



Aboriginal Affairs and  
Northern Development Canada

Affaires autochtones et  
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# Overview of Estates Management

**February 2014**

**Canada**



## Outline

- ❖ Who is covered by the *Indian Act*?
- ❖ The Minister's role:
  - decedent estates
  - living estates
  - minors
  - wills (section 45 and 46)
  - intestacy (section 48)
- ❖ Transfer of jurisdiction (section 44)
- ❖ The administration of estates:
  - notification of death
  - appointing administrators
  - duties of administrators
- ❖ Interest in land as an estate asset
- ❖ The application of the *Family Homes on Reserves and Matrimonial Interests or Rights Act*



## Who is covered by the *Indian Act*?

The *Indian Act's* rules on wills and estates don't apply to everyone

- ❖ The individual must:
  1. Have status (be registered in the Indian Register) and
  2. Make their home on reserve
    - ✓ Includes people who live on-reserve but are away for a period of time to go to school or for seasonal employment
    - ✓ Includes people whose home is on reserve, but who have to leave to go into a care facility off-reserve
    - ✓ Does not include First Nations individuals with status who don't live on-reserve, or people who live on-reserve but don't have status



## Who is covered by the *Indian Act*?

The *Indian Act's* rules for First Nations adults who are unable to manage their own finances (dependent adults) don't apply to everyone

- ❖ The individual must:
  1. Be a member of a First Nation, and
  2. Make their home on reserve
    - Includes people who live on-reserve, but are away for a period of time to go to school or for seasonal employment
    - Includes people whose home is on reserve, but who have to leave to go into a care facility off-reserve
    - Does not include status First Nations people who don't live on-reserve, or people who live on-reserve, but don't have First Nations status
  3. Found to be incapable of managing their property under the provincial or territorial law



## The Minister's role: decedent estates

- ❖ Section 42 of the *Indian Act* 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."
- ❖ Provincial legislation applies off reserve
- ❖ AANDC's role:
  - Approve wills and confirm the appointments of executors or administrators
  - Settle the estates of people who have passed away, when nobody in the family is able to do so



## The Minister's role: living Estates

- ❖ Section 51 of the *Indian Act* states:
  - “...subject to this section, all jurisdiction and authority in relation to the property of mentally incompetent Indians is vested **exclusively** in the Minister.”
- ❖ AANDC's role includes:
  - Appoint persons to administer the estate
  - Order the sale, lease, disposition, etc. of property to pay debts or engagements, discharge encumbrances, pay maintenance expenses, etc.
  - Ensure the proper management of the estate



## The Minister's role: minors

- ❖ Section 52 of the *Indian Act* provides the Minister with *discretionary jurisdiction* over the property of a minor:
  - “The Minister **may** administer or provide for the administration of any property to which infant children of Indians are entitled and may appoint guardians for that.”



## The Minister's role: wills (section 45)

- ❖ To be approved, the will of the deceased must contain the following elements:
  - ✓ be in writing
  - ✓ be signed by the deceased
  - ✓ express the deceased's wishes
  - ✓ be intended to take effect on death
- ❖ The will has no legal force until it is approved by AANDC or a court has granted probate



## The Minister's role: wills (section 46)

- ❖ The Minister may void all or part of a will
- ❖ Six grounds for voiding a will:
  - duress or undue influence
  - lack of testamentary capacity
  - terms of the will create undue hardship for dependants
  - disposes of reserve land contrary to the interests of the band or contrary to the *Indian Act*
  - vague or uncertain
  - terms of the will are against the public interest



## The Minister's role: intestacy (section 48)

- ❖ If the entire will is voided or if an individual dies without a will AANDC applies the intestacy rules (as per section 48 of the Act)
  - First \$75 K goes to surviving spouse
  - 1 child –  $\frac{1}{2}$  of remainder to child and other  $\frac{1}{2}$  to survivor
  - 2 children or more –  $\frac{2}{3}$  to be split between descendants;  $\frac{1}{3}$  to survivor
  - If no spouse, divided *per stirpes* (the property of an intestate is distributed equally to the branches of descent) between descendants
  - If no spouse or children, equal shares to parents then living
  - No spouse, children or parents – brother and sisters in equal share
  - No spouse, children, parents or siblings – goes to next of kin



## Transfer of jurisdiction (section 44)

- ❖ The *Indian Act* enables the Minister to engage provincial courts in 2 ways:
  - courts may exercise jurisdiction with the consent of the Minister
  - the Minister may refer a specific question to the court (including grant of probate)
- \*\* **Under Subsection 44(3), a court exercising any jurisdiction or authority under s.44 cannot enforce any order related to real property on reserve without the written consent of the Minister**
- ❖ If an estate is referred to a provincial court, the *Indian Act* and the *Family Homes on Reserves and Matrimonial Interests or Rights Act* apply, NOT provincial legislation



## The administration of estates: notification of death

- ❖ Notification of death starts the administration process
- ❖ There is no obligation to inform the Minister of a death
- ❖ The Department is often notified by:
  - family members
  - the Indian Registration System
  - the Indian Registry Administrator or Band Council employee



## The administration of estates: appointing administrators

- ❖ Under the *Indian Act*, the Minister may act as executor or administrator or approve someone else to act
- ❖ Current AANDC policy:
  - ensure that executors/administrators/family members are accorded the same rights and opportunities to control their own affairs as individuals off reserve
  - if no family member is willing or able, an AANDC employee will be appointed to acts as “administrator of last resort”



## The administration of estates: duties of administrators

- ❖ Set out in Indian Estates Regulations, C.R.C. c. 954
- ❖ Duties of administrators include:
  - finding and keeping the assets of the deceased and collecting money due to the deceased
  - preparing an inventory
  - paying debts
  - serving as a defendant in estate actions, giving notices
  - distributing the assets
  - generally carrying out the duties of the administrator set out by the *Indian Act*, the regulations or the Minister



## Interest in land as an estate asset

- ❖ Section 49 states that an heir or beneficiary can only inherit the entitlement to possession or occupation of land once approved by the Minister
- ❖ An interest in land on reserve cannot be transferred to heirs who are not band members of that First Nation
  - custom allotments are not recognized as estate assets under the *Indian Act*.
  - if an interest in reserve land is gifted to a non-band member (through the will or by intestacy), section 50 applies and the interest is sold to a band member or the band, and the proceeds are distributed to the beneficiaries
- ❖ Section 50 states:
  - the right of the land that has been gifted to a non-member shall be sold by the “superintendent” (Departmental employee) to the highest bidder among those entitled to reside on that reserve and the proceeds shall go to the devisee or descendant
  - unsold interest in land revert to the band
  - no sale is final until approved by the Minister



## The application of the *Family Homes on Reserves and Matrimonial Interests or Rights Act*

- ❖ *Derrickson v. Derrickson* (1986) (S.C.C.) stated that provincial matrimonial real property law does not apply on reserve, as it deals with reserve land which is constitutionally federal jurisdiction
- ❖ In the absence of the legislation to address this gap, it was possible that a surviving spouse or common-law partner would not inherit or be entitled to an equal division of the matrimonial interests or rights on reserves
- ❖ The *Family Homes on Reserves and Matrimonial Interests or Rights Act* was passed on June 19, 2013 to address this legislative gap respecting matrimonial real property rights and interests on reserve
- ❖ The Act includes several provisions to ensure increased protections for surviving spouses and common-law partners with respect to matrimonial real property interests or rights on reserves
- ❖ For the legislation to apply, one of the spouses or common-law partners has to be an Indian or First Nation member



## The application of the *Family Homes on Reserves and Matrimonial Interests or Rights Act* continued...

**The Act has two main components:**

- 1. First Nation Law-Making Power:** First Nations can enact their own community-specific matrimonial real property laws which can be applied in provincial and territorial courts
  - ❖ the First Nation law-making provisions are in sections 7 to 11 of the Act and came into force on December 16, 2013
- 2. Federal Provisional Rules:** The Act also establishes a set of interim rules, that, once in force, would provide matrimonial real property rights and protections to residents living on reserves until a First Nation develops and enacts its own laws under the Act or other federal legislation
  - ❖ the provisional federal rules will come into force on December 16, 2014.
  - ❖ should a First Nation enact its own matrimonial real property law under the legislation before December 16, 2014, the provisional federal rules will not apply to that community



## The application of the *Family Homes on Reserves and Matrimonial Interests or Rights Act* continued...

- ❖ To claim survivor rights and interests to the family home under the provisional federal rules in the Act rather than under a will or under sections 48-50.1 of the *Indian Act*, a survivor must make an application to the court within 10 months after their spouse or common-law partner dies
- ❖ Survivors may be entitled to an amount equal to half the value of the deceased's interests in or right to the family home and other matrimonial interest or rights
- ❖ Once the matrimonial share has been distributed, the remainder of the estate will be distributed to the remaining heirs or beneficiaries as per the will or section 48 of the *Indian Act*
- ❖ The Act does not preclude the survivor from inheriting other assets from the deceased



## The application of the *Family Homes on Reserves and Matrimonial Interests or Rights Act* continued...

- ❖ The provisional federal rules, once in force, provide that surviving spouses or common-law partners have an automatic right to occupy the family home for a minimum of 180 days following the death of their spouse or common-law partner
  
- ❖ On application, the provisional federal rules will enable courts to provide to the surviving spouse or common-law partner, for a specified time, exclusive occupation as well as reasonable access to the family home



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## For more information

### **Links to AANDC website:**

<http://www.aadnc-aandc.gc.ca/fra/1100100032519/1100100032520>

<http://www.aadnc-andc.gc.ca/eng/1100100032519/1100100032520>

<http://www.aadnc-aandc.gc.ca/fra/1100100032553/1100100032557>

<http://www.aadnc-andc.gc.ca/eng/1100100032553/1100100032557>