

GUIDE TO WILLS AND ESTATE PLANNING FOR FIRST NATIONS CLIENTS LIVING ON RESERVES

FEBRUARY 2025



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INTRODUCTION

Purpose of this Guide

Estate planning and will drafting for First Nations persons living on reserves present distinct legal and practical issues. Practitioners must be aware of these in providing legal services in these areas to residents of reserves.

This Guide is intended as an informational aid for lawyers and notaries in British Columbia who advise First Nations clients in wills and estate planning matters, but who are not themselves specialists in Aboriginal law or wills and estates. In issuing the Guide, BCLI was mindful of Call to Action No. 27 of the Report of the Truth and Reconciliation Commission of Canada, which points to the need for interculturally competent and informed provision of legal services to Indigenous peoples.

Non-testamentary personal planning documents such as enduring powers of attorney, representation agreements, and advance care directives that are frequently prepared concurrently with wills are outside the scope of this Guide. Practitioners should be aware that like estate planning, incapacity planning for Indigenous persons living on reserves presents distinct legal and cross-cultural issues.

Terminology in this Guide

In the Canadian context, the term “Indigenous peoples” refers collectively to First Nations (status and non-status), Inuit and Métis peoples. This Guide deals with an area of Canadian law that affects some First Nations people who are eligible for status

and membership within a First Nation. We therefore use the terms First Nation and First Nations persons throughout this Guide.

At times, we reference Canadian legislation which uses terms such as “Indian,” and “band”. This Guide uses those terms when referencing legislation and when those terms carry a specific statutory meaning. We recognize that these terms have colonial associations and use of them in this Guide should not be taken to imply endorsement of either the terminology or the colonial frameworks from which they derive.

Why are on- and off-reserve estate planning different?

Estate planning for First Nations persons living on reserves is different because the governing law is different. Generally speaking, succession and estate administration come within provincial legislative jurisdiction. The federal legislative jurisdiction over “Indians, and Land Reserved for Indians” under s. 91(24) of the *Constitution Act, 1867*¹ allows Parliament to enact laws specifically in relation to Indigenous peoples, including First Nations persons and reserves set aside for them. These federal laws displace the application of provincial laws that would otherwise apply, including those relating to succession and estates.

The federal legislative jurisdiction under s. 91(24) applies in theory to all Indigenous peoples in Canada.² In relation to wills, intestacy, and estates of Indigenous persons, however, it has been exercised only in part through the *Indian Act*.³ The *Indian Act* applies to some, but not all, First Nations

persons. It does not apply to the other Indigenous peoples.

Modern treaties, self-government agreements, and self-government legislation may make the *Indian Act* provisions inapplicable to the will or estate of a member of a First Nation or Modern Treaty Nation.⁴ Depending on the terms of the treaty or self-government agreement and the extent to which self-government powers have been exercised, the result may be that the *Indian Act*, laws passed by the First Nation under self-government powers, or provincial law may apply to a will or estate.

Practitioners must be careful to determine precisely what legislative framework, modern treaty, or self-government agreement applies to the will and estate of a First Nations client or to particular assets, such as a possessory interest in reserve land or cultural property. *Depending on the applicable legal regime, some or all of the information in this Guide may be inapplicable to your client’s estate.*

Bear in mind that regardless of legalities, the values and norms of a First Nations client’s culture regarding succession to property on death can have the same importance to the client whether the client lives on- or off-reserve.

¹ 30 & 31 Vict., c. 3.

² *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 S.C.R. 99.

³ R.S.C. 1985, c. I-5.

⁴ Peter W. Bogardus and Mary B. Hamilton, *Wills Precedents: An Annotated Guide* (Vancouver: Continuing Legal Education Society of British Columbia, 1998, updated) at 29-2.



PART A: DRAFTING WILLS FOR RESIDENTS OF RESERVES

Step 1: Determine what legal regime applies to the client's will

Several distinct legal regimes potentially apply to the will of a First Nations client living on a reserve or to particular terms in it. The law applicable to the will as a whole or to particular terms of a will (especially testamentary gifts of interests in reserve land) may be determined by a modern treaty, a self-government agreement, a First Nation law passed under a land code authorized by the *Framework Agreement on First Nation Land Management*,⁵ or the *Indian Act*. Depending on the client's circumstances or location of particular assets, provincial succession law may also be applicable.

MODERN TREATIES, SELF-GOVERNMENT AGREEMENTS AND FIRST NATIONS LAWS

If the client's First Nation is a party to a modern treaty or a self-government agreement, consult its terms to determine whether they affect the law that will govern

the client's will and the distribution of the client's estate.

Also confirm whether the First Nation is a signatory to the *Framework Agreement on First Nation Land Management* and has passed a land code and other laws that could affect the ability to transfer particular assets to a beneficiary. Signatory First Nations to the *Framework Agreement on First Nation Land Management* are listed on a website maintained by the Lands Advisory Board and First Nations Land Management Resource Centre.⁶

The text of modern treaties and self-government agreements can usually be found from public sources including the internet, but laws of First Nations enacted pursuant to them or otherwise may not be readily accessible. As clients may be unable to supply relevant legal information themselves,

⁵ See online: <labrc.com/wp-content/uploads/2023/03/Framework-Agreement-on-First-Nation-Land-Management-Dec-2022.pdf>. See also *Framework Agreement on First Nation Land Management Act*, S.C. 2022, c. 19, s. 121.

⁶ See online: <labrc.com/signatory-first-nations>.

you should consult the band office or other chief administrative agency of the client's First Nation to verify the existence and terms of any potentially applicable local laws.

INDIAN ACT PROVISIONS ON WILLS AND ESTATES

Sections 42-50.1 of the *Indian Act* apply to the will or estate of a First Nations client if the client

- has status or had status at the time of death
- is ordinarily resident on reserve land or land belonging to the Crown in right of Canada or a province, or was so at the time of death, and
- no modern treaty, self-government agreement or law of the client's First Nation passed under self-government powers makes these *Indian Act* provisions inapplicable.

Note: Throughout this Guide, reference to persons being ordinarily resident or living "on a reserve" is intended to INCLUDE First Nations persons with status who are ordinarily resident on a reserve OR on other land held by the Crown in right of Canada OR on land held by the Crown in right of a province. Similarly, reference to a person ordinarily resident "off-reserve" does NOT INCLUDE First Nations persons with status who are ordinarily resident on land held by the Crown federal or provincial.

The Trust Moneys, Estates and Treaty Annuities Directorate of Indigenous Services Canada ("ISC") is principally responsible for administering ss. 42-50.1 on behalf of the Minister of Indigenous Services ("the Minister") in all provinces. Estates Units are established in ISC regional offices to provide estate services to the First Nations in the area served by each. Estate services for First Nations in Yukon and the Northwest Territories are provided by Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC).

Provincial and territorial law governs succession and estate administration in respect of:

- First Nations persons with status who ordinarily reside off-reserve on land not owned by the Crown in right of Canada or a province,
- First Nations persons with status who are ordinarily resident on a reserve if a modern treaty, self-government agreement or law of the client's First Nation passed under self-government powers makes the provincial or territorial law applicable,
- non-status Indigenous persons regardless of their ordinary residence.

In British Columbia, therefore, the *Wills, Estates and Succession Act*⁷ ("WESA") applies to persons who ordinarily reside off-reserve regardless of whether they have status under the *Indian Act*, and to non-status persons even if they are ordinarily resident on a reserve.

What is "status" for purposes of the Indian Act?

A person is said to have "status" if that person is registered in the Indian Register that ISC is required to maintain by the *Indian Act* or is entitled to be registered there.

⁷S.B.C. 2009, c. 13.

Who is entitled to status?

Status is determined by descent from persons who were or were entitled to be registered. In the past, qualification for status was based on policies and criteria that conflict with present-day constitutional and human rights standards. Some of these conflicts have been addressed by amendments to the *Indian Act*.

The present eligibility requirements for registration are found in ss. 6 and 7 of the *Indian Act*. Issues of eligibility for registration are beyond the scope of this Guide, but if there is any question surrounding your client's entitlement to registration, you should consider those provisions carefully and consult ISC (or CIRNAC if the client is resident in Yukon or NWT) to determine the matter.

According to ISC, the guiding questions that inform eligibility for status are:

- Are either or both of the individual's parents registered or entitled to be registered?
- Are any of the individual's grandparents registered or entitled to be registered?
- Is anyone in the individual's immediate or extended family registered or entitled to be registered?⁸

First Nations persons with status receive a status card stating their identification information, registration number, and the band (First Nation) to which they belong.

Meaning of "ordinary residence"

Ordinary residence for the purpose of the wills and estates provisions of the *Indian Act* is a concept linked to both a person's

actual residence and the person's habits and intentions regarding their place of residence. It has been judicially defined as "residence in the customary mode of life of the person concerned...contrasted to special or occasional or casual residence."⁹

Absence from a reserve for a special reason does not mean the person ceases to be ordinarily resident there. A person likely would be considered to be ordinarily resident on reserve in situations similar to these:

- The person always lived on reserve until having to move into a long-term care facility off-reserve in their last years for necessary care unavailable on reserve.
- The person leaves a reserve to attend a post-secondary educational institution.
- The person left the reserve for a temporary purpose such as hunting, fishing or engaging in seasonal employment, with the intention of returning.¹⁰

⁸ Canada, Indigenous Services Canada, *Finding out if you are entitled to be registered under the Indian Act* (Ottawa: ISC, 2024) online: <www.sac-isc.gc.ca/eng/1710868412176/1710868541374>. At the time of publication of this Guide, Bill C-38, *An Act to amend the Indian Act (new registration entitlements)*, 1st Sess., 49th Parl., which contained amendments to the *Indian Act* that would have expanded entitlement to registration for certain persons, had lapsed due to prorogation of Parliament. These amendments may be re-introduced in the future.

⁹ *Thomson v. Minister of National Revenue*, [1946] 1 S.C.R. 209 at 224, approved in *Canada (Attorney General) v. Canard*, [1976] 1 S.C.R. 170.

¹⁰ Indigenous Services Canada, Estates Unit – BC Region, *Estate Administration on Reserve: A Guide for Executors and Administrators in British Columbia*, ver. 8 (February 2018) at 5.

Step 2: Determine if client has a possessory interest in reserve land intended to pass under the will and address related issues

If the client has or claims to have ownership of a home or rights in a parcel of reserve land that the client wants to give to a beneficiary, you will need to determine carefully what the client's interest actually is and whether the interest can pass under the terms of a will or must revert to the band.

It is imperative to determine the precise legal regime that applies to the lands of your client's First Nation: a modern treaty, a self-government agreement, a land code and laws passed under it by First Nations, or the *Indian Act*.

Individuals may obtain at most a possessory interest in reserve land. The possessory interest can only be transferred to another member of the band.

POSSESSORY INTERESTS IN RESERVE LAND UNDER THE INDIAN ACT

The information in this section relates to cases where the *Indian Act* continues to apply by default.

Under Canadian law, the Crown in right of Canada holds title to reserve lands for the use and benefit of the bands for which the reserves were established.¹¹ Individuals cannot own rights in reserve land itself, although they may own structures on it.

An individual can only obtain a legally enforceable possessory interest in reserve land from the band with the approval of the Minister.¹² If the land has not been allotted to the individual by the band council with the approval of the Minister, that person is not considered to be lawfully in possession of reserve land.¹³

When a band council has allotted surveyed land for the exclusive use of a band member and the Minister has approved the allotment, ISC issues a *certificate of possession* ("CP"). The CP is sent to the band, which then provides it to the band member to confirm that individual's right to occupy the land. Before 1952, a *location ticket* was issued instead for allotments of surveyed land.

A CP may be issued to two or more band members in joint tenancy or tenancy in common.

Pending approval of the allotment, ISC may issue a *certificate of occupation* which gives a temporary right to dwell on the allotted parcel of land.

If the allotted parcel of land is unsurveyed, documentary confirmation of an individual's right to be in possession of the land is in the form of a *notice of entitlement* ("NE").¹⁴

An allotment may have been made by a band council resolution and approved by the Minister, but no document confirming the interest was provided to the individual member. In these cases, the interest may be reflected on an abstract of a title search from the Indian Lands Registry System ("ILRS") as "NETI," standing for "no evidence of title issued."

¹¹ *Indian Act*, *supra*, note 3, s. 18(1). The federal Crown continues to hold the title to reserve land that is subject to the *Framework Agreement on First Nation Land Management* for the use and benefit of the band for which the reserve was established.

¹² *Ibid.*, s. 20(1).

¹³ *Ibid.*

¹⁴ Indigenous Services Canada, *Indian Lands Registration Manual*, App. A, "Notice of entitlement," online: <publications.gc.ca/collections/collection_2014/aadnc-aandc/R32-193-2013-eng.pdf>.

It may also be difficult to track down who has a CP interest given the fact that the registries maintained by ISC (see below) are not Torrens systems and do not warrant title, priority of interests, or the accuracy of the records.¹⁵ They are akin to a deed registration system and at most are “best efforts registries” based on voluntary filings.¹⁶

Due in part to inadequate documentation and lack of a robust CP registry or land registration system, the reality under the *Indian Act* regime is that most individuals living on reserve are not considered to be in lawful possession of the reserve land they occupy. As a consequence, a possessory interest in that land cannot pass on the death of these individuals to a beneficiary or intestacy heir.

A transfer of possession of reserve land to a beneficiary of a will or an heir in intestacy is not legally effective until it is approved by the Minister.¹⁷

INHERITANCE OF INTEREST IN RESERVE LAND RESTRICTED TO BAND MEMBERS

The *Indian Act* restricts the right to inherit a right to possession or occupation of reserve land “by devise or descent” to persons who are *entitled* to reside on the reserve (not merely persons who may be resident there).¹⁸ In effect, this means that the right to inherit a possessory interest in reserve land is restricted to band members.¹⁹

It is possible to grant a life interest in CP land by will, as long as the life tenant is a band member.²⁰ The same is true with regard to remainders.²¹

In order to be eligible to inherit an interest in reserve land, a beneficiary or intestacy heir or life tenant must be a member of the band at the time of death of the will-maker or intestate.²² A beneficiary or intestacy heir who is not a member of the band cannot automatically obtain the right to inherit the

¹⁵ Aboriginal Affairs and Northern Development Canada (“AANDC”), *Indian Lands Registration Manual* (Ottawa: AANDC, July 2013) at 1-3.

¹⁶ David K. Camp, “The Indian Land Registry and Related Survey Process” (Continuing Legal Education British Columbia, October 2007) at para. 4.1.4.

¹⁷ *Supra*, note 3, s. 49.

¹⁸ *Ibid.*, s. 50(1).

¹⁹ *Supra*, note 10 at 13.

²⁰ *Supra*, note 14, paragraph 9.2.

²¹ *Ibid.*

²² *Supra*, note 10 at 13.



interest by becoming a member or resuming membership afterwards.²³ The consent of the band would be required.²⁴

If a person who is not entitled to live on the reserve stands to inherit land by will or on intestacy, the Act directs that the land must be sold by ISC to the highest bidder in a sale open to all band members and the proceeds paid to the beneficiary or intestacy heir.²⁵ If the land is unsold after six months, the right to possession reverts to the band, subject to payment of compensation to the devisee or intestacy heir in the Minister's discretion for permanent improvements made on the land.²⁶

ISC national policy allows for alternatives to sale of the interest of a non-member beneficiary or heir in some cases.²⁷ Practitioners should contact the ISC Estates Unit in Vancouver by telephone (604-775-5100 or toll-free in BC 1-888-917-9977) or e-mail at BCestates@canada.ca regarding alternatives.

Note that an auction sale may be avoided if a beneficiary who is ineligible to inherit an interest in reserve land disclaims the interest and a residuary gift clause in the will confers the residue on one or more eligible beneficiaries.

See the precedent in the Appendix for a form (ISC Form C-100) that can be used by a non-band member to disclaim an interest under a will in reserve land which the non-band member is prohibited from inheriting.

²³ *Ibid.*

²⁴ Information provided by ISC.

²⁵ *Supra*, note 3, s. 50(2).

²⁶ *Ibid.*, s. 50(3).

²⁷ *Supra*, note 10 at 13.

WHERE CP WAS ISSUED BUT IS NOT REGISTERED IN NAME OF CURRENT OCCUPANT

It is common for a parcel of CP land to be passed down through successive generations without the CP that was issued to an ancestor of a client having been transferred into the name of each person who possessed the land successively before the client became the occupant. If the current occupant wishes to pass the interest by will to a beneficiary, the CP would first have to be transferred into the name of the occupant. Before this could be done, the interest must be transferred into the name of each person who successively held the interest pursuant to an intervening transfer. This may take considerable time.

In order to address the possibility that a client may die before the CP interest is transferred into the client's name, the client's will should include a clause devising the CP interest to the intended beneficiary despite the persisting deficiency in the title documentation. Even if the defect in the proof of title is not yet cured by the time the client dies, the clause will serve to confirm the client's wishes and thus increase the probability of those wishes being honoured.

IF CLIENT CLAIMS TO HAVE A CP, BUT ONLY PARTIAL DOCUMENTATION IS AVAILABLE

If a client lacks the appropriate documentation to confirm they have a CP and a registry search does not indicate one, use whatever evidence the client can provide as a starting point to gather further information about the CP in question and register it if possible.

Any documentary evidence tending to corroborate a client's claim to have a CP

can be shown to the band housing office. Examples include council minutes, meeting notes, an e-mail message, or any document emanating from the band that points to the client having a CP. The best practice is to visit the band housing office in person and speak directly to the officials. This may facilitate the registration of a CP if it is only registration that is lacking.

Once partial evidence has been accepted by the band housing office, you could then inform the ISC Lands Unit that the process of registering the CP has been started. While it is the band that ultimately issues the CP to the individual, involving ISC may serve to expedite the process.

IF CLIENT DOES NOT HAVE A CP AND NONE APPEARS TO HAVE BEEN ISSUED

Clients may believe they live on CP land, but the CP may never have been issued. Many residents of reserves dwell in houses owned by the band on land allotted to them according to the customs and traditions of their First Nation, but customary allotments are outside the statutory framework of the *Indian Act* and are not registrable.²⁸ Transfers and testamentary gifts of customary allotments are not valid under Canadian law because of s. 20 of the *Indian Act*. Thus, customary allotments cannot be inherited through a will.

A customary allotment could form the basis for an application to the band council for a resolution to formalize the allotment to lead to issuance of a CP. However, you may consider advising your client to make an application of this kind to the band council as a first step towards achieving the ability to transfer the right to occupy the land to a beneficiary by will.

²⁸ *Lower Nicola Band v Trans-Canada Displays Ltd*, 2000 BCSC 1209 at para. 151. *The Family Homes on Reserves and Matrimonial Interests or Rights Act* ("Family Homes Act"), S.C. 2013, c. 20, s. 2(1) contains an exception to the unenforceability of customary allotments. An interest in or a right to a *structure* (not land) on reserve land or First Nations self-managed land that is recognized by the First Nation is also recognized under that Act for the purpose of protecting a right to occupy the spousal home in the context of conjugal breakdown or following the death of a First Nations member who held the right.

In the absence of a CP, a gift in a will of a possessory interest in reserve land is not legally binding, but including the gift in a will may cause the band to consider the deceased's wishes and possibly decide to give effect to them. It is crucial to explain to the client that the gift is not binding on the band and whether it will be honoured is entirely in the discretion of the band council at the time the estate is being administered following the client's death. A precedent for a letter conveying this advice is included in the Appendix.²⁹

Non-CP land that is the subject of a precatory testamentary gift of this kind must be adequately described in the will. This may present difficulty, as the lot may not have been surveyed or have an address. In such cases, practitioners may need to resort to a metes and bounds description, appending to the will a map of the reserve drawn to scale with the parcel of land clearly outlined, or employ some other means of identifying the land.

THE THREE LANDS REGISTRY SYSTEMS MAINTAINED BY ISC

Note there are *three* separate registry systems currently maintained by ISC in which interests in reserve lands and documents affecting those interests potentially may be recorded:

Indian Land Registry System ("ILRS"). This registry relates to reserve land subject to the *Indian Act*. It actually comprises two registries: the Indian Land Registry required by s. 21 of the *Indian Act*, and the Surrendered and Designated Lands Registry required by s. 55.

*First Nations Land Registry System ("FNLRS").*³⁰ This system relates to reserve land that is administered subject to the *Framework Agreement on First Nations Land Management*, a land code passed by the First Nation, and any laws of the First Nation passed under the land code. A significant number of First Nations in British Columbia now have a land code.

²⁹ The precedent was provided by Seniors First BC, a not-for-profit organization that *inter alia* provides some legal services to eligible older adults.

³⁰ The current FNLRS is maintained by Indigenous Services Canada, but a new registry for lands under the *Framework Agreement on First Nations Land Management* intended to be owned, managed and administered by First Nations is being co-developed: Indigenous Services Canada, "First Nation Land Management: Policy and Legislation," online: <www.rcaanc-cirnac.gc.ca/eng/1686318557963/1686318775639>.

An enhanced level of access allowing authorized users to obtain an abstract relating to a particular parcel of land is obtainable through Citrix, a platform used by the federal government to store and protect the records. A Citrix account is necessary for this purpose. First Nations officials and legal practitioners may obtain a Citrix user account without fee through ISC. An example of an application form for access by a legal practitioner via Citrix is found in the Appendix.

When searching Citrix for records by a client's name, the system sometimes does not return results when both a first name and last name are entered. If the search does not return any results, it may help to try searching by a first name or last name only as well as checking alternative spellings of names.

Where a land code is in effect, provisions of the *Indian Act* relating to the administration of reserve lands, environment and natural resources are inapplicable.

Self-Government First Nations Land Register ("SGFNLR"). This system relates to lands subject to self-government agreements with particular First Nations that have the effect of displacing the *Indian Act* entirely. Self-government agreements are implemented by special legislation.

All three systems are publicly searchable through the same portal: services.aadnc-aandc.gc.ca/ILRS_Public/Default.aspx.

Inquiries about transfers of interests in reserve land may be directed to ISC Land Holding Specialists in Vancouver at (604) 775-5100.



Step 3: Drafting a will subject to the Indian Act

A will subject to the *Indian Act* has fewer formal requirements than one subject to WESA. Section 45(2) of the *Indian Act* requires a will only to be:

- in writing;
- signed by the will-maker; and
- set out wishes or intentions about the distribution of the will-maker's property after death.

It appears that ISC interprets the signing requirement under s. 45(2) to include dating by the will-maker.

Witnessing of the will-maker's signature and other testamentary formalities required under provincial law are not essential.³¹

Despite the lesser formality required for a valid will that is subject to the *Indian Act*, it is always advisable to comply with the formalities for a validly executed and attested will under WESA, because the will-maker may be living off-reserve at the time of death.³²

IDENTIFYING INFORMATION TO INCLUDE IN A RESERVE RESIDENT'S WILL

In addition to the usual information included to identify the will-maker, the executor(s) and beneficiaries, and to describe assets, practitioners should ensure wherever possible that the will of a reserve resident specifies:

- the First Nation to which the will-maker belongs

- that the will-maker belongs to a treaty first nation, if the client's First Nation is a treaty First Nation as defined in the *Interpretation Act*³³
- the will-maker's band membership number
- if the will is passing a CP interest or a life interest in CP land, the full legal description of the parcel of land in question, including the parcel identification number, lot number, block number, and Canada Lands Surveys Records ("CLSR") number
- the names of the beneficiaries and executor matching their names as they appear on government-issued identification, especially status cards.

There may be many common family names on a reserve. Several band members may have the same first and last names. For greater certainty in referring to beneficiaries, executors, or other persons named in a will, use additional information to point to the identity of a specific individual such as a date of birth, physical address, etc.

Clients may use kinship terms that can denote a blood relation when referring to intended beneficiaries or other persons who are not in fact blood relatives. For example, "my niece"

³¹ *Indian Estates Regulations*, C.R.C., c. 954, s. 15.

³² Bogardus and Hamilton, *supra*, note 4 at 29-3.

³³ R.S.B.C. 1996, c. 238. Section 29.1(1) defines "treaty first nation":

"treaty first nation", as the context requires, means

(a) a first nation that is a party to a final agreement, or

(b) the government, as constituted under the final agreement and constitution, of such a first nation;

may not necessarily denote a daughter of a sibling but a person who was raised in the client's family group. To avoid post-mortem issues arising from cross-cultural confusion about kinship terminology, practitioners should look beyond the terminology used by the client in will instructions and find out the actual nature of the relationship between the client and a person who will be mentioned in the will so it can be described accurately.

FAILED TESTAMENTARY GIFTS AND INTESTACY

Don't assume that if a gift under the will fails, it will necessarily go to the same person or persons as it would if the will were not subject to the *Indian Act*. The *Indian Act* does not contain anti-lapse provisions that could prevent a partial intestacy or accretion to residue if a beneficiary predeceases the will-maker or the gift fails for another reason.

Significant differences also exist between the intestacy provisions in s. 48 of the *Indian Act* and those in WESA.

Example:

Section 48(8) of the *Indian Act* prevents a possessory interest in CP reserve land from passing on intestacy to a relative more distant than a brother or sister of the deceased when the deceased has no surviving sibling. If the deceased has no surviving spouse, parents, or siblings, the CP land reverts to the Crown for the benefit of the Band, and nieces and nephews of the deceased cannot inherit the deceased's CP interest.³⁴

See further regarding Intestacy in Part B of this Guide.

CULTURAL PROPERTY

Generally

Distribution of culturally significant assets on death may be subject to customary or enacted laws of the client's First Nation or the terms of a modern treaty.³⁵ These may restrict the testamentary freedom of individual clients concerning these assets. For example, cultural assets may belong to particular clans or kinship groups and traditionally cannot be transferred to non-members. Practitioners should investigate this possibility and discuss restrictions on disposition of cultural property with clients when taking will instructions and preparing the will. Individual clients may not be fully knowledgeable regarding restrictions their communities impose on disposition of cultural property in their possession.

Hereditary titles

Some clients may wish to pass on their titles as hereditary chiefs or other traditional office holders by means of their will. As traditional titles are not subject to Canadian law, they cannot be the subject of a legally binding gift under a will. At the most, a will clause purporting to pass a hereditary title can serve only as an expression of wishes. This may need to be explained to the client.

FUNERAL AND OTHER CULTURAL CEREMONIES

Clients should be asked if they have any wishes regarding observance of funereal ceremonies and practices of their respective First Nations. These wishes can then be recorded in the will if the client so desires.

³⁴ *Indian Act*, *supra*, note 3, s. 48(8); *Okanagan Indian Band v. Bonneau*, 2003 BCCA 299.

³⁵ *Bogardus and Hamilton*, *supra*, note 4 at 29-7.

Some clients may be uncomfortable with speaking about cultural ceremonies and traditions with a lawyer or notary who does not belong to their community. The will could then refer to an individual who knows about the client's funeral and commemoration wishes and who could communicate them at the appropriate time to the client's personal representative and family members.

BEST PRACTICES FOR PRESERVATION OF ORIGINAL WILL

The same best practices should be followed for the safe storage and preservation of the original wills of reserve residents as for all other wills. Some band offices have fireproof safes in which original wills can be stored. ISC does not maintain a repository or a register of wills and their locations.

The Wills Registry maintained by the British Columbia Vital Statistics Agency is available to First Nations clients. It is good practice to register the location of the original will by filing a wills notice at a nominal cost (currently \$17.00). The registration should be updated by filing a new wills notice when the will is moved to another location or revoked.

WILL INSTRUCTIONS INTERVIEW CHECKLIST

Practitioners may find this checklist useful when taking will instructions from First Nations clients. It is meant to supplement the Will-Maker Interview Checklist³⁶ found in the Law Society of BC Practice Checklists Manual:

Is the client registered or entitled to be registered under the *Indian Act*?

Does the client hold a status card?

To which First Nation does the client belong?

Is the client ordinarily resident on reserve?

How does the client's First Nation administer its lands? (under the *Indian Act*, First Nation Land Management, a Self-Government Agreement, or a Modern Treaty?)

Does the client hold a CP for a parcel of reserve land?

Does the client have a spouse or children and are they members of the same First Nation?

Blended families are common on reserve, as are customary and informal adoptions. When speaking with clients about children, it is important to determine the exact nature of the client's relationship with individuals in a family group so that the will refers to them in sufficiently certain terms.

Does the client have a previous spouse occupying a matrimonial home?

Does the client's First Nation have its own matrimonial real property laws or do the

³⁶ See online: <www.lawsociety.bc.ca/Website/media/Shared/docs/practice/checklists/G-2.pdf>.

Indian Act and Family Homes on Reserves and Matrimonial Interests or Rights Act govern the rights of surviving legal spouses and common-law partners?

Does the client's First Nation have a land code in force?

Does the client own real property or a business off-reserve?

Does the client's First Nation have traditional laws regarding disposition of property on death or special rules regarding cultural assets?

Does the client own a trapline or hold fishing licences? If the client holds fishing licences, are they transferable only to band members?







PART B: ADMINISTRATION OF ESTATES

JURISDICTION OVER PROBATE AND ADMINISTRATION OF ESTATES

Procedures established under the *Indian Act* apply to the administration of the estates of First Nations persons

- with status *and*
- ordinarily resident on a reserve at the time of death

unless the terms of an applicable modern treaty, self-government agreement, or a First Nations law passed under them provide otherwise. This section of the Guide deals with the estate administration procedures under the *Indian Act* that apply by default.

Provincial law (WESA in British Columbia) applies to probate and the administration of the estates of

- non-status First Nations persons
- First Nations persons with status who were *not* ordinarily resident on a reserve at the time of death
- First Nations persons with status who live on a reserve when a modern treaty, self-government agreement or law of the

client's First Nation passed under self-government powers makes the provincial law applicable.

PROCEDURE WHEN A RESIDENT OF A RESERVE DIES

When a First Nations person residing on reserve dies, the Regional Office of ISC should be notified of the death and receive the following information:

- the deceased's Indian Registry number appearing on their status card
- the name of the deceased's First Nation
- the date of death
- whether the deceased left a will.³⁷

ISC should also be notified when a person with status residing off-reserve dies so that the death can be noted in the Indian Registry.

ISC requires proof of death in the form of a copy of the death certificate. The local ISC Superintendent is required to forward a copy of the death certificate and the names and contact information of persons entitled to share in the estate to the Minister.³⁸

³⁷ *Ibid.*, at 5.

³⁸ *Indian Estates Regulations*, CRC c. 954, s. 3.

If the deceased left a will, the original will must be sent to ISC. (It is returned to the executor with a stamp following approval. See “Requirement for Approval by the Minister” below.)

In order to determine whether it has jurisdiction over the estate, ISC will confirm that the deceased was registered or entitled to be registered under the *Indian Act* and will check with the deceased’s First Nation to confirm whether the deceased was resident on the reserve.

ISC will also search its registries to determine if the deceased had a registered interest in reserve lands. If the deceased’s First Nation manages its own lands under the *Framework Agreement on First Nations Land Management*, a land search is conducted in the FNLRs.

REQUIREMENT FOR APPROVAL OF WILL BY THE MINISTER

Section 45(3) of the *Indian Act* provides that a will of an Indian has no legal force or effect as a disposition of property until it has been approved by the Minister or a court has granted probate pursuant to the Act. This is a major difference from provincial succession law, under which a valid will takes effect of its own force from the time of death.

Like other provisions of the *Indian Act* dealing with wills and estates, s. 45(3) only applies to First Nations persons with status who were ordinarily resident on a reserve at death.³⁹

A court may only grant probate of a will that is subject to s. 45(3) of the *Indian Act* if the Minister has transferred jurisdiction to the court to do so.⁴⁰ If the Ministry does so, the court may not make or enforce any order relating to real property on a reserve without

having the additional written consent of the Minister.

“Approval” of a will under s. 45(3) of the *Indian Act* is similar to probate. ISC verifies the authenticity of the will and confirms that it is signed, disposes of property of the deceased, and is intended to take effect on death.⁴¹ ISC does not otherwise review or evaluate the terms of the will.⁴²

Steps that may be taken pending approval of a will

While a will subject to s. 45(3) of the *Indian Act* is not legally effective before approval by the Minister, some non-dispositive steps may be taken by the named executor pending approval. These include:

- making funeral arrangements
- notifying financial institutions of the deceased’s death and providing proof of death to freeze accounts.⁴³

In cases where there is an urgent issue to address, such as a need to protect estate assets from dissipation, a named executor or family members may contact the ISC Estates Unit to accelerate appointment of the personal representative.⁴⁴ The Estates Unit will have designated an estates officer to serve the deceased’s First Nation.

Beneficiary designations under insurance policies, pension and retirement plans

Unlike WESA, the *Indian Act* does not define the term “will,” and so it is unclear whether beneficiary designations under insurance policies, pension plans, RRSPs, etc. require approval by the Minister under s. 45(3). They are technically testamentary as embodying an intention regarding passage of property on death, even though their proceeds

³⁹ *Supra*, note 3, s. 4(3).

⁴⁰ *Ibid.*, s. 44(2).

⁴¹ *Supra*, note 10 at 7.

⁴² *Ibid.*

⁴³ Information provided by ISC.

⁴⁴ Information provided by ISC.

are considered to pass outside the estate. Payment to a designated beneficiary might be challenged as being in breach of s. 45(3), so a leading text on Aboriginal law suggests that insurance companies, plan administrators, and other payors should obtain confirmation from ISC that approval is not being withheld before disbursing under a beneficiary designation.⁴⁵

POWER OF MINISTER TO VOID WILL

Section 46(1) of the *Indian Act* empowers the Minister to declare a will void in whole or in part on one or more of these grounds:

- The will was executed under duress or undue influence
- The testator at the time of execution of the will lacked testamentary capacity
- The terms of the will would impose hardship on persons for whom the testator had a responsibility to provide
- The will purports to dispose of land in a reserve in a manner contrary to the interest of the band or contrary to this Act
- The terms of the will are so vague, uncertain, or capricious that proper administration and equitable distribution of the estate of the deceased would be difficult or impossible to carry out in accordance with this Act; or
- The terms of the will are against the public interest.⁴⁶

Note that some of these grounds are the same ones on which a court could declare a will or a term in a will void under provincial law, e.g. lack of capacity, undue influence, and uncertainty. Some are unique to the *Indian Act*, however, and make the Minister's powers to avoid a will or term in it broader than those of a court applying the provincial law of wills.

In particular, a court has no power under provincial law to declare an otherwise valid

will or a gift under the will void because it is "capricious." The standard of "hardship" for persons whom the will-maker had a responsibility to provide as a ground for voiding a will is also different from, and potentially broader than, the threshold of "inadequate provision" for varying a will under WESA.⁴⁷ The class of persons whom the Minister could take into account as being those for whom the will-maker had a responsibility to provide is potentially broader than the class of those who could apply under WESA for variation of the terms of a will, namely the will-maker's spouse and children.

Section 46(2) provides that if the Minister or a court declares a will void, the will-maker is deemed to have died intestate. The estate would then be distributed under s. 48 (see "Intestacy" below). If the will is declared partially void, a gift that is affected by the declaration is deemed to have lapsed unless a contrary intention appears from the will. The property that was the subject of the voided gift would then go to the residuary beneficiary, if the will designates one. If there is no clause stating who will receive the residue, or if the void gift is a gift of residue, the subject of the voided gift would pass on intestacy.

APPOINTMENT OF PERSONAL REPRESENTATIVE BY ISC

The Minister's jurisdiction over wills and estates extends to the appointment, authorization, and removal of personal representatives.⁴⁸ If a will names an executor and the will is approved, ISC will normally appoint the named executor as the personal representative.

If there is no will or a will does not appoint an executor, ISC appoints an administrator. ISC contacts the beneficiaries or legal heirs in intestacy to ask if any of them wish to

⁴⁵ Jack Woodward, *Native Law* (Toronto: Carswell, 1989) (loose-leaf updated 2019, release 2), ch. 16 at 11.

⁴⁶ *Indian Act*, *supra* note 3 at s. 46(1).

⁴⁷ *Supra*, note 7, s. 60.

⁴⁸ *Supra*, note 3, s. 43.

administer the estate or nominate someone to do so. ISC appoints the administrator nominated by them or, failing agreement, according to an order of precedence. A surviving spouse would normally be given precedence over descendants and siblings of the deceased as an administrator in an intestacy.

ISC provides the executor or administrator with an information package on estate administration and the duties of a personal representative.

ISC also searches the Indian Land Registry, or the First Nations Land Registry if applicable, to determine whether the deceased had a registered interest in reserve land and informs the personal representative of the search result.

If none of the persons entitled to inherit are willing or able to act as an administrator, an ISC Estates Officer will act as the administrator of last resort.

APPEAL FROM DECISION OF MINISTER CONCERNING WILLS AND ESTATES

Anyone affected by a decision of the Minister under powers conferred by ss. 42, 43, and 46 of the *Indian Act* may appeal the decision to the Federal Court within two months of the date of the decision.⁴⁹ The right of appeal thus extends to decisions concerning the acceptance of documents as wills, the approval of wills, the withholding of approval, avoidance of wills or terms in them or refusal to avoid, the appointment or removal of a personal representative, and virtually any decision of the Minister in a testamentary cause or matter arising from the death of a person with status and ordinarily resident on reserve.

One of two preconditions to an appeal must be met: either the matter in issue must involve more than \$500 or the Minister must consent to the appeal.⁵⁰

⁴⁹ *Ibid.*, s. 47.

⁵⁰ *Ibid.*

INTESTACY

Rules on inheritance under an intestacy are found in s. 48 of the *Indian Act*. The effect of the rules is summarized in this table:

If the Intestate Left:	Result
Surviving spouse or common-law partner but no surviving children	Spouse or common-law partner receives entire estate
Surviving spouse or common-law partner and one surviving child	Spouse or common-law partner receives first \$75,000 and any remaining estate divided equally between surviving spouse and the child
Surviving spouse or common-law partner and surviving children	Spouse or common-law partner receives first \$75,000 and 1/3 of remaining estate, children receive 2/3 of remaining estate
No surviving spouse or common-law partner but intestate had surviving children	Children receive estate in equal shares
No surviving spouse or common law partner, but surviving children and one or more children who predeceased the intestate leaving issue	Estate divided into shares equal in number to number of children of intestate; issue of deceased children take share their parent would have received if their parent had survived the intestate
No surviving spouse, common-law partner, children, grandchildren or other lineal descendants, but surviving parents	Parents receive entire estate
No surviving spouse, common-law partner, children, or parents but surviving siblings	Siblings receive estate in equal shares
No surviving spouse, common-law partner, children, or parents but surviving siblings and predeceased siblings who had issue	Estate divided into shares equal in number to number of siblings of intestate; issue of deceased siblings take share their parent would have received if their parent had survived the intestate ⁵¹

⁵¹ Section 48(6) is silent with respect to interests in reserve land, so where the intestate is survived by a sibling, it is arguable that the issue of a deceased sibling take the interest in reserve land their parent would have received if their parent had survived the intestate.

If the Intestate Left:	Result
No surviving spouse, common-law partner, children, parents or siblings, but surviving children of siblings (nieces and nephews)	Interest in reserve land that the intestate held vests in the Crown in right of Canada for the benefit of the band. ⁵² Living nieces and nephews inherit rest of estate in equal shares
No surviving spouse common-law partner, children, parents, siblings or surviving children of siblings	Interest in reserve land that the intestate held vests in the Crown in right of Canada for the benefit of the band. Section 48(7) appears to require rest of estate to be divided between living next of kin of equal degree of consanguinity, but there are differing interpretations of the effect of ss. 48(6)-(8) inclusive ⁵³

A spouse may be a legal spouse or a party to a traditional marriage with the intestate. A common-law partner is defined in the *Indian Act* as someone who cohabits with an individual in a conjugal relationship for at least one year.⁵⁴

There may be more than one person entitled to the spousal share, such as where an intestate was separated from a legal spouse and had a common-law partner at the time of death.⁵⁵ Separation, even for a long period before the death of the intestate, will not disqualify a spouse from inheriting if the spouse was still married to the intestate when the intestate died.⁵⁶ For this reason, a reserve resident's will should be changed or a new will executed following a separation.⁵⁷

Persons who were legally adopted or adopted according to the custom of the First Nation may be treated as an heir in intestacy.⁵⁸ Unless all the heirs agree in writing that the person should inherit despite the lack of consanguinity with the intestate, a person claiming a right to inherit on the basis of custom adoption would need to prove the nature of the custom and that the custom was actually followed in the case of that person.⁵⁹ The ISC Adoption Unit should be contacted regarding information on custom adoptions. (See Contact List of Government Agencies at the end of this Guide.)

⁵² *Supra*, note 3, s. 48(8). See also *Okanagan Indian Band v. Bonneau*, 2003 BCCA 200.

⁵³ Some writers interpret ss. 48(6)-(8) as making intestate inheritance by kin more remote than nieces and nephews impossible, which would result in the portion of the estate that is not an interest in reserve land escheating to the Crown in right of Canada for the benefit of the band. See Olthuis Kleer Townshend LLP, *Aboriginal Law Handbook*, 5th ed. (Toronto: Thomson Reuters, 2018) at 363-364. Woodward describes ss. 48(7)-(8) as "enigmatic": *supra*, note 45 at 16-14.

⁵⁴ *Supra*, note 3, s. 2.

⁵⁵ *Supra*, note 10 at 14.

⁵⁶ Marie-Noel Campbell and Eve Hansen (Jastalaans), "Wills and Estates on Reserve," paper delivered at Canadian Elder Law Conference, November 2023 at 6.

⁵⁷ *Ibid.*

⁵⁸ *Supra*, note 10 at 14.

⁵⁹ *Prince v. Canada*, 2000 BCSC 1066.

RIGHTS OF SURVIVING SPOUSES AND COMMON-LAW PARTNERS IN FAMILY HOMES ON RESERVES

The *Family Homes on Reserves and Matrimonial Interests or Rights Act*⁶⁰ (“FHRMIRA”) confers rights on surviving spouses or common-law partners of deceased First Nation members that are similar to rights conferred by provincial matrimonial property legislation that is inapplicable to real property on reserves. The FHRMIRA is intended to ameliorate the harshness of s. 50 of the *Indian Act* that bars non-member spouses and common-law partners from having a possessory interest in the family home on reserve, and to further Indigenous legal authority over matrimonial property. The Act applies if at least one member to a spousal or conjugal relationship is or was a First Nation member or has status.⁶¹

FHRMIRA declares that First Nations have the power, with the approval of their members, to enact their own laws respecting the use, occupation, and possession of family homes on their reserves and the division of the value of interests or rights in or to structures on their reserves.⁶² It also contains provisional rules that apply unless and until First Nations enact their own matrimonial real property laws addressing these subjects.⁶³

In the case of First Nations that self-manage their lands under the *Framework Agreement on First Nation Land Management Act*, the FHRMIRA provisional rules apply until both a land code and matrimonial real property laws enacted by the First Nation are in force.⁶⁴ The provisional rules apply to First Nations that are parties to a self-government agreement

with the Crown in right of Canada only if the Minister of Indigenous Services has made a declaration on the recommendation of the parties to the self-government agreement that they apply and matrimonial real property laws enacted by the First Nation under FHRMIRA or the self-government agreement are not in force.⁶⁵

There are at least 17 First Nations across Canada with their own community-specific matrimonial real property laws of the kind contemplated by the FHRMIRA.⁶⁶ In British Columbia, this includes the Tk’emlúps te Secwepemc First Nation. It is important to check for any First Nation-specific matrimonial real property laws by consulting the band office or other First Nation administrative agency having responsibility, as this may affect the administration of the client’s estate in significant ways.

Only the provisional rules of the FHRMIRA concerning rights of a surviving spouse or common-law partner following the death of the other party to the relationship are covered in this Guide.

Right of survivor to temporary occupation of family home

The FHRMIRA refers to a surviving spouse or common-law partner of the deceased as a “survivor.” The provisional rules allow a survivor who does not hold an interest or right to the family home to occupy that home for a period of 180 days after the date of death of the other party, whether or not the survivor is a member of the First Nation or has status.⁶⁷

⁶⁰ S.C. 2013, c. 20.

⁶¹ *Ibid.*, s. 6.

⁶² *Ibid.*, ss. 7(1) and 8(1).

⁶³ *Ibid.*, s. 12(1).

⁶⁴ *Ibid.*, s. 12(2).

⁶⁵ *Ibid.*, s. 12(3).

⁶⁶ See the ISC webpage “First Nations with Matrimonial Real Property Laws Under the Family Homes on Reserves and Matrimonial Interests or Rights Act” at <www.sac-isc.gc.ca/eng/1408981855429/1581783888815>. Section 11(6) of FHRMIRA requires the Minister to maintain and publish a list of First Nations with community-specific matrimonial property laws contemplated by FHRMIRA.

⁶⁷ FHRMIRA, *supra*, note 60, s. 14.

Order for exclusive possession of family home

A survivor may apply to the provincial or territorial superior court (in British Columbia, the BC Supreme Court) for an order for exclusive possession of the family home and reasonable access to it for any period of time set by the court, regardless of whether the survivor is a member of the First Nation or has status.⁶⁸ The court may make an interim order giving exclusive possession pending determination of the application.⁶⁹

In deciding whether to grant an order for exclusive possession, the court must consider:

- the best interests 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
- the terms of the will
- the terms of any agreement between the spouses or common-law partners
- the collective interests of First Nation members in their reserve lands and the representations made by the 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
- the medical condition of the survivor
- the period during which the survivor has habitually resided on the reserve
- the fact that the family home is the only property of significant value in the estate
- the interests of any person who holds or will hold an interest or right in or to the family home
- the interests of any elderly person or

person with a disability who habitually resides in the family home and for whom the survivor is the caregiver

- the existence of exceptional circumstances that necessitate the removal of a person from the family home in order to give effect to the grant of exclusive occupation of that home to the survivor, including the fact that the person has committed acts or omissions that constitute family violence, or reasonably constitute psychological abuse, against the survivor, any child in the charge of the survivor, or any other family member who habitually resides in the family home; and
- the views of any person who received a copy of the application, presented to the court in any form that the court allows.⁷⁰

A copy of the application for an exclusive possession order must be sent to the personal representative, the Minister, any person who has reached the age of majority whom the applicant is asking the court to exclude from the home, any person who holds an interest or right in or to the family home, and any other person who must receive notice according to the rules of court.⁷¹

Survivor's options regarding share of value of family home

Under the provisional rules, a survivor has two options regarding inheritance or division of the value of the family home.

First option. FHRMIRA entitles the survivor to apply to the provincial superior court (in BC, to the BC Supreme Court) to receive half the value of the deceased's interest in the

⁶⁸ *Ibid.*, s. 21(1).

⁶⁹ *Ibid.*, s. 21(2).

⁷⁰ *Ibid.*, s. 34(1).

⁷¹ *Ibid.*, s. 36(1).

family home and half the value of “matrimonial interests or rights,” as defined in the FHMIRA.⁷²

“Matrimonial interests or rights” for the purposes of the FHMIRA are rights or interests in reserve land or structures on it other than the family home that were acquired by the deceased during the spousal or conjugal relationship, acquired before it in specific contemplation of the relationship, or that appreciated in value during the relationship (excluding interests or rights acquired by the deceased through gift or inheritance and interests or rights traceable from them).

Survivors choosing this option must apply to the court within 10 months of the death of the other spouse or common-law partner.⁷³ The court may grant an extension of time to make the application if the survivor did not know of the death until after the 10-month period expired, did not know of any divisible interests or rights within that period, or the delay in applying was due to other circumstances beyond the survivor’s control.⁷⁴

The survivor must send copies of the application to ISC and the personal representative. Other persons affected by the order or who must receive notice of the application under the rules of court must also receive copies of the application.⁷⁵ The personal representative is required to notify the beneficiaries or heirs of the application. If no personal representative has been appointed, ISC will notify them.⁷⁶

Choosing the first option does not prevent the survivor inheriting assets or legacies from the

estate of the deceased other than the family home and matrimonial interests or rights, as defined in the FHRMIRA.

Second option. The survivor may choose to inherit under the will of the deceased or in intestacy, rather than applying under the FHRMIRA.

No distribution of estate assets for minimum of 10 months following death

Unless a survivor consents in writing to an earlier proposed distribution, the personal representative may not distribute any portion of the estate until 10 months have elapsed since the death of the deceased or any extended period fixed by the court without an application having been made within that time for division of the value of the family home and matrimonial interests or rights under the FHRMIRA provisional rules.⁷⁷

If the survivor applies for the division of value within the time allowed, no distribution may take place until the application is decided or otherwise resolved.⁷⁸ In cases of need, reasonable advances may still be made in the meantime to a survivor or other dependants of the deceased for their support.⁷⁹

Advertising for creditors, heirs and other claimants

The *Indian Estates Regulations* appear to make advertising for claims of creditors and others against the estate mandatory regardless of the size of the estate.⁸⁰ They require a notice to “creditors, heirs and other claimants” to be posted in the post office,

⁷² *Ibid.*, s. 34(1).

⁷³ *Ibid.*, s. 36(1).

⁷⁴ *Ibid.*, s. 36(2).

⁷⁵ *Ibid.*, s. 36(5).

⁷⁶ *Ibid.*, s. 36(6).

⁷⁷ *Ibid.*, s. 38(1).

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*, s. 38(2).

⁸⁰ CRC, c. 954, s. 8(1).

the “agency office” (nowadays band office) and other public places where notices are usually posted or given to the band to which the deceased belonged.⁸¹ The notice must specify that claims against the estate must be filed within 8 weeks of the date on which the notice is posted.⁸² Claims that are filed after the 8-week window may be rejected unless the Minister orders otherwise.⁸³ Evidence in support of a claim by a creditor for a debt owed by the deceased must accompany the claim or be filed within 15 days of the date of the notice of the claim.⁸⁴

ISC supplies a personal representative with blank copies of a “Notice to Creditors, Heirs and Other Claimants” and advises them to post the notices in the band office, post office, and “other public places.”⁸⁵ A copy of the notice should be sent to the Housing Resources Officer at ISC’s Regional Office in Vancouver.

TRANSFERS OF LAND FROM ESTATES

Transfers of registered interests in reserve land that is not self-managed are not valid until they are approved by the Minister.⁸⁶ To obtain approval, the personal representative must submit a form entitled “Transfer of Land by Personal Representative” to ISC.

Inquiries about transfers may be directed to an Individual Land Holding Specialist at ISC in Vancouver. (See Contact List of Government Agencies that appears at the end of this Guide.)

If the First Nation manages its own lands under the *Framework Agreement for First*

Nation Land Management, the First Nation must approve the transfer. You will need to consult the band office or other administrative agency of the client’s First Nation that is responsible for land management regarding the procedure and the forms required.

OFF-RESERVE LAND OWNED BY DECEASED

If a reserve resident whose estate is subject to the *Indian Act* owned fee simple land off-reserve, the land must be transferred to beneficiaries or heirs under the laws relating to transfer and registration of land from estates that are applicable where the land is situated. If the land is situated in British Columbia, this will require a grant of probate or administration from the BC Supreme Court. Before an application for an estate grant may be made, the personal representative needs to request that ISC issue an order under s. 44 of the *Indian Act* consenting to that court exercising probate jurisdiction with regard to the off-reserve real property of the deceased resident of the reserve.⁸⁷

PROBATE FEES NOT PAYABLE ON ASSETS SITUATED ON RESERVE

On any application to the BC Supreme Court for a grant of probate or administration in relation to a First Nations person with status, no probate fees are payable in relation to assets of the deceased that were situated on reserve at death, regardless of whether the person was ordinarily resident on or off a reserve at the time of death. This is because of s. 87 of the *Indian Act*, which exempts the personal property of a First Nations person situate on a reserve from taxation.

⁸¹ *Ibid.*, s. 8(2).

⁸² *Ibid.*

⁸³ *Ibid.*, s. 8(3).

⁸⁴ *Ibid.*, s. 8(4).

⁸⁵ *Supra*, note 10 at 11.

⁸⁶ *Supra*, note 3, s. 49.

⁸⁷ *Supra*, note 10 at 9.



APPENDIX

List of acronyms

CIRNAC	Crown-Indigenous Relations and Northern Affairs Canada
CP	Certificate of Possession
FHRMIRA	<i>Family Homes on Reserves and Matrimonial Interests or Rights Act</i>
FNLRS	First Nations Land Registry System
ILRS	Indian Land Registry System
ISC	Indigenous Services Canada
NE	Notice of Entitlement
NETI	No Evidence of Title Issued
SGFNLR	Self-Governing First Nations Land Register
WESA	<i>Wills, Estates and Succession Act (B.C.)</i>

Sample letter to client concerning lack of certificate of possession⁸⁸

SENIORS FIRST BC
Legal Services

310 – 1281 West Georgia Street
Vancouver, BC V6E 3J7
Business Line: 604-688-1927
Fax: 604-437-1929

Private and Confidential

DATE _____

Hand-delivered

Dear _____

RE: Transfer of interest in land in a will

You have asked Seniors First BC to assist you in the preparation of a will. Seniors First BC has agreed to assist you with this. In providing instructions for the preparation of your will you indicated you have an interest in land. This letter addresses your interest in this land.

We have determined that this land is not held by a Certificate of Possession. We believe that this land is an interest that belongs to the XXXXX Nation (The "Band"), which means that you currently appear to be allowed to use and occupy the land but have no legally binding interest to transfer this land.

We have included a statement of wishes as to who the land should pass to for use and occupation. This will serve as an indication to the Chief and Council as to whom you wish your interest in the land should pass to, but it is not a binding designation. The final decision on who will be able to occupy and use the land will belong to The Band.

Signing this Letter

If you have read and understand this letter, and the limited nature of your interest in the land as described above, please sign and return a copy of it to Seniors First BC.

Yours truly,

Seniors First BC

per:

LAWYER'S NAME

I have read this letter carefully and understand the contents.

Signed at _____, BC on _____ 20____.

Print Name:

⁸⁸ Reproduced with permission of Seniors First BC.

Absolute disclaimer form for use by non-band member inheriting an interest in reserve land⁸⁹



Indigenous Services
Canada

Services aux
Autochtones Canada

ABSOLUTE DISCLAIMER

Form C-100

IN THE MATTER OF THE *INDIAN ACT*, R.S.C. 1985, CHAPTER I-5 AND AMENDMENTS THERETO,
AND IN THE MATTER OF THE ESTATE OF _____, DECEASED, NO. _____ OF THE _____ INDIAN
BAND, IN THE PROVINCE OF BRITISH COLUMBIA, WHO DIED ON OR ABOUT _____ AND WHO
AT THE TIME OF DEATH HAD BEEN ORDINARILY RESIDENT ON _____ I.R. NO. _____.

ABSOLUTE DISCLAIMER OF POSSESSORY INTEREST IN RESERVE LAND (for use by a non-band member inheriting an interest in reserve land)

☐ I refuse to accept the following gifts from the above-noted estate:

OR:

☐ I refuse to accept any and all gifts whatsoever from the above-noted estate, whether by
Will or intestacy.

Dated this _____ day of _____, 20____, at _____, in the Province of _____.

WITNESSED BY: _____	) _____
Signature of witness	) Signature of heir/beneficiary
_____	) _____
Name of witness	) Name of heir/beneficiary
(Please print full name in block letters)	(Please print full name in block letters)

Indigenous Services Canada, BC Region
600 – 1138 Melville Street
VANCOUVER BC V6E 4S3
Tel. 604.775.5100 Fax 604.775.7149

Canada
Form C100 Rev Oct/11

⁸⁹ Copy of an official work published by the Government of Canada. Not produced in affiliation with, or with the endorsement of the Government of Canada.

Application form for access to Indian lands registry via Citrix⁹⁰

Indian Lands Registry System (ILRS) Access Form

[Utilities, Law Offices, Other Federal Departments and other levels of Government Within Canada]

REQUESTED FOR – to be completed by the applicant

☐ Applicant already has a Citrix account with Indigenous Services Canada

Please print clearly or add text using a PDF editor to avoid mistakes or delays

Name (Family, Given)	
Work Title	
Company/Organization	
Work Address	
Preferred Phone Number	
Preferred Email (will be used for login authentication)	

By completing this form, you agree to notify the IT Service Desk immediately in the case of termination with the employer you have provided above. Entering your name above signifies your signature.

IT Service Desk Email: sti-its@sac-isc.gc.ca

IT Service Desk Phone: 866-795-6465 (toll free)

Your account will have:

Read Access (Redacted) – Allows user to search for and view instrument records, run reports, view and download documents where personal and sensitive information has been redacted.

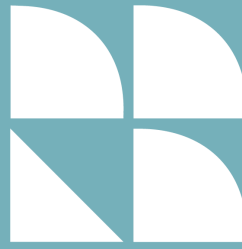
⁹⁰ Copy of an official work published by the Government of Canada. Not produced in affiliation with, or with the endorsement of the Government of Canada.

Contact list of government agencies

Estates	ISC Estates Unit (Vancouver)	Toll-free in BC 1-888-917-9977 or 604-775-5100	BCestates@canada.ca
Reserve Lands and Transfers of Interests in Lands	ISC Lands and Economic Development (Vancouver)	604-562-6865	
	ISC Land Holding Specialists (Vancouver)	604-775-5100	
Custom Adoption	ISC Adoption Unit 10 rue Wellington Gatineau QC K1A 0H4	1-800-567-9604 (ISC Public Inquiries Contact Centre)	
Birth and Death Certificates	BC Vital Statistics Agency	Toll-free in BC 1-888-876-1633 or 250-952-2681	www.vs.gov.bc.ca
Fishing Licences	Fisheries and Oceans Canada Vancouver Regional Office	604-666-0384	www.dfo-mpo.gc.ca
Traplines	BC Ministry of Environment and Parks	Toll-free in Canada 1-800-663-7867 or 250-387-6121	
Fishing boats and other vessels	Transport Canada Vessel Licensing and Registration	1-877-242-8770	vr-ib@tc.gc.ca



ABOUT THE BCLI



The British Columbia Law Institute (BCLI) is BC's independent, not-for-profit law reform agency. BCLI engages in scholarly research and analysis to determine pathways for law reform. We bring together the expertise and experience of collaborators to develop just and innovative solutions and increase access to justice in BC.

BCLI carries forward the work of the BC Law Reform Commission which operated until 1997. In 2022, we established our Reconciling Crown Legal Frameworks Program to support the research and innovations required to bring BC's laws into alignment with Indigenous laws as anticipated by BC's *Declaration on the Rights of Indigenous Peoples Act*.

Better laws. Plain and simple.

Our work

REPORTS

Reports recommend specific reforms for legal frameworks based on deep research, expert input, and public engagement.

STUDY PAPERS

Study papers explore and analyze current legal issues and considerations for reform.

PRACTICAL RESOURCES

Practical resources provide public legal information materials and tools for best practices.

Our process

INVESTIGATE

Identify legal issues to determine law reform needs.

RESEARCH, ANALYZE, & ENGAGE

Carry out legal research, analysis, and engagement to recommend reforms.

OUTREACH

Connect to deepen support for law reform needs.

 604 822 0142
 bcli@bcli.org
 bcli.org

 1822 East Mall, University of British Columbia
Vancouver, British Columbia V6T 1Z1

The work of the BCLI primarily takes place on the unceded territories of the xʷməθkʷəy̓əm (Musqueam Indian Band), Skwxwú7mesh (Squamish Nation) and Səlílwətaʔ/Selilwitulh (Tsleil-Waututh Nation).

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Ministry of
Attorney General