Nation individual ceases to have an ordinary residence on the reserve, his or her will would still be legally valid.[64]

Minister's Power and Discretion under the Legislation:

Under the Act, the Minister has an all-encompassing power with regard to On-Reserve First Nation members' testamentary proceedings. The Act specifically states:

> 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.[65]

60. *George Estate v. Gabriel*, 2009 BCSC 198, 175 A.C.W.S. (3d) 930, [2009] B.C.J. No. 282 (B.C. S.C.), at para. 92
61. *Bernard Estate v. Bernard* (1986), 29 D.L.R. (4th) 133, (*sub nom.* Bernard, Re) [1987] 1 C.N.L.R. 45, 23 E.T.R. 15 (N.B. Q.B.), at para. 10.
62. *Leonard v. Canada (Minister of Indian & Northern Affairs)*, 2004 FC 665, [2004] 3 C.N.L.R. 150, 8 E.T.R. (3d) 61 (F.C.) at para. 25; *Morin v. Canada*, 2001 FCT 1430, 43 E.T.R. (2d) 79, [2001] F.C.J. No. 1936 (Fed. T.D.) at para. 52.
63. *Indian Act*, s. 45(3).
64. Sherry Evan and Susan A. Willis, "Aboriginal Estates: Policies and Procedures of INAC, BC Region" (Continuing Legal Education Society of British Columbia, April 1, 2007).

The Minister approves wills before they are deemed valid,[66] approves the appointment of the executor should there be a will,[67] appoints and authorizes the administrator of the estate[68] and decides wills' validity where there is a challenge.[69] With the consent of the Minister a provincial court can exercise the jurisdiction of the Minister in hearing a testamentary dispute.[70] The Minister has discretion under the Act to transfer its probate jurisdiction to a provincial superior court. In addition the Minister may refer to the provincial superior court any question arising out of any will or the administration of the estate.[71]

The Federal Court in *Longboat v. Canada (Attorney General)*[72] stated that ss. 42 and 43 of the Act create "a special regime for the administration of the estates of Indians which grant all jurisdiction and authority exclusively to the Minister in testamentary matters of Indians, including the authority to appoint and remove administrators".[73]

In deciding whether to invalidate a will the Minister's broad discretion is demonstrated by the following provisions of the Act under s. 46(1):

> (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.

65. *Indian Act*, s. 42(1).
66. *Indian Act*, s. 45(3).
67. *Indian Estates Regulations*, s. 9, and *Indian Act*, s. 43.
68. *Indian Act*, s. 43(c), and *Regulations*, s. 11(1).
69. *Indian Act*, ss. 43(e), 46.
70. *Indian Act*, s. 44(1).
71. *Indian Act*, s. 44(2).
72. (2013), 95 E.T.R. (3d) 83, [2014] 2 C.N.L.R. 195, 442 F.T.R. 311 (Eng.) (F.C.), affirmed 2014 FCA 223, 1 E.T.R. (4th) 5, 466 N.R. 120 (F.C.A.).
73. *Ibid.* (F.C.) at para. 38.

> (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.

As demonstrated in the statute, these provisions provide much more discretion to the Minister than under the law of the provinces for the purposes of invalidating a will. Ordinary Canadian citizens can make a "capricious" testamentary dispossession of their property.[74] In addition, imposing a hardship on a person for whom the testator had a responsibility to provide may be the impetus for a dependents support claim but will not invalidate the will of those governed by provincial law.

In *Longboat v. Canada (Attorney General)*,[75] the Federal Court heard an appeal brought under s. 47 of the Act of a decision of the Minister to remove an administrator from an estate. The court quoted the Supreme Court of Canada in *Canard* for the proposition that the provisions of the Act dealing with testamentary capacity and the administration of estates grant "substantial discretionary jurisdiction" to the minister.[76]

The court in *Longboat* held that deference is owed to ministerial discretion tied to the removal of an administrator or issues concerning the validity of wills. The court held that the Minister's exercise of discretion in removing an administrator was reviewable on a reasonableness standard.[77]

Are the Testamentary Provisions of the Indian Act Insulated from Provincial Legislation or the Common Law?

As mentioned at the outset of this paper, s. 91(24) of the *British North American Act* confers on Parliament the authority to legislate with respect to "Indians, and lands reserved for the Indians". However, s. 88 of the statute states:

> 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 Management Act*, or with any order, rule, regulation or law of a

74. See the will of Dr. William "Tiger" Dunlop.
75. 2014 FCA 223, [2014] 2 C.N.L.R. 195, 95 E.T.R. (3d) 83 (F.C.), affirmed 1 E.T.R. (4th) 5, 466 N.R. 120, 2013 FC 1168 (F.C.A.).
76. *Ibid.* (F.C.), at para. 22.
77. *Ibid.* at paras. 24-27.

> 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 the case law there is a tension when addressing the question of whether provincial law applies where it does not contradict the provisions of the *Act*. In *Re Williams Estate*,[78] the British Columbia Supreme Court rejected the argument that the Act formed a complete code with respect to the estate of an "Indian" who had died intestate and any provincial statute which would add to that code would be "inconsistent" with the Act. Lord J. for the British Columbia Supreme Court stated:

> This argument overlooks the plain wording of s. 87 [now s. 88] where it is made very plain that the test is inconsistency which to my mind means something which is at variance, or incompatible or contrary.[79]

Under the view espoused by Lord J. in *Williams Estate*, provincial legislation would apply so long as it is not incompatible with the Federal Legislation. However in *Canada (Attorney General) v. Canard*, Justice Dickson for the Manitoba Court of Appeal stated:

> Section 42 et seq., constitutes a comprehensive testamentary code in respect of Indians. It was plainly the intention of Parliament, in enacting those sections that provincial legislation of 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.[80]

When the Supreme Court of Canada took up the appeal in *Canard* it did not address Dickson J.A.'s statement.

However when the Minister transfers a testamentary matter under s. 44, the Act stipulates that the judge is required to exercise the authority of the Minister under the Act and "any other powers, jurisdiction and authority ordinarily vested in the Court".[81] Under s. 46 the Minister has the authority to void in whole or in part Wills. In interpreting s. 44 and s. 46 where a matter has been transferred to the judiciary, the statements of Baker J. in *Johnson v. Pelkey*[82] are elucidating:

78. (1960), 32 W.W.R. 686, 1960 CarswellBC 89, [1960] B.C.J. No. 81 (S.C.).
79. *Ibid.* at para. 8.
80. *Canada (Attorney General) v. Canard* (1972), 30 D.L.R. (3d) 9 at p. 16, [1972] 5 W.W.R. 678, 1972 CarswellMan 69 (Man. C.A.), reversed (1975), 52 D.L.R. (3d) 548, [1976] 1 S.C.R. 170, [1975] 3 W.W.R. 1 (S.C.C.).
81. *Indian Act*, s. 44.
82. (1997), 17 E.T.R. (2d) 242, 36 B.C.L.R. (3d) 40, [1997] B.C.J. No. 1290 (B.C. S.C.) at paras. 103-104, additional reasons (1998), 23 C.P.C. (4th) 277, 23

> 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 section 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.

Notwithstanding the ambiguity surrounding the application of provincial statutes, this has not applied to the common law. The Act does not supplant the common law rules tied to the execution of the will, capacity, or the requirement that the testator must have knowledge and approval of the contents of the will.[83] The only caveat is that courts have taken the view when interpreting the Act that the "court must strictly interpret the provisions . . . which deny Indians the testamentary rights enjoyed by other Canadians".[84]

Conclusion

On-reserve First Nation estate planning and litigation are unique matters that at the very least require a basic understanding of the issues addressed in this paper. It is essential that estate and litigation practitioners have an understanding of when the Act applies when drafting wills for band members, or when dealing with contentious estate proceedings, as the case may be. This paper is a mere introduction to the various issues that aboriginal individuals face in handling their testamentary affairs. As the aboriginal population continues to age, these issues will continue to arise more frequently.

E.T.R. (2d) 137, [1998] B.C.J. No. 3257, affirmed 1999 BCCA 348, 207 W.A.C. 229, [1999] B.C.J. No. 1321 (B.C. S.C.).

83. *Vout v. Hay*, [1995] 2 S.C.R. 876, 125 D.L.R. (4th) 431, 7 E.T.R. (2d) 209 (S.C.C.).

84. *Ibid.* at para. 105; see also *George Estate v. Gabriel*, 2009 BCSC 198, 175 A.C.W.S. (3d) 930, [2009] B.C.J. No 282 (B.C. S.C.) at para. 87.