



## Estates of Indians: What to do in a situation of intestacy

by Kathryn Pilkington

The purpose of this issue is to discuss the distribution of property on intestacy where a status Indian dies without a Will. As a matter of practice, a solicitor would be wise to bear in mind that the wills and estates of Indians are governed by a mix of law and local practice, which varies from First Nation to First Nation. Further, self-governance agreements may include the enactment of First Nations laws that are relevant to wills and estates. While the scope of this article does not allow for the consideration of every issue a practitioner will need to assess, it does set out the rules of succession where a status Indian dies without a Will.

### JURISDICTION IN A NUT SHELL

The *Constitution Act, 1867*, grants Parliament exclusive legislative authority over “Indians, and lands reserved for Indians”. The *Indian Act*<sup>1</sup> is the instrument through which parliamentary authority is exercised. Sections 42 to 52 of the Act deal with Indian estates, with section 48 specifically addressing intestacy. It is important to note that the Act applies only to status Indians “ordinarily resident on a reserve” and will not apply to Inuit, Métis or non-status Indians<sup>2</sup>.

### INTESTACY DISTRIBUTION

As noted above, section 48 of the Act provides for the distribution of property when an Indian dies without a Will, where the Will is declared to be invalid by the Minister<sup>3</sup> or a court, or where a Will is not in proper form. Pursuant to section 42, provincial succession laws will not apply to status Indians. I note that the intestate provisions of the Act, while similar to those found in provincial legislation, do differ with respect to reserve lands.

### Surviving Spouse's Share

First \$75,000 - Where the net value of the estate of an intestate Indian does not, in the opinion of the Minister,

exceed \$75,000.00, the estate goes to the surviving spouse or common-law partner<sup>4</sup>.

The excess - Where the net value of the estate exceeds \$75,000, the first \$75,000 goes to the surviving spouse and the excess is divided as follows:

- a) If the intestate left no issue, the excess goes to the surviving spouse<sup>5</sup>;
- b) If the intestate left one child, that child will receive one-half of the excess with the other half going to the surviving spouse; and
- c) If the intestate left more than one child, the children share two-thirds of the excess and one-third of the excess goes to the surviving spouse.

The above distribution applies as long as any children are living or died leaving issue. Notably, the term “child” is defined in the Act as including “a legally adopted child and a child adopted in accordance with Indian custom”.

### Where children are not adequately provided for under intestate distribution

Notwithstanding the above, if the Minister is satisfied that any children of the deceased will not be adequately provided for, the Minister may direct that all or any part of the intestate estate that would have otherwise gone to the surviving spouse, shall go to the children.

### Occupation of lands on a reserve by the surviving spouse

The Minister also has the authority to direct that the surviving spouse has the right to occupy any lands on a reserve that were occupied by the intestate Indian at the time of his or her death. As a practical note, however, it is important to be aware that the Minister's authority in this regard only applies to a spouse who is a member of the First Nation where he or she resides<sup>6</sup>.

<sup>1</sup> *Indian Act*, R.S.C. 1985, c. I-5, as amended [Act].

<sup>2</sup> *Ibid.* s. 21. I note that practitioners should review the *Indian Estates Regulations* and the Department of Indian Affairs and Northern Development (“DIAND”) “Estates Procedure Manual”, together with the *Indian Act* to fully appreciate the framework for dealing with Indian estates.

<sup>3</sup> The Minister of Indian Affairs and Northern Development [Minister].

<sup>4</sup> A common-law partner means a person who has been cohabiting with the deceased in a conjugal relationship for at least 1 year.

<sup>5</sup> The Act, *supra* note 1 at s. 48.

<sup>6</sup> Otherwise, the provision would be contrary to the remainder of the *Indian Act*, which prohibits possession of lands on reserves by anyone except members of the First Nation. I note, however, s.28 provides for an exception in that the Minister may issue a 1-year permit to a non-resident.

## Distribution to descendants/ascendants

Where an intestate Indian dies leaving children, his estate is distributed, subject to the surviving spouse's share if any, *per stirpes* among his issue<sup>7</sup>.

- **Where there is no surviving spouse or issue**, the estate goes to the father and mother of the deceased in equal shares if both are living, and to the surviving parent if one parent predeceased the intestate<sup>8</sup>.
- **Where there is no surviving spouse, issue or parent**, the estate goes to any brothers or sisters, equally, *per stirpes*. If any brother or sister predeceased the intestate but left children, their children shall take the share that the parent would have taken if living. If the intestate left no living brothers and sisters, the intestate's nieces and nephews will share the estate *per capita*<sup>9</sup>.
- **Where there is no surviving spouse, issue, parent, sibling or nieces/nephews**, the estate will go to

the next-of-kin<sup>10</sup>. As a practical note, however, it would appear that this provision has no effect given that "next-of-kin" is defined to be limited, in subsection 48(8) of the Act, to levels of consanguinity of nieces and nephews. Since nieces and nephews are specifically provided for in subsection. 48(6), subsections 48(7) and (8) appear to have no effect.

Descendants and relatives of the intestate Indian conceived before the intestate's death but born after death will inherit as if they had been born during the lifetime of the intestate<sup>11</sup>.

Any interest in a reserve land which is not capable of devise according to these rules reverts back to the First Nation.

Practitioners should be aware that the estate provisions of the Act will not always apply, particularly where the relevant First Nation has its own laws pursuant to a self-government agreement.

<sup>7</sup> The Act, *supra* note 1 at s. 48(4)

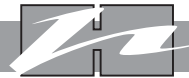
<sup>8</sup> *Ibid.*, s. 48(5)

<sup>9</sup> *Ibid.*, s. 48(6)

<sup>10</sup> *Ibid.*, s. 48(7)

<sup>11</sup> *Ibid.*, s. 48(10). I note that provincial legislation provides for the same.

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