# The Gathering Storm of Inheritance Law in Canada: The Indian Act - Paternalism or Fiduciary Protection?

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Imagine the following scenario: there is a country in which one set of inheritance laws applies to a portion of the population and another set of inheritance laws applies to another portion of the population. These laws grant differential rights to these groups of people, who are distinguishable only by their heritage and residency.

This country exists. This country is Canada.

Inheritance laws have a significant impact on the distribution and retention of land and wealth, often reflecting the changing values of a given community. Inheritance laws can dramatically impact the development of society and over the course of a generation, can influence its growth, success, or decline.

Over the years, Canadian inheritance law has been revised to reflect changing social mores and values. However, the rules governing wills and estates under the Indian Act[1] (the "Act") and the corresponding Indian Estates Regulations[2] (the "Regulations") remain, in many respects, relics of paternalism that are incompatible with modern policies of reconciliation and aboriginal self-governance.

## Inheritance Law under the Indian Act

Section 42(1) of the Act states: "all jurisdiction and authority in relation to matters and causes testamentary, with respect to deceased Indians, is vested exclusively in the Minister"[3] of Indigenous and Northern Affairs (the "Minister").[4] This jurisdiction applies exclusively to Indians who are ordinarily resident on reserve.[5] The Act grants powers to the Minister which are quasi-judicial and wide-ranging. Most significantly, the Act provides that the Minister may:

Appoint and remove executors of wills and administrators of estates of deceased Indians;[6]

Make any order, direction or finding that she deems necessary with respect to wills and estates of deceased Indians;[7]

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;[8]

Accept as a will any instrument that makes testamentary dispositions, and is signed by an Indian;[9] and

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.[10]

The Regulations also grant the Minister 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.[11] 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.[12]

All other Canadians are subject to provincial wills and estates legislation, but in no jurisdiction are any individuals or institutions, other than the courts, empowered to act with such broad discretion.

## Limits on Intestate Inheritance

One particularly concerning aspect of the Act is the limit it places on intestate inheritance. Unlike provincial inheritance legislation which provides for intestate inheritance by remote relations of the deceased, section 48(8) of the Act states that 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. Nieces and nephews are not entitled to inherit an interest in reserve land on intestacy.

Arguably, the purpose of s. 48(8) of the Act is to limit the devise of an interest in reserve land. However the effect is to deprive the nieces and nephews of an intestate aboriginal an interest in reserve land. This prohibition is, moreover, unnecessary, because s. 50(1) of the Act bars non-band members from acquiring possession or occupation rights to reserve land.

Simply put, s. 48(8) denies 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 of a deceased aboriginal who are not band members. Even more troubling, nieces and nephews of deceased aboriginals who are band members lose the possession and occupation rights they would generally enjoy under the equivalent provincial legislation.

Why the differential treatment you ask? Arguably, the intention of these provisions, (similar to other aspects of the Act) is to protect reserve land and to recognize the unique relationship between the Crown and Canada's aboriginal peoples.

A more critical review, however, reveals that the provisions of the Act governing aboriginal succession and inheritance law are, at best, outdated and at worst, a remnant of Federal paternalism. A strong case can be advanced supporting the contention that aspects of the Act relating to aboriginal inheritance law violate the right to equality before and under the law contained in section 15 of the *Charter of Rights and Freedoms*, amounting to substantive discrimination. Notably, such a violation would be considered legally unjustifiable and inconsistent with the social values to which Canada aspires.

P.S.:
The provisions discussed in this article are ripe for a *Charter* challenge: this issue has not been dealt with by the Supreme Court of Canada since *Canard v. Canada (Attorney General)*, a case which took place in relation to the *Bill of Rights* in 1975. Given Canada's aging population and the resulting transfer of wealth currently taking place in Canada, (in aboriginal and non-aboriginal communities alike), it seems likely this remnant of inheritance law past will come under scrutiny sooner rather than later.

This topic is more fully addressed in a two-part article published by the author, *The Honour of the Crown and Indian Succession and Inheritance Law in Canada: Fiduciary Protection or Creeping Re-Appropriation of Aboriginal Property*, A.Q., Volume 45, No. 2.; and *Discrimination by Fiduciary Protection: Continuing Federal Paternalism in Aboriginal Succession and Inheritance Law*, A.Q., Volume 46, No. 1.

1. R.S.C. 1985, c. I-5.
2. C.R.C. 1978, c. 954.
3. *Supra* note 3.
4. 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.
5. *Ibid* at s. 4(3).
6. *Ibid* at 43(a).
7. *Ibid* at 43(e).
8. *Ibid* at 44(1) and 44(2).
9. *Ibid* at 45(2).
10. *Ibid* at 46(1)
11. The Regulations, *supra* note 4 at s. 11(1).
12. *Ibid* at s. 9.