



# First Nations Potpourri

**T**his article is a collaboration of the Aboriginal Practice Group at Boughton Peterson Yang Anderson Law Corporation. Coordinating editor was George Cadman, with contributions from James Baird (Wills), Martin Sennott (Conveyancing), and William Cooper (Taxation).

As BC moves further down the road toward Treaty resolution and First Nations self-government, a practitioner's focus needs to centre increasingly on basic issues for First Nations peoples. In this case, such simple matters as Wills, estate administration, conveyancing, and taxation become important in advising and assisting First Nations clients, whether living on or off reserve land. Equally, one must be alert to these issues when advising those who do business with First Nations peoples and enterprises.

In this article, you will find three basic areas addressed, though a caution must be issued: each transaction is different, each requiring attention to detail and a close examination of applicable statutory provisions, regulation, or by-law. Without comment on the political framework that

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is the *Indian Act*, Department of Indian Affairs and Northern Development (DIAND), the role of Band Council, and Ministerial discretion and approval (or any of the politics associated with any of those), reality for the practitioner is that if you choose to deal with these matters, you must also be prepared to function in that environment.

## **Preparing Wills for First Nations Persons in British Columbia**

### **Generally**

The principal consideration in preparing a Will for a First Nations person is the effect of his or her status under the *Indian Act*. The applicable portions of the *Indian Act* define certain persons as an "Indian" and, in this article, the word Indian should be read as only those persons defined as such under the *Indian Act*. If you are dealing with a Nisga'a citizen, you should be aware the Nisga'a treaty contains a variety of special provisions relating to Nisga'a citizens and their government.

### **The *Indian Act***

The *Indian Act* has special provisions dealing with Wills for Indians. While a Will that conforms to the formal requirements of the *Wills Act* also constitutes a valid Will for purposes of the *Indian Act*, one should be aware of the *Indian Act* provisions. One of the first things to note is that the *Indian Act* defines an Indian as a person who is registered under the *Indian Act*. Section 4 of the Act, however, limits the application of the Will and estate provisions of the *Indian Act* to Indians living on a reserve or Crown land. If an Indian (as defined) lives on a reserve or on Crown land, the estate of that person is governed by the *Indian Act*. If the person does not reside on a reserve or Crown land at the time of death, however, the succession laws of British Columbia will apply to his or her estate.

It should be noted the intestacy provisions of the *Indian Act* are different from those in the *Estate Administration Act*. If drafting Wills for First Nations persons, one should be familiar with those provisions, as well as the ability of the Minister to vary the intestate scheme.

### **Formalities for Wills**

Section 45(2) of the *Indian Act* relaxes the formalities for Wills compared to those of the *Wills Act* (two witnesses present at the same time). The Minister has the

discretion to accept informal documents as a Will. One should note, however, that the *Indian Act* still requires there be a “written instrument signed by an Indian.” Good practice would be to draw all Wills to conform to the formal requirements of the *Wills Act*.

## Land

The most critical area to be aware of relates to the rights of First Nations persons to land on an Indian reserve. An Indian may obtain a Certificate of Possession giving rights to a parcel of reserve land for his or her own use. This is not, however, fee simple ownership as it is understood under the Land Title system. Section 50 of the *Indian Act* states that persons who are not entitled to reside on a particular reserve cannot inherit land on that reserve.

In drawing a Will, one must ensure that any beneficiary of the person’s reserve land is a member of the same band and entitled to reside on the reserve. One should also note a Certificate of Occupation (of reserve land) is not the same as a Certificate of Possession (see Section 20 of the *Indian Act*).

## Wills Variation and Other Issues

Section 46 of the *Indian Act* deals with variation of a Will but is not the same as the *Wills Variation Act*. In the case of the *Indian Act*, the Minister (by voiding portions of the Will) can vary a Will for the benefit of persons for “whom the testator had a responsibility to provide.” The *BC Wills Variation Act* limits this class of person to only spouses and children. There are a number of other reasons provided for variation such as that set out in Section 46(1)(d), “the will purports to dispose of land in a reserve in a manner contrary to the interest of the band or contrary to (the *Indian Act*).”

Also of note, the *Indian Act* has its own definition of a “common law spouse.”

## Operation of the *Indian Act*

Section 42(1) of the *Indian Act* provides that “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.”

The Minister of Indian Affairs and Northern Development (the “Minister”) has a great deal of discretionary authority under the *Indian Act* when it comes to dealing with Indian Wills and estates. Wills drafters are cautioned to familiarize themselves with the policies of the Indian Affairs and Northern Development. For more information, see the article entitled “Aboriginal estates policies and procedures of INAC BC Region” [Continuing Legal Education Society of British Columbia: [www.cle.bc.ca](http://www.cle.bc.ca)].

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## Conveyancing Pitfalls

The issue of Aboriginal conveyancing is one many practitioners wish to avoid. This aversion is generally stated to be due to the unreliability of the federal lands registry and a general lack of procedures for such conveyancing. Conveyancing procedures for Aboriginal land—or to use the defined term in the *Indian Act*, Indian Land—are well settled, however. The misperception may be the result of practitioners’ being unaware of the differences between “fee simple” transactions and Aboriginal land transactions. It is important to note that Aboriginal land (or “reserve land”) is completely different than fee simple land; the conveyancing rules and procedures are also completely different.

Without specific experience in this area, there are a large number of pitfalls that may trap the unknowing practitioner. The scope of this article does not permit anything further than a very general discussion of the larger pitfalls.

One difference between Aboriginal land conveyancing and fee simple conveyancing that practitioners should note is the timing difference between our

Land Title Registry and the federal Indian Land Registry. While we are accustomed in British Columbia to obtaining almost immediate registration numbers for filings at the Land Title Registry, the Indian Lands Registry is a lot slower. This may effect closing dates, possession dates, and funding dates for new mortgages.

In addition, the Indian Lands Registry is not a Torrens system and therefore does not afford the protections that a Torrens system provides. Therefore a practitioner will be required to obtain and review in a detailed manner the register for a particular piece of property, including reviewing documents filed, to ensure that his or her client is obtaining the interest the client expects.

A second important difference is that our standard forms prescribed by the *Land Title Act* that practitioners have come to know and love may not be appropriate for use in Aboriginal lands conveyancing. Many documents are therefore drafted from scratch—which makes a careful review of documents registered even more important.

Third, one must be conversant with the consent procedures required, ultimately resting with the Minister *after* all other consents (including Band Council) and Band by-law issues have been resolved. All these also affect transaction timing.

In general, Aboriginal land conveyancing is simply a different system and knowledge and expertise in our Torrens system does assist very well. Once, however, a practitioner is well versed in the procedures in the Indian Lands Registry, the applicable *Indian Act* Sections, and the by-laws of the band where the property is located, efficient and economical conveyances can be achieved.

## Taxation of New First Nations’ Businesses

“Indians” living on a “reserve” (as defined in the *Indian Act* (Canada)), who are contemplating establishing a business, must give careful consideration to the tax ramifications of the particular business structure where the First Nations entrepreneur’s business is part of the

commercial mainstream and is located off the reserve. The particular business entity may take the form of a proprietorship or partnership or the entrepreneur may choose to form a corporation.

In selecting the appropriate vehicle, care must be taken because the available tax exemption contained in Section 87 of the *Indian Act* only applies to the personal property of an Indian situated on a reserve. This includes the income of an Indian paid by an employer situated on a reserve, provided there are sufficient “connecting factors.”

The issue of connecting factors, first discussed in the Supreme Court of Canada decision of *Williams*, was more recently analysed in the 1995 Tax Court of Canada decision of *Southwind*. In that case the Court concluded that the two most important factors to look at in making this determination are where the work was performed and where the income was earned. Therefore, even if the corporation’s office is situated on reserve, the fact that the business activities are being conducted off reserve in the commercial mainstream will most likely lead to the corporation’s income being taxable.

In a recent technical interpretation issued by the Canada Revenue Agency (CRA), CRA noted that the income of a Status Indian earned from his or her interest in a limited partnership may be tax exempt based on a broader range of connecting factors, although CRA notes that these factors, which were drawn from the *Recalma* case, placed a significant emphasis on the location of the income-generating activity that gave rise to the investment income.

Therefore, it would seem that the best structure to minimize the income tax arising in respect of a business enterprise conducted by a Status Indian in commercial activities located off reserve would be a corporation that paid out all its available income to its principals in the form of employment income.

In this matter, Status Indians may bring themselves under the guidelines published by CRA, entitled “Exemption

for Employment Income Guidelines” that, although not hard and fast rules, certainly seem to provide a big distinction between First Nations entrepreneurs carrying on their business through a proprietorship or partnership and those who have incorporated their business and pay out all income as employment income.

Based on Guideline No. 2, CRA would generally take the view that the employment income is exempt if it is earned by a Status Indian employee who lives on a reserve, provided the employer is also resident on the reserve.

Accordingly, not only will the incorporated Status Indian who lives on a reserve be able to draw his income from his corporation on a tax-free basis, the owner of the corporation will also enjoy the benefits of limited legal liability not available to proprietors or persons actively engaged in the business of a partnership.

While there are some important rules to follow in setting up this structure, incorporation can be a valuable tool.

So ends a glimpse into the day-to-day legal aspects of First Nations life and business. As First Nations emerge fully as key players in the business life of this province and Canada, it is the day-to-day basics that will remain important both to First Nations persons and to us as practitioners, whether we are assisting them to do business or assisting those with whom they do business. ▲

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