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CANADA

WILLS AND ESTATES

Report of the Standing Committee on Aboriginal Affairs And Northern Development

Chris Warkentin
Chair

MAY 2014

41st PARLIAMENT, SECOND SESSION

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THE STANDING COMMITTEE ON ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT

has the honour to present its

SIXTH REPORT

Pursuant to its mandate under Standing Order 108(2) the Committee has studied the subject matter of wills and estates and has agreed to report the following:

INTRODUCTION

The administration of wills and estates on reserves is a complex matter, with implications for land management, land tenure, citizenship, matrimonial property, adoptions, and the solemnization of marriages, among other aspects of reserve life.

The Standing Committee on Aboriginal Affairs and Northern Development ("the Committee") became aware of issues relating to the administration of wills and estates on reserves during its examination of Bill C-428, Indian Act Amendment and Replacement Act. This bill was introduced in the House of Commons as a private member's bill on 4 June 2012 by Rob Clarke, Member of Parliament for Desnethé–Missinippi–Churchill River. Among other things, the bill sought to repeal the wills and estates provisions of the *Indian Act*. However, because of potential legislative gaps and unintended consequences that could result from doing so, the Committee agreed to remove this clause until further study could be done.

Partly due to these legal and administrative complexities, the Committee did not have the opportunity to devote as much time to the matter of wills and estates as it would have wished, including during its recent study of reserve land management.[1] At the same time, the Committee acknowledged the importance of addressing this issue, and committed to doing so upon completion of that study.

One of the primary challenges presented during the land management hearings had to do with what witnesses described to the Committee as "legacy issues". These issues surface when individual interests in land are not formally documented or otherwise lack formal legal recognition. Not surprisingly, these undivided interests in land and uncertain tenure of reserve land holdings can have serious implications for First Nation individuals when determining the descent of property, often resulting in difficult and protracted disputes.

Recognizing the importance of these issues to First Nation individuals and communities alike, the Committee held, on 8 and 29 April 2014, additional hearings exclusively on wills and estates, and met with departmental officials and legal experts.

1 Report of the Standing Committee on Aboriginal Affairs and Northern Development, *Study of Land Management and Sustainable Economic Development on First Nation Reserve Lands*, March 2014.

BACKGROUND

A. Wills and Estates on Reserve

In Canada, the provinces and territories generally have jurisdiction relating to wills and estates. However, section 91(24) of the *Constitution Act, 1867* grants to the federal government exclusive jurisdiction over "Indians and lands reserved for the Indians". As a result, the federal government exercises legislative authority for "matters and causes testamentary" on reserve.[2]

Together with the *Indian Estates Regulations*, sections 42–50.1 of the *Indian Act* set out the legislative framework for dealing with wills and the succession of property of "Indians" ordinarily resident on reserve.[3] The *Indian Act* wills and estates regime provides the Minister with quasi-judicial authority to make decisions related to a deceased Indian's estate, to monitor the action of an executor and administrator, and to act as an administrator of last resort. While federal jurisdiction over wills and estates has been transferred to signatory First Nations under some of the modern treaty agreements, the jurisdiction of First Nations to make laws relating to wills and estates is not recognized under the *Indian Act*.[4]

The extent to which provincial legislation regarding wills and estates can apply on reserves is as yet unsettled. Generally, it is thought that provincial laws that are not inconsistent with the Act and the *Indian Estates Regulations* may be applicable through referential incorporation under section 88 of the *Indian Act*.[5] However, there is some question as to whether the provisions of the *Indian Act* form a complete testamentary code that would preclude the application of provincial laws, as well as whether provincial laws relating to use or interests in land would apply.

B. Role of Aboriginal Affairs and Northern Development Canada

Aboriginal Affairs and Northern Development Canada (AANDC) considers estates administration to be primarily a private family matter. Its policy is therefore to ensure that friends and relatives of the deceased have the opportunity to administer the estate. If no such non-departmental administrator can be appointed, AANDC will act as

2 "Matters and causes testamentary" includes all matters and causes relating to the grant and revocation of letters probate of wills or letters of administration.

3 The "wills and estates" provisions of the *Indian Act*, as well as the accompanying regulations, do not apply to Indians who reside off-reserve (or not residing on Crown lands), pursuant to subsection 4(3) of the Act. Generally, Indians who live off-reserve are subject to provincial laws on wills and estates, with the exception of a devise (i.e., gift, bequest) of real property on reserve.

4 Modern treaty arrangements, in particular in British Columbia, transfer jurisdiction over wills and estates to signatory First Nations, thus removing the application of the *Indian Act* provisions. To date, except for the descent of cultural property, First Nations have chosen not to exercise this authority, deferring instead to provincial laws.

5 Jack Woodward, *Native Law*, Vol. 2, Chapter 16.

"administrator of last resort" and ensure that the estate is processed and distributed in accordance with policy, regulations and law.

Under its Decedent Estates Program, AANDC provides assistance to First Nation members to administer the estates of deceased First Nation individuals who were ordinarily resident on a reserve before their death. The program also supports the Department's responsibility to ensure that reserve land is transferred to eligible parties.[6] Under section 50(1) of the *Indian Act*, only those individuals who are members of the same band as the deceased can acquire a right to inherit land on a reserve (section 50(1)). Accordingly, the program oversees the sale of land that would otherwise pass to a beneficiary or heir who is not a band member.

6 Under section 50 of the Act, only those individuals who are members of the same band as the deceased can acquire a right to inherit land on a reserve (section 50(1)). Heirs and beneficiaries who are not members of the same band in which the reserve land is associated are only entitled to the proceeds of the sale (section 50(2)). If, after six months, there is no sale, the reserve land interest reverts back to the band free from any claim on the part of the heir (section 50(3)).

ISSUES RAISED IN TESTIMONY

Witnesses advised the Committee that a number of issues complicate the administration of wills and estates under the current *Indian Act* framework and contribute to the often lengthy timeframe needed to resolve an estate. Among the principal challenges for administering wills and estates is the prevalence of certainty of tenure issues that affect reserve land. As John Gailus explained in his appearance before the Committee, individual interests in reserve land are often poorly documented or lack legal recognition. The poor documentation of interests in reserve land can have significant implications for determining the descent of property pertaining to a particular estate, and can lead to disputes over land entitlement among First Nations individuals.[7]

Witnesses also remarked on delays that may be associated with the administration of estates.[8] Given the Minister's exclusive jurisdiction and authority over estates under the *Indian Act*, the Minister and Departmental officials are involved in many of the aspects of administering an estate, including probating a will, appointing an administrator, determining heirs and distributing assets. Departmental officials indicated that approximately 3,600 estate files are open each year, and that roughly 44 employees were dedicated to administering estates across Canada.[9] Accordingly, departmental witnesses remarked that measures to support the capacity of First Nations in estate-related matters may be the single most effective way to improve the program's effectiveness and efficiency.[10]

In addition, the low rate of involvement in estate planning by First Nations individuals can also complicate the administration of estates.[11] The vast majority of First Nations individuals living on-reserve die intestate (without a will), which often leads to a longer and more complicated estate process.[12] The estate process is complicated further when family and community members fail to notify the Department of the death in a timely manner, if at all. While AANDC is only responsible for estate assets once it is made aware of a death, notification delays make it more challenging for the Department to secure and

7 House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, Evidence (AANO), *Evidence*, 1st Session, 41st Parliament, 12 June 2012 (John Gailus, Barrister and Solicitor).

8 AANO, 2nd Session, 41st Parliament; also see, British Columbia Assembly of First Nations "Wills and Estates", *Governance Toolkit*.

9 AANO, *Evidence*, 2nd Session, 41st Parliament (Andrew Saranchuk, Assistant Deputy Minister, Resolution and Individual Affairs Sector, Aboriginal Affairs and Northern Development Canada).

10 This finding is also supported by the Department's April 2013 Evaluation of the Decedents Program.

11 According to the April 2013 departmental program evaluation, only 8% of deceased First Nations individuals on reserves had a will, with approximately 90% dying intestate. In many instances, there may be no family or community member available to administer the estate of the deceased, effectively making AANDC the default administrator.

12 AANO, *Evidence*, 2nd Session, 41st Parliament (Andrew Saranchuk, Assistant Deputy Minister, Resolution and Individual Affairs Sector, Aboriginal Affairs and Northern Development Canada).

distribute estate assets.[13] For example, estate assets may be "gifted" or distributed according to tradition before AANDC is notified and able to secure these possessions.

The Committee also heard that the current *Indian Act* wills and estates framework is not as comprehensive as its provincial counterpart. Witnesses cautioned, however, that simply replacing the current system with provincial wills and estates regimes may not necessarily result in greater efficiencies. In fact, it could place greater financial and administrative burdens on individual First Nation members, as well result in increased costs to the Department. Witnesses also cautioned that the nature of reserve lands may exclude certain aspects of provincial laws from being applicable and could result in two different regimes operating concurrently. It was also suggested certain elements of the current *Indian Act* framework that may be better suited to First Nations realities. For example, the Act's provision for holograph wills mean that individuals who live in rural, remote or isolated communities do not have to travel hundreds of kilometres to execute a will.

C. Observations

While witnesses appearing before the Committee agreed that the *Indian Act* wills and estates provisions, and its associated regulations, were neither as comprehensive nor as up to date as the comparable provincial regimes, they cautioned that any substantive reform must be entered into with great care, and include the meaningful involvement of First Nations. Given the very personal impact on the lives of individuals, the potential effects on kinship ties, as well as the cultural heritage that has traditionally guided and informed these matters, the Committee acknowledges that substantive reform must involve and reflect First Nations traditions.

One such initiative to build a culturally relevant and innovative governance structure is that of the Muskeg Lake Cree First Nation. Over the past few years, the Muskeg Lake Cree First Nation in Saskatchewan has worked closely with community Elders and teachers to identify the foundational Cree laws, values and principles in order to incorporate those laws and principles into their constitution.[14]

The Committee agrees that comprehensive reform efforts will take time and resources, and that any such efforts should be led by First Nations. Accordingly, rather than proposing specific recommendations, the Committee would encourage AANDC to consult with interested First Nations on possible measures to modernize the existing policy and regulatory framework and consider alternatives to the current framework – such as broadening First Nations by-law making authority under the *Indian Act* to include wills and estates, application of provincial regimes and/or traditional First Nations legal systems – before moving forward with any reforms or modifications to its wills and estates policy. Areas identified by witnesses that could be explored in this respect include, for example, establishing clear guidelines for family administrators, determining appropriate thresholds

13 Ibid.

14 Muskeg Lake Cree Nation, nêhiyaw wiyasowêwina (Cree Law).

for distribution of property in cases of intestacy, identification of administrative and regulatory gaps and the use of community-based dispute resolution mechanisms.

Finally, members of the Committee are mindful that even the most robust and modern wills and estates regime cannot address the land disputes that arise from unsettled and divided interests with regard to who owns, or is entitled to own, a parcel of land on reserve. This uncertainty of tenure on reserve, where land holdings are often un-documented, has deleterious implications for the descent of property. The Committee therefore encourages federal officials to implement, as a matter of priority, the recommendation set out in its 2014 report on land management where it relates to clarifying land tenure arrangements on reserve through the formal documentation of customary land holdings and title-based land registry systems.

APPENDIX A
LIST OF WITNESSES

Organizations and Individuals	Date	Meeting
Department of Indian Affairs and Northern Development	2014/04/08	20
Roy Gray, Director, Indian Moneys, Estates and Treaty Annuities		
Andrew Saranchuk, Assistant Deputy Minister, Resolution and Individual Affairs Sector		
Department of Justice		
Martin Reiher, Acting General Counsel, Director, Operations and Programs, Legal Services		
Tom Vincent, Counsel, Operations and Programs Section		
Devlin Gailus Barristers and Solicitors	2014/04/29	21
John Gailus, Partner		
Indigenous Bar Association in Canada		
Valerie Richer, Member, Board of Directors		
Brock A. F. Roe, Member, Board of Directors		

REQUEST FOR GOVERNMENT RESPONSE

Pursuant to Standing Order 109, the Committee requests that the government table a comprehensive response to this Report.

A copy of the relevant *Minutes of Proceedings* (Meetings Nos. 20,21, 22 and 23) is tabled.

Respectfully submitted,

Chris Warkentin

Chair