Constitutional Issues in Indigenous Estates and Succession Law: Crown Paternalism under the *Indian Act*

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The complicated constitutional relationship between Canada's Indigenous Peoples, their lands, and the Crown stretches back to the *Royal Proclamation, 1763,* which formalized the fiduciary relationship between the Crown and Indigenous Peoples with respect to the sale and procurement of tribal lands.[1] The Crown was thus positioned as an intermediary between Canada's Indigenous Peoples and its colonial settlers; no sale of extant tribal land was allowed, except to the Crown and its representatives. Under the *Indian Act*[2] (the "**Act**") and the *Canadian Charter of Rights and Freedoms*[3] (the "**Charter**"), this legal arrangement, a double-edged sword that enshrines Indigenous land rights while granting the Crown exclusive dominion over them, has continued with relatively little change for more than two and a half centuries.

One necessary consequence of this arrangement is that the estate of an "Indian"[4] falls under the jurisdiction of the federal government pursuant to the Act and the attendant *Indian Estates Regulations*[5] (the "**Regulations**"). This paper will outline the differential treatment of Indian estates under the Act and the Regulations, and comment on the fairness and equality issues

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[1] (October 7, 1763), George 3 (UK), No. 1.

[2] R.S.C. 1985, c. I-5.

[3] Part I of the *Constitution Act,* 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[4] Whenever "Indian" is used in this paper, it refers to the definition of "Indian" under ss. 2 and 5 of the Act.

[5] C.R.C. 1978, c. 954.

raised by such differential treatment within the context of a potential constitutional challenge to the estates and succession regime under the Act.

I: INDIAN ESTATES AND SUCCESSION

A. Jurisdiction of the Minister

The Regulations and ss. 42 to 50.1 of the Act provide the governing framework for the wills and estates of Indigenous Canadians who are ordinarily resident on reserve. All jurisdiction in relation to "matters and causes testamentary" is "vested exclusively" in the Minister of Indigenous Services and/or the Minister of Crown-Indigenous Relations and Northern Affairs (together, the "**Minister**").[6] The Minister therefore has a quasi-judicial role with respect to Indian estates, stepping into the shoes of the provincial courts which otherwise have jurisdiction over estates matters.

Importantly, the Minister only has jurisdiction over the estates of Indians who are "ordinarily resident" on reserve. Dickson, J.A., as he then was, summarized the case law surrounding the term "ordinarily resident" in *Canada (Attorney General) v. Canard*: the term refers to the "customary mode of life" of the individual concerned, and connotes a residence in a particular place with a degree of continuity apart from temporary absences.[7] Therefore, absences due to work, travel, and illness do not necessarily serve to sever the estate of an Indian from the jurisdiction of the Minister.[8] In any event, the succession of land on a reserve belonging to a deceased Indian must be dealt with under the Act and Regulations, given the Crown's fiduciary duty with respect to reserve lands, per s. 49 of the Act:

> 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

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[6] The Act, *supra* note 2, at 42(1). It is not clear at present which of the two new Ministries created by the Trudeau Government through the bifurcation of the former Ministry of Indigenous and Northern Affairs Canada will take primary responsibility for the management of Indian estates and succession.

[7] (1972), 30 D.L.R. (3d) 9, [1972] 5 W.W.R. 678, 1992 CarswellMan 69 (C.A.).

[8] See *Earl v. Canada,* 2004 FC 897, 256 F.T.R. 84; *Dickson Estate (Re)*, 2012 YKSC 71, 226 A.C.W.S. (3d) 605.

lands until the possession is approved by the Minister.

Therefore, the jurisdiction of the Minister under the Act applies not only to members of Canada's Indigenous Peoples who are ordinarily resident on reserve, but also to the transfer of all reserve lands.

B. Transfer of Reserve Lands

Members of First Nations bands do not possess title to reserve lands in the same way that title is held in non-reserve lands: a band member may be issued a certificate of possession with respect to land on a reserve, but that land is held by the Crown for the benefit of the band as a whole, and can only be transferred under particular circumstances. All transfers of a certificate of possession for reserve lands must be approved of by the Minister. [9] This can create issues with the transfer of land as a result of the varying and potentially divergent interests of individual band members, the band, and non-member beneficiaries.

No person who is not a band member can obtain a right of possession or occupation in band lands by devise or as the result of an intestacy.[10] Where an individual who is not a band member becomes entitled to an interest in reserve lands, the reserve superintendent auctions off the possessory rights to the highest bidder, with the proceeds paid out to the beneficiary.[11] Where no tender is received within six months (or such further period as the Minister may direct), the right to possession reverts to the band free of any claims by a non-member beneficiary, subject to payment at the discretion of the Minister to the beneficiary out of the funds of the band.[12]

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[9] The Act, *supra* note 2, at s. 24.
[10] *Ibid* at 50(1).
[11] *Ibid* at 50.
[12] *Ibid*.

Finally, the *Family Homes on Reserves and Matrimonial Interests or Rights Act* (the "**Family Homes Act**") outlines some additional limitations on the use and transfer of reserve lands.[13] Without the Family Homes Act, the provisions of the Act would operate to deny a non-band-member spouse a possessory right to a matrimonial home located on a reserve. The Family Homes Act therefore grants bands the authority to enact laws with respect to the use, occupation, and possession of lands on reserve in the context of family law, providing that until such laws are enacted, the *Provisional Federal Rules* under the Family Homes Act (the "**Provisional Rules**") apply.[14] With regard to the topic at hand, the Provisional Rules grant a non-member spouse rights of occupation of the on-reserve matrimonial home for 180 days following the death of a spouse, and entitle said non-member spouse to an amount equal to half the value of the deceased's interest in the on-reserve matrimonial home as at the date of death.[15]

The rules under the Act, as amended by the Family Homes Act, represent an attempt to balance the rights of various individuals with the rights of a band to exclusive possession of band lands. The purpose of s. 50 of the Act is thus 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."[16] Ultimately, however, the Minister retains the discretion to decide on the appropriateness of any transfer of land or payment to beneficiaries pursuant to s. 50 of the Act.

C. Intestacy

One further aspect of Indian estates and succession law that differs from the law elsewhere in Canada is the disposition of property on intestacy under s. 48 of the Act and the corresponding

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[13] S.C. 2013, c. 20.
[14] *Ibid* at 12.
[15] *Ibid* at ss. 14 and 34.
[16] *Okanagan Indian Band v. Bonneau*, 2002 BCSC 748, 216 D.L.R. (4th) 21 at para. 85, aff'd 2003 BCCA 299, [2003] 277 D.L.R. (4th) 240, leave to appeal refused (2004), 344 W.A.C. 158 (SCC).

Regulations. Unfortunately, these intestacy provisions frequently determine the distribution of Indian estates, as the majority of band members resident on reserve die without a will.[17]

The following are the key features of the intestacy provisions under s. 48 of the Act:

- The spouse of the deceased is entitled to a preferential share of the estate in the amount of $75,000;
- If the deceased has one child, that child will receive half of the proceeds that remain in the estate (after the $75,000 preferential share), with the remaining half going to the spouse;
- If the deceased has more than one child, the children will split two-thirds of the proceeds that remain in the estate (after the $75,000 preferential share), with the remaining one-third going to the spouse;
- If a child has predeceased the deceased leaving issue, the issue will receive the child's share in equal shares *per stirpes*;
- If the Minister is satisfied that the children of the deceased are not adequately provided for, the Minister may direct that a portion of the estate to which the spouse would otherwise be entitled shall go to the children of the deceased; and
- If the deceased has no spouse, children, or grandchildren at the time of death, the estate will devolve to, in order and on a *per capita* basis, the deceased's:
    - Parents;
    - Sister and brother, and where any sister of brother predeceases the deceased, to the issue of that sister or brother in equal shares *per stirpes*;
    - Nephews and nieces; and
    - Next of kin in equal consanguinity.

[17] *Sixth Report of the Standing Committee on Aboriginal Affairs and Northern Development,* chaired by Chris Warkentin (May 2014, 41st Parliament, Second Session, at p. 2 footnote 4 [*Sixth Report*].

Controversially, as opposed to the administration of intestate estates outside of the Act and pursuant to the corresponding provincial statutes, s. 48(8) provides that no relative more remote than a brother or sister can inherit a possessory interest in reserve land on an intestacy. In such cases, the interest in land will revert to the band. This is true even where the nieces and nephews of an Indian intestate are members of the band living on the reserve where the deceased's possessory interest in land is situated. The British Columbia Court of Appeal upheld this reading of s. 48(8) of the Act in *Okanagan Indian Band v. Bonneau*.[18]

D. General Powers of the Minister

Finally, pursuant to the extensive jurisdiction of the Minister, the Act provides the Minister with wide-ranging and discretionary powers regarding Indian estates and succession. Most significantly, the Act provides that the Minister may:

1) Appoint and remove executors of wills and administrators of estates of deceased Indians;[19]
2) Make any order, direction or finding that she deems necessary with respect to wills and estates of deceased Indians;[20]
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;[21]
4) Accept as a will any instrument that makes testamentary dispositions, and is signed by an Indian;[22] 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

[18] *Supra* note 16, at 49.
[19] The Act, *supra* note 2, at 43(a).
[20] *Ibid* at 43(e).
[21] *Ibid* at ss. 44(1) and 44(2).
[22] *Ibid* at 45(2).

responsibility to provide", incompatibility with the provisions of the Act, vagueness, uncertainty, capriciousness, or irreconcilability with public interest.[23]

In addition to the above, the Regulations grant the Minister the discretion to appoint an officer of the Ministry 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.[24] 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.[25]

These Ministerial powers go beyond the Crown's fiduciary duties with respect to the management of reserve lands to form an estates and succession framework separate and apart from the statutory regimes that exist in each province and territory, though it has been held that the common law applies to the estates of Indians to the extent that it is not inconsistent with the Act.[26] No provincial wills and estates legislation empowers any individual or institution, other than the courts, to act with such broad discretion. In the few instances where bands have negotiated treaties to excise the jurisdiction of the Minister as it relates to matters testamentary, they have uniformly adopted the applicable provincial legislation.[27]

The Minister's wholesale oversight of Indian estates, as outlined above, is problematic for a variety of reasons. At the most basic level, the Act provides for a level of ministerial control that is incompatible with modern attempts to create nation-to-nation relationships between the Crown and Canada's Indigenous Peoples. As such, the estates and succession regime outlined in the Act appears ripe for not only a constitutional challenge, but for replacement through the

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[23] *Ibid* at 46(1).
[24] The Regulations, *supra* note 3, at 11(1).
[25] *Ibid* at 9.
[26] *Johnson v. Pelkey*, 1999 B.C.C.A. 348, [1999] 207 W.A.C. 229, [1999] B.C.J. No. 1321 (B.C. S.C.).
[27] *Sixth Report*, *supra* note 17, at p. 4, footnote 2.

negotiation of treaties pursuant to the new mandate of the Ministry of Crown-Indigenous Relations and Northern Affairs.

II: CONSTITUTIONAL ISSUES AND INDIAN ESTATES

The primacy of the Constitution, and the attendant right to challenge government legislation as unconstitutional, is enshrined in Section 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."[28] The advent of the Charter in 1982 thus provided a new avenue to attack legislation and policies that undermine the historical rights of Indigenous Peoples or result in their unequal treatment under the law.

In addition to the s. 15 equality rights guaranteed to every Canadian, the s. 25 of the Charter also provides that:

> The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
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> a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
> b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

Therefore, while an individual member of Canada's First Nations may challenge the constitutionality of the estates provision of the Act, the analysis must always include an understanding of the land rights granted to Indigenous Peoples and enshrined in the Charter. The issue at hand is thus how to safeguard the land rights of First Nations and, at the same time, move away from the paternalistic and colonial notion of fiduciary protection that has undermined the dignity and autonomy of First Nations.

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[28] Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

This section will provide an overview of the law of constitutional challenges and the grounds on which a constitutional challenge to the estates regime in the Act and Regulations could be advanced. Finally, the opportunity to use negotiated treaties as an alternative means of circumventing the Act will be discussed.

A. The Law of Constitutional Challenges

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:

> (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.

The test for determining whether a s.15 violation exists is effectively summarized in *R. v. Swain* (*"**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.[29]

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. The Court must then determine whether any violation can be saved under s. 1 of the Charter, as a reasonable limit that can be "demonstrably justified in a free and democratic society."

In *Law v. Canada (Minister of Employment & Immigration)*, 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.[30] 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.[31] 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."[32] This inquiry is based on a reasonable person standard.[33]

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*.[34] In this

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[29] [1991] 1 S.C.R. 933, [1991] S.C.J. No. 32 (Q.L.) [1991] 5 C.R. (4th) 253 at 80.
[30] [1999] 1 S.C.R. 497, [1999] S.C.J. No. 12, 1999 CarswellNat359, 1999 CarswellNat 360 [*Law*].
[31] *Ibid* at para 88.
[32] *Ibid* at para 59.
[33] *Ibid* at para 60.
[34] [1986] 1 S.C.R. 103 [*Oakes*].

analysis, the burden shift 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.

B. The Grounds for a Constitutional Challenge

i. Section 1 Analysis

The first two parts of the test in *Swain* are easy to meet in this case: (1) the Act establishes distinctive treatment under the law as its estates provisions only apply to status Indians living on reserve; and (2) per *Corbiere v. Canada (Minister of Indian & Northern Affairs)*, "aboriginality-residence" (meaning whether an indigenous person lived on or off a reserve) is analogous to the grounds enumerated in s. 15.[35]

The next part of the test is whether the impugned provisions produce substantive discrimination. This element of the test is difficult to analyze 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, he or she is likely to have faced significant disadvantages with respect to a non-aboriginal comparator group:

[35] [1999] S.C.R. 203, [1999] S.C.J. No. 24, 1999 CarswellNat 663, 1999 CarswellNat 663 at paras. 6 and 14.

- 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
- 47% of those on reserve and 75.8% of non-aboriginals are employed.[36]

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 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?[37]

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:

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[36] Karen Kelly-Scott and Kristina Smith "Aboriginal peoples: Fact sheet for Canada," (November 3, 2015) *Statistics Canada, Aboriginal Statistics Division*.

[37] *Law, supra* note 26, at 51. Importantly, in *Quebec (Attorney General) v. A.*, 2013 S.C.C. 5, the court held that a finding of discrimination can be based on the perpetuation of stereotype or the existence of prejudice.

(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.[38]

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 as guaranteed in s. 25 of the Charter. While the limits to the devise and descent 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, while the basis for differential treatment of Indian lands may be valid under s. 1 of the Charter, this does not mean that specific provisions of the Act, and the paternalistic ministerial discretion contained therein, are invulnerable to a challenge.

One circumstance where limits to the transfer of possession of reserve land that may amount to discrimination in the case of s. 48(8) of the Act. Section 48(8) 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. Nieces and nephews are therefore 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.

The effect of this section 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

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[38] *The Fundamental Principles of Indian Law* (Edmonton, First Nations Resource Counsel, 1990) at Section V, "Indian Wills and Estates", at p. 10.

bars non-band members from acquiring possession or occupation rights to reserve land, all s. 48(8) does is deny compensation for an interest in land 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.

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."[39] 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. The language of fiduciary duty simply obfuscates the culpability of the federal government in imperiling Indian estates in the first place.

This has the distasteful effect of preserving a law that turns First Nations living on reserve into "objects of administration" rather than full participants in a legal system.[40] 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.[41] Similarly, if the Minister wishes to refer a matter to the provincial courts, that decision remains entirely at his or her discretion.[42]

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[39] *The Unjust Society, The Tragedy of Canada's Indians* (Edmonton: M.G. Hurtig Ltd., 1969) at p. 140.
[40] Flanagan as cited in Ken Coates "The Indian Act and the Future of Aboriginal Governance in Canada," *National Centre for First Nations Governance* (May 2008), p. 14
[41] The Act, *supra* note 2, at s. 44(1).
[42] *Ibid* at s. 44(2).

Even where the important purpose of the preservation of reserve land is engaged, the Minster's authority is a constant barrier to be overcome: the Minister must approve of any claim of 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.[43] Given the power imbalance between the Crown and First Nations, and the long history by the former to control and assimilate the latter, this arrangement is an affront to the basic human dignity of those living on reserve.

Apart from the overarching emotional impact of the law, it has practical effects that must be considered. As of 2014, the INAC had only 44 employees to deal with the approximately 3,600 estates files opened for IRRs in a given year.[44] Several cases point to instances where delays by the Minister, inappropriate decisions by the Minister, and/or insufficient investigation by the Minister have led to problems with the administration of the estate of an IRR.[45]

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.[46] 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 bringing an application under the provisions of the Act.[47]

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[43] *Ibid* at ss. 50(1), 50(4) and 44(3).
[44] *Sixth Report*, *supra* note 17, at p. 4.
[45] See *Francis v. Canada (Minister of Indian and Northern Affairs)*, [2000] 4 C.N.L.R. 99, 35 E.T.R. (2d) 16 (Fed. T.D.); *Morin v. Canada (Minister of Indian and Northern Affairs)*, 2001 F.C.T. 1430, 43 E.T.R (2d) 79 (Fed. T.D.); *Leonard v. Canada (Minister of Indian and Northern Affairs)*, 2004 F.C. 665, [2004] C.N.L.R. 150.
[46] See *Re Dickson Estate* [2012] F.C.J. No. 146 and *Canard, supra* note 31.
[47] See *Earl v. Canada* [2004] F.C.J. No. 1094.

The discriminatory effects of the act, when viewed in context of the demeaning nature of the Act as a while, offend the basic dignity of First Nations. This amounts to violation of the right to equal treatment before and under the law, and equal protection and benefit of the law.

ii. Section 1 Analysis

In the case of the wills and estates regime under the Act and the Regulations, the first part of the *Oakes* test dealing with the pressing and substantial objective of the law involves a complex analysis. On one hand, the Act can be said to protect the rights of Indigenous Peoples with respect to land, but on the other hand, the system created by the Act to do so is generally discriminatory. At present, given the pressing need to preserve reserve lands – which occupy only 0.3% of Canada's land base[48] – it may be necessary to concede the first part of the *Oakes* test with respect to the overarching objectives of the estates provisions of the Act.

It is far simpler to argue that the measures taken to achieve those objectives are neither reasonable nor demonstrably justified. This inquiry is concerned with "whether there are less harmful means of achieving the legislative goal."[49] This does not mean that the measures must be the most reasonable option, only that they fall within a range of reasonable alternatives.[50]

While certain measures may be rationally connected to the purpose of preserving reserve lands for the benefit of First Nations, the question 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. While examining what a less discriminatory system might look like is outside the scope of this paper, several suggestions are readily apparent. First of all, those living on reserve should have the right to automatic access to the courts. Nieces and nephews who are band members should be allowed to inherit an interest in land on an intestacy. Negotiated

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[48] Bradford W. Morse, "Twenty Years of Protection: the Status of Aboriginal Peoples under the Canadian Charter of Rights and Freedoms" (2001), 21 Windsor Y.B. Access Just. 385 at p. 390.
[49] *Hutterian Brethren Church of Wilson v. R* (1978), [1979] 1 F.C. 745, 1978 1978 CarswellNat 455, at 53.
[50] *Lavoie v. Canada*, 2002 S.C.C 23, [2002] 1 S.C.R. 769, at 61.

agreements could give bands a greater say in the devise of land while still providing individual parties and the government with a forum for consultation.

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 or not the effects of the law are proportional with respect to its objective. In creating barriers to access to provincial courts; in subjecting Indian estates to the broad discretion of the Minister; and in perpetuating prejudice, stereotyping, and colonialism, the discriminatory effects of the impugned provisions appear to be incompatible with the human dignity of those living on reserve.

C. Treaties

A constitutional challenge as outlined above relies on an applicant or applicants, with the right set of facts, and a willingness to take the issue to the courts. While certain groups may act as intervenors, the process is not truly consultative, and at the end of the day, if the Act or any of its provisions are deemed unconstitutional, it is up to the government to go back to the drawing board and produce a solution.

Given the above, and the possibility that a constitutional challenge of the Act may be unsuccessful regardless of any arguments made herein, the use of treaties to negotiate out of the estates provisions of the Act may be a better way forward. With the split of the Ministry of Indigenous and Northern Affairs Canada into two Ministries, the Trudeau Government intended to give effect to a renewed relationship with Canada's Indigenous Peoples, with a focus on "closing the socioeconomic gap between Indigenous Peoples and non-Indigenous Canadians, and making foundational changes to our laws, policies and operational practices based on the recognition of rights to advance self-determination and self-government." [51]

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[51] Office of the Prime Minister, "New Ministers to support the renewed relationship with Indigenous Peoples," *News* (August 28, 2017), retrieved from: http://pm.gc.ca/eng/news/2017/08/28/new-ministers-support-renewed-relationship-indigenous-peoples.

In the interest of self-determination, it will be part of the new mandate of the Ministry of Crown-Indigenous Relations and Northern Affairs to negotiate treaties that reflect a nation-to-nation relationship between the Crown and Indigenous Peoples. With the important caveat that any treaty negotiated to remove the jurisdiction of the Minister with respect to Indian estates must include the special land rights guaranteed under s. 25 of the Charter, such treaties could provide for greater access to justice, and inheritance laws that better reflect the culture and needs of First Nations.

III: CONCLUSION

The wills and estates regime under the Act is reflective of a long history of paternalistic fiduciary protection of First Nations by the Crown. While this relationship has served to protect the special land rights of Indigenous Peoples, it has also been wielded by the Crown as a tool to assimilate, relocate and subjugate members of Canada's First Nations. It is past time for the federal government to bring the Act more in line with modern conceptions of Indigenous-Crown relations, whether through amendments to the legislation or the negotiation of treaties with First Nations. Any such changes to the law will involve a complex balancing of the sometimes divergent interests of individuals, bands, and First Nations as a whole, and should reflect the unique standing of Indigenous Peoples in Canada to make treaties with the Crown, as first laid out in the *Royal Proclamation, 1763,* and now guaranteed in the Charter.