DISCRIMINATION BY FIDUCIARY PROTECTION: CONTINUING FEDERAL PATERNALISM IN ABORIGINAL SUCCESSION AND INHERITANCE LAW

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Inheritance laws and customs have a profound impact on the distribution and retention of land and wealth, often reflecting the changing values of a given community. Lawrence M. Friedman refers to succession law as a genetic code that replicates societal structures from one generation to the next;[1] that is, until a genetic mutation (or in this case, new law) leads to evolution by saltation, embedding new social norms within a few generations. In the United Kingdom, for example, a series of sweeping reforms following WWI[2] sounded the death knell of an inheritance and property rights regime, grounded in male primogeniture, which had endured for half a millennium and discriminated based on birth order, sex, legitimacy, and marital status. These reforms played an important part in decreasing the economic dependence of women on men, and allowed women to find new roles in the public, social and economic life of Britain.

Inheritance law in Canada, true to its English heritage, has also been subject to revision, reflecting and cementing changing social mores. However, the rules governing wills and estates under the *Indian Act*[3] (the "Act") and the corresponding *Indian Estates*

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1. Lawrence M. Friedman, "The Law of Succesion in Social Perspective" in *Death, Taxes and Family Property*, Edward C. Halbach Jr., ed. (St. Paul: West Publishing, 1977) at 9 and 14.
2. See the *Administration of Estates Act, 1925*, c. 23; and the *Law of Property Act, 1925*, c. 20.

Regulations[4] (the "Regulations") remain, in many respects, relics of paternalism that is incompatible with modern policies of reconciliation and aboriginal self-governance. Given the importance of inheritance law to the transfer of land and wealth, and its potential to create new forms of social organization, a change to the wills and estates regime governing Canada's First Nations is necessary to give effect to those modern policies.

This paper is the second in a two-part series regarding the management of Indian[5] estates under the Act. Part I in this series outlined the differential treatment of Indian estates under the Act, as well as the comprehensive authority exercised by the Federal Government with regard to the testamentary freedom of members of Canada's First Nations living on reserve and the administration of their estates.[6] This paper will draw on the inherent inequality and negative effects of that differential treatment to build the case for a constitutional challenge based on the equality rights enshrined in the *Canadian Charter of Rights and Freedoms*[7] (the "Charter"). Specifically, this paper will address:

1) relevant aspect of the wills and estates regime under the Act and corresponding Regulations;[8]
2) the law with respect to constitutional challenges under the s. 15 equality provisions of the Charter; and
3) an analysis of the wills and estates regime in the Act with respect to s. 15 of the Charter.

Wills and Estates under the Act

Section 42(1) of the Act provides that "all jurisdiction and authority in relation to matters and causes testamentary, with respect to deceased Indians, is vested exclusively in the Minister"[9] of Indigenous and Northern Affairs (the "Minister").[10] This juris-

3. R.S.C. 1985, c. I-5.
4. C.R.C. 1978, c. 954.
5. Whenever "Indian" is used in this paper, it refers to the definition of "Indian" under ss. 1 and 5 of the Act.
6. Arieh Bloom and Lionel J. Tupman, "The Honour of the Crown and Indian Succession and Inheritance Law in Canada: Fiduciary Protection or Creeping Re-appropriation of Aboriginal Property?" (2016), 45 Adv. Q. 177.
7. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
8. The full wills and estates regime can be found in the Regulations and ss. 42 to 50.1 of the Act. See Bloom and Tupman, *supra*, footnote 6, for a more complete overview of the law concerning Indian wills and estates.
9. *Supra*, footnote 3.

diction applies exclusively to Indians who are ordinarily resident on reserve.[11] As a result of the blanket authority provided to the Minister under the Act, her powers are quasi-judicial and wide-ranging. Most significantly, the Act provides that the Minister may:

1) appoint and remove executors of wills and administrators of estates of deceased Indians;[12]
2) make any order, direction or finding that she deems necessary with respect to wills and estates of deceased Indians;[13]
3) refer matters arising out of the will or estate of a deceased Indian to the court that would have jurisdiction were the deceased not an Indian, or consent to the exercise of her jurisdiction under the Act by such a court;[14]
4) accept as a will any instrument that makes testamentary dispositions, and is signed by an Indian;[15] and
5) declare the will of an Indian void, in whole or in part, due to: undue influence, lack of testamentary capacity, the imposition of hardship on those "for whom the testator had a responsibility to provide", incompatibility with the provisions of the Act, vagueness, uncertainty, capriciousness, or irreconcilability with public interest.[16]

In addition to the above, the Regulations grant the Minister the discretion to appoint an officer of Indigenous and Norther Affairs Canada (IANC) to act as administrator of the estates of all deceased Indians. This officer can transfer the administration of such estates to the superintendent of the reserve on which the deceased resided.[17] The Regulations also require the executor of an estate, whether approved or appointed by the Minister, to act under the instructions of the administrator where the Minister so orders.[18]

Thus, under the Act and the Regulations, the Minister, his appointed officers, and the reserve superintendent have extensive

10. The Ministry has undergone two name changes in recent years. The Minister was formerly referred to as the Minister of Indian Affairs and Northern Development, and subsequently, the Minister of Aboriginal Affairs and Northern Development.
11. Section 4(3).
12. Section 43(a).
13. Section 43(e).
14. Section 44(1) and 44(2).
15. Section 45(2).
16. Section 46(1)
17. Section 11(1).
18. Section 9.

discretionary power over the estates of deceased Indians living on reserve. No provincial wills and estates legislation empowers any individual or institution, other than the courts, to act with such broad discretion.

As for provincial legislation, there is a controversy regarding the extent to which applies to Indian estates that fall under the Act, especially where the Minister has exercised her discretion to transfer questions arising out of an estate to the provincial courts.[19] The application of the common law to the estates of Indians, however, has been accepted to the extent that it is not inconsistent with the Act.[20]

A Constitutional Challenge to the Indian Estates Regime in the Act

The primacy of the Constitution, and the attendant right to challenge government legislation as unconstitutional, is enshrined in s. 52(1) of the *Constitution Act, 1982*: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."[21] Any challenge to the constitutionality of a law is a two-part process. The party challenging the law must not only prove that it violates a right guaranteed by the Charter, but that this violation can't be saved as a reasonable limit that can be "demonstrably justified in a free and democratic society".[22]

Is the Estates Regime a Violation of the Charter?

I The Law

The clearest and most relevant basis for challenging the wills and estates regime contained in the Act is that it results in unequal treatment contrary to s. 15 of the Charter:

19. See *Williams, Re* (1960), 32 W.W.R. 686, 1960 CarswellBC 89, [1960] B.C.J. No. 81 (B.C. S.C.); and *Canada (Attorney General) v. Canard* (1972), 30 D.L.R. (3d) 9, [1972] 5 W.W.R. 678, 1972 CarswellMan 69 (Man. C.A.), reversed [1976] 1 S.C.R. 170, 52 D.L.R. (3d) 548, [1975] 3 W.W.R. 1 (S.C.C.). The issue was not taken up in *Canada (Attorney General) v. Canard* (1975), [1976] 1 S.C.R. 170, 52 D.L.R. (3d) 548, [1975] 3 W.W.R. 1 (S.C.C.), which reversed the decision of the Court of Appeal.
20. *Johnson v. Pelkey*, 1999 BCCA 348, 207 W.A.C. 229, [1999] B.C.J. No. 1321 (B.C. C.A.).
21. Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
22. Charter, s. 1.

> (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

While s. 15(2) above provides a constitutional basis, in certain circumstances, for the unequal treatment of historically disadvantaged groups, the Supreme Court has held that s. 15(2) should be understood in conjunction with s. 15(1) as a guarantee of substantive equality. Essentially, the protection for affirmative action programs is "confirmatory and supplementary" to the right to equal treatment under the law, providing a justification for the unequal treatment of certain groups in the context of advancing their interests.[23]

The test for determining whether a s. 15 violation exists is effectively summarized in *R. v. Swain* as follows:

> The court must first determine whether the claimant has shown that one of the four basic equality rights has been denied (*i.e.*, equality before the law, equality under the law, equal protection of the law and equal benefit of the law). This inquiry will focus largely on whether the law has drawn a distinction (intentionally or otherwise) between the claimant and others, based on personal characteristics. Next, the court must determine whether the denial can be said to result in "discrimination". This second inquiry will focus largely on whether the differential treatment has the effect of imposing a burden, obligation or disadvantage not imposed upon others or of withholding or limiting access to opportunities, benefits and advantages available to others. Furthermore, in determining whether the claimant's s. 15(1) rights have been infringed, the court must consider whether the personal characteristic in question falls within the grounds enumerated in the section or within an analogous ground, so as to ensure that the claim fits within the overall purpose of s. 15 – namely, to remedy or prevent discrimination against groups subject to stereotyping, historical disadvantage and political and social prejudice in Canadian society.[24]

Therefore, in order for a violation of s. 15 to be proven, the court must find (i) distinctive treatment under the law, (ii) based on enumerated or analogous grounds, and (iii) resulting in substantive discrimination.

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23. *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, 188 D.L.R. (4th) 193, [2000] S.C.J. No. 36 (S.C.C.) at para. 105.
24. [1991] 1 S.C.R. 933, 5 C.R. (4th) 253, [1991] S.C.J. No. 32 (S.C.C.) at 80.

Subsequently, in *Law v. Canada (Minister of Employment & Immigration)*,[25] Lamer C.J.C. added to the evaluative framework articulated above by emphasizing the importance of establishing a comparator group and analyzing contextual factors in assessing the merits of a s. 15 claim. Four primary contextual factors are identified: pre-existing discrimination, the correspondence between the grounds of the claim and the actual circumstances, the ameliorative purpose or effect of the law in question, and the nature and scope of the interest affected by the law.[26] In addition, *Law* provides that a discrimination inquiry is both subjective and objective. Subjective, in that "the right to equal treatment is an individual right, asserted by a specific claimant with particular traits", and objective in that the court must turn its mind to "the larger context of the legislation in question, and society's past and present treatment of the claimant and of other persons or groups with similar characteristics or circumstances".[27] This inquiry is based on a reasonable person standard.[28]

II Analysis

The issue of the inequalities arising from the ss. 42 to 44 wills and estates provisions of the Act was last challenged under the Bill of Rights.[29] The challenge pre-dated the Charter. In *Canard v. Canada (Attorney General)*,[30] the focus was on the formal equality of the provisions themselves, which *per* Beetz J. could not be read to preclude Indians from administering the estates of deceased Indians based on their race. The majority held that the provisions did not violate the Bill of Rights. In his dissent, however, Laskin C.J.C. held that the sections in question, when read in conjunction with the Regulations and examined in the context of the policies of the Department of Indian Affairs, served as a *de facto* disqualification of Indians as estate administrators.

The approach taken by Laskin C.J.C. is more consistent with the substantive equality approach undertaken in a Charter analysis of s. 15 as outlined above. It appears likely then, that despite some modernization of IANC policies, the wills and estates regime under the Act and regulations is vulnerable to a challenge based on such a substantive equality approach.

25. [1999] 1 S.C.R. 497, 170 D.L.R. (4th) 1, 43 C.C.E.L. (2d) 49 (S.C.C.) [*Law*].
26. *Ibid.* at para. 88.
27. *Ibid.* at para. 59.
28. *Ibid.* at para. 60.
29. S.C. 1960, c. 44.
30. (1975), [1976] 1 S.C.R. 170, 52 D.L.R. (3d) 548, [1975] 3 W.W.R. 1 (S.C.C.).

The first step in the analysis is determining if the Act establishes distinct treatment under the law. That the Act establishes such a distinction is clear on its face. The wills and estates provisions of the Act apply only to those Indians ordinarily resident on a reserve, whereas the wills and estates of other Canadians fall under the appropriate provincial legislation.

Next, the court must find that this distinctive treatment is based on enumerated or analogous grounds with respect to s. 15 of the Charter. This second issue is also relatively simple. In *Corbiere v. Canada (Minister of Indian & Northern Affairs)*,[31] the court held that "aboriginality-residence" (meaning whether an indigenous person lived on or off a reserve) was analogous to the grounds enumerated in s. 15. All that remains, therefore, is determining whether or not the distinct treatment under the law is substantively discriminatory within the evaluative framework established in *Law*.

As for the subjective assessment required by *Law*, it is impossible to consider fully without a known claimant. What can be inferred from statistics, however, is that if the claimant in this matter is an Indian living on reserve, she is likely to have faced significant disadvantages with respect to a non-aboriginal comparator group. The percentage of individuals living in a lone parent household was 39% on reserves and 17.4% for non-aboriginals; 27.7% of those on reserves and 4% of non-aboriginals live in crowded homes; 42.9% of those on reserve and 6.8% of non-aboriginals live in homes requiring major repairs; 47.2% of those on reserve and 12.1% of non-aboriginals have no diploma or degree; and finally, 47% of those on reserve and 75.8% of non-aboriginals are employed.[32] The current circumstances of First Nations members on reserve relative to other Canadians is the result of centuries of mistreatment by government and society, and this is the objective context in which a reasonable person must determine whether the wills and estates provisions of the Act create substantive inequality.

In this respect, both the purpose and effect of a piece of legislation are vulnerable to a s. 15 Charter challenge. The essential questions to ask, as stated in *Law*, are as follows:

> Do the impugned [Act] provisions, in purpose or effect, violate essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice? Does the law, in purpose or

31. [1999] 2 S.C.R. 203, 173 D.L.R. (4th) 1, [1999] 3 C.N.L.R. 19 (S.C.C.) at 6 and 14, reconsideration/rehearing refused 2000 CarswellNat 2393 (S.C.C.).
32. Karen Kelly-Scott and Kristina Smith, "Aboriginal peoples: Fact sheet for Canada" (Statistics Canada, Aboriginal Statistics Division, November 3, 2015).

> effect, conform to a society in which all persons enjoy equal recognition as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect, and consideration? Does the law, in purpose or effect, perpetuate the view that [Indians on reserves] are less capable or less worthy of recognition or value as human beings or as members of Canadian society?[33]

With some exceptions, those questions deserve an affirmative answer in this case. With respect to the purpose of the law, as the Act was first passed in 1876, its purpose has necessarily changed over time. A relatively modern conception of the purpose of the impugned provisions, proffered by Robert A. Reiter, suggests that the reasons for including wills and estates provisions in the Act are threefold:

> (i) preservation of the Indian land base demands a limitation on the descent or devise of interest in reserve land, otherwise non-band members could acquire possession of reserve land, and whittle away at the reserve land base.
> (ii) the Crown has a fiduciary obligation to preserve the estates of reserve resident Indians and mentally incompetent Indians and minor Indians. The rationale for this is that these estates are held in trust by the Crown.
> (iii) the Crown-Indian relationship as evidenced in the treaties and in the Royal Proclamation of 1763 and codified in the *Indian Act* administration of their estates presupposes the wardship of Indians by the Crown.[34]

The first line of reasoning above serves to deprive Indians of the right to freely dispose of land that is enjoyed by other Canadians, but as it is grounded in the special circumstances of Canada's First Nations with respect to land occupation, it appears unlikely to meet the threshold of offending the dignity of a claimant pursuant to a s. 15 challenge. While the limits to the inheritance of possession rights under s. 50 of the Act do not necessarily ameliorate the position of Indians, the clear purpose and effect of s. 50 is to keep the right to possess or occupy reserve land exclusive to members of a specific band.

However, one circumstance where limits to the transfer of possession of reserve land that may amount to discrimination,

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33. *Law*, *supra*, footnote 25. Importantly, in *Quebec (Attorney General) v. A.*, 2013 SCC 5, [2013] 1 S.C.R. 61, 354 D.L.R. (4th) 191 (S.C.C.), the court held that a finding of discrimination can be based on the perpetuation of stereotype or the existence of prejudice.
34. *The Fundamental Principles of Indian Law* (Edmonton, First Nations Resource Counsel, 1990) at Section V, "Indian Wills and Estates", at p. 10.

despite the contextual factors supporting such limits, is in the case of s. 48(8) of the Act, which stipulates that on intestacy, if the surviving relatives are more remote than a brother or sister, any interest in reserve land vests in the Crown to the benefit of the band. Therefore, under the Act, nieces and nephews are not entitled to inherit an interest in reserve land on intestacy, though provincial legislation with respect to intestacy allows for the vesting of such an interest in non-reserve lands.

While s. 48(8) serves the purpose of limiting the devise of interest in reserve land, its effect is to deprive the nieces and nephews of an intestate of an interest in reserve land when the band's possessory rights are already protected. Because s. 50(1) of the Act bars non-band members from acquiring possession or occupation rights to reserve land, all s. 48(8) does is deny the proceeds of a sale of the land under s. 50(2), or compensation for permanent improvements to the land under s. 50(3), to nieces and nephews who are not band members. Meanwhile, nieces and nephews who are band members lose the possession and occupation rights they could otherwise inherit. Therefore, there is a strong argument that s. 48(8) amounts to substantive discrimination against the nieces and nephews of intestates whose estates are administered under the Act.

The second and third purposes of the impugned provisions, as articulated by Reiter, are easier targets for a discrimination claim. They reflect the inherent paradox of the Act: that it affirms special status while operating as an instrument of control. As Harold Cardinal wrote, many members of Canada's First Nations "would rather continue to live in bondage under the inequitable *Indian Act* than surrender our sacred rights".[35] The purposes of the wills and estates provisions in the Act, insofar as they present the relationship between the Crown and Indians as similar to that of a warden and ward, are prejudicial and perpetuate the damaging stereotype that those living on reserves are unable or unwilling to care for themselves in the same manner as other Canadians. Couching the Act in the language of fiduciary duty simply obfuscates the culpability of the federal government in imperilling Indian estates in the first place. The fact remains that in adopting such a purpose, the Act mistakes the forced imposition of its provisions on indigenous peoples for the willing abandonment by those peoples of freedoms they might otherwise enjoy.

This has the distasteful effect of preserving a law that turns First Nations living on reserve into "objects of administration" rather

35. *The Unjust Society, The Tragedy of Canada's Indians* (Edmonton: M.G. Hurtig Ltd., 1969) at p. 140.

than full participants in a legal system.[36] Even where the Act aims to provide similar options to Indians as are available under provincial legislation, the exercise of those options remains at the discretion of the Minister. For example, the provision that allows courts to exercise the jurisdiction of the Minister under the Act requires that any Indian wishing to utilize this option obtain the consent of the Minister.[37] Similarly, if the Minister wishes to refer a matter to the provincial courts, that decision remains entirely at her discretion.[38] In the first instance, the Act deprives those living on reserve of automatic access to the benefits of the court system. In the second instance, should an applicant or respondent wish to remain under the simplified procedure of the Act, that choice is ultimately not hers to make.

Even where the important purpose of the preservation of reserve land is engaged, it is hard to view the Minister's role as anything short of paternalistic. The Minister must approve of any claim to entitlement to possession or occupation of lands by devise or descent; the Minister must approve a sale of an interest in land before the buyer acquires the legal right to possession or occupation; and the Minister must consent to all orders relating to reserve land before they can be enforced.[39] The Minster's authority is a constant barrier to be overcome. Given the power imbalance between the Crown and First Nations, and the long history by the former to control and assimilate the latter, it is an affront to the basic human dignity of those living on reserve that they must continue to be governed by a discriminatory law to maintain hard-won rights to reserve land.

An example of how the *Indian Act* may restrict on-reserve Indians testamentary rights is s. 46(*e*) of the *Indian Act* which states:

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

That one may dispose of one's property in a capricious manner is a hallmark of private property rights. In Ontario non-Indian on

36. Flanagan as cited in Ken Coates, "The Indian Act and the future of Aboriginal governance in Canada" (National Centre for First Nations Governance, 2008), at p. 14.
37. *Indian Act*, s. 44(1).
38. Section 44(2).
39. Sections 50(1), 50(4) and 44(3).

reserve people can dispose of their property in their wills as they see fit subject to support for dependants under the *Succession Law Reform Act* or any type of equalization claim advanced under the *Family Law Act*.

Recently the Ontario Court of Appeal stated the following about testamentary freedom:

> A testator's freedom to distribute her property as she chooses is a deeply entrenched common law principle.[40]

> The Freedom to dispose of her property as a testator wishes has a simple but significant effect on the law of wills and estates: no one, including the spouse or children of a testator, is entitled to receive anything under a testator's will, subject to legislation that imposes obligations on the testator.[41]

Unfortunately on-reserve First Nations do not appear to have this freedom, as the *Indian Act* restricts their ability to make capricious dispositions.

Apart from the overarching emotional impact of the law, it has practical effects that must be considered. On the upside, the Act is designed to deal with Indian estates quickly, and it should be acknowledged that the INAC has an expertise with respect to the disposition of reserve land.[42] Equally, s. 45(2) of the Act, which allows the Minister to accept any document signed by an Indian and dealing with the disposition of her assets upon death as a will, can be viewed in a positive light. Given that the vast majority of those living on reserve die intestate,[43] this provision has the benefit of preserving the testamentary intentions of a deceased Indian where they might otherwise be lost.

On the flip side, many of the provisions with positive practical effects are also likely to invite negative consequences. While the speedy disposition of estates can be a good thing, it also leads to situations where communication with family and beneficiaries of a deceased, and the collection of evidence with respect to the wishes of a deceased, is not fully undertaken. Delays are a continuing danger

40. *Spence v. BMO Trust Co.*, 2016 ONCA 196, 395 D.L.R. (4th) 297, 14 E.T.R. (4th) 31 (Ont. C.A.) at para. 30, additional reasons 2016 ONCA 286, 264 A.C.W.S. (3d) 1095, 2016 CarswellOnt 5888, leave to appeal refused 2016 CarswellOnt 9351 (S.C.C.).

41. *Ibid.* at para. 32.

42. Roger D. Lee, "Estates under the Indian Act", *British Columbia Probate and Estate Administration Practice Manual* (Continuing Legal Education Society of British Columbia, 2007), at p. 4.

43. Chris Warkentin, *Report of the Standing Committee on Aboriginal Affairs and Northern Development* (May 2014, 41st Parliament, Second Session), at p. 4.

for a department that has 44 employees to deal with the approximately 3,600 Indian estates files opened each year.[44] In *Francis v. Canada (Minister of Indian and Northern Affairs)*,[45] the Minister took months to respond to letters from a lawyer that made inquiries about the Minister's decision and indicated the litigant wished to appeal it. Despite finding that the Minister took too long to answer the lawyer's letters, the court held that the two-month window to file an appeal with the Federal Court had expired.

In *Morin v. Canada (Minister of Indian and Northern Affairs)*,[46] the court held that this Minister had made an unreasonable decision in failing to consider the validity of a newly discovered will, and in failing to consult all beneficiaries before making the decision not to consider the validity of the later will. In that case, the Minister decided to uphold a 1954 will and void a 1986 will after a meeting with some of the beneficiaries that raised concerns about the deceased's lack of capacity at the time the later will was executed. In overturning the Minister, the court stated that:

> The unsupported conclusion that the department had met its fiduciary duty was not a relevant reason for refusing to give effect to a document proffered as a testamentary instrument, particularly where no inquiry was directed into the existence of any testamentary intent.[47]

In the interest of speed and simplicity, the Minister used his broad discretion to void a will without engaging in a proper investigation of its merits.

The provisions allowing the Minister broad powers to accept a testamentary document signed by an Indian as a valid will can also lead to complications. In *Leonard v. Canada (Minister of Indian and Northern Affairs)*,[48] the court emphasized that the Minister "has no particular expertise in the interpretation of the [testamentary] document" and found that the Minister had erred in voiding the entire document where severing the impugned sections would have sufficed, and would have preserved the testamentary intent of the deceased.[49] The case of *Bernard Estate v. Bernard*,[50] meanwhile, raises issues about the vulnerability of Indians with respect to undue influence given the lack of formality required to find a valid will. In

44. *Ibid.* at p. 4.
45. [2000] 4 C.N.L.R. 99, 35 E.T.R. (2d) 16, [2000] F.C.J. No. 848 (Fed. T.D.).
46. 2001 FCT 1430, 43 E.T.R. (2d) 79, [2001] F.C.J. No. 1936 (Fed. T.D.).
47. *Ibid.* at para. 73.
48. 2004 FC 665, [2004] 3 C.N.L.R. 150, [2004] F.C.J. No. 829 (F.C.).
49. *Ibid.* at para. 29.
50. (1986), 29 D.L.R. (4th) 133, (*sub nom.* Bernard, Re) [1987] 1 C.N.L.R. 45, [1986] N.B.J. No. 757 (N.B. Q.B.).

Bernard, a will was found to be valid despite the fact that it was attested to by the executrix, who was also the wife of the primary beneficiary. While hardly conclusive, the case highlights the vulnerability of Indians under the Act to potential undue influence, especially where medical records and other discovery is difficult to obtain under the procedure in the Act.

A further effect of the law is to create jurisdictional confusion. There are many cases where letters of probate have been granted under both the provincial legislation and by the jurisdiction of the Minister.[51] A further issue in such cases is the accidental attornment by an applicant to the jurisdiction of the Minister by raising the issue of jurisdiction while bring an application under the provisions of the Act.[52]

One final issue with respect to the discriminatory effects of the wills and estates regime under the Act is the issue of whether or not the Act and the Regulations, read together, serve to exclude members of Canada's First Nations from acting as administrators for the estates of Indians. Since the decision in *Canard*, there have been changes to government policy with respect to the appointment of administrators. The INAC's current policy, in line with that of other government agencies, like the Ontario Public Guardian and Trustee, is to act as administrators of last resort.[53]

However, the broad powers conferred to the Minister under the Act and the Regulations to appoint and remove administrators was, for a long time and in accordance with the generally paternalistic nature of the Act, broadly used to preclude Indians, including family members, from acting as such.[54] In any event, the change in policy, while a positive development, does not erase the very real potential for Indians to be excluded from the administration of estates under the Act as a result of the broad appointment and removal powers of the Minister.

While it would be disingenuous to suggest that the cases and problems outlined above are representative of every Indian estate dealt with under the Act, it is the position of this paper that the practical concerns they raise, in addition to the demeaning tone of the Act as a whole, offends the human dignity of First Nations living

51. See *Dickson Estate, Re*, 2012 YKSC 71, 226 A.C.W.S. (3d) 605, [2012] Y.J. No. 146 (Y.T. S.C.); and *Canard, supra*, footnote 30.

52. See *Earl v. Canada (Minister of Indian & Northern Affairs)*, 2004 FC 897, 256 F.T.R. 84, [2004] F.C.J. No. 1094 (F.C.).

53. Sherry Evans and Susan A. Willis, "Aboriginal estates: Policies and procedures of the INAC, BC Region" (Continuing Legal Education Society of British Columbia, April 1, 2007), at p. 10.

54. See Laskin C.J.C.'s dissent in *Canard, supra*, footnote 30.

on reserve and result in substantive discrimination. This amounts to violation of the s. 15(1) Charter right to equal treatment before and under the law, and equal protection and benefit of the law.

Is the Violation Demonstrably Justified?

Presuming a finding of substantial discrimination under s. 15 of the Charter, the court must turn to the saving provisions under s. 1 of the Charter to decide whether or not such a violation is justified in the circumstances.

I The Law

In order to determine whether a violation of s. 15 is justified under s. 1 as a reasonable limit to the rights protected by the Charter, the court must follow the test laid out in *R. v. Oakes*.[55] In this analysis, the burden shifts to the state to prove that the violation is reasonable in the circumstances. The *Oakes* test can be summarized as follows:

1) there must be a pressing and substantial objective for the law; and

2) the measures designed to achieve the objective must be reasonable and demonstratively justified, in that:

    i. the measures are rationally connected to the objective;
    ii. the measures result in the minimal impairment of the freedom or right in question; and
    iii. the effects of the measures are proportional with respect to the objective.

Therefore, the Crown must demonstrate that the measures taken under the Act are generally proportional with respect to the necessary legislative objective of the Act.

II Analysis

In the case of the wills and estates regime under the Act and the Regulations, an applicant challenging the constitutionality of same would likely have to concede the first part of the *Oakes* test dealing with the pressing and substantial objective of the law. Unless and until there is a significant change in the relationship between the Crown and Canada's First Nations, the Crown owes a fiduciary duty to those First Nations, especially with regard to the preservation of interests in reserve lands for the benefit of Indian bands.

55. [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200, [1986] S.C.J. No. 7 (S.C.C.).

A determination of whether or not the measures taken to achieve that objective are reasonable and demonstrably justified is far more complex. The first question the court must ask in determining whether the measures are reasonable is whether or not they are rationally connected to the objective. In this case, most of the provisions of the Act appear to be rationally connected to the pressing and substantial objective, in that they grant the federal government, in the guise of the Minister, special powers to administer Indian estates and preserve band interests in reserve land pursuant to its fiduciary duties. While there is an argument to be made that the true objective of the measures is to allow the Minister to exert control of the estates of deceased Indians, this does not take away from the fact that the measures taken correspond with stated objectives of the law.

Next, the court must determine whether or not the measures taken are minimally impairing with respect to the Charter right that they violate. This inquiry is centred on "whether there are less harmful means of achieving the legislative goal" and the Crown must show the absence of such means in "a real and substantial manner".[56] This does not mean that the measures must be the most reasonable option, only that they fall within a range of reasonable alternatives.[57]

The question in the case at hand is whether or not the preservation of Indian estates and reserve land could be achieved in a way that is less damaging to the equality rights of Canada's First Nations. Viewing the wills and estates regime contained in the Act and the Regulations as a whole, it appears that there are less impairing means. These less impairing measures have to do with the consultation and choice absent from the provisions of the Act. As has been done for certain indigenous groups, jurisdiction with respect to inheritance law could be dealt with by treaty.[58] Equally, bands could be given the opportunity to accede to the jurisdiction of the provincial courts in matters testamentary or to choose to remain within the jurisdiction of the Minister.

As for the provisions dealing specifically with the difficult issue of the devise or descent of an interest in reserve lands, the availability of a less impairing option is less obvious. There is a complex balancing of the rights of individuals and bands with respect to the possession and occupation of reserve lands. The less impairing options outlined with respect to the wills and estates regime as a whole would require

56. *Hutterian Brethren of Wilson Colony v. Alberta*, 2009 SCC 37, [2009] 2 S.C.R. 567, [2009] 9 W.W.R. 189 (S.C.C.) at paras. 53 and 55.

57. *Lavoie v. Canada*, 2002 SCC 23, [2002] 1 S.C.R. 769, 210 D.L.R. (4th) 193 (S.C.C.) at 61.

58. Warkentin, *supra*, footnote 43 at p. 2.

the Minister to consent to granting their jurisdiction over reserve lands to the provincial courts or the relevant authority in a given treaty. The Crown must maintain a role in decisions about reserve land as it holds these lands in trust. Additionally, a neutral third party must maintain a role in deciding such issues due to the conflicting interests of bands and individuals where an interest in land might revert to the bands. In these circumstances, the oversight of the Minister, as a representative of the federal government, is likely a reasonable measure with respect to the objective of the Act. However, this oversight could conform to the less impairing measures outlined above, if the Minister maintained the right to approve the decisions of other bodies with respect to reserve lands. (As an aside, the language of the Act could be amended to empower interested parties to have a voice in decisions with respect to band land, and to require the Minister to provide a forum to consult such interested parties.)

If the court does not accept the above arguments with respect to minimal impairment, the final issue to be determined in an *Oakes* analysis is whether the effects of the law are proportional with respect to its objective. *Per Oakes*, the "more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society".[59] In creating barriers to access to provincial courts; in subjecting Indian estates to the broad discretion of the Minister; in perpetuating prejudice and stereotyping; and in creating a regime where Indian estates are dealt with under a relic of colonialism, the discriminatory effects of the impugned provisions do not appear proportional. These measures are incompatible with the human dignity of those living on reserve.

As for the specific issue of the prohibition of nieces and nephews of an intestate from inheriting a interest in band land in s. 48(8) of the Act, it is not clear that the effects of this measure are proportional to the objective. As stated in the s. 15 analysis above, this provision does not add additional protection to the already-existing prohibition against the inheritance or occupation or possession rights of non-band members. Instead, it denies nieces and nephews compensation for the land where they are not band members, and denies nieces and nephews rights they could inherit if they were more closely related to the intestate. The band is therefore the ultimate beneficiary of this provision. Whether or not a court determines that the provision is proportional will depend on whether or not the court believes that, in

59. *Oakes*, *supra*, footnote 55 at 71.

this case, the objective of the law is best served by subsuming the interests of individuals to those of the band in this instance.

Ministerial oversight with respect to the more general limits to the right to possess and occupy reserve lands is most likely to be deemed proportional under the final element of the *Oakes* test. Due to the pressing need to preserve reserve lands, which occupy only 0.3% of Canada's land base,[60] the effect of the law in limiting the devise or descent of an interest in land based on band member status, while discriminatory, is likely proportional to the objective of the law. This is especially true in circumstances where the band's interests differ from the interests of an individual band member or non-band member Indian. Unless the trust relationship between the Crown and First Nations with respect to reserve lands is deemed unconstitutional, which is an extremely complex issue in and of itself, Ministerial oversight with respect to the devise and descent of reserve lands may or may not be saved under s. 1 of the Charter.

CONCLUSION

The wills and estates regime contained in the Act and the Regulations cannot be uncoupled from the policies of control and assimilation effected under the authority granted to the federal government by the Act. Insofar as they are discriminatory, and neither reasonable nor demonstrably justified, the impugned provisions should be of no force or effect. The question of what form a fair and reasonable First Nations wills and estates regime might take is outside the scope of this paper but the policy changes and treaties that are slowly minimizing the reach and authority of the Act offer a way forward, especially considering such treaties are constitutionally protected.[61] In the interim, as stated by Iacobucci J. in the decision in *Vriend v. Alberta*,[62] "groups that have historically been the target of discrimination cannot be expected to wait patiently for the protection of their human dignity and equal rights while governments move towards reform on step at a time". It is time to challenge the overbearing and discriminatory wills and estates regime that applies to Canada's First Nations living on reserves.

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60. Bradford W. Morse, "Twenty Years of Protection: the Status of Aboriginal Peoples under the Canadian Charter of Rights and Freedoms" (2002), 21 Windsor Y.B. Access Just. 385 at p. 390.
61. Coates, *supra*, footnote 36.
62. [1998] 1 S.C.R. 493, [1999] 5 W.W.R. 451, [1998] S.C.J. No. 29 (S.C.C.) at para. 122.