

## INTERESTS IN INDIAN LAND: ISSUES TO BE CONSIDERED IN ESTATE PLANNING AND ESTATE ADMINISTRATION

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### I. INTRODUCTION

Having a general understanding of the unique estate law principles under the *Indian Act*, R.S.C. 1985, c.1-5 (the “*Act*”) and the *Family Homes on Reserves and Matrimonial Interests or Rights Act* S.C. 2013 c.20 (the “*Family Homes On Reserves Act*”) is important if you practice in the areas of estate law or Aboriginal Law. Whether you are advising First Nation governments, individuals, or the provincial or federal government, it is likely that an estate issue has or will come up in your practice. Importantly, when reserve lands are implicated you must be mindful of the significant restrictions on the ability to alienate and convey those lands in the estate administration or planning context.

This brief paper is intended to provide you with some insight on the unique estate law principles that apply to Indians living on reserve, and Indian lands, and to alert you to some unique issues that I have recently encountered in my practice. This paper will consider the following issues:

1. the holding of Indian lands in trust;

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2. estates issues that affect surviving beneficiaries who are not Indians (or members of the same Band);
3. the importance of dealing with estate planning and administration issues in a timely manner.

## II. INDIAN ACT AND ITS REGULATIONS

There is no shortage of literature and resources that identify estate law principles which apply pursuant to the *Act*. A google search will likely result in many links to resources. The first place to look for guidance on the administration of an Indian's estate is the *Act*. These principles can generally be found in sections 42 to 50.1 of the *Act* or in the *Indian Estate Regulations*, C.R.C. 1978, c. 954. If the deceased is a status Indian and resided or was ordinarily resident on reserve at the time of their death, the *Act* will most likely be applicable.

The *Act's* estate administrative provisions, and the *Act* as a whole, make it is very difficult to alienate or convey Indian reserve lands. It is important to note that the estate law principles which may apply off-reserve may not be the same as those on reserve. The case of *Okanagan Indian Band v. Bonneau*, [2003] 3 C.N.L.R. 160, highlights this.

In *Okanagan Indian Band*, the closest surviving beneficiaries of the deceased Indian were his five nieces and nephews. None of them were members of the Okanagan Indian Band. At issues was the sale by the administratrix of a parcel of land that was lawfully held by the deceased immediately before his death. The Band challenged the sale on the basis that the administratrix did not have the lawful authority to sell the parcel since the parcel vested back to Her Majesty for the benefit of the Band according to the *Act*. In other words, the Band and INAC's position was that the nieces and nephews were barred from

inheriting the land under the *Act*. Therefore, the land could not be sold for their benefit.

The provisions of the *Act* that were at issue included the following:

2. (1) *In this Act,*

. . . . .

*“estate” includes real and personal property and any interest in land;*

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...

*(8) Where an estate goes to the next-of-kin, it shall be distributed equally among the next-of-kin of equal degree of consanguinity to the intestate and those who legally represent them, but in no case shall representation be admitted after brothers’ and sisters’ children, and any interest in land in a reserve shall vest in Her Majesty for the benefit of the band if the nearest of kin of the intestate is more remote than a brother or sister.<sup>2</sup>*

The court agreed with the Band and INAC that the land had vested back to Her Majesty for the benefit of the Band. The Court considered the historical circumstances that influenced the drafting of the provision and determined it was the intention of the legislators to preclude any beneficiary after brothers and sisters from inheriting Indian lands. The court considered the historical context to support its interpretation of the intestate provisions as follows:

48 *In our view, the changes in language enacted by S.C. 1951, c. 29 and carried through into the current statute do not effect substantive changes to the law as it existed before 1951. The definition of “estate” is merely a comprehensive and more convenient mode of describing the property of an intestate. The proviso in the pre-1951 legislation that an interest in reserve land could not devolve to next-of-kin beyond brothers and sisters clearly excepted such interests in land from the general rule for devolution and resulted in a different rule in those circumstances for land and for personalty. Consequently,*

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<sup>2</sup> *Okanagan Indian Band v. Bonneau*, [2003] 3 C.N.L.R. 160 (“*Okanagan*”), at paras 7 to 15.

*the expression of that exception in ss. 48(8) of the Indian Act represents merely a formalistic change and was not intended by Parliament to effect a substantive change in the law.*

*49 In the result, by operation of ss. 48(8), in all circumstances where the estate devolves to next-of-kin, an interest in reserve land is excepted if the next-of-kin is more remote than a brother or sister of the intestate. In those cases, the interest in land reverts to the Crown for the benefit of the band. It follows, in our view, that the chambers judge answered the question correctly.<sup>3</sup>*

Although the rules concerning intestacy may now be different in the provinces, the court was bound to adopt the legislature's intention to apply different rules for the disposition of lands versus the personal property of an Indian.

First Nations can enact their land laws to depart from the *Act's* archaic intestacy principles. This requires the First Nation to enact their own land code pursuant to the *First Nations Land Management Act*, S.C. 1999, c.24. There are many First Nations who have implemented land codes. However, I have surveyed several of them and did not find one where a First Nation has enacted their own intestacy provisions. Rather, they all seem to have language analogous to the following:

### *38. Transfers on Death*

#### *Indian Act application*

#### *38.1*

*Until Shawanaga First Nation exercises jurisdiction in relation to wills and estates, the provision of the Indian Act dealing with wills and estates shall continue to apply with respect to Interests in Shawanaga First Nation Land.*

#### *Registered of transfer*

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<sup>3</sup> *Okanagan*, at para 48-49.

38.2 *A person who receives an Interest in Shawanaga First Nation Land by testamentary disposition or succession in accordance with a written decision of the Minister, or his or her designate, pursuant to the Indian Act, is entitled to have that Interest registered in the Shawanaga First Nation Lands Register.*

#### *Disposition of Interest*

38.3 *If no provision has been made by the deceased Member of the disposition of the Interest to another Member, the following rules apply:*

- (a) the Minister or his or her delegate may make application to Council requesting that an instrument evidencing lawful possession or occupation of Shawanaga First Nation Land be issued; or*
- (b) a Certificate of Possession or other instrument may be issued in accordance with procedures established by Council, or application of the Minister or his or her delegate, if the beneficiary or purchaser is a Member of the Shawanaga First Nation.<sup>4</sup>*

### **III. HOLDING INDIAN LANDS IN TRUSTS**

Although trusts may be a commonly used legal instrument in estate planning, they are not always an option for Indians who seek to benefit a non-member. The ability to use a trust to hold an interest in reserve lands is very limited. When dealing with lands on reserve, either in estate planning or commercial arrangements, it is very important to remember there is restricted availability of trust vehicles that may alienate reserve lands.

The case of *Chiefswood Christian Fellowship v Jacobs*, 2001 CarswellOnt 1864 (“*Chiefswood*”) highlights the limited application of trust law where the alienation of reserve lands is concerned. In *Chiefswood*, the issue before the court was whether a

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<sup>4</sup> This is an example taken from the Shawanaga First Nation Land Code, 2019, s. 38. You can view other land codes which are available on the First Nations Land Management Resource Centre website at: <https://labrc.com/resource/land-codes/>.

Certificate of Possession (“CP”) could be held in trust for non-Band members. The three original holders of the CP intended for the land to be used for a church. After some internal discord amongst the congregation, the CP holders (respondents) sought to evict the church. The applicant church maintained that the CP holders were holding the CP as trustees, in trust, on behalf of the church and its pastor. Therefore, they maintained that they could not be evicted. The CP holders argued that they were not trustees and had a right to possession. In dismissing the position advanced by the church, the court referred to the Supreme Court of Canada decision in *Derrickson v Derrickson* 1996 (*Derrickson*) which held:

*The right to possession of lands on an Indian reserve is manifestly of the very essence of the federal exclusive legislative power under subsection 91(24) of the Constitution Act 1967. It follows that provincial legislation cannot apply to the right of possession of Indian reserve lands.*

*When otherwise valid provincial legislation, given the generality of its terms, extends beyond the matter over which the legislature had jurisdiction and over a matter of federal exclusive jurisdiction, it must, in order to preserve its constitutionality, be read down and given the limited meaning, which will confine it within the limits of the provincial jurisdiction.*

*It follows that the provisions of the Family Relations Act dealing with the right of ownership and possession of immovable property, while valid in respect of other immovable property, cannot apply to lands on an Indian reserve.*

...

*In the result, even assuming that s. 88 of the Indian Act applies to lands reserved for the Indians, the provisions of the Family Relations Act would, in my opinion, fall within the exception of s. 88 and would not be applicable to lands reserved for the Indians.*

*In reaching this conclusion I am not unmindful of the ensuing consequences for the spouses, arising out of the laws in question, according as real property*

*is located on a reserve or not. In this respect, I borrow the following sentence, albeit in a different context, from P.W. Hogg, op. cit., at page 554:*

*Whether such laws are wise or unwise is of course a much controverted question, but it is not relevant to their constitutional validity.*

The court found that the same principles which exclude provincial legislation from application to reserve lands also applied to common law and equity principles where the alienation of reserve lands was concerned. Specifically, if the equitable principles of trust were inconsistent with the *Act*, they would be inapplicable to reserve lands. The court found that, just as the impugned provisions of the *Family Relations Act* conflicted with the *Indian Act* in *Derrickson*, the principles of trust law also conflicted with the provisions of the *Indian Act*.<sup>5</sup>

The Court in *Chiefswood* listed several sections of the *Indian Act* that were inconsistent with the application of trust law principles. The court concluded by stating:

*Thus, I come inescapably to the conclusion that the equitable trust principles which apply to lands in the normal course do not apply to lands on a reserve. Such principles are inconsistent with the provisions of the Indian Act, which provides a complete and comprehensive regime for "possession" of lands on a reserve. To paraphrase Professor Hogg, whether such conclusion may result in inequity or whether such laws are "wise or unwise is of course a much controverted question, but it is not relevant to their constitutional validity."<sup>6</sup>*

...

*In sum, I conclude that the equitable principles of trust do not apply on reserve. Neither are they incorporated by reference pursuant to s.88 of the Indian Act.<sup>7</sup>*

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<sup>5</sup> *Chiefswood Christian Fellowship v Jacobs*, 2001 CarswellOnt 1864 ("*Chiefswood*") at para 15 and 17 and 23.

<sup>6</sup> *Chiefswood*, at para 18.

<sup>7</sup> *Ibid*, at para 23.

#### **IV. ESTATES AND FAMILY HOMES ON RESERVES AND MATRIMONIAL INTERESTS OR RIGHTS ACT**

Another issue that recently came through our office is the situation where a band member passes away and leaves a surviving spouse who is a non-Band member. The children who survived were non-biological children of the deceased, and non-Band members. We acted for the deceased's mother who held the CP for the property where the matrimonial home, and another home owned by the deceased, were located. The mother continued to allow the surviving spouse to reside in the home and the Band permitted this arrangement. The surviving spouse was eventually asked to leave the reserve due to her conduct towards other neighbours, but the children remained in the home. This situation has worked well for this family but what if the situation was different and the mother did not want to be so accommodating?

The answer rests in section 14 of the *Family Homes on Reserves and Matrimonial Interests or Rights Act* which permits a non-member surviving spouse 180 days to continue residence in the matrimonial home. After that time, they may seek an Order from the court pursuant to section 21(1) to continue occupying the matrimonial home. Before granting such an Order, the Courts will consider the following enumerated factors:

- a) *The best interest of any children who habitually reside in the family home, including the interest of any child who is a First Nation member to maintain a connection with that First Nation;*
- b) *the terms of any agreement between the spouses or common-law partners;*
- c) *the collective interest of the First Nation members in their reserve lands and the representations made by council of the First Nation on whose reserve the family home is situated with respect to the cultural, social and legal context that pertains to the application;*

- d) *the period during which the applicant has habitually resided on the reserve;*
- e) *the financial situation and the medical condition of the spouses or common-law partners;*
- f) *the availability of other suitable accommodation that is situated on the reserve;*
- g) *any existing order made on a matter related to the consequences of the breakdown of the conjugal relationship;*
- h) *family violence;*
- i) *any acts or omissions by one of the spouses or common-law partners that reasonably constitute psychological abuse against the other spouse or common-law partner, any child in the charge of either spouse or common-law partner, or any other family member who habitually resides in the family home;*
- j) *the existence of exceptional circumstances that necessitate the removal of a person other than the applicant's spouse or common-law partner from the family home in order to give effect to the granting to the applicant of exclusive occupation of that home, including the fact that the person has committed acts that constitute family violence, or reasonably constitute psychological abuse against the applicant, any child in the charge of either spouse or common-law partner, or any other family member who habitually resides in the family home;*
- k) *the interests of any elderly person or person with a disability who habitually resides in the family home for whom either spouse or common-law partner is the caregiver;*
- l) *the fact that a person, other than the spouse or the common-law partners, holds an interest or right in or to the family home;*
- m) *the views of any person who received a copy of the application, presented to the court in any form that the court allows.<sup>8</sup>*

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<sup>8</sup> *Family Homes on Reserves and Matrimonial Interests or Rights Act, S.C. 2013, c.20, s. 21(3)*

The only reported case so far that applies section 21 is *Toney v Toney Estate*, 2018 NSSC 179 (*Toney Estate*). In that case, the surviving spouse made an application to the court for an Order to reside in the matrimonial home beyond the 180-day period. The deceased was a Band member and held a CP to the property for their matrimonial home. The court granted the surviving spouse an Order allowing her to live in the matrimonial home. Among the factors that the court considered in granting the relief, the court noted that the surviving spouse had resided on the reserve for over 30 years, contributed significant sums to improve the home, and had customized the home somewhat to account for her disability (severe MS). She had no other place to live, no other assets in the estate, and she was living off a modest disability payment monthly. Her husband had been Chief, and she had worked for the Band until her diagnosis with multiple sclerosis. Even though she obtained the relief she was requesting, it came with strict conditions.<sup>9</sup>

In determining which conditions to order, the court considered the fact that there was an extreme housing shortage, and the fact that the deceased's children wanted to have possession of the home. The court ordered that she was required to maintain the home and not commit waste. She was also prohibited from cohabitating with anyone during her occupation of the home, other than one of her children or grandchildren. Further, any material changes in her personal circumstances, such as re-partnering and the partner moving in, would constitute a material change and the Order would be subject to revocation.<sup>10</sup>

## **V. DEAL WITH ESTATE MATTERS IN A TIMELY MANNER**

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<sup>9</sup> *Toney v Toney Estate*, 2018 NSSC 179 at paras 107 -138.

<sup>10</sup> *Ibid*, at paras 139 -142.

As a general recommendation it is advisable for clients to deal with estate matters in a timely manner. This is easier said than done. It is my perspective that many indigenous people do not like to estate plan in the manner that lawyers are trained to assist with. I have had the privilege of sitting with various elders over the years and one of the recurring themes in my discussions with them about estate planning, or the lack thereof, is the fact that Indigenous people generally do not talk about the end of life. They prefer to live in the moment rather than thinking and planning about the inevitable.

I have also observed that it is customary for Indigenous families (which at times are quite large) to know who will be inheriting what from an estate based on their internal discussions. In my community, where we generally do not have CPs or Certificates of Occupation, I have observed many instances where someone passes away and the family simply knows who is entitled to take over the residences or how various chattels are to be disbursed. When you practice in the area of Aboriginal Law it is important to have an understanding that even though a family may not spell out their wishes on paper or register ownership in a certain manner prior to death (re. joint tenancy principles), it does not mean that there is not a custom in place which will address the disbursement of the estate assets.

Regardless of the manner in which estate planning is carried out, it is still important to encourage a quick administration of estates, especially in the context of land rights on reserve. Recently, I have been retained to advise some CP holders on a plan of their First Nation to either buy out their CP interests or a portion of their land rights for the purposes of settling a historical flood claim. The First Nation either needs to acquire the property or get permission to be on the lands, so that it can register a flooding easement along the

shoreline. The First Nation has hit a significant obstacle because the original CP interests were conveyed several decades ago and the original holders of the CPs have since passed on and so have some of their surviving beneficiaries. The estates of many of the original CP holders were never administered, and now many of the families who have survived are large. Some have blended families, and families where one spouse is not a band member or not an Indian. As you can see the situation has become very complicated.

The example above highlights the importance of dealing with estate matters in a timely manner. We, as counsel, can play an influential role in the administration of estates by reminding and encouraging our clients to complete the estate administration process, especially where there are interests in land at issue.

## **VI. CONCLUSION**

This paper has hopefully highlighted the fact that the alienation of Indian reserve lands is very restrictive. The paternalistic intention of the legislation has created a somewhat archaic estate administration regime that is very different from that which applies to those residing and owning lands off-reserve. The restrictions impose significant barriers to the use of trusts for estate planning purposes. The only area where there has been some flexibility to the restrictions is where the matrimonial property is concerned. However, there is limited case law that is available to consider this newer exception and we do not have much guidance on how to estate plan with this exception. While there is the opportunity for First Nations to adopt their own intestacy and estate administration laws, a review of the publicly available land code database suggests that most communities have not yet taken this step. In the mean-time, the regime governing interests in

landholdings on reserve prioritizes the interests of the Band as whole, rather than the interests of the individual landholder. Unfortunately, this can lead to unexpected outcomes when a Band member living on reserve passes away without planning their estate, particularly in large and/or blended families. So, we must remain cautious when dealing with Indian lands in estate administration matters and be mindful of these restrictions when assisting clients with property on reserve do their estate planning.