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Acknowledgements

Writers	Darwin Hanna and Cynthia Callison
Content contributors	Camia Weaver and Rob Cherniack
Project co-ordinators	Camia Weaver, Rob Cherniack, and Fran Auckland
Legal review/update	Stella Spence
Editors	Gayla Reid, Sheilagh Simpson, Winnifred Assmann, Frank Chow, and Kathryn Spracklin
Legal citation editor	Katie Heung
Designers	Dan Daulby (cover and spine) and Frank Chow (inside pages)
Cover art	Richard Sumner
Publishing co-ordinator	Candice Lee

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Community and Aboriginal Programs
Legal Services Society
1500 – 1140 West Pender Street
Vancouver, BC V6E 4G1
Fax: 604- 601-6296
E-mail: APLM@lss.bc.ca

Please note

This publication explains the law in general. It is not intended to give you legal advice on your particular problem. Because each person’s case is different, you may need to get legal help. This publication is up-to-date as of June 2002.
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Introduction
Aboriginal law has developed under different acts in Canada. Aboriginal rights are recognized in s.35(1) of the Constitution Act, 1982. Section 91(24) of the British North America Act (now called the Constitution Act, 1867) created federal responsibility for Indians. As a result, Aboriginal clients often have unique legal needs.

The LSS Poverty Law Services Review Committee Interim Report indicates that in order to meet the legal needs of their Aboriginal clients, advocates require ready access to information. This manual identifies and addresses Native issues and Aboriginal rights within the major areas of Poverty Law.

The manual summarizes each subject, the state of the law, Aboriginal issues, relevant legislation, case law, and resources. It also gives examples of common client problems.

Although most of the information and analysis contained in the manual is from legal sources – legislation, case law, legal texts, articles – some information is based on personal experience. For many advocates, sharing personal experience is an effective way to find solutions to the unique legal situations of Aboriginal peoples.

When you are representing an Aboriginal client, you often have to determine whether the client is a registered Indian and whether the client is subject to federal law, provincial law, or band by-law.

To advocate for the unique needs of Aboriginal clients, you may need to:

- Give summary legal advice
- Gather information
- Review relevant legislation and case law
- Negotiate with appropriate government officials and/or band councils
- Provide representation before an administrative tribunal or court.

If you are unable to provide a service for an Aboriginal client, make the appropriate referral to a lawyer who specializes in the area of law specific to the client’s legal issue.
Please note: The federal government department responsible for First Nations, Inuit, and Northerners is now most commonly called Indian and Northern Affairs Canada (INAC), though its “legal” name remains the Department of Indian Affairs and Northern Development (DIAND). Both names are correct and refer to the same entity, but, to avoid confusion, we have chosen to use the name Indian and Northern Affairs Canada throughout this manual.

A snapshot of Aboriginal peoples who live in BC

Aboriginal people are diverse culturally, geographically, and historically. The following statistics will aid you in understanding the background of Aboriginal peoples who live in British Columbia:

- Out of BC’s total population, 5.4 percent are Aboriginal. Of the 65 Native dialects spoken in Canada, about 28 are spoken in BC.
- BC has one-third of Canada’s Indian bands, and three-quarters of the total number of Indian reserves in Canada.
- When Bill C-31 came into force in 1985, more than 17,000 individuals regained their Indian status in British Columbia.
- It is estimated that half of BC’s registered Indians live on reserve, while the other half live off reserve, in rural and in urban communities.
- BC’s total Métis and out-of-province population estimates may be low, but are recorded at approximately 35,000.
- The majority of Aboriginal peoples live in the Lower Mainland and on Vancouver Island. The North Coast, Nechako, Northeast, and Cariboo have the next highest concentrations of Aboriginal peoples.
- The Aboriginal population is younger and growing at a faster rate than the rest of the population in BC. A younger population, combined with higher overall birth rates, means that Aboriginal peoples are growing at a rate that exceeds the rate of the general population.

The following statistics illustrate the social and economic conditions of BC’s Aboriginal peoples:

- Although Aboriginal peoples represent about 5 percent of the population, they are over-represented in both the provincial and federal prisons (19 percent of provincial inmates and 17 percent of federal inmates, based on appearance only).
- National statistics indicate that Aboriginal persons are eight times more likely than non-Aboriginal persons to become victims of homicide, and ten times more likely to commit homicide (homicide victims, 18 percent; homicide suspects, 22 percent).
Aboriginal women and children (under the age of fifteen) suffer the highest rates of abuse. One in three Aboriginal women reports being abused by her partner. Of the children who are removed from parental custody by voluntary agreements, 13 percent are Aboriginal, and by court order, 53 percent are Aboriginal.

Suicide rates are 3 to 4 times higher, with rates among young age groups being 5 to 6 times higher.

To sum up

To understand the reality of these statistics, it is necessary to recognize that our laws exist within a historical context. The *Royal Commission on Aboriginal Peoples* summarizes that context, and concludes that Aboriginal societies were dispossessed of their homelands and made wards of the state.

The situation of Aboriginal people is affected by this history and its impact on the lives of Aboriginal people today. Our goal is to assist advocates and self-advocates to understand the unique needs of Aboriginal clients. This manual is one tool for reaching that goal.

The law changes frequently and we will do our best to keep this manual up-to-date. You can help by e-mailing any information you have about changes to Aboriginal poverty law to us at APLM@lss.bc.ca.
Common client problems

- Is the client exercising or engaging in an activity under an Aboriginal or treaty right?

- Does a government law, regulation, or decision interfere with the client’s Aboriginal or treaty right?
Summary

The Aboriginal and treaty rights of the Aboriginal peoples of Canada are constitutionally protected by s.35(1) of the Constitution Act, 1982.

Many Aboriginal peoples engage in activities that are based on the traditions, customs, and practices of their community. For the most part, Aboriginal peoples carry on these cultural activities without interference from government. However, Aboriginal persons may engage in activities that are in violation of a federal or provincial law or regulation. In such cases, Aboriginal persons may be charged and prosecuted under the applicable law.

State of the Law

In 1982, “the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada” were “recognized and affirmed” by s.35(1) of the Constitution Act, 1982.

Native Issues

To provide effective service to your Aboriginal clients, you need to be aware of how the courts have treated s.35(1), an area of law that is developing rapidly.

Keep an open mind when your clients assert an Aboriginal or treaty right to a service or a defence of an action. Whether that person has an Aboriginal or treaty right to engage in certain activities depends on the specific and factual circumstances of the case.

Who is an Aboriginal person?

Section 35(2) of the Constitution Act, 1982, provides the definition of Aboriginal peoples of Canada as “Indian, Inuit and Métis peoples of Canada.”

Based on this open definition, non-status Indians or non-registered Indians may possess Aboriginal rights to engage in certain activities. However, this definition does not make reference to the definition of an “Indian” as contained in the Indian Act.
The Indian Act states that a person may belong to an “Indian, Inuit or Métis peoples of Canada” group on the basis of one or more of the following non-exclusive factors:

- Community acceptance
- Self-identification
- Ancestry
- Adoption
- Marriage
- Cultural and language affiliation and knowledge
- Shared history and treatment.

**What are treaty rights?**

Across Canada, the Crown entered into many historical and modern treaties and agreements with Aboriginal peoples. A “treaty is an exchange of solemn promises between the Crown and various Indian nations”: R. v. Badger.

Treaty rights are constitutionally protected by s.35(1) of the Constitution Act, 1982. In BC, the Crown and Aboriginal peoples have entered into the following treaties: Treaty 8, Douglas Treaties, and the Nisga’a Final Agreement. Some BC Aboriginal peoples are beneficiaries under other treaties.

Clients who possess treaty rights may seek assistance for treaty entitlements. You need to review the treaty and case law to determine treaty rights, benefits, and entitlements.

**What are Aboriginal rights?**

Because the “existing” rights, “recognized and affirmed” by s.35(1) of the Constitution Act, 1982, are not defined, the courts, Aboriginal peoples, and the government have all provided their own interpretation of what the “existing” rights are.

Courts have developed the law of Aboriginal rights based on the specific facts of the First Nation or Aboriginal person in litigation. The Supreme Court of Canada established in the Sparrow case that there are “existing Aboriginal … rights” under s.35(1) of the Constitution Act, 1982. The Sparrow case established an “Aboriginal right to fish for food and for the ceremonial purposes of the band,” based on an existing Aboriginal right. It further set out the test for Aboriginal peoples to prove a violation or infringement of their rights, and the test for the Crown to justify the law or regulation. The Sparrow case also found that Fisheries and Oceans Canada
must give Aboriginal peoples priority access to the fishery, subject only to conservation.

The Vanderpeet case expanded the principles of Sparrow. It developed a “purposive analysis” of s.35(1), and set the test for Aboriginal rights to be an “integral part” of the “distinctive culture” of the claimants. And in Delgamuukw v. British Columbia, the Supreme Court established that s.35(1) “confers the right to use the land for a variety of activities, not all of which need to be aspects of practices, customs and traditions which are integral to the distinctive cultures of Aboriginal societies.” Oral history evidence maybe utilized to substantiate Aboriginal rights and title in court: Vanderpeet and Delgamuukw.

Summary of Supreme Court decisions

The following is a review of the major cases on Aboriginal and treaty rights decided by the Supreme Court. This review, while not exhaustive, is intended to help advocates understand the case law that has developed since the Constitution Act, 1982.

R. v. Sparrow

The appellant, Ron Sparrow, was charged under s.61(1) of the Fisheries Act with the offence of fishing with a drift net longer than permitted by the band’s Indian food fishing licence, issued by Fisheries and Oceans Canada. The appellant argued that the net length restriction was inconsistent with his Aboriginal rights.

The court established that there are “existing” Aboriginal rights under s.35(1) of the Constitution Act, 1982. The court found that the Musqueam people possessed an Aboriginal right established to fish for sustenance, ceremonial, and social purposes.

To be an “existing” Aboriginal right, the Aboriginal right must have been in existence in 1982 and unextinguished.

The Crown’s intention to extinguish Aboriginal rights must be “clear and plain” in any law. Aboriginal rights must be interpreted flexibly to permit their evolution over time. Aboriginal rights are to be generously and liberally construed. The federal Crown must act in a fiduciary capacity with respect to Aboriginal peoples.

Aboriginal people have the burden to prove that their rights are violated or infringed. To determine whether Aboriginal rights are infringed, the following questions must be asked:

• First, is the limitation unreasonable?
• Second, does the regulation cause undue hardship?
• Third, does the regulation deny to the holders of the right their preferred means of exercising that right?

If the law or regulation infringes upon an Aboriginal right, the Crown must justify the law or regulation. For the justification analysis, the following questions must be asked:

• First: is there a valid legislative objective?

If a valid objective has been determined, then the next step is:

• Has the Crown upheld its fiduciary relationship towards Aboriginal peoples?

The court indicated that conservation is a valid legislative objective.

The court further indicated that the Crown must meet its fiduciary obligation in the following ways:

• The allocation of the fishery “after valid conservation measures have been implemented must give top priority to the Indian food fishing” over the other user groups.

• The federal Crown must consult with Aboriginal peoples before implementing conservation measures and for the regulation of the fisheries.

**R. v. Vanderpeet**

Fisheries and Oceans Canada charged the appellant, Dorothy Vanderpeet, with the sale of fish contrary to s.27(5) of the British Columbia Fishery (General) Regulations, for selling ten salmon for $50.

The court adopted general principles from *Sparrow*. It found that s.35(1) should be given a generous and liberal interpretation in favour of Aboriginal peoples, and that any doubt or ambiguity as to the existence of Aboriginal rights must be resolved in favour of Aboriginal peoples. The purpose of s.35(1) is to recognize that Aboriginal peoples were living here first, and to provide the means by which Aboriginal societies and occupations are reconciled with the sovereignty of the Crown.

The court developed an “integral to a distinctive culture test” to identify whether an Aboriginal person has established an Aboriginal right protected by s.35(1):

[I]n order to be an Aboriginal right, an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right.
This is the test that is utilized by all courts to determine whether an Aboriginal person possesses an Aboriginal right. The court set out ten factors to be considered in the application of the test:

1. Courts must take into account the perspective of Aboriginal peoples themselves.

2. Courts must identify precisely the nature of the claim being made in determining whether an Aboriginal claimant has demonstrated the existence of an Aboriginal right.

3. In order to be integral, a practice, custom, or tradition must be of central significance to the Aboriginal society in question.

4. The practices, customs, and traditions that constitute Aboriginal rights are those that have continuity with the traditions, customs, and practices that existed prior to contact.

5. Courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating Aboriginal claims.

6. Claims to Aboriginal rights must be adjudicated on a specific rather than general basis.

7. For a practice, custom, or tradition to constitute an Aboriginal right, it must be of independent significance to the Aboriginal culture in which it exists.

8. The “integral to a distinctive culture” test requires that a practice, custom, or tradition be distinctive (that is, it makes the culture what it is); it does not require that the practice, custom, or tradition be distinct (that is, unlike or different in kind or quality from another culture).

9. The influence of European culture will be relevant to the inquiry if it is demonstrated that the practice, custom, or tradition is integral only because of that influence.

10. Courts must take into account both the relationship of Aboriginal peoples to the land and the distinctive societies and cultures of Aboriginal peoples.

In applying the test to Vanderpeet’s claim, the court found that before contact, exchanges of fish by the Sto:lo were only incidental to fishing for food purposes, and thus the appellant did not possess an Aboriginal right to sell fish.

**R. v. Gladstone**

The appellants, Donald and William Gladstone, were charged with offering to sell herring spawn (roe) on kelp caught under the authority of an Indian food fish licence, contrary to s.61(1) of the *Fisheries Act* and contrary to s.27(5) of the *British Columbia Fishery (General) Regulations*; and of
attempting to sell herring spawn on kelp, contrary to s.20(3) of the Pacific Herring Fishery Regulations.

The court found that the commercial trade of herring spawn on kelp was “an integral part of the distinctive culture” of the Heiltsuk before contact. The fishery regulations did not extinguish the Heiltsuk right to commercially trade herring spawn on kelp; they only controlled the fisheries. There was nothing in the regulations that expressed a “clear and plain” intention to extinguish the Heiltsuk right.

The failure of the Crown to recognize an Aboriginal right, and the failure of the Crown to grant special protection to the Aboriginal right, do not together constitute a “clear and plain” intention to extinguish the Aboriginal right. The Crown infringed the Heiltsuk right to harvest roe on kelp by limiting the Heiltsuk commercial catch. By regulating the commercial herring catch, the Crown was acting with a valid legislative objective. However, by not allocating the Heiltsuk priority to the herring roe on kelp commercial fishery based upon the Heiltsuk’s prior pre-contact commercial harvest rates, the Crown failed to uphold its fiduciary duty to the Heiltsuk.

**R. v. Marshall**

Donald Marshall Jr. was charged with selling eels without a licence, contrary to s.7(1) of the Fisheries Act. Marshall admitted to selling 463 pounds of eels without a licence, but asserted that he had a treaty right to catch and sell fish under the Treaty of 1760.

This treaty provided a promise (negative covenant) by the Mi’kmaq not to “traffick, barter, or exchange any Commodities in any manner but with such persons or the managers of such Truck houses as shall be appointed or Established by His Majesty’s Governor.” A few years after the treaty was signed, the British abandoned the “Truck houses.”

Marshall was convicted at trial, and the Court of Appeal upheld the conviction.

The Supreme Court concluded that terms of the Treaty of 1760 were incomplete. In order to ascertain the terms of the treaty, the Supreme Court referenced historical records and examined the objectives of both the British and the Mi’kmaq.

The court stated that “the trade arrangement must be interpreted in a manner which gives meaning and substance to the promises made by the Crown.” The court further stated, “the surviving substance of the treaty is not the literal promise of a Truck house, but a treaty right to continue to obtain necessaries through hunting and fishing and by trading the products of those traditional activities subject to [justifiable] restrictions.”
The court referenced a recorded note from 1760 that said, “there might be a Truck house established for the furnishing them with necessaries.”

The court concluded that the Mi’kmaq may trade for “necessaries,” but not for “economic gain.” In analyzing the concept of “necessaries,” the court accepted that the concept could be better described today as “moderate livelihood.” The court indicated that evidence did not suggest that the Mi’kmaq trade generated “wealth which would exceed a sustenance lifestyle.”

The court provides guidance to Fisheries and Oceans Canada to accommodate the Mi’kmaq treaty right to commercially harvest ocean resources:

Catch limits that could reasonably be expected to produce a moderate livelihood for individual Mi’kmaq families at present-day standards may be established by regulation, and enforced without violating the treaty right.

The Supreme Court acquitted Donald Marshall Jr. of the charges. After rendering its decision, the court provided a clarification. In its clarification, the court held that the federal and provincial governments have the regulatory authority to regulate the exercise of treaty rights, subject to the constitutional requirements that restrictions on the exercise of treaty rights must be justified on the basis of conservation.

**Definitions**

“Existing” means “unextinguished” rather than exercisable at a certain time in history.

“Indian” means a person who, under the Indian Act, is registered as an Indian or is entitled to be registered as an Indian: Indian Act.

**Relevant Legislation**

*British Columbia Fishery (General) Regulations*, SOR/84/248.


*Constitution Act, 1982*, s.35(1), being Schedule B to the Canada Act, 1982 (U.K.), 1982, c.11.
Fisheries Act, R.S.C. 1970, c. F-14, s. 61(1).

Fisheries Act, R.S.C., 1985, c. F-14, s. 7(1).

Indian Act, R.S.C. 1985, c. I-5, s. 2.

Pacific Herring Fishery Regulations, SOR/84-324, s. 20(3).

Cases Cited


Resources


2
Bankruptcy

Common client problem

- The client plans to “go bankrupt.” What will that mean for the client’s property on and off reserve?
Summary

This chapter deals with bankruptcy and Native issues related to bankruptcy. Native people who live on or off reserve are subject to bankruptcy laws, as long as these laws do not conflict with ss.29 and 89 of the Indian Act, which created exemptions that protect the real and personal property, including cultural property, of Indians on reserve.

State of the Law

Bankruptcy is governed by the federal Bankruptcy and Insolvency Act (BIA). Bankruptcy is the responsibility of the Office of the Superintendent of Bankruptcy, at Industry Canada.

The Indian Act, specifically ss.29 and 89, create exemptions from the BIA. It protects from seizure the real and personal property, including cultural property, of on-reserve debtors.

Practice Notes

- **Is the client responsible and liable for this debt?** Note any limitation periods. (See the chapter on debt collections and contracts.) What is the client’s total debt?

- **Is the client able to negotiate a settlement?** Before you discuss bankruptcy with the client, review what other options may be available.

- **Would the client benefit from the Debtor Assistance Program?** This program offers general debt counselling services, administers proposals under the BIA, and administers debt pools, including Orderly Payment of Debts.

- **Is the client interested in Orderly Payment of Debts?** A client does not need to declare bankruptcy in order to take advantage of the Orderly Payment of Debts program. This program is a debt-pooling plan, which is a repayment program regulated by law under the Bankruptcy and Insolvency Act and administered by the provincial government. Whether a client qualifies depends on the amount of his or her disposable income and the size of the debt.
• **Does the client know what happens in a bankruptcy process?** In a bankruptcy process, a debtor gives up most of his or her assets in exchange for having the debt eliminated by law. Debtors often do not have many assets, or anything that maybe taken in the bankruptcy process. However, debtors should know that some debts must still be paid during and after bankruptcy, for example, maintenance to a former spouse and court fines.

You may want to talk to the client about the process of discharge from bankruptcy under the BIA. The possibilities may include an absolute (relieves the client of debts) or conditional (certain conditions must be met) discharge.

• **How does a client start the process?** The client first meets with a trustee, who assesses the client’s financial situation and administers the bankruptcy or bankruptcy proposal. To qualify, the client’s total debt must exceed $1,000.

A debtor begins this process by filing an application for bankruptcy with a government official, called an official receiver. If the official receiver accepts the application (called the assignment), he or she then appoints a trustee in bankruptcy.

For more information, a client may visit the Office of the Superintendent of Bankruptcy in Vancouver at 300 West Georgia Street, Suite 1900, Vancouver, BC V6B 6E1, or Phone: 604-666-5007, or Fax: 604-666-4610.

• **How much will the process cost?** The bankruptcy process will cost a client approximately $1,000 to $2,000. The trustee will require a minimum payment to begin the proceedings.

• **How much may a client keep?** The bankrupt person begins with a basic $2,000 exemption. Under the BC *Court Order Enforcement Act*, and under Part 1, ss.3 and 4, of the BIA, a client is also allowed to keep the following assets:
  
  - Household furnishings and appliances to a value of $4,000, or any other goods or personal property exempt from execution under provincial and federal statutes
  
  - A motor vehicle to a value of $5,000, if he or she is not a maintenance debtor, or $2,000, if he or she is a maintenance debtor
  
  - $10,000 for tools and other personal property that are used for work
  
  - GST credits and prescribed payments relating to the essential needs of the debtor.
What may a debtor still owe after bankruptcy? Debts that bankruptcy cannot discharge are as follows:

- An amount owing on a fine or penalty imposed by law
- An amount owing on a recognizance or bail bond
- A court order or separation agreement for maintenance
- An amount obtained by fraud while the bankrupt was in a position of trust
- An amount obtained by false pretences, or by a fraudulent misrepresentation
- An award of damages by a court in civil proceedings in bodily harm, sexual assault, or wrongful death cases
- Student loans where the date of bankruptcy occurs within 10 years of when the bankrupt ceased to be a full- or part-time student.

Native Issues

The general laws of bankruptcy apply to Aboriginal peoples living on or off reserve. Exceptions to the general laws exclude real and personal property, including cultural property situated on reserve.

Cultural property should not be assigned to a trustee in bankruptcy. Nor should it be included in the first $2,000 of the bankrupt’s estate.

Does the client have cultural property?

Your role may be to help the client figure out whether an item is cultural property, and therefore exempt.

Cultural property includes movable objects that have sacred, ceremonial, historical, traditional, and/or cultural importance.

Guidelines as to what constitutes cultural property may be found in the following federal and provincial legislation:

- Sections 4(1)(2a-f),(3),(4) of the *Cultural Property Export and Import Act*, which prevents certain types of articles (specified in a control list) from leaving Canada without a permit issued by the government of Canada under this Act.
- Sections 3(1)(2a-i) of the *Heritage Conservation Act*, which protects heritage property in BC.
Cultural property may be communally held. Your client may be holding cultural property in trust for the community. Some objects may fall within the ownership of the community through the ordinary principles of inheritance and trust, or through the customary laws of the First Nation. If this is the case, you may request a letter from the band council, community members, or hereditary chief. The letter should state that the property belongs to the community or clan.

Section 91 of the *Indian Act* protects the following:

- Indian grave houses
- Carved grave poles
- Totem poles
- Carved house poles
- Rocks with painting or carving on them.

These items are considered cultural property and cannot be acquired or removed without the consent of the Minister of Indian Affairs and Northern Development. If the client has unknowingly assigned cultural property to a trustee for distribution without the consent of the minister, the assignment may be void because the property is exempt from seizure.

**Does the client have real or personal property on reserve?**

On-reserve real or personal property is exempt from bankruptcy under ss.29 and 89 of the *Indian Act*.

There is one important exception to this rule: real or personal property on reserve is subject to seizure by another status Indian.

Review your client’s property with him or her. You want to find out whether the property is exempt from seizure under ss.29 and 89 of the act. The exemption depends on whether the property is located on reserve or is “deemed to be located on reserve” under s.90 of the act.

Real property on reserve such as a house is clearly exempt from seizure and distribution in the bankruptcy process. A judge may grant the discharge from bankruptcy conditional on the payment of a portion of the debt owed to creditors where the debtor holds substantial property on reserve: *Re Davey; Re Sioui*.

Property “deemed to be located on reserve” is also exempt from seizure and distribution in the bankruptcy process. This includes any personal property purchased or given to Indians or bands by the Crown. For example, a school bus purchased with monies from the minister is not
subject to seizure even when in use off reserve: *Kingsclear Indian Band v. J.E. Brooks and Associates Ltd.*

Personal property located on reserve or “deemed to be located on reserve” is also exempt from seizure and distribution in the bankruptcy process. The personal property does not have to be permanently located or situated on reserve, but it does have to be more than momentarily on reserve. The main location of the property must be on reserve.

Ask your client about the use and safekeeping of personal property to determine its main location. If the main location is on reserve, the property is “deemed to be located on reserve” even though it is used off reserve: *Leighton v. B.C. (Gov’t)*. An example is a car purchased on reserve even if the car is later used off reserve. The location of the car is the owner’s residence, which is the place where the car is kept when not in use and to which the car is returned: *Danes v. The Queen; Watts v. The Queen*.

Determining whether moveable personal property is situated on reserve depends on a number of issues and on the kind of personal property. You should review cases interpreting ss.87, 89, and 90 of the *Indian Act*. These sections confirm that it is the Crown’s duty to protect the property of Indians (i.e., reserve land and chattels) from dispossession by non-Indians: *Mitchell v. Peguis Indian Band*.

**Does the client have personal property off reserve?**

Personal property held off reserve is included in the bankruptcy process.

For example, in one case, the bankrupt agreed to assign the sale proceeds of his off-reserve property to a trustee for distribution to his creditors. The court held that the provisions of s.89 of the act did not apply to these monies, even if the bankrupt had been living on reserve at the time of the property sale, because he or she had agreed to the assignment in the bankruptcy process: *Re Smoke*.

**Community and family factors**

A judge may exercise discretion in recognizing community and family factors.

The *Bankruptcy and Insolvency Act* allows the court to exercise discretion when granting a discharge for bankruptcy. In one case, the judge exercised this discretion and considered the bankrupt’s high cost of living in her northern Aboriginal community, and her financial obligations to her extended family, as an integral part of Aboriginal culture: *Re Lemaigre*. 
Definitions

“Bankrupt” means a person who has made an assignment, or against whom a receiving order has been made, or the legal status of that person.

“Bankruptcy” means the state of being bankrupt or the fact of becoming bankrupt.

“Chattel” means goods capable of transfer by delivery.

“Seizure” means taking possession of the chattels of a debtor.

“Trustee” means a person who holds the bankrupt’s property in trust for creditors.

Relevant Legislation

Court Order Enforcement Act, R.S.B.C. 1996, c.78.
Debt Collection Act, R.S.B.C. 1996, c.92.
Indian Act, R.S.C. 1985, c.I-5, ss.28, 29.

Cases Cited

Re Davey (1999), 44 OR.(3d) 327; [2000] 3 C.N.L.R. 48 (Ont.S.C.)
Resources

Related chapters in this manual are Debt Collections and Contracts, and Taxation.


3
Criminal (Non-Tariff)

Common client problems

- The client is an Aboriginal person. What does this mean for sentencing?
- Can the client get into a restorative justice program?
Summary

This chapter deals with restorative justice alternatives that relate to Aboriginal offenders. It looks at options to pursue when a client does not qualify for legal aid but needs assistance with diversion or sentencing submissions.

The “restorative justice” approach is a process in which all the parties involved in a particular criminal matter participate collectively to resolve and deal with the aftermath. The spirit of restorative justice is direct participation by those affected by the crime: the victim, the offender, and their families and communities.

A restorative justice approach may be perceived as too lenient. However, when combined with probationary conditions, this approach could impose a greater burden on the offender than would a custodial sentence: *R. v. L.L.J.*

State of the Law

Section 718.2(e) of the *Criminal Code* deals with the purpose and principles of sentencing. These provisions direct the court to consider alternatives to incarceration for all offenders, with particular attention to the circumstances of Aboriginal offenders: *R. v. Gladue.*

Practice Notes

You need to know what is available for your client in terms of mainstream restorative justice models and Aboriginal restorative justice models. The following may give you an idea of what to look for.

**How does an offender take part in restorative justice alternatives?**

Cases may be accepted as diversions from traditional court proceedings, as a sentencing option, or after completion of formal court proceedings.

The offender has a choice whether or not to participate.

The victim may also participate, but always on a voluntary basis.
Typically, a facilitator (mediator or panel) brings the offender and the victim together and gives each the opportunity to tell his or her story, ask and answer questions, and discuss how the offender may repair the harm done to the victim.

**Mainstream restorative justice models**

A number of restorative justice models apply. The following are not intended to deal with serious offences or property offences.

**Victim-offender reconciliation**

The victim-offender reconciliation model brings the victim and the offender together with a trained mediator in a neutral environment to discuss the offending behavior. The aim is to have the offender explain his or her actions and learn to take responsibility for his or her behavior. This model helps the victim express his or her feelings to the offender, and to achieve a sense of closure.

**Family group conferencing**

The family group conferencing model brings together the victim, the offender, and their respective support groups with a trained facilitator. In some cases, the investigating police officer participates to confirm the facts. The group works to reach a consensus and to agree on what the offender needs to do to address his or her behavior and repair the harm done. This model has been used with Aboriginal offenders: *R. v. McKay*.

**Neighborhood accountability panel**

The neighborhood accountability panel (also called the Community Accountability Panel) is convened to determine appropriate sanctions for offenders who have committed crimes in the community. The panel consists of community members who meet with the offender and with the offender’s family. The victim and the victim’s support group are encouraged to participate. The panel attempts to identify and address some of the underlying issues that may be contributing to the criminal behavior. The panel then decides upon appropriate measures for reparation. An agreement is drawn up, and a panel member is chosen to act as a mentor for the offender and to ensure that the terms of the agreement are met.
What sentencing alternatives are specifically for Aboriginal offenders?

Aboriginal restorative justice models rebuild and restore balance to relationships and to communities collectively dealing with the aftermath of criminal offences.

Section 718.2(e) of the Criminal Code now recognizes the possibility of alternatives to sentencing for all offenders “with particular attention to be given to the circumstances of Aboriginal offenders.” While this section does not automatically create a reduction in sentence, it does recognize the serious over-representation of Aboriginal peoples in prisons. It encourages judges to take a restorative justice approach in sentencing Aboriginal offenders by considering his or her background and sentencing other than incarceration.

The Supreme Court interpreted s.718.2(e) of the code in the Gladue case. It found that a specific reference to Aboriginal offenders in this section requires sentencing judges to pay particular attention to the circumstances of Aboriginal offenders and to consider restorative justice measures in place of traditional sentencing principles. The sentencing judge must also consider the systemic or background factors relevant to Aboriginal offenders and decide the appropriate sentencing for the offender.

The courts must recognize past and present systemic and overt discrimination.

How does an offender qualify for sentencing alternatives?

- The offender self-identifies as an Aboriginal person.
- The offender provides some evidence of how being Aboriginal has contributed to his or her being in court.
- The court determines that s.718.2(e) of the code applies and considers:
  - Unique systemic or background factors to the offence
  - Overt/direct/systemic discrimination, current and historical
- Someone who understands the Aboriginal issues involved, if required, prepares a pre-sentence report.
- The court considers sentencing models appropriate to the offender’s Aboriginal heritage.
What do you need to know about the pre-sentence report?

- The court may consider a pre-sentence report in addition to oral submissions at the sentencing hearing.
- If the court requires a pre-sentence report, someone with knowledge and understanding of Aboriginal peoples should prepare it. That person should also know about the resources available to the client.
- It may be useful for you to meet with the Native courtworker, family members, and elders in the Aboriginal client’s community in a mutual effort to prepare a report or prepare witnesses to give evidence at the sentencing hearing.

What should the pre-sentence report include?

A pre-sentence report involving an Aboriginal community may include:

- Family involvement – what the family is willing and able to provide in terms of support for the offender’s rehabilitation and restoration to the community.
- Community support – what the community has to offer in terms of supporting, counseling, and monitoring the offender.
- Community involvement – the recommendations of the chief and council, elders, and family members for the restoration of the offender to the community.
- Victim involvement – what will make the victim feel safe and facilitate his or her healing and restoration.

What Aboriginal restorative justice initiatives are available for your client?

Aboriginal communities have restorative justice traditions that have been adapted in culturally meaningful ways and applied to the criminal justice system. They may be community- or family-driven.

You may get information about Aboriginal restorative justice either in the community where the offence occurred or in the offender’s own community. The following places may have information: Crown counsel’s office, Native courtworkers, probation services, friendship centres, the local band office, and the offender’s band office.

If no restorative justice programs exist in your client’s community, that fact does not negate the judge’s duty to review alternative initiatives and craft sentences in accordance with an Aboriginal perspective.
Note that the role of restorative justice in a sexual assault case may or may not be appropriate based on the safety of the community: R. v. J.(C.); R. v. T.(W.B.).

**Aboriginal restorative justice models include:**

1. **Circle sentencing**

   Circle sentencing was one of the first applications of Aboriginal restorative justice to be recognized by the courts: R. v. Moses.

   A sentencing hearing is conducted in a circle with the court and the community. Together, they try to achieve consensus on an appropriate sentence that will shift the focus from punishment to rehabilitation. The judge has exclusive power to impose the sentence: R. v. Morin. However, the goal of circle sentencing is to promote meaningful community involvement and consensus among the participants.

   The specific circumstances of both the offence and the offender must be considered in each case: R. v. Moses. Circle sentencing requires a considerable investment of time and resources. R. v. Joseyounen established factors for courts to consider before ordering a circle sentencing:
   - The accused must agree to the circle.
   - The accused must have deep roots in the community in which the circle is held and from which the participants are drawn.
   - Elders and respected non-political leaders must be willing to participate.
   - The victim must be willing to participate.
   - In the case of a battered spouse, the victim must have counseling available and be accompanied in the circle by a support team.
   - Disputed facts should be resolved before the circle is held.
   - The case must be one in which the court is willing to take a calculated risk and impose something other than a prison term.


2. **Sentence advisory committee**

   Sentencing circles that include neither victim nor judge may function as pre-sentence advisory committees for the court, where the judge refers cases to the community for a recommendation on sentence: R. v. Rich.
3. Elders’ or community sentencing panel

The elders’ or community sentencing panel allows local community members to sit with the judge. These community members assist in the disposition and sentence of criminal matters, provide information on each offender, and advise on sentencing. A case where the judge noted the submissions of the community: R. v. P.(J.A.).

4. Community mediation committee

This model facilitates the complete diversion of criminal offenders from the court system. These committees provide disposition and resolution of criminal actions without criminal sentences. This is the only model that allows local community members to have the final decision on disposition.

Diversion

Section 717(1) of the Criminal Code or s.4 of the Young Offenders Act, and the discretion of the Crown, provide the basis for diverting adults and young offenders into alternative processes. For diversion, the offender admits to having committed the offence.

For example: In Vancouver, the Crown prosecutor, at his or her sole discretion, may divert criminal charges for accused Aboriginal people before trial to a Transformative Justice Program at the Vancouver Aboriginal Friendship Centre Society, 107 – 1607 E. Hastings Street. This program focuses on changing offender behavior, reconciliation between offender and victim, and compensation for victims.

Firearms Issues

Is the client facing charges involving firearms?

The client may be facing charges under the provincial Firearms Act.

The loss of firearms and the prohibition of firearms could cause the Aboriginal person extreme and undue hardship by impairing his or her ability to provide food for the family.

In such situations, the case may be covered by the LSS Aboriginal Case Coverage Committee.

This committee functions as an exemption review for hunting and fishing cases, and in other cases where an individual has been charged with a
regulatory offence under provincial or federal legislation and an Aboriginal rights defence is asserted.

Consider making a pre-hearing application to restore seized articles in hunting and fishing cases based on necessity.

**Note:** The court may not be willing to hear an Aboriginal rights submission at a pre-hearing application, as Aboriginal rights evidence will not be addressed until trial.

**Prohibition orders and Aboriginal right to hunt or fish**

At trial, the court may be required to impose a mandatory prohibition order. Or it may consider a discretionary prohibition based on safety concerns and order the prohibition under ss.109 and 110 of the *Criminal Code*.

The offender may argue that the court should consider the Aboriginal right to hunt or fish for sustenance by modern method when determining whether a prohibition of firearms is appropriate.

In *Chabot*, the Aboriginal offender pleaded guilty to robbery involving the use of a firearm. The court considered the Aboriginal offender’s cultural significance of engaging in traditional hunting activities and s.718.2(e) of the code. It did not impose a firearms prohibition: *R. v. Chabot*.

**Application to revoke a prohibition order**

After a trial in which a prohibition order was granted, the client may apply to revoke a prohibition order where there is no longer a public safety risk, or may apply to lift a prohibition order for sustenance or employment purposes under ss.112 and 113 of the code.

**Getting the exhibits back**

After a trial where an item such as a firearm was used as a court exhibit, the owner of the firearm is responsible for making the arrangements to get it back. In most cases, the owner must contact the court registry after the appeal period to arrange for the return of the firearm.

In civil cases, the judge may order that the owner be allowed to retrieve his or her property immediately following the court proceedings.

In criminal cases, the exhibits will not be returned until the appeal period has expired, unless the Crown and defence counsel agree in writing that no appeal will be filed and that the exhibits maybe returned immediately.
no arrangements are made, the court registry will keep the exhibits for one year and then dispose of them.

If the police have items that have not been used as court exhibits, the owner must deal directly with the police department or detachment to have the items returned.

Definitions

“Aboriginal” means the Aboriginal peoples of Canada, including Indian, Inuit, and Métis as defined by s.35(2) the Constitution Act, 1982.

Relevant Legislation

Constitution Act, 1982, s.35(12), being Schedule B to the Canada Act, 1982 (U.K.), 1982, c.11.

Cases Cited

(Nfld.S.C.)

Resources


4

Debt Collections and Contracts

Common client problem

- Is a contract or debt enforceable against the client’s property located on reserve?
Summary

This chapter deals with native issues that relate to consumer contracts and debt collection. It looks at the sections of the Indian Act that protect debtors’ real and personal property on reserve.

State of the Law

Creditors cannot always rely on provincial legislation to enforce payment of debts owed to them by band members living on reserve.

Sections 29 and 89 of the Indian Act protect the assets of these debtors from seizure, garnishment, and liens. The exemption created by these sections of the act involves personal property or interest in land on reserve.

Practice Notes

• **Is the contract valid?** Contracts may be oral or written and must have an offer, acceptance, consideration, communicated agreement on acts and promises, and *certainty* on essential terms.

  If your client entered into an oral contract, find out what was said by both parties and whether an agreement was reached. If your client entered into a written contract, review the contract thoroughly. A good resource in which to review contract common law is the book *The Law of Contract in Canada*.


Examples of what to do if:

  - The client has entered into a contract for goods or services, and now wants to get out of the contract.

    Look at the Consumer Protection Act, which provides some specific rights to cancel a contract (beyond the general rights at common law). For example, the act creates a ten-day cooling-off period from door-to-door salespersons. The consumer may cancel the contract during this period.
The client wants to complain about being treated unfairly by a business, for example, a salesperson who made false promises about the condition of a car.

The Trade Practice Act prohibits deceptive or unconscionable acts or practices before, during, and after the transaction. The act gives the court the power to award the consumer damages. Note that by authority of this act, the Small Claims Court has exclusive jurisdiction.

The client wants to complain about a violation of an unsecured contract.

If there has been a violation of the provincial acts governing unsecured consumer contracts and transactions, the client may complain to the Consumer Services Program, Ministry of Public Safety and Solicitor General. The program has offices in Burnaby, Cranbrook, Kamloops, Kelowna, Prince George, and Victoria. The director has a wide range of authority to enforce these provincial acts.

The client has a problem related to secured goods. For example, the client might be worried about a lien.

If you are dealing with payments under a security agreement, get a copy of the security agreement from the client and consult the Personal Property Security Act. This act regulates secured consumer contracts and establishes a uniform system for the registration, priority and enforcement of secured loans and credit transactions in BC.

Consumers who think creditors are not acting in good faith or in a reasonable manner may claim damages under this act through a court action. A good resource in which to review secured transactions is the British Columbia Personal Property Security Act Practice Manual.

Consumer contracts may include conditional sales, in which the contract for lease or sale of goods stipulates that ownership or possession of the goods remains with the seller until conditions of the contract are fulfilled. Usually, the condition is payment in whole or part of the contract price for the goods. When the conditions are fulfilled, the purchaser acquires ownership of the goods.

The client has a credit problem. For example, the client has been turned down for credit and says that the credit report is unfair.

The Privacy Act and the Credit Reporting Act protect consumers from a creditor’s use of the credit rating system. For example, a credit check done without a consumer’s knowledge or consent
violates his or her right to privacy. The Credit Reporting Act regulates credit-reporting agencies, facilitates granting of credit by insisting on up-to-date and reliable information, and limits access to consumer credit reports.

- **The client is being harassed by a debt collector.**

  Consumers are protected from methods of collection that include:
  
  - Collecting from the wrong person
  - Contacting family, friends, and neighbors
  - Harassing phone calls
  - Visiting the debtor at work and talking to the debtor’s employer
  - Criminal rates of interest
  - Demands after the debt is paid.

  The Criminal Code and the Debt Collection Act provide protection from these methods of collection.

- **The client’s debts are out of control.**

  Consumers may receive aid and counseling for debts from the Debtor Assistance Branch, Ministry of Attorney General. The Debtor Assistance Act provides for debt counseling, creditor mediation, debt pooling, and debt consolidation. The Bankruptcy and Insolvency Act provides for conditional reorganization. Some consumers may be unable to pay their debts and may have to claim bankruptcy.

- **The client wants to go to court to seek a consumer remedy or to collect a debt. To which court does the client go?**

  Court actions for consumer contracts and debt collections under $10,000 may be begun or defended in the BC Provincial Court (Small Claims Court, Civil Division) under the Small Claims Act.

  Court actions over $10,000 may be begun or defended in the BC Supreme Court under the Rules of the Supreme Court of Canada (in force June 28, 2002).

  For amounts under $10,000, your client would probably choose Small Claims Court: the process is quick, it costs less, and the rules are not complicated.

  The court rules and common law provide procedures for: pre-judgment remedies, obtaining judgments, post-judgment collections, and enforcement. Judgments without civil court actions may be under the jurisdiction of the Criminal Code and the Creditor Assistance Act.
Native Issues

The general laws of consumer contracts and debt collections apply to Aboriginal peoples, except where the laws conflict with the Indian Act.

Section 89 of the act protects the personal property and land interest on reserve of the band and of the individual. This exemption was created to protect the land base, and the assets of the debtor from seizure, garnishment, and liens by anyone other than a status Indian or a band.

What does the exemption for real and personal property mean for the client?

In order for a client to qualify for the exemption provided by s.89(1) of the Indian Act, the client must be an Indian as defined in the act and his or her property, including designated lands, must be situated on reserve: Canadian Imperial Bank of Commerce v. E. and S. Liquidators Ltd. Membership in the band where the property is located is not required.

The creditor must be a person other than an Indian or a band.

A creditor, other than an Indian or a band, may not charge, pledge, mortgage, attach, levy, seize, distress, or execute against the property of an Indian on reserve. This exemption does not apply to incorporated companies such as tribal councils or Aboriginal organizations: Johnson v. West Region Tribal Council; R. v. National Indian Brotherhood.

A creditor who is an Indian or a band may:

- Charge
- Pledge
- Mortgage
- Attach
- Levy
- Seize
- Distress
- Execute against the property of an Indian or a band on reserve
What happens if a creditor threatens garnishment or seizure of personal property of a client on reserve (or has already garnished or seized)?

In this instance, notify the creditor in writing that the property at issue is exempt under s.89(1) of the Indian Act. If the property has already been garnished or seized, request that the creditor return the property.

If the creditor does not return the property, you may apply to the court for a declaration that the property was situated on reserve and seek damages against the creditor.

If the creditor is an Indian, all proceeds of the garnishment or seizure must be in favor of that Indian.

What if the collection agent is Indian?

Some creditors have assigned debts for the purpose of collection to an Indian. If a collection agency is owned by an Indian, look at the corporate structure of the agency in order to establish whether the agency may be considered an Indian.

If you have established that an Indian is attempting the collection, ask to review the agreement between the Indian collection agent and the original creditor. Any percentage of the debt that requires the collection agent to pay the non-Indian creditor remains exempt from seizure.

For example, in *Alberta (Workers’ Compensation Board) v. Enoch Band*, the assignment of a debt to an Indian did not trigger an s.89(1) exemption from seizure. In this case, all the money collected was going to be paid to the creditor.

If the collection agency has prepaid the creditor for the assignment of a debt, this may satisfy the requirement of s.89(1) that the debt is owed to an Indian.

A collection agency is liable for any damages caused by its collectors. In *Syrette v. Sewell*, police officers were ordered to pay damages where the court found that the seizure of a vehicle was prohibited by s.89(1) of the Indian Act.
How do you know if the personal property is “deemed to be” on reserve?

The real and personal property of an Indian or a band must be on reserve to be exempt from collection. The Indian need not be on reserve: *Williams v. Canada*.

Whether personal property is on reserve depends on the specific circumstances of each case: ss.29, 87, 89, 90 of the *Indian Act*. These sections confirm the Crown’s duty to protect the property of Indians from dispossession by non-Indians: *Mitchell v. Peguis Indian Band*. Take a fair and liberal approach when determining whether the property is situated on reserve: *Metlakatla Ferry Service Ltd. v. B.C. (Gov’t)*; *Nowegijick v. R*.

To decide the location of property, examine the pattern of use and safekeeping of the property. If the main location is on reserve, the property is situated on reserve, even if it is used off reserve: *Leighton v. B.C. (Gov’t)*. An exception to the “paramount location” doctrine is the receipt of money on reserve. In this instance, the court will consider whether the activity that generates the income is on or off reserve: *Recalma v. Canada*; *Dykstra v. Monture*.

A good resource guide for determining whether property is located on reserve is *Native Law*, by Jack Woodward.

How do you know if personal property is “deemed situated on reserve”?

Some personal property is “deemed to be on-reserve” by s.90(1) of the *Indian Act*, including:

- [Personal property] that was purchased by [the Crown] with Indian monies or monies appropriated by Parliament for the use and benefit of Indians or bands
- [Personal property] given to Indians or to a band under a treaty or agreement between a band and [the Crown]
- Money appropriated by Parliament for the use and benefit of a band, which is exempt from attachment even if is deposited in a bank that is situated off reserve: *Fricke v. Moricetown Indian Band*.

If the money is provided by an agreement or treaty between the client and the Minister of Indian Affairs and Northern Development and is used to purchase property, the property should be considered exempt; even if the property leaves the reserve, it is not subject to seizure: *Kingsclear Indian Band v. J.E. Brooks and Associates Ltd.*
What if the client has waived his or her rights to the section 89 exemption?

The validity of a waiver of a s.89 exemption against the parties who signed the contract has not been tested. A waiver may be valid over the business property of an Indian on reserve: *L. Martin (1984) Inc. v. Shubenacadie Indian Band v. Francis*.

Some creditors will ask the debtor to sign a waiver over specific property and ask the band to provide a Band Council Resolution (BCR) to allow the creditor to enter the reserve and remove the property. However, such a waiver is specific to the party/creditor to which it was given: *Kingsclear Indian Band v. J.E Brooks and Associates Ltd*.

What other remedies do creditors have?

The act does not prevent other remedies against an Indian or a band. Court orders may be obtained against Indians and may be enforced by creditors.

Indians may be required to attend payment hearings so that the judgment creditor may establish the judgment debtor’s off-reserve assets and his or her ability to pay. If an Indian does not have property or interests off reserve, the on-reserve property will still be exempt from seizure: *Campbell v. Sandy*.

What if the client has a conditional sales contract?

The seller may retain the right to execute against property that is otherwise exempt from seizure.

**Section 89(2) of the Indian Act states:**

A person who sells to a band or a member of a band a chattel under an agreement whereby the right of property or right of possession thereto remains wholly or in part in the seller may exercise his rights under the agreement notwithstanding that the chattel is situated on a reserve.

Whether the conditional sale conforms to the provisions of s.89(2) of the act depends on the wording of the contract.

The property must be in the possession of the creditor or owned by the creditor at the time of collection. If the debtor has fulfilled the conditions of the sale, the debtor immediately acquires property ownership. A creditor cannot execute against the personal property of an Indian under s.89(1) of the *Indian Act*. 
If your client has defaulted under the terms of a conditional sales contract and a court order is granted for recovery of the property, a sheriff acting under the authority of the court order is entitled to enter the reserve and execute the order: *R v. Bernard*.

**What if the client has made a security agreement?**

The provisions of s.89(2) of the *Indian Act* do not protect secured interests in property.

Under the *Personal Property Security Act*, a security agreement creates a secured interest in personal property for creditors upon registration. It provides for the enforcement of security agreements against the personal property.

You should ensure that the agreement and enforcement conform to the requirements of the *Personal Property Security Act*. For example, if two-thirds or more of the total amount secured is paid, the creditor cannot seize the personal property without obtaining a court order.

A secured interest does not create ownership or possession for a creditor required by s.89(2) of the act. Therefore, s.89(1) protects the personal property of an Indian debtor situated on reserve that is the subject of a registered secured interest of a creditor. For example, a creditor may have a secured interest in a vehicle of an Indian debtor. If the Indian debtor defaults, the secured creditor still cannot enforce the security agreement on reserve, for example, by taking possession of the vehicle if the vehicle is situated on reserve. Such an agreement can be enforced only off reserve.

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**Definitions**

“Collateral” means personal property including goods, securities, instruments, documents of title, chattel paper, intangibles, money, crops, or licences that are the subject of a security agreement.

“Commercial reasonableness” means a general concept applicable to all conduct in relation to a security arrangement that may be characterized as the actions of a reasonably prudent business person in similar circumstances. See McLaren, *Secured Transactions in Personal Property in Canada*.

“Conditional sale” means a contract for the sale or lease of goods where ownership or possession of the chattel remains with the seller until the
conditions of the contract are fulfilled, usually payment in whole or part: s.89(2) of the Indian Act.

“Designated reserve land” means reserve land for which the band has released or surrendered its rights or interests in the land: s.2(1) of the Indian Act.

“Security agreement” means a written agreement that provides for a security interest in the debtor’s property or collateral to secure repayment of the debt for the creditor or secured party: s.1 of the Personal Property Security Act.

“Secured transaction” means a security agreement registered with the Personal Property Registry in BC: s.1 of the Personal Property Security Act.

“Unsecured transaction” means a transaction without a security agreement or interest.

**Relevant Legislation**

*Credit Reporting Act*, R.S.B.C. 1996, c.81.
*Creditor Assistance Act*, R.S.B.C. 1996, c.83
*Rules of the Supreme Court of Canada*, SOR/2002-156.
Cases Cited


Campbell v. Sandy, [1956] 4 D.L.R.(2d) 754 (Ont. Co. Ct.)


Metlakatla Ferry Service Ltd. v. B.C. (Gov’t) (1987), 12 B.C.L.R.(2d) 308; [1987] 2 C.N.L.R. 95 (B.C.C.A.)


5
Employment Law

Common client problems

- The client’s employer has failed to pay standard benefits.
- The client has been dismissed from his or her employment position with an Aboriginal organization.
Summary

This chapter deals with employment law relating to Native issues. The major question is: Does federal or provincial legislation apply? In general, the Canada Labour Code regulates employment by band councils and employment activities specific to Aboriginal peoples.

State of the Law

Both federal and provincial law regulate the area of employment.

- Federal laws such as the Canada Pension Plan and the Employment Insurance Act apply to all employment relationships.
- The nature of the work determines which legislation applies to a specific employment relationship.
- Terms for employment relationships are regulated by either federal or provincial legislation.
- Employment disputes may include: contractual issues, collection problems, human rights complaints, labor law issues, and small claims court matters.

Native Issues

There are no provisions in the Indian Act regarding employment law. Federal or provincial legislation may apply, depending on the employer and location of the employment.

- Canada Labour Code is a federal legislation that applies to a “federal work, undertaking or business” that is within the legislative authority of Parliament: s.2 of the Canada Labour Code, s.91(24) of the Constitution Act, 1867.
- Employment Standards Act is a provincial legislation that applies to most employment relationships in British Columbia.

The code and the act have different employment and appeal processes. The code contains a reinstatement provision that is not found in provincial legislation.
**Exceptions:** If the band council has passed a by-law, or if the band has negotiated self-government (by federal legislation or modern treaty), the band council may have the authority to control employment relationships on reserve.

**Practice Notes**

**Does federal or provincial law apply?**

- Find out who the employer is. Is the client employed by the band?
- Identify the client’s duties or activities. Are the majority of the duties directly or indirectly related to the administration and operation of the band (for example, maintenance and services)? Is the band council responsible for the distribution of the service?

**Note:** Indian status and band membership is not at issue when determining whether federal or provincial laws apply.

In the following cases, the code covers employment relationships in areas of federal jurisdiction:

- The normal operations and activities of a band by authority of the *Indian Act* are considered “federal work, undertaking or business,” and the band council is considered an employer: *Code; Public Service Alliance of Canada v. Francis; Paul Band v. R.*

- The code applies to Indian school boards operating schools on reserve: *Manitoba Teacher’s Society v. Fort Alexander Indian Band, Chief and Council.*

- The code does not apply to employment on reserve where the activity is not specific to Indians, or does not have some element of “Indianness” to bring it under federal jurisdiction: *Four B Manufacturing Ltd. v. United Garment Workers of America.*

- If your client is employed by a private business or the activities are not a “federal work, undertaking or business” and not specific to Indians, then the act applies to the employment relationship, even though the employment activities may be carried out on reserve.
Does the client have a grievance with his or her current employer?

- Review the written agreement that sets out the terms and conditions of your client’s employment. That agreement cannot be altered unless the employee and employer both agree.

- Review the employer’s policies, procedures, and manuals about employees, including staff notices and Band Council Resolutions (BCRs). The employer’s policies and procedures will form part of your client’s employment agreement, but only if the policy was accepted by the employee clearly as forming part of the agreement, or if the employee was given adequate notice of the policies and procedures.

- Review legislation. The code and the act contain minimum employment standards. If the employer has failed to pay overtime, severance, or holiday pay, has not met safety standards, or has allowed harassment, your client may wish to pursue a complaint. This may be done either through the inspector, by authority of the Criminal Code (Part III) (various limitation periods), or by the Employment Standards Branch (six-month limitation). You need to review other legislation, such as the Employment Insurance Act, Workers Compensation Act, etc.

- Review case law. Common law concepts such as breach of trust apply to employment relationships with band councils. For example, employees cannot undermine the services expected of a public body and should not publicly criticize the policies of the band or tribal council: Roseau River Tribal Council v. James and Nelson. Your client may wish to pursue a court action. In that case, review the applicable court rules for limitation periods and filing procedures.

- Review federal or provincial human rights legislation to determine whether your client has been the victim of discrimination. For example, a band council cannot discriminate against an employee who practices traditional native spirituality: Charles v. LacLaRonge Indian Band. Your client may wish to pursue a human rights complaint, and has one year (limitation period) in which to do so.

- Determine whether your client is a union member and eligible for union representation. Your client is entitled to fair representation and may want to obtain a remedy from the federal or provincial labour relations board.

Has your client been dismissed?

If your client has been dismissed, gather all information surrounding the employment (as outlined for grievances).

Has your client been constructively dismissed by recategorization, demotion, humiliation, lower benefits, job title, or changes to reporting? Because the band council does not hire or dismiss employees as an agent of the Crown,
a court action against a band for specific or wrongful dismissal need not be pursued in Federal Court: Bear v. John Smith Indian Band Chief; Chadee v. Norway House First Nation.

If your client is covered by the code, ask for the employer’s reason for dismissal in writing.

**What were the steps that led up to the dismissal?**

The decision to dismiss long-term employees must result from properly organized band council meetings: Gullstrom v. Tlowitsis-Mumtagila First Nation; Brougham v. Carrier-Sekani Tribal Council. Band councils are bound by the rules of natural justice, and the Federal Court may review their decisions.

**Procedure if your client is covered by the code**

When you ask for the employer’s reasons for dismissal in writing, the employer has fifteen days to respond to your request.

Your client has **ninety days** from the date of the dismissal to file a complaint with Labour Canada, which will attempt to settle the matter before referring the complaint to an arbitrator.

**An arbitrator may order an employer to:**

- Reinstate the employee
- Compensate the employee for lost wages with or without reinstatement
- Delete from the employee’s personnel record any reference to the dismissal.

**Judicial review**

Your client has **thirty days** to file for a judicial review from the date of the arbitrator’s decision, or from the date he or she received the band council decision: Federal Court Act. The grounds for judicial review are quite limited, and may be found under s.18.1 of the Federal Court Act. Review thoroughly the merits of a judicial review before advising a client to proceed.

**Mitigation of damages**

At common law, your client is required to minimize damages suffered from a breach of his or her employment contract. However, there may be a problem with collecting from a band or an Indian on reserve. See Debt Collections and Contracts.
**Keep records**

Advise your client to keep detailed records of job searches, medical documentation (that may exclude him or her from job searches), and conversations and interviews with prospective employers. These records are required for employment insurance applications and human rights complaints.

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**Definitions**


“Employee” means a person who has agreed to work for an employer in an employment relationship.

“Employer” means a person, company, society, organization, or band that has employed a person.

“Employment agreement or contract” means an oral or written agreement concerning the employment relationship, such as hours, duties, location, pay, and benefits.

“Federal work, undertaking or business” means any work, undertaking, or business that is within the legislative authority of Parliament.

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**Relevant Legislation**


Cases Cited


Resources


6
Family (Non-Tariff)

Common client problems

- Does a child adopted by custom have the same status as a child adopted under provincial law?
- Can a non-band member claim assets on reserve in a “division of family assets”?
Summary

This chapter provides an overview of Native issues surrounding family law. These issues include: child welfare, custom adoption, custom marriage, custody, family access, family maintenance, and enforcement because of a family breakdown.

Native Issues

Child welfare

The purpose of the provincial *Child, Family and Community Service Act* is to protect children in British Columbia from abuse and neglect, and to ensure their safety and well-being.

Does the Aboriginal community have authority?

The act is applicable to Aboriginal children living both on and off reserve. However, for children’s welfare in a particular Aboriginal community, the authority is delegated in the following circumstances:

- The Aboriginal community has authority delegated by the act. For example, the Nuu-chah-nulth Tribal Council provides child welfare services for all band members and their children who live in BC, either on or off reserve.

- The band council has enacted by-laws with the approval of the minister in charge of child welfare on reserve. Once the by-laws are enforced, the court will not interfere with the band council’s jurisdiction, nor will the provincial laws apply to the band members and their children who live on reserve lands: *Section (E.G.) v. Spallumcheen Band Council.*

- The Aboriginal community has a treaty right to pass and administer child welfare laws through its own institutions. In BC, the *Nisga’a Final Agreement* provides that the *Nisga’a Lisims Government* (the government of the Nisga’a Nation described in the Nisga’a Constitution) may make laws about child and family services that are comparable to provincial standards: *Nisga’a Final Agreement.*

Protocol agreements: Regardless of the authority of child welfare, band councils and tribal organizations have developed protocol agreements and established working practices with the Ministry of Children and Family Development.
The protocol agreement permits the Aboriginal community to provide child protection services in place of the ministry. Other band councils have developed agreements with the federal government where the band council has absolute responsibility for child welfare services on reserve.

**Who must be notified when an Aboriginal child is apprehended?**

By authority of the *Child, Family and Community Service Act*, the ministry is obliged to notify an apprehended child’s Aboriginal community, band council, or tribal organization representative.

If the representative decides to participate, he or she is a party to the action and has a right to:
- Receive all records and information
- Speak at the hearing
- Call witnesses and question other witnesses
- Participate in any mediation
- Propose support for the child’s parents or suggest another culturally appropriate plan for the care of the child.

**What is the role of the band?**

While bands are not persons capable of having custody of a child, the Aboriginal community representative may support the child or have access to the child: *Tom v. Children’s Aid Soc. (Winnipeg); Re C. and V.C.*

**What does the Child, Family and Community Service Act say about Aboriginal identity?**

By authority of the *Child, Family and Community Service Act*, the ministry must include steps to preserve the child’s Aboriginal identity while the child is in care.

The Aboriginal child’s cultural identity is only one factor in determining the best interests of the child and is evaluated by the courts, depending on the particular circumstance of each case: *N.H. and D.H. v. H.M. and M.H.*

**Custom adoption and marriage**

In cases concerning customary adoption and marriage, courts have upheld Aboriginal custom. The courts have held that “vested rights are not to be taken away without express words or necessary intendment [intent] or implication”: *Re Noah.*
This presumption against interference with vested rights is further strengthened by the “clear and plain test” for extinguishment of Aboriginal rights set out in Delgamuukw.

**What laws apply when non-Native parents adopt an Indian child?**

When non-Native parents adopt an Indian child, provincial adoption laws apply, but the adoption does not affect the child’s Indian status. If the child is not registered as a band member at birth, there may be problems relating to the band’s by-laws and membership code.

**What happens with Aboriginal custom adoption?**

Custom adoption is an important aspect of Aboriginal societies, and is common in Aboriginal communities. Each community has developed its own procedures for custom adoption.

**Decisions by the courts:**

Adoptions made in accordance with Native custom have not been abolished: *Re Adoption of Katie.*

The following criteria apply to a custom adoption:

- There is consent of the natural and adopting parents.
- There is voluntary consent of the child to be placed with the adopting parents.
- The adopting parents are Native or entitled to rely on Native custom.
- The rationale for Native custom adoptions is present in the case: *Re Tagornak Adoption Petition.*

The relationship created by custom is fundamentally the same relationship as that resulting from an adoption order made by authority of the Adoption Act. Section 46(1) of the act provides that, on application, the court may recognize that an adoption of a person by the custom of an Indian band or Aboriginal community has the effect of an adoption under this act. Section 46(2) does not affect the person’s Aboriginal rights: *Re B.C. Birth Registration No. 1994-09-0430399.*

**The Indian Act recognizes the practice of customary laws**

The definition of “child” includes a child adopted in accordance with custom. Amendments to the Indian Act have extended the entitlement of Indian status to children who are adopted by custom.

In addition to legislative recognition of custom adoption, custom adoption constitutes an Aboriginal right within the meaning of s.35(1) of the
Constitution Act, 1982, once it is established to be “an integral part of the distinct culture” of the Aboriginal community: Casimel v. Insurance Corporation of British Columbia.

**What are the procedures in a custom adoption?**

The Registrar is obligated to respond to an application for registration on the basis of Indian custom adoption and to make a decision on eligibility.

Affidavits from the natural parents, the adoptive parents, the band council, and elders should accompany an application for registration on the basis of customary adoption. The affidavits should state the custom for adoption, and that the applicant was adopted in accordance with that custom. Any other supporting documentation should be submitted with the application. For example, s.13(1) of the Adoption Act states that:

> 13 (1) The consent of each of the following is required for a child’s adoption:

- (a) the child, if 12 years of age or over;
- (b) the birth mother;
- (c) the father;
- (d) any person appointed as the child’s guardian.

**What you need to know about customary marriage**

Section 91(26) of the Constitution Act, 1867, states that “Marriage and Divorce” are federal powers, and s.92(12) that “solemnization of marriage” is a provincial power. The courts have recognized customary marriages and divorces since 1867: Connolly v. Woolrich; R. v. Nan-e-quis-aka.

The common law recognized customary marriage as marriage that is not solemnized in the ordinary way, but that creates an agreement to marry followed by cohabitation. Once a customary marriage is established, the parties are entitled to family law remedies upon marriage breakdown.

The Indian Act no longer accepts marriage of any type as a basis for entitlement to Indian status.

**Family breakdown**

If the partners are married, the federal Divorce Act applies to custody, access, and maintenance. However, the provincial Family Relations Act applies to the division of assets, and may also apply to custody, access, guardianship, and maintenance if orders are obtained under this act.
If the partners are in common-law marriage, the *Family Relations Act* governs custody, access, guardianship, maintenance, and division of assets.

**What you need to know about custody and access**

The *Family Relations Act* and the *Divorce Act* regarding custody and access apply to Aboriginal parents.

- The primary consideration in determining custody and access is the best interests of the child.
- Custody, access, and guardianship may be granted to grandparents, stepparents, aunts, and other extended family members.
- Aboriginal parents may want to ask an elder or leader in their community to assist in making mutually satisfactory arrangements.
- If the Aboriginal parents cannot agree, they may seek a court order for custody, access, and guardianship through the standard court procedures.
- The court may allow the band social worker to do a home study, and may take into consideration support that either party has from his or her Aboriginal community.
- Aboriginal communities do not have jurisdiction over custody, access, and guardianship of Aboriginal children. However, the U.S. encourages tribal jurisdiction, and an Alberta court has recognized and enforced such a custody order: *Vielle v. Vielle*.

**What about the division of family assets at family breakup?**

When a couple separates the property accumulated during the marriage may be divided between the spouses: s.66(1) *Family Relations Act*. Family property consists of land, money, pensions, and business interests. Legally married people who are separating are entitled to half of each of the family assets.

This act applies to Aboriginal people living on or off reserve, with the exception of real property located on reserve. The purpose of the exemption is to protect the Indian land base.

- Courts have found remedies under the act concerning reallocation of reserve lands, including the matrimonial home, to be invalid: *Derrickson v. Derrickson*.
- Courts may divide the family assets that do not include interests in reserve lands, and may make an order for compensation in lieu of a division of family assets on reserve lands: *George v. George*.
- Courts may also make orders restraining a spouse from interfering with possession of the matrimonial home on reserve lands.
If a band is a party to the *First Nations Land Management Act*, it is under an obligation to establish general rules and procedures addressing the occupation of the matrimonial home upon a marriage breakdown. This amendment to the *Indian Act* is being challenged on the basis of breaches of s.15 of the *Charter of Rights and Freedoms*, and under breaches of the Crown’s fiduciary duty to Aboriginal women: *British Columbia Native Women’s Society v. Canada*.

**Family maintenance and enforcement**

When a family breakdown occurs, both parents have an obligation to support the children of the marriage, whether or not they were married at the time of the births.

In addition to child support, courts may order spousal maintenance under the *Family Relations Act* or the *Divorce Act*. These acts have different terms, including the definition of a “child.” The court may distribute income or gross-up income in determining amounts payable for support when the payer is receiving tax-exempt income as a status Indian: *LeBourdais v. LeBourdais*.

Maintenance orders may be enforced by the spouse who obtained the order (with assistance from counsel, if necessary), or through government programs. In BC, under the *Family Maintenance Enforcement Act*, the Family Maintenance Enforcement Program (also known as FMEP) monitors, collects, and enforces support payments on behalf of recipients who are enrolled in the program. This service is free.

The Director (of FMEP) has the power to “attach” or “garnish” income, including wages, workers compensation benefits, bank accounts, pensions, rental income, federal money owing to the payer, or other income or assets.

Under the *BC Benefits Statutes Amendment Act*, people who receive benefits “assign their maintenance rights” over to the Crown for collection and enforcement. This means that the government may obtain, change, and enforce maintenance orders. When maintenance orders are paid on time, clients receive incentive payments.

These are acts of general application, and apply to Aboriginal peoples who live both on and off reserve: *Potts v. Potts*.

**What happens when the debtor or payer lives on reserve, or his or her personal property is located on reserve?**

- An Indian spouse may enforce maintenance orders against the payer whose personal property is on reserve, whether or not the spouse is a band member: *Director of Support Custody Enforcement v. Nowegijick*. 
A non-Indian spouse cannot enforce maintenance orders or other garnishment orders against an Indian’s personal property that is located on reserve: s.89(1) of the Indian Act. See Debt Collections and Contracts in this manual for more on s.89(1).

**Definitions**

“Attach” means the attachment of property under a writ of attachment.

“Child” means the following under the:

1. Adoption Act – an Aboriginal child means a child
   - Who is registered under the Indian Act; who has a biological parent who is registered under the Indian Act;
   - Who is under 12 years of age and has a biological parent who is of Aboriginal ancestry, and considers himself or herself to be Aboriginal; or
   - Who is 12 years of age or older, of Aboriginal ancestry, and considers him or herself to be Aboriginal.

2. Indian Act
   - A child born in or out of wedlock, a legally adopted child, and a child adopted in accordance with Indian custom who is between the ages of 6 and 16.

3. Family Relations Act
   - A person who is under the age of 19 years.

4. Divorce Act – a child of two spouses or former spouses who, at the material time
   - Is under the age of majority, and who has not withdrawn from his or her parent’s charge; or
   - Is the age of majority, and who has not withdrawn from his or her parent’s charge, but is unable by reason of illness, disability, or other cause to withdraw from his or her parent’s charge or to obtain the necessities of life.

“Garnishment” means to issue a process of garnishment against the debtor’s property for payment of a debt that is owed by the debtor.

“Registrar” means the officer in Indian and Northern Affairs Canada who is in charge of the Indian Register and the band list maintained in the department: Indian Act.
**Relevant Legislation**


*Nisga’a Final Agreement Act*, S.B.C. 1999, c.2.


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**Cases Cited**


*Connolly v. Woolrich* (1869), 17 R.J.R.Q. 266, affirming 17 R.J.R.Q. 75 (Que.C.A.)


Re Adoption of Katie (1961) 38 W.W.R. 100; 32 D.L.R.(2d) 686 (N.W.T.Terr.Ct.)


Re Tagornak Adoption Petition, [1984] 1 C.N.L.R. 185 (N.W.T.S.C.)


Resources


Common client problems

- **On reserve.** The client has a problem with on-reserve housing that typically involves eligibility, financing, repairs, eviction, or foreclosure.

- **Off reserve.** The client has a problem with housing available to status Indians in rural areas, or with cooperative or native housing societies in urban areas.
Summary

This chapter presents a brief overview of the laws about reserve lands and describes the types of housing available.

When a client has a housing problem on reserve, you may need to find out how the land is registered, what interests exist in respect of the land, and what kind of housing is involved.

Typical off-reserve housing issues include:

- The housing qualifies for Canada Mortgage and Housing Corporation (CMHC) funds.
- The housing is subject to federal laws; the band owns and operates the housing.

Native Issues

Aboriginal peoples live primarily in substandard housing both on and off reserve. They rent living accommodations more often than they own their homes.

The limited land base and the inability to qualify for personal mortgages without guarantees present on-reserve housing problems for the band and the Minister of Indian Affairs and Northern Development.

Reserve Lands

Who has the authority to make decisions and where are these decisions recorded?

- Section 91(24) of the Constitution Act, 1867, grants exclusive jurisdiction over “Indians and lands reserved for Indians” to the federal government.
- The Crown in Right of Canada holds the title to “lands reserved for Indians” for the use and benefit in common of the band: s.2(1) of the Indian Act.
• Section 60 of the *Indian Act* and *First Nations Land Management Act* grants authority to band councils to request and be granted the right to exercise control and management over their own lands.

• The right to possession of reserve lands is determined by band councils with the approval of the minister, and authorized by s.20 of the *Indian Act*.

• There is no automatic right of residence on reserve lands, and, without such authority, persons, including band members, are trespassing: *Joe v. Findlay*. Non-band members who enter reserve lands without authority may be trespassing and subject to a summary conviction: s.30 of the *Indian Act*.

**Indian Land Registry**

Indian and Northern Affairs Canada (INAC) has developed an Indian Land Registry system that records information and the legal status of individual parcels of reserve land. The Indian Land Registry consists of three main registers:

• **Reserve General Register.** This includes information about the reserve. For example: the date the reserve was established; the size of the reserve; the existence of easements (roads, railways, hydro, sewer, water, telephone lines); and information about surrenders or designations.

• **Reserve Parcel Register.** This is a record of which parcel of land has been assigned to whom by a certificate of possession, a certificate of occupation, or a locatee lease.

• **The Surrendered and Designated Lands Register.** This describes land that has been surrendered for sale; details of land sales; details of unsold surrendered land; surveys of land designated for leasing purposes, and records of any transactions relating to a designated parcel of land.

A band member or representative may examine the contents of the Indian Land Registry without a formal request. The band member or representative may also request the contents from INAC by authority of the *Privacy Act* and the *Access to Information Act*.

**Band council by-laws.** The band may have passed Band Council Resolutions (BCRs), by-laws, and policies concerning reserve lands. The band is authorized to make by-laws governing reserve lands by authority of s.81 of the *Indian Act*.

The band council may require a formal request to review its by-laws and policies relating to residency on reserve lands.
How does the band allot land?

With the approval of the minister, the band council may allot parcels of land to individual band members by authority of s.20 of the *Indian Act*.

An allotment refers to the decision of the band council to grant exclusive individual rights of possession of a parcel of reserve land.

The principles of administrative fairness and natural justice must govern the band council’s decision to grant an allotment. For example, a formal meeting of the band council must take place, and the majority of the band council present at the meeting must pass a BCR.

Lawful possession requires a valid BCR. Courts have held that if the BCR allowing the allotment is not valid, then the allotment is also invalid: *Leonard and the Kamloops Indian Band et al. v. Gottfriedson*. Persons other than band members may use or occupy reserve lands only by means of a lease or a permit.

Once band councils make the decision about an allotment of a parcel of land on reserve, INAC makes the decision to grant proof of the allotment by way of a certificate. There may be circumstances where a person has lawful possession of the land at issue without a certificate of possession: *George v. George*.

How does the client hold the allotment?

There are different ways to hold reserve land allotments.

*The client may have a certificate of possession*

A certificate of possession allows a band member to possess a parcel of land, and is therefore proof of lawful possession.

A certificate of possession has all the characteristics of ownership, and the individual may occupy the land without interference; however, the title remains with the Crown.

Individuals may sell the certificate of possession to other band members, lease with consent of the band and the minister, or develop subject to some limitations.

*Who may cancel a certificate of possession?*

INAC has the authority to cancel a certificate of possession. A provincial court cannot give possession to someone else; however, it can order compensation: *Derrickson v. Derrickson; George v. George*. 
In the case of a cancellation because of surrender or expropriation, the client may be entitled to compensation.

**Development issues:** Recent case law has recognized the communal nature of land holdings on reserve, and has limited the power of the minister to approve development. In *Tsartlip Indian Band v. Canada*, the Federal Court of Appeal held that the minister was unreasonable in making a decision allowing a band member to lease reserve lands for a trailer park.

The band council objected to this development, and the court held that the minister has a fiduciary obligation to the band because of the communal nature of the title of reserve land.

This case sets out the premise that the minister cannot make decisions at the request of one band member without proper consideration of the rest of the band members.

**The client may hold land in “joint tenancy” or “tenancy in common”**

Allotted land may be held as “joint tenancy” or as “tenancy in common.” The parcel of land can be sold or transferred during the lifetime of the owner. This possession continues indefinitely so long as there are heirs to the estate of a certificate of possession to someone who has the right to live on reserve.

**The client may have a certificate of occupation**

A certificate of occupation is authorized by s.20(4-6) of the *Indian Act*. This allows occupation of land for an initial two-year period, and may be extended to four years.

A BCR is needed to obtain this certificate and to request an extension. The minister has the final say as to whether or not there will be an extension. An extension may be used as a first step in applying for a certificate of possession. If required conditions are fulfilled, INAC may approve the BCR.

At the expiration of the time allowed, a decision must be made by the minister to grant a certificate of possession or to refuse the band council allotment.

**The client may have a location ticket**

By previous legislation, the location ticket is proof of lawful possession of a parcel of land on reserve. The client who possesses a location ticket should ask INAC to issue a certificate of possession in its place.
The client may hold land by custom or tradition

A person may be in lawful possession of a parcel of land by custom or tradition. However, the Indian Act does not recognize such Indian land holdings and, if a conflict develops, the person may not have a remedy.

You may indicate support for the person’s traditional land holding in other ways:

- An elder’s testimony may indicate that the client or the client’s family was given lawful possession of the parcel of land and how it was acquired.
- Minutes of band council meetings may indicate what and who prompted the initial possession.
- A loan application signed by the band council and approved by INAC may be sufficient to prove valid lawful possession from a course of conduct by the parties involved: George v. George.

Does the client have a permit for temporary activity?

Section 28 of the Indian Act allows for the use of reserve land by a member or non-member by way of permits granted by BCR.

Permits grant use for a temporary activity. When the activity is completed, the right to use the land is no longer in effect. If the permit-holder dies, the right granted by the permit ceases. This is unlike a certificate of possession or occupation, which is passed to the heirs of an estate.

Permits have a time limit (not to exceed one year without the consent of band council), and must be approved by INAC.

There are no rights of assignment, and the permit can be cancelled at any time. INAC must cancel a permit issued by authority of s.28 of the Indian Act.

Does the client lease a house on reserve?

Section 58(3) of the act allows for leasing of houses on reserve by the band or individual members. This requires the consent the band council and INAC.

A lease is a written contract. The common law of residential tenancy applies on reserve. This means that the rights provided under the lease can be assigned, and can be terminated only with notice or for cause. The lease must be executed by INAC on behalf of the band member.
If proper procedures for issuing a permit or a lease are not followed, the rights provided may not apply. Since the rights provided for in the agreement are void, there is no tenancy created at common law. Proper procedures for eviction must be strictly followed: Sheard v. Chippewas of Rama First Nation Band Council.

A landlord may evict without cause for a month-to-month tenancy, but must give one month’s notice to evict.

**Has the non-band member client been evicted?**

When a non-band member is evicted, find out whether the tenancy is a tenancy at will or a periodic tenancy.

A tenancy at will may be terminated without notice.

A periodic tenancy is evidenced by a monthly rental payment. One month’s notice must be given to terminate a periodic tenancy.

Any agreement made by the band or a band member to permit a person other than a member to occupy, use, or live on reserve is void without a permit or a lease.

**Mobile homes on reserve**

Tenants in a mobile home park on reserve lands are not covered by the Residential Tenancy Act. It is not the person who lives on the land but the fact that the land is under federal jurisdiction that governs: Anderson v. Triple Creek Estates.

**Check the band by-laws:** A band may have a by-law in place that prohibits non-band members from residing on reserve. The by-law must be properly drafted and in accordance with the Indian Act, and the minister must have approved the by-law in order for it to have any effect: Six Nations of the Grand River Band v. Henderson.
Types of Housing

There are various types of housing on and off reserve, funded from various sources. You need to find out the type of housing is at issue and the source of funding.

Who has the authority to make decisions about housing?

A band council may itself act on housing matters, or may delegate authority to a housing committee that decides on eligibility issues.

- The band council or housing committee has a general duty of procedural fairness to provide a fair process to individuals with legal rights, and where its decision-making processes affect the individual member’s interests.

- Band councils are held to be “federal tribunals,” and the decisions they make are subject to scrutiny according to the principles of administrative law: Frank v. Bottle.

- The minister must comply with the rules of natural justice and allow all parties an opportunity to make representations if the circumstances warrant it. The Federal Court may review a decision made by the minister or by a band council, within thirty days.

Who manages subsidies for on-reserve housing?

Housing Capital Subsidy

INAC administers the money for housing on reserve through a housing capital subsidy. This subsidy is for construction of housing and for the repair or maintenance of existing housing. This subsidy is not meant to cover the cost of new construction.

The amount of subsidy received depends on the size of the band, the condition of existing houses, what the band did with previous monies for housing, and what category the reserve falls under.

Lending institutions may provide loans to a band or a band member with a ministerial guarantee. The amount ranges from $20,000 to $43,000 for each unit. This amount varies according to the reserve category, for example:

- Urban – Vancouver
- Rural – Okanagan
- Remote – Telegraph Creek
- Special access – Bella Bella.
Is the client in CMHC housing?

CMHC is a housing agency of the federal government. It administers the National Housing Act for the benefit of all Canadians. CMHC provides bands with funds in the form of monthly subsidies. The band is authorized to use this money for operating costs, which include maintenance, repairs, and administration.

There are a number of different CMHC programs that a band may access.

Social housing program

This program is designed to provide modest, affordable housing for low- and moderate-income earners. Under this program, the band is responsible for planning, building, owning, administering, and maintaining low-rent housing projects for its members.

The band enters into an agreement with CMHC to maintain the housing to a certain standard. This is a contractual obligation and can be enforced if the client’s house is not being maintained in good condition. Normally, this type of housing is made under a tenancy agreement between the band and the member. The tenancy agreement will provide the terms for eviction. If there is no tenancy agreement, the eviction must comply with common law.

In a situation where the client is in arrears on his or her rent, the band council will normally take steps to avoid evicting a band member, and will negotiate a rental repayment schedule. The client should contact the housing officer at the band office to make such arrangements.

Note that band social housing policies govern the administration of housing programs on reserve. When advising a client, make sure that you know about the policies of the particular Band: BigStone Cree Nation v. Boskoyous; Matsqui IndianBand v. Bird.

Residential Rehabilitation Assistance Program (RRAP)

CMHC administers the RRAP program. This program provides funding for repairs to existing houses on reserve, and can be provided to a band member who holds a certificate of possession.

- The loans are provided to assist in repairs to houses that are more than five years old and considered substandard by CMHC standards. The housing standards are set by CMHC and include: structural soundness, electricity wiring, plumbing and heating, fire and safety standards, and provisions for people with disabilities.
- The client may use the program only once.
• The client may borrow an amount that is considered forgivable (the client does not have to pay back the amount borrowed). A band may also receive funding from this program.

• A band that has received funding from this program for a house in which the client lives, is obligated to spend the money according to the specifics of the contract.

**Rural and Native Homeownership and Rental Program**

This program assists Indians who live in rural areas to buy or rent a home off reserve. People use it most often to build or buy a home.

This is for band members who want to live off reserve. There are restrictions if your client wants to use this program:

• The client must live in an area that has a population of less than 2,500.

• The client’s total family income must be less than the amount established by CMHC for the area.

• The client’s existing housing must be either unsuitable, or maintenance costs must be more than 30 percent of his or her family income.

To buy a house under this program, your client must provide a down payment in the form of cash, labour, materials, or land. CMHC will then subsidize his or her payment so that the monthly mortgage and tax payments are not more than 25 percent of the client’s family income for rent, heat, water, and sewer.

**Is the client in band housing with a rental purchase agreement?**

In some cases, a band enters into a rental purchase agreement with a member regarding existing band housing. The band must retain lawful possession until the loan is paid off, and there should be a clear agreement in place. Review the agreement to establish whether the terms are within the band’s authority, because many band members enter into agreements without obtaining legal advice.

**Is the client eligible for Bill C-31 housing?**

When Parliament amended the *Indian Act* in 1985 to restore Indian status to those who had lost status under various discriminatory provisions of the act, the government stated its intention to provide the means for Indian bands to make available the necessary housing for those members returning to reserves.

If your client falls under this category, you may want to explore what the band had received specifically for Bill C-31 members.
Does the client have a private mortgage?

Private mortgages between band members are not necessarily prohibited by the act. However, upon default, the minister’s consent must be obtained to transfer the certificate of possession at issue. Review the mortgage agreement thoroughly. An argument may be made that under s.29 of the act, the property is exempt from seizure, and that transfer is a form of seizure.

Some bands may have a revolving housing fund. This involves band members paying into a fund, which is then used for a variety of housing projects. These projects are not subsidized by CMHC.

Is the client dealing with loan issues?

Section 29 of the act provides that reserve lands are exempt from seizure. This exemption has made it very difficult for Indians to obtain credit for needed repairs to their homes or to buy a house on reserve. Financial institutions usually require a “ministerial guarantee.” This is a guarantee by INAC to repay the loan to the financial institution if the member defaults.

Review the BCR presented with the client’s application to INAC for the ministerial guarantee. The client may have agreed to transfer his or her certificate to the band and to vacate the land upon default of the loan. Such transfer can take place only with the minister’s consent.

The band cannot unilaterally take lawful possession of the land at issue without the minister’s consent. The minister has the power to hold back any funds payable to the band equal to the amount that is in default under a ministerial guarantee.

To avoid these measures, the client may approach the band and discuss possible alternatives. The financial institution may agree to renegotiate the terms of the loan (lowering payments, extending the time to complete payment).

Does the client live in off-reserve housing operated by the band?

Some bands operate off-reserve housing societies. The Residential Tenancy Act applies to off-reserve housing, depending on the specific corporate structure of the society.
Definitions

“CMHC” means the Canada Mortgage and Housing Corporation.

“Joint tenants” are co-owners or possessors with the right of survivorship.

“Tenants in common” are co-owners or possessors with no right of survivorship.

Relevant Legislation


Indian Act, R.S.C. 1985, c.I-5.


Cases Cited


8
Human Rights

Common client problems

- Was the client denied a benefit or service based on discrimination on a “prohibited ground”?
- Did the band council deny the client a benefit or service?
Summary

This chapter deals with Native issues related to human rights legislation. It focuses on:

- Discriminatory practices of employers, businesses, and bands based on race
- The application of human rights legislation to Aboriginal rights and to decisions made by band councils and Indian and Northern Affairs Canada (INAC).

Aboriginal clients are considered to be members of the general public, whether they live on or off reserve. The federal and provincial human rights legislation applies to Aboriginal peoples.

There are some exceptions to the application of human rights legislation to some services provided by band councils and INAC.

State of the Law

Canadian Human Rights Act

Both federal and provincial legislation concerning human rights are in force. The Canadian Human Rights Act (CHRA) applies to the federal government and to federal businesses such as telephone companies, banks, airlines, and railroads in the areas of service and employment.

The purpose of the CHRA is stated in s.2 as follows:

Every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have, consistent with his or her duties and obligations as a member of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability or conviction for an offence for which a pardon has been granted.

Section 3 of the CHRA lists the grounds of discrimination prohibited by the CHRA, and s.5 sets out four elements or conditions for its application.

In order to be discriminatory, the practice must satisfy the following four conditions. It must:
• Deny or deny access to goods, services, facilities, or accommodation to any individual, or differentiate adversely in relation to any individual
• Involve a service customarily available to the general public
• Be carried out by a supplier of goods or services
• Be based on prohibited grounds of discrimination, which are described in s.3.

Complaints alleging discrimination may be made to the Canadian Human Rights Commission (CHRC), which may establish a tribunal to hear the complaint and decide whether discrimination has occurred and whether it can be justified. An attempt is first made to mediate a satisfactory remedy to the issue.

**British Columbia Human Rights Code**

The British Columbia Human Rights Code is similar in scope, and applies to the provincial government and provincial businesses.

The remedies available include reinstatement, compensation for wage loss, damages for hurt feelings, post- and pre-judgment interest, and costs. A tribunal may also order the respondent to stop the discriminatory practice.

The prevailing principle for damages is to put the harmed individual back into the position in which he or she would have been but for the wrongful act, subject to a duty to mitigate financial loss. There must be a causal connection between the discriminatory practice and the amount of damages.

In adjudicating matters under the provincial human rights legislation, the main principle of law has been that “prejudice without discrimination is not wrongful in the law.” “Derogatory racist language, *per se*, is not a contravention of the Act”: *Dakota Ojibway Tribal Council v. Bewza*. There must be evidence of “discrimination.”

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**Practice Notes**

**Which jurisdiction applies to the client’s complaint?**

The circumstances of your client’s complaint will help you decide which jurisdiction applies. Where the “supplier” derives its authority is where jurisdiction lies. For example, a hotel operating under provincial and municipal licences would be bound by the provincial human rights legislation.
Native Issues

Has the band council denied the client a service?

If the band council has denied the client a service, examine the reasons for the discriminatory acts or practices. Next, determine whether these acts or practices were applied in accordance with the Indian Act.

If they were, then the following exemption applies. Section 67 of the CHRA states:

Nothing in this act affects any provision of the Indian Act or any provision made under or pursuant to that Act.

The CHRA does not apply to measures, practices, and acts set out and authorized by the act, thereby safeguarding band councils and INAC from discrimination claims.

Courts and tribunals have interpreted the application of the exemption contained in s.67 of the CHRA narrowly. They have found that the CHRA applies to decisions of band councils outside the provisions of the act. They have also found that the CHRA applies where measures, practices, and acts arising from the act were not carried out in accordance with the provisions of the act.

The decision must be based on the provisions of the act in order for the exemption in s.67 to apply.

The application of s.67 of the CHRA must be considered as a question of fact in each case, and cannot be read as a wide-ranging application to exclude all acts and practices by band councils or INAC. Services provided exclusively to Indians who live on reserve are services “customarily available to a member of the general public.”

How do you determine whether section 67 of the CHRA applies?

To determine whether s.67 is applicable to your client’s circumstances, ask the following questions:

- Who is the supplier of the service?
- Who is ultimately responsible for the service?
- Is the decision to deny the service expressly or by implication based on a provision made by the Indian Act?
Examples:

- **Client refused credit by financial institution.** Because of the difficulties in garnishing and seizing property on reserve, some Aboriginal peoples have been refused credit by financial institutions. If this is the case, and you are able to establish that it is the only reason for the denial of credit, this could constitute discrimination under human rights legislation.

- **Client denied services by band.** If the client has been denied housing or education services, or if the band has an employment policy in place that may be considered discriminatory, it may be necessary to bring the issue to the band’s attention and attempt to settle the matter.

A complaint may also be made to the minister regarding discriminatory acts and practices of the band. Although INAC is ultimately responsible for services under the act, it does not usually become involved in band council decisions.

**CHRC review of band decisions**

In cases where the CHRC has been asked to review the decisions of a band council, it is able to do so only if the decision has not been made under a provision of the act.

If the tribunal has jurisdiction, it may order the band council and INAC to cease the discriminatory behavior.

In *Canada (Human Rights Commission) v. Gordon Band Council (re Laslo)*, the Court held that the Canadian Human Rights Tribunal could not grant a remedy to the complainant band member for discrimination in the allocation of housing on reserve because such decisions were expressly entrusted to the band council by Parliament under s.20(1) of the *Indian Act*.

In the case of *MacNutt v. Shubenacadie Indian Band*, the court held that the band was discriminating on the basis of race in not providing welfare to non-Indians who were entitled to live on reserve.
International law and Native issues

International law maintains that the global population is deserving of a minimum standard of human rights. The rights of Indigenous peoples have been recognized and affirmed in the International Covenant on Civil and Political Rights. Article 27 reads:

In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

Canada was a signatory to this covenant.

The United Nations Human Rights Committee criticized Canada for violating this article in the case of a woman who lost her status and right to live on reserve when she married a non-Indian: Lovelace v. Canada. This decision was the basis for the 1985 amendments to the Indian Act (Bill C-31), which reinstated women who had lost their Indian status through marriage to non-Indians.

The Charter of Rights and Freedoms and Aboriginal rights

Neither the Charter of Rights and Freedoms nor the Constitution creates rights for Aboriginal peoples, but they do protect existing Aboriginal and treaty rights of the Aboriginal peoples of Canada. The Charter protects rights and freedoms guaranteed to all Canadians, whereas s.35(1) of the Constitution Act, 1982, protects rights that specifically pertain to Aboriginal peoples.

Section 25 of the Charter provides that:

The guarantees in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any Aboriginal, treaty or other rights or freedoms that pertain to the Aboriginal peoples of Canada including ... any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

The purpose of s.25 is to prevent s.15 equality rights from overriding the special rights of Aboriginal peoples. Section 32 authorizes constitutional review of federal and provincial statutes.
Because band council power is delegated by Parliament under the Indian Act, it is directly subject to the application of the Charter when exercising authority under the act. However, the Charter cannot scrutinize an Aboriginal government executing its duties and functions under an Aboriginal right.

In other words, the Charter applies to the actions of a band council unless the council can prove it was acting under an Aboriginal right. The Charter saves Aboriginal rights from encroachment.

The guarantee of equality found in s.15 of the Charter does not act to erode the special status and rights of Aboriginal peoples. It also has been held that special rights granted by the act do not come within the scope of s.15 of the Charter. For example, s.87 of the act grants tax exemption to status Indians. This section is an example of “other” rights that cannot be challenged on the basis of the s.15 equality rights of the Charter.

Aboriginal peoples may rely on s.15 to ensure that they are treated equally. In Corbiere v. Canada (Minister of Indian Affairs and Northern Development), the court held that the provision in s.77(1) of the act was discriminatory to band members living off reserve lands who had traditionally voted in band council elections.

The provisions in the Criminal Code were found to be discriminatory under s.15(1), and therefore of no force and effect, to the extent that they were inconsistent in the case R. v. Punch. The court held that the code’s providing for a six-person jury rather than a twelve-person jury in the Northwest Territories, where Aboriginal people are the majority, was discriminatory.

Other Aboriginal peoples accused of serious criminal offences have challenged jury selection on the basis of racial bias, including widespread prejudice against Aboriginal people and stereotyping that relates to credibility, worthiness, and criminal nature under s.15(1) of the Charter: R. v. Williams; R. v. Fleury.

**Definitions**

“Discrimination” means unfair treatment or denial of normal privileges to persons because of their race, age, sex, nationality, or religion; a failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored.

“Discriminatory practices” means practices that deny, or deny access to, goods, services, facilities, or accommodation customarily available to the
general public, or that differentiate adversely in relation to any individual, on a prohibited ground of discrimination.

**Relevant Legislation**


**Cases Cited**


*Corbiere v. Canada (Minister of Indian Affairs and Northern Development)* (1999), 239 N.R. 1; 173 D.L.R.(4th) 1 (S.C.C.)


**Resources**


9
Immigration

Common client problems

• Can an Aboriginal from the U.S. be deported from Canada if he or she does not have Canadian citizenship and Indian status?

• After moving to Canada, can a client who was raised in the U.S. obtain Indian status, band membership, and eligibility for band and DIA benefits?

• Can the client obtain a “green card” to work in the U.S.?
Summary

Some nations have their traditional territories in both Canada and the U.S., and many Aboriginal peoples travel and move to and from the U.S., for family, cultural, and work purposes.

In general, Aboriginal peoples believe that they have the right to travel freely between the two countries.

Native Issues

Emigration to Canada

Aboriginal peoples believe that the Jay Treaty of 1794 between the governments of the United Kingdom and United States allows Aboriginal peoples to travel freely between Canada and the United States.

Article 3 of the Jay Treaty states:

[At] all times be free ... to Indians dwelling on either side of the ... boundary line freely to pass and repass by land, or inland navigation, into the respective territories and countries of the two parties on the continent of America ... and freely to carry on trade and commerce with each other.

Can a non-Canadian Aboriginal person rely on the Jay Treaty?

A non-Canadian Aboriginal person cannot rely upon the Jay Treaty to enter Canada without being subject to the Immigration Act.

The Jay Treaty has been held not to be a treaty within the meaning of s.35(1) of the Constitution Act, 1867: Smith v. Canada (Minister of Employment and Immigration).

If a non-Canadian Aboriginal is facing a departure or deportation hearing, that person may argue that he or she should receive protection as an Aboriginal right under s.35(1) of the Constitution Act, 1867: Watt v. Canada (Minister of Citizenship and Immigration) and R. v. Vanderpeet.

In order to prove an Aboriginal right, that person would have to provide evidence of the following:
• He or she belongs to an Aboriginal peoples of Canada group under s.35(2) of the Constitution Act, 1867.
• The Aboriginal group occupied lands in Canada.
• It was “integral to the culture” of the Aboriginal peoples to engage in activities on those lands in Canada.

Is an Aboriginal client who recently came from U.S. eligible for services and benefits?

A status Indian client who recently immigrated to Canada from the U.S. will be eligible for any programs and services for status Indians.

If the client is a band member, he or she will be eligible for any programs and services delivered by the band, and be eligible to vote in band elections.

Children born and raised in the U.S. of status Indian and band member parent(s) may be eligible to be registered as a status Indian and as a band member under the Indian Act and/or band membership code.

Can an Aboriginal client go the U.S. and apply for a “green card”?

An Aboriginal person is eligible for U.S. residency if that person has at least 50 percent “Indian Blood.” The client is not required to be a registered status Indian in Canada.

If the client can demonstrate to the U.S. Immigration office that he or she has at least 50 percent Indian Blood, the client is immediately eligible for residency and may apply for a green card. The client may apply for residency at any border crossing in Canada that has a U.S. Immigration office.

The client must show the following documents:
• Birth certificate or passport
• Two photos, less than 30 days old
• Status card (if the client does not have a status card, picture identification from a well-recognized Aboriginal organization may be accepted)
• Letter stating the client’s Aboriginal ancestry, including his or her parents’ percentage of Indian blood, tribal group, and birth dates of both client and client’s parents (the letter may be written by the client’s band or by a well-recognized organization such as the United Native Nations).
Applying for residency will be a lot easier if the client provides the following:

- A valid reason for moving to the U.S.
- A new U.S. address.

To apply for U.S. residency, the client must fill out an (I-181) form, which is available at the U.S. Immigration office. Once this form is completed, the client can bring it to a Social Services office and apply for a Social Security Number, which will give him or her access to U.S. government services.

The client is not required to have a green card to work in the U.S. However, it is strongly suggested that the client apply for a green card when he or she applies for residency, in order to avoid problems with potential employers.

If a U.S. Immigration officer refuses the client access or resident alien status, the client has the right to a hearing before a U.S. Immigration judge.

**Definitions**

“Green card” means a work visa obtained from the U.S. Immigration office that allows a person to work in the U.S.

**Relevant Legislation**


*Jay Treaty*, (1794) 12 Bevans 13, art. III.
### Cases Cited


### Resources


Common client problems

- Is the client eligible to be registered as a status Indian?
- Is the client eligible to be registered as a member of a band or First Nation?
- Is the client having difficulty accessing and receiving benefits and services from government or the band?
This section deals with eligibility to be registered as a status Indian and acquire band membership.

It is very important for an Aboriginal client to get registration as a status Indian and a band member. It confirms his or her Aboriginal ancestry and makes that person eligible for benefits from federal, provincial, and band governments.

Registration as a status Indian means that the client is eligible for Indian and Northern Affairs Canada (INAC) programs and services, which include education, health care, and dental care. Registration also allows statutory benefits according to the Indian Act. In addition, registration as a status Indian may make the person eligible for band membership.

Who is entitled to be registered as a status Indian?

Section 5 of the Indian Act authorizes INAC to maintain a list of status Indians.

Section 14.1 of the Indian Act provides that a person may inquire with the registrar to find out whether his or her name may be included on the Indian register or a band list maintained by the registrar.

In order to be registered as a status Indian, an Aboriginal person must meet the requirements as set out in s.6 of the act.

Section 6(1)(a) of the act provides that a person is entitled to be registered as a status Indian if that person was registered or entitled to be registered before April 17, 1985.

Children of status Indian parents may be also entitled to be registered as Indians: ss.6(1)(f) and 6(2) of the act.

Before 1985, the act discriminated against Indian women who married non-Indian men, and also provided for voluntary or involuntary enfranchisement of Indian status. The former s.12(1)(b) of the act provided that an Indian woman upon marriage to a non-Indian man “is no longer entitled to be registered unless she is subsequently the wife or widow of a status Indian.”
In 1985, Bill C-31 amended the act to eliminate the discriminatory provisions and to provide reinstatement of Indian status to women and their children. This amendment also reinstated Indians and their children who voluntarily or involuntarily enfranchised their Indian status.

**Reinstatement of Indian status**

Section 6(1)(c) of the act provides for the reinstatement of Indian status for those persons who lost their Indian status, or were deemed ineligible for Indian status based upon the “Double Mother Rule,” or when an Indian woman married a non-Indian man.

The “Double Mother Rule” provides that males born to women who gained Indian status by marriage, could not pass Indian status to their children if they married a non-Indian woman.

An Indian woman who lost her Indian status by marrying a non-status Indian before 1985 is entitled to reinstatement of her Indian status. The children of Indian women who lost their Indian status because they married non-Indian men are entitled to reinstatement of their Indian status.

**Reinstatement of enfranchisees**

Section 6(1)(d) of the act provides that Indians who voluntarily gave up their Indian status by applying for enfranchisement, or who lost their Indian status due to foreign residence, serving in the military, becoming a professional, or obtaining an university degree, are eligible for reinstatement. This section also provides that spouses and children of enfranchised men are eligible for reinstatement of their Indian status.

**Registration eligibility of children of status Indian parent(s)**

The provisions relating to the eligibility of children whose parents are registered or eligible to be registered as status Indians under different sections of s.6 of the act can be complicated. This is because the eligibility for registration has changed over the years, and the eligibility of the child is dependent upon the eligibility of the child’s parents.

A child *is* eligible to be registered as a status Indian if:

- Both parents are registered or eligible to be registered under s.6, including the following situations: both parents are eligible under s.6(1), both parents are eligible under s.6(2), one parent is eligible under s.6(1) and the other parent is eligible under s.6(2) – per s.6(1)(f).
• One parent is registered or eligible to be registered under s.6(1), whether or not the other parent is registered or eligible to be registered – per s.6(2).

A child is not eligible to be registered if one parent is registered or eligible to be registered under s.6(2) and the other parent is not registered or eligible to be registered.

Registration of adopted children

Custom-adopted and legally adopted children of a parent registered under s.6(1), or parents registered under s.6(1) and/or (2), may be eligible for registration as a status Indian. The definition of “child” in the act includes a child born in or out of wedlock, a legally adopted child, and a child adopted in accordance with Indian custom.

Who is entitled to band membership?

Section 8 of the act provides that each band shall maintain a band list in which the name of each member is entered.

The registrar maintains the band list until a band assumes control of the list.

If the band list is maintained by the registrar, an Indian is automatically entitled to have his or her name entered onto a band list if that Indian meets one of the following criteria:

• Is entitled to be entered onto the band list before April 17, 1985
• Is entitled to be registered as an Indian under s.6(1)(c) or (d), and ceased to be a band member due to the prior discriminatory and enfranchisement provisions of the Indian Act
• Is the child of parents who are both entitled to have their name entered onto the band list.

If a band assumed control of its band list between April 17, 1985, and June 28, 1987, the band does not automatically include as a member on its band list an Indian who was reinstated under s.6(1)(d) or 6(1)(f) or 6(2), and who has only one parent entitled to have his or her name on the band list.

When a band assumes control of its list, the band must establish membership rules for reviewing decisions on membership.
Applying for Indian status

Who is eligible for registration as an Indian under the Indian Act?

- Children who are born to status Indians where one parent is registered under s.6(1), or both parents are registered under s.6(2)
- Women who lost their status by marrying, and children who lost their status because of their mother’s marriage
- Children who lost their status because one parent did not have status
- Most people who agreed to give up their status (enfranchised)

How can the client and the client’s children apply for registration as an Indian under the Indian Act?

The client must apply for registration for himself or herself and for his or her children, from INAC.

For clients born on or after April 17, 1985:
1. Obtain a long-form birth certificate, which shows the names of the children’s parents, from vital statistics for the province or territory in which the child was born.
2. Fill out the “Application for Registration of Children under the Indian Act” form available from the nearest INAC or band office.
3. Send the registration form and birth certificate to the registration clerk at the nearest INAC or band office.

For clients born before April 17, 1985:
1. Obtain and fill out either of the following forms: “Application for Registration of an Adult under the Indian Act” or “Application for Registration of Children under the Indian Act.” The forms are available from the nearest INAC or band office.
2. Include as much information as possible about the client’s Aboriginal background, and the name or location of the First Nation to which the client’s ancestors belonged. Include the names and status numbers of relatives who have been registered as Indians.
3. Send the completed form and birth certificate to the Registrar of Indian Registration and band lists, INAC, Ottawa, Ontario K1A 0H4.

Note that the client must also submit two passport-size photos if he or she wants an Indian-status identification card.
**What if the client was adopted?**

If the client was custom-adopted or legally adopted by Indian parent(s), when applying for registration as an Indian, the client should include the names of the adoptive parent(s) on the application form.

The registrar will request further information confirming the legal adoption or custom adoption. The registrar will want proof in the form of affidavits from family members, non-family members, and elders, and will require a Band Council Resolution (BCR) stating that the applicant was adopted under customary procedure. To save time, provide this information at the time of application.

The adoption of an Indian child by non-Indian parents does not sever the child’s status as an Indian: *Natural Parents v. Supt. of Child Welfare.*

**Applying for band Membership**

**Who is eligible for band membership?**

An Indian client will automatically receive band membership if he or she was registered or was entitled to be registered as an Indian before April 17, 1985.

Bands were given the option of assuming control of their membership between April 17, 1985, and June 28, 1987.

If the Indian client and the client’s children wish to be entered on a band list of a band that did not assume control of its membership, the client will be enrolled as a band member by INAC when he or she is registered as an Indian.

If the band assumed control of its membership, then the client must meet the criteria outlined in the band’s membership code. Most membership codes provide automatic membership for children of band members.

Depending on the band’s membership rules, the client may be eligible for band membership but not for registration as an Indian within the meaning of the *Indian Act.*

Adopted children of a band member may also be entitled to band membership: *Moon v. Campbell River Indian Band.*

The client should contact INAC or the band to find out if the band has assumed control of its band list. If it has assumed control, the client may ask the band to provide him or her with a copy of the membership code. The client has the right to access the band membership code under the
federal Access to Information Act: Twinn v. Canada (Minister of Indian Affairs and Northern Development).

**What if the client’s name has been omitted from the Indian register?**

When an Aboriginal client submits an Indian-status application to INAC, the client may receive a letter from the registrar advising that INAC “cannot conclude that the applicant is entitled to registration under the Indian Act.”

If this happens, you may follow the act appeal process.

Section 14.2 of the act provides a process to “protest” the omission or deletion of a person from the Indian register or band list maintained by INAC, **within three years.** You may send a written notice to the registrar, containing a brief statement of the grounds of protest.

Before you send the written protest, review it to ensure that the client included all relevant facts in the application.

The registrar will often deny an application to be registered as an Indian, because the applicant has only one parent who is registered as an Indian under s.6(2). Depending upon the facts, you can argue that the parent should have been registered as an Indian under s.6(1), as the parent was adopted by Indian parents, even though he or she has only one Indian parent.

**Custom adoptions:** The registrar may accept applications from Indians who can provide evidence that they were custom-adopted by Indian parent(s); the definition of child includes a child who was custom-adopted: *Indian Act.*

It is important to obtain affidavits from all persons who can affirm that the applicant was custom-adopted and that the custom adoption was done in accordance with Aboriginal custom.

The registrar will conduct an investigation and make a final decision.

Under s.14.3(1) of the act, your client may appeal the decision of the registrar **within six months** by providing a written notice of appeal to the *Supreme Court of British Columbia.* The court can affirm, vary, or reverse the decision of the registrar.
What if the client’s name has been omitted from the band list?

Sometimes a person will be registered as an Indian but is not automatically added to a band list. The band may have set up rules for reviewing membership.

A band cannot deny membership to anyone entitled to have his or her name on the band list under the act: Scrimbitt v. Sakimay Indian Band Council. Most band membership codes have an appeal process.

If the band refuses to follow its membership code or does not follow principles of administrative fairness or natural justice, consider making an application for judicial review in Federal Court within thirty days of the decision to reject.

Status Indian rights and benefits

Medical Services Plan

WHO IS ELIGIBLE?
The province of British Columbia provides health care programs including a Medical Services Plan to all individuals who have lived in BC for three months before the application for enrollment and upon payment of premiums.

The Medical Services Branch (MSB), Health Canada, will pay the Medical Services Plan premiums on behalf of all registered Indians and registered Inuit.

HOW DO CLIENTS APPLY?
Clients may complete a Medical Services Plan Application for Enrollment. The forms are available from the BC Government Agent Office or Health Canada or Native community health worker.

Registered Indians and registered Inuit must provide their registry or status numbers on the application to have their premiums paid.

Forward the completed application to:

Medical Services Branch
Health Canada
230 – 757 West Hastings Street
Vancouver, BC V6C 1A1
MBS will verify the registry or status number and authorize the payment of premiums. Health Canada will send the application to Medical Services Plan when it has been authorized.

Newborn children are automatically covered for the first three months, to give people time to complete the registration process with INAC.

If the client or the client’s dependants are not registered Indians or registered Inuit, the client must arrange for the payment of premiums personally or through his or her employer or financial assistance worker.

The Medical Services Plan will forward a CareCard to the client when his or her application has been processed.

WHAT ARE THE BENEFITS OF THE MEDICAL SERVICES PLAN?
The Medical Services Plan provides the following benefits:

- The services of a physician or a specialist, when referred by a physician
- Maternity care by a physician or a specialist, when referred by a physician
- Diagnostic X-ray and laboratory services, when ordered by a physician, podiatrist, dental surgeon, or oral surgeon
- Dental and oral surgery, when medically required to be performed in a hospital
- Orthodontic services related to severe congenital facial abnormalities.

The Medical Services Plan provides the following additional benefits:

- Eye examinations once every 24 months (exceptions for persons under 16 or over 65 and for persons with a medical condition requiring more frequent examinations)
- Services of an orthopedist.

Non-insured health benefits

This program offers a range of health care benefits that are not covered by provincial or territorial insurance plans such as the BC Medical Services Plan, or by other third-party insurance.

WHO IS ELIGIBLE?
The MSB provides non-insured health benefits for registered Indians and registered Inuit.
HOW DO CLIENTS APPLY?
To receive non-insured health benefits, clients need a CareCard and a status card.

If the client has moved to BC within the last three months and has not yet obtained a CareCard, proof of other provincial health care system coverage is acceptable, along with his or her status card.

WHAT DOES THE NON-INSURED HEALTH BENEFITS PROGRAM COVER?
Non-insured health benefits include:
- Prescription drugs
- Medical supplies and equipment
- Eyeglasses and optometry services
- Medical transportation
- Dental care

HOW DO CLIENTS OBTAIN NON-INSURED HEALTH BENEFITS FOR PRESCRIPTION DRUGS?
To obtain non-insured health benefits for prescription drugs, the client needs to follow these steps:
1. Ask a medical practitioner (i.e., physician, specialist, dentist) for advice.
2. Obtain a prescription from the medical practitioner.
3. Obtain MSB approval for the prescription, if required (some pharmacists are willing to seek such approval for clients).
4. Bring the prescription to a pharmacist.
5. Identify himself or herself as a person eligible for non-insured health benefits and show his or her CareCard and status card.

HOW DO CLIENTS OBTAIN MEDICAL SUPPLIES AND EQUIPMENT?
When a physician prescribes a course of treatment that requires supplies or equipment, the client will need to fill out the appropriate forms for pre-authorization from MSB. Pharmacists or medical supply houses may have these forms.

The following items may be covered, if the client has a prescription:
- Hearing aids and hearing aid supplies
- Bandages
- Bathing aids
- Prosthetics
• Soaps
• Diabetic supplies (glucometers are covered by Pharmacare)
• IUDs (intrauterine device) and condoms.

The following items may be covered with special authorization:
• Walkers
• Canes
• Wheelchairs

**Note:** For more detailed information about pre-authorization requirements, you or your client should talk directly with the pharmacist, a Native community health worker, or MSB.

**HOW DO CLIENTS OBTAIN EYEGLASSES AND OPTOMETRY SERVICES?**

To obtain non-insured health benefits for eyeglasses and optometry services, the client needs to follow these steps:

1. Visit a licensed eye care practitioner for an eye examination to determine whether vision care is necessary.
2. Get a prescription from the licensed eye care practitioner.
3. Bring the prescription to a product supplier.
4. Identify himself or herself as a person eligible for non-insured health benefits and show his or her CareCard and status card.
5. Get MSB approval for the prescription if approval is required under the terms of the program.

Generally, costs for standard lenses and frames will be covered with no extra charge to your client. Other vision care benefits depend on vision changes and requirements, minimum time intervals, and circumstances leading to replacement or repair. A client can obtain details on the exceptions and limits of the program coverage from his or her eye care practitioner or supplier, or from MSB.

**HOW DO CLIENTS GET MEDICAL TRANSPORTATION?**

When medical treatment is needed but is unavailable locally, the costs of traveling to and from the nearest health care facility may be covered by non-insured health benefits. Prior approval from MSB is required.

The following expenses may be covered in appropriate circumstances:

• **Transportation** will be approved if the necessary medical treatment is not available locally and the client cannot reasonably use family or community resources for travel.
Accommodation and meals will be covered if an extended stay is required.

Transportation expenses for an escort may be approved when an escort is essential for medical reasons.

To obtain medical transportation benefits, you must contact MSB and speak to a medical transportation benefits worker. The client will be required to provide information from a health care provider regarding diagnosis, treatment required, where they need to go for medical care, and the best way to travel to the recommended facility. It is best to contact MSB as early as possible in order for arrangements for travel and accommodation to be made.

Note: All coverage is lost if the client leaves the health facility against his or her doctor’s advice.

HOW DO CLIENTS GET DENTAL CARE?

Dental services provided by licensed BC dentists, denturists, and dental specialists are covered up to $600 in each calendar year (twelve months). The dental care provider may submit a claim directly to MSB.

The following dental services are covered under Plan A:

- Exams (once per year)
- X-rays
- Fluoride treatments
- Preventative sealants
- Space maintenance for children
- Polishing (once per year)
- Scaling (once per year)
- Fillings
- Servicing of appliances such as dentures.

All emergency services, including all treatment of young children, will be provided without pre-authorization.

Dental services under Plan B require pre-authorization. These include any work that will cost more than $600 and any item not covered under Plan A.

The limits are usually waived so that the necessary treatment can be covered. MSB currently pays 90 percent of the Plan B fee guide.
While most dentists accept this level of payment, they are not obliged to, and may bill your client for the 10 percent not covered by MSB. Other dentists may ask your client to pay the full cost of the service; the client must then seek reimbursement from MSB.

Note that a recommended course of action may not be covered. For example, if a fixed partial denture (a bridge) is recommended but a removable partial denture is a cheaper option, MSB may limit the amount it will contribute to the cost of the bridge. Your client may be responsible for the difference.

**Mental health**

**PSYCHOLOGICAL COUNSELLING**

A family physician can provide up to four hours of counselling to a client, refer a client to a registered psychiatrist, or provide the client with a referral for other treatment. Psychological counselling is separate from any ongoing program.

Non-insured health benefits will cover short-term, crisis intervention counselling in circumstances where no other services are available or accessible. Access to these benefits should be a last resort.

To access this program, your client needs to obtain a referral from his or her physician and pre-authorization from MSB. Travel costs are not covered.

Note that requests for funding for crises arising out of residential school abuse must normally meet crisis intervention criteria; however, assessment sessions may be authorized to ensure that treatment is within the mandate, or to determine whether special consideration is necessary.

**Alcohol and drug treatment:** A client will need prior approval from an MSB alcohol zone consultant and zone director to access this service, unless the federal government sponsors the program. In either case, a client needs to be referred by an alcohol/drug counsellor or doctor.
Transfer and self-government agreements

Currently, the following Aboriginal communities administer their own non-insured health benefits:

<table>
<thead>
<tr>
<th>Band/Services</th>
<th>Band/Services</th>
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<tbody>
<tr>
<td>Adams Lake Band</td>
<td>Nanaimo First Nation</td>
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<tr>
<td>Canim Lake Band</td>
<td>North Thompson Band</td>
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<tr>
<td>Carrier-Sekani Family Services</td>
<td>Nuu-chah-nulth Tribal Council</td>
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<tr>
<td>Chehalis Indian Band</td>
<td>Old Masset Village Council</td>
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<tr>
<td>Cowichan Tribes</td>
<td>Sh’ulh-etun Society</td>
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<td>Esketemc First Nation</td>
<td>Sechelt Indian Band</td>
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<tr>
<td>Gitxsan Health Authority</td>
<td>Skidegate Band Council</td>
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<tr>
<td>Heiltsuk Tribal Council</td>
<td>Sliammon Band</td>
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<tr>
<td>Hesk’w’en’scutxe Health Services</td>
<td>Southern St’at’i’me Health Society</td>
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<tr>
<td>Kitamaat Village Council</td>
<td>Spallumcheen Band</td>
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<tr>
<td>Ktunaxa/Kinbasket Tribal Council/Society</td>
<td>Sto:lo Tribal Council</td>
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<tr>
<td>Kwakiutl District Council</td>
<td>Tl’atz’en Nation</td>
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<tr>
<td>Lake Babine Nation</td>
<td>Xeni Gwet’in First Nation</td>
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If the client belongs to any of these bands or tribal councils, the client must contact his or her band or tribal council for non-insured health benefits, instead of MSB.

NISGA’A TREATY

The Nisga’a Valley Health Board administers non-insured health benefits for all registered Nisga’a in addition to the services covered by the BC CareCard.

The benefits are provided on the basis of professional medical or dental judgment of need. Benefits currently include drugs, medical supplies and medical equipment, medical transportation assistance, vision care, dental and orthodontic care, mental health, physiotherapy services, and Medical Services Plan premium payments.

In order to access these benefits, Nisga’a people need to be registered members and hold a valid Nisga’a CareCard. For more information, contact:

Nisga’a Valley Health Board
256 Tait Avenue, P.O. Box 234
New Aiyansh, BC V0J 1A0
Toll-free: 1-888-233-2212
**Appeal procedures**

A client has the right to appeal a decision that denies coverage for non-insured health benefits.

For non-insured health benefits administered by Health Canada, there are three levels of appeal available to a client. To begin an appeal, the client must write a letter and attach supporting information from his or her professional health care provider stating the condition for which the benefit is being requested; the diagnosis and prognosis; relevant diagnostic test results; and justification for the proposed treatment.

**WHERE TO SEND THE FIRST LEVEL OF APPEAL**

The first level of appeal for medical supplies and medical equipment or vision benefits is:

NIHB Regional Manager  
Medical Services Branch  
Health Canada  
Suite 540 Federal Building  
757 West Hastings Street  
Vancouver, BC V6C 3E6  
Toll-free: 1-800-317-7878

The first level of appeal for drug benefits is:

Director, NIHB Drug Exception Centre  
Medical Services Branch  
Health Canada  
Address Locator 6103A  
3rd Floor, 1547 Merivale Road  
Nepean, ON K1A 0L3  
Toll-free: 1-800-259-5611

The first level of appeal for a denied dental benefit is:

Manager, Dental Predetermination Unit  
Medical Services Branch  
Health Canada  
Suite 540, Federal Building  
757 West Hastings Street  
Vancouver, BC V6C 3E6  
Toll-free: 1-888-321-5003
WHERE TO SEND THE SECOND AND THIRD LEVELS OF APPEAL

If a client does not agree with the appeal decision, the client may proceed further by appealing to the Regional Director, Pacific Region, who will refer the appeal to a committee for a recommendation. If the client does not agree with the decision, he or she may proceed to the final level by appealing to the Director General, Non-Insured Health Benefits.

If the band or tribal council administers the non-insured health benefits, the client should contact his or her community health representative, and ask for appeal policy and procedures.

Membership rights

Voting rights

Bands are governed by an elected chief and council. The band council is made up of one chief and from two to twelve councillors, depending on member population: s.74(2) of the Indian Act.

Band members may have a right to vote in band elections for chief and council, depending upon whether the band follows the act or custom. Bands that are subject to the Indian Act election procedures are listed in the Indian Bands Council Elections Order. Bands that are not listed follow their own custom for the election of chief and council.

Indian Act elections

Both the act and the Indian Band Election Regulations govern elections. In recent years, the act and the regulations were amended to comply with the Supreme Court’s decision in Corbiere v. Canada (Minister of Indian Affairs and Northern Development). In this decision, the court found that band members do not have to be “ordinarily resident on the reserve” to vote in band elections.

In order to be eligible to vote, members must be listed on the band list and be 18 years old. Electors are able to nominate and vote for chief and council.

Under the regulations, the band must provide the electoral officer with the last known address of all electors who do not live on reserve. Before an election, the electoral officer must mail a nomination form and mail-in ballot to an elector who does not live on reserve: s.4.2(1)(b) and 5(3) of the Regulations.

If a member is not listed on the voter’s list before an election, the member has to demonstrate to the electoral officer that his or her name was improperly omitted: s.4(4) of the Regulations.
Custom elections

Bands that opted not to be subject to the act and the regulations are governed by their own customary election procedures.

Many bands that follow custom election procedures have adopted election codes that are similar to the regulations. However, some bands have no written rules, and have a chief and a council that is made up of hereditary chiefs or leaders.

There is debate as to whether bands can rely upon tradition to disallow democratic election practices. A band cannot follow a discriminatory policy that denies the right to vote in band elections from members who had their membership reinstated under Bill C-31: Scrimbitt v. Sakimay Indian Band Council.

Band council

A band council governs bands. The band council has the authority to make decisions regarding most band affairs: s.2(3)(b), 81, 83, and 85.1 of the act. Band members are involved in decisions in so far as allowed under provisions made at general meetings, and under the act. (The Indian Referendum Regulations provide the manner in which a referendum is held for a membership vote for the surrender for sale or lease of reserve land under the Indian Act.)

Band councils usually meet on a regular basis, and the meetings are generally governed by the Indian Band Council Procedure Regulations. These regulations provide that band council meetings are open to band members, but members usually attend only if they have a matter on the agenda. In practice, band councils follow a combination of custom, Robert’s Rules of Order, and regulations in conducting their meetings and when making decisions. The decisions of the council are normally conveyed by BCR. A council cannot pass a BCR unless a quorum of the band council consents.

Band council decisions are administered and implemented through band administrative staff. Typically, bands will have the following staff: manager, education coordinator, social assistance worker, and housing manager.

Bands receive funding and authority from a number of federal government departments, including INAC, Health Canada, Human Resources Development Canada (HRDC), and Canada Mortgage and Housing Corporation (CMHC), to deliver programs for social development, education and post-secondary education, band membership, housing, and land.
**Disputes with bands**

A band council or an employee may make a decision that adversely affects the interests of a band member, or a dispute may arise over miscommunication or lack of due process.

Band councils owe a fiduciary obligation to band members in the management of band affairs: *Assu v. Chickite*. Before making a decision that may affect a band member, the band has a duty of administrative fairness and natural justice. This includes providing notice of the meeting to the band member, disclosing any concerns, and giving the band member an opportunity to be heard: *Sheard v. Chippewas of Rama First Nation Band Council*.

The first step in any dispute with a band may be to obtain further information. To do this, contact the band employee who manages the program and/or an INAC official who works with the band.

If you are unable to get information from these sources, the information may be accessible under the *Access to Information Act*.

Once information is obtained, it is usual to send a letter to the band council and/or INAC detailing the dispute and requesting a meeting with the band council to discuss the complaint.

If you feel that the decision of the band council was wrong, you may apply for judicial review of the decision, as a band council is considered a federal tribunal under the *Federal Court Act*. A band member must apply to the Federal Court for judicial review within thirty days of receiving the decision.

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**Definitions**

“Band” means a body of Indians (a) for whose use and benefit in common, lands ... have been set apart ..., (b) for whose use and benefit in common, monies are held by Her Majesty, or (c) declared by the Governor in Council to be a band for the purposes of the *Indian Act: Indian Act*.

“Band list” means a list maintained by a band or Indian and Northern Affairs Canada. A band list is a list of band members: *Indian Act*.

“Child” includes a child born in or out of wedlock, a legally adopted child, and a child adopted in accordance with Indian custom: *Indian Act*.

“Elector” means a person who under the *Indian Act* is:
• Registered on a band list
• Of the full age of 18 years
• Qualified to vote at band elections.

“Indian” means a person who, under the Indian Act, is registered as an Indian or is entitled to be registered as an Indian: Indian Act.

“Indian Moneys” means all monies collected, received, or held by Her Majesty the Queen, in right of Canada, for the use and benefit of Indians or bands, as defined by the Indian Act.

“Indian Register” means the register of Indians that is maintained by the registrar of Indian and Northern Affairs Canada: Indian Act.

“Member of a band” means a person whose name appears on a band list or who is entitled to have his name appear on a band list: Indian Act.

“Registered” means registered as an Indian in the Indian Register: Indian Act.

“Registrar” means the officer in Indian and Northern Affairs Canada who is in charge of the Indian Register and the band list maintained in the department: Indian Act.

**Relevant Legislation**

**Cases Cited**


Corbiere v. Canada (Minister of Indian Affairs and Northern Development) (1999), 239 N.R. 1; 173 D.L.R.(4th) 1 (S.C.C.)


Twinn v. Canada (Minister of Indian Affairs and Northern Development), [1987] 3 F.C. 368; 26 Admin. L.R. 197 (F.C.T.D.)

**Resources**


11
Law Enforcement Complaints

Common client problems

- Do off-reserve police officers have jurisdiction on reserve?
- How may a client make a complaint against the misconduct of a police officer, a tribal police officer, or a band by-law enforcement officer?
- How are band by-laws enforced?
Summary

This chapter deals with law enforcement on reserve and how to make a complaint against police and enforcement officers.

Topics include:
- Regular policing services on reserve, usually provided by the RCMP
- Enforcement of band by-laws by band by-law enforcement officers.

Some bands have tribal police members established on reserve. These police often work in conjunction with the local RCMP to deal with major crime issues, and remain on call to deal with day-to-day issues.

State of the Law

Royal Canadian Mounted Police

The RCMP acts under the authority of the Royal Canadian Mounted Police Act, which is federal legislation. Although the RCMP operate within BC under contract, they are governed by the RCMP Act and not the provincial Police Act.

Some Indian bands have contractual arrangements with either the municipal police force or the RCMP for law enforcement services on reserve.

The RCMP has the same jurisdictional authority on reserve as it does off reserve, and an agreement with the band is not necessary. The RCMP has the authority to enforce federal and provincial laws on reserve.
The client wants to lay a complaint against a law enforcement officer

**RCMP**

The Commission for Public Complaints Against the RCMP monitors complaints against RCMP members, conducts its own investigations into allegations of misconduct, and holds public inquiries if appropriate. The commission is independent from the RCMP.

A client may make a complaint by completing the form RCMP Public Complaint Receipt (RCMP GRC 1442). A client may submit the form at any RCMP detachment or send it directly to:

Commission for Public Complaints Against the RCMP  
Western Region Office  
7337 137 Street  
Suite 102  
Surrey BC V3W 1A4  
Phone: 604-501-4080 (general enquiries)  
Fax: 604-501-4095  
1-800-665-6878 (Canada-wide, toll-free, for complaints)  
E-mail: complaints@cpc-cpp.gc.ca

**Municipal police**

Municipal police forces act under the Police Act. They are governed separately. A municipal police force does not have jurisdiction on reserve unless an agreement is in place between it and the band council.

The Police Act sets out the complaint procedure against members of municipal police forces. The client needs to make the complaint within six months of the incident.

There are four steps in the complaint process. These are:

1. An informal investigation and a formal investigation, both of which are conducted by the police department concerned
2. A public inquiry before the municipal police board
3. An appeal
4. Further inquiry conducted by the BC Police Commission.
If you have problems in the handling of a complaint, first try to resolve it by dealing with the chief constable of the police force that is involved, or by contacting the Complaints Commissioner of the BC Police Commission, at Suite 405 – 815 Hornby Street, Vancouver. The phone number is 604-660-2385. In Victoria, the commission office is located at Suite 304 – 3960 Quadra Street. The phone number is 250-387-0020.

Section 51 of the Police Act states that using the complaints process does not preclude the citizen from taking or continuing civil or criminal proceedings against a municipal officer for an alleged misconduct. This may include civil tort actions in assault, false imprisonment, damages because of an illegal seizure, or malicious prosecution. Depending on the alleged misconduct, this could also include a human rights complaint: Syrette v. Sewell. This would be an option for a complaint against a band by-law officer.

**The client is facing a band by-law penalty**

The band council can make by-laws for the purpose of:

- Law and order
- The prevention of disorderly conduct and nuisances
- Control of traffic violations
- Control of trespass
- Control of intoxicants
- Other matters arising from the by-laws.

A band by-law enforcement officer enforces the by-laws. More and more bands are hiring these officers under ss.81 and 85 of the Indian Act.

A by-law passed by a band council and approved by the Minister of Indian Affairs and Northern Development is a statutory instrument. It has the force of the law within the boundaries of the reserve. Prosecutions are conducted in provincial court, not in federal court. The proceedings are by way of summary conviction; therefore, a charge must be laid within **six months** of the alleged offence.

The appeal of convictions follows normal criminal appeal procedures.

By-law enforcement officers are not constables appointed under the Police Act or the RCMP Act, nor are they “peace officers” under the Criminal Code.
The Charter of Rights and Freedoms may apply to some activities of band enforcement officers: *R. v. Hatchard.* A by-law may be also enforced by a “peace officer.”

The band has an avenue to obtain a civil injunction in order to enforce a by-law.

**Practice Notes**

- The penalty imposed upon a summary conviction for contravening a by-law is a fine not exceeding $1,000, or imprisonment for a term not exceeding 30 days, or both. This should enable the client to obtain a lawyer through the intake process.

- To provide the client with assistance, gather as much information as possible. Make a request under the *Access to Information Act* to establish that there is in fact a by-law in place authorizing a band by-law enforcement officer to enforce by-laws on reserve.

- The Minister of Indian Affairs and Northern Development must approve a by-law. If the band does not obtain such approval, the band by-law enforcement officer would not have the authority to enforce any matter on reserve.

- Bands sometimes deploy “peacekeepers,” “watchpeople,” or “monitors” to watch and report on activities on and off reserve. Unless these watchers have powers conferred on them by a band by-law, they do not possess any law enforcement powers except the same ones held by all citizens.

- The band may pass a Band Council Resolution (BCR) in an attempt to regulate activities on reserve. A BCR does not have the force of law, but it does indicates the council’s intention.

**The client wants to lay a complaint against a band by-law enforcement officer?**

If the client has a complaint against a band by-law enforcement officer, make the complaint to the chief or band council. Contact the band manager for information about the process.
The client wants to lay a complaint against tribal police

Several First Nations have established their own tribal police force, for example, the St’at’imc Tribal Police Force. These tribal police forces have their own police board. Tribal police forces may be subject to the provincial Police Act and are subject to the same complaint process outlined above.

Definitions

“Band by-law enforcement officer” means a constable who is authorized by the band to enforce band by-laws.

“Band by-law” is a by-law enacted by a band council under s.87 of the Indian Act.

Relevant Legislation

Indian Act, R.S.C. 1985, c.I-5.

Cases Cited


Resources

Common client problem

- Your client’s relative or friend is vulnerable to abuse and neglect, and/or incapable of making decisions when caring for himself for herself or managing his or her affairs.
**Summary**

The Minister of Indian Affairs and Northern Development has all jurisdiction and authority in relation to mentally incompetent Indians: s.51(1) *Indian Act*. However, the minister usually exercises his or her authority only with respect to Indians who live on reserve.

Generally, the minister transfers the administration of the assets of a mentally incapable Indian to a relative or friend or to the Public Guardian and Trustee of British Columbia.

Other provincial laws concerning adult guardianship apply to Indians, unless they are inconsistent with s.51(1) of the *Indian Act*.

**State of the Law**

The four acts that comprise the adult guardianship legislation are the:

- *Representation Agreement Act*
- *Health Care (Consent) and Care Facility (Admission) Act*
- *Adult Guardianship Act*
- *Public Guardian and Trustee Act*.

Together these acts promote self-determination and provide support and protection to those who are vulnerable to abuse and incapable of making their own decisions.

On February 28, 2000, parts of the legislation came into effect:

**Representation Agreement Act**

The act, now in force, enables adults to plan for a time when they may become incapable of making their own decisions, by making a representation agreement containing standard provisions or other provisions.

Section 7(1)(a) and (b) standard provisions include:

- Handling routine finances
- Making minor and major health care decisions
- Deciding on personal care matters
- Hiring a lawyer to, for example, settle an accident claim.
Other provisions of s.9(1) include:

- Selling real estate (g)
- Making care arrangements for minor children (f)(i)
- Refusing life support (c).

**Health Care (Consent) and Care Facility (Admission) Act**

The consent provisions are in force. These provisions affirm the right of adults to make their own health care decisions and to have those decisions respected: ss.4(a), (b), (c), (d), and (e). When an adult is incapable of giving consent, procedures are set out that allow family members to give substitute consent. The Care Facility Admission provisions are not yet in force. They set out procedures for the admission of adults to care facilities.

**Adult Guardianship Act**

**Part 1: Abuse, neglect, and self-neglect legislation.** This part of the act, now in force, promotes a co-ordinated community response to abuse, neglect, or self-neglect. The act emphasizes the importance of support and assistance and provides new tools for intervention when abused or neglected adults are found to be incapable of making the decision to refuse assistance.

**Part 2: Court-ordered decision making.** This part of the act is not yet in force. It will replace the Patients Property Act by providing for a revised system of formal court appointments of substitute decision-makers, where necessary.

**Public Guardian and Trustee Act**

This act, now in force, clarifies the powers of the Public Guardian and Trustee in the investigation of financial abuse.

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**Native Issues**

The provincial standard for deciding whether a person is mentally incapable is found in s.3(2) of the Adult Guardianship Act. The same standards apply to Indians and non-Indians.

If an Indian person is mentally incapable, the minister has jurisdiction and authority over his or her property: s.51(1)(b) of the Indian Act. In practice, this applies only to Indians who live on reserve: s.4(3) of the Indian Act.
However, the minister retains jurisdiction and authority over the property of mentally incapable Indians who live off reserve: s.91(24) of the Constitution Act, 1867. The minister may appoint persons to administer all aspects of the estate. The minister may also order that off-reserve property be dealt with under provincial laws. Generally, an Indian and Northern Affairs Canada (INAC) Lands and Trusts Officer prepares an inventory of all real and personal assets. The minister may then appoint a relative or friend to be the administrator of the estate, or may appoint the Public Trustee and Guardian of BC: s.2 of the Indian Estates Regulations to interpret the powers and duties of administrators.

If the minister administers the estate, the Federal Court may review any decisions.

Matters such as contractual responsibility, criminal responsibility, and health facility admission are all dealt with under the applicable provincial legislation, as long as the act and regulations are consistent with s.51(1) of the Indian Act.

Definitions

“Mentally incompetent Indian” means an Indian who, pursuant to the laws of the province in which he resides, has been found to be mentally defective or incompetent, for the purposes of any laws of that province providing for the administration of estates of mentally defective or incapable persons.

Relevant Legislation

Adult Guardianship Act, R.S.B.C. 1996, c.6.

Health Care (Consent) and Care Facility (Admission) Act, R.S.B.C. 1996, c.181.


Indian Act, R.S.C. 1985, c.I-5.

Patients Property Act, R.S.B.C. 1996, c.349.


Representation Agreement Act, R.S.B.C. 1996, c.405.
Resources

Public Guardian and Trustee of British Columbia.  
<http://www.trustee.bc.ca>

Representation Agreement Resource Centre, Vancouver.  
Phone: 604-875-0188 or <http://www.rarc.ca>
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Motor Vehicle/Traffic

Common client problems

- Does the client fall within the definition of “dependant” in order to qualify for insurance benefits?
- Do provincial motor vehicle laws apply on reserve?

Note
This section is under development and will be issued at a later date.
Common client problems

- Prison staff have taken away an Aboriginal prisoner’s prayer bundle or other spiritual items.
- What opportunities exist for Aboriginal communities to be involved in the rehabilitation and reintegration of Aboriginal offenders into the community?
Summary

Prisoner law is a very specialized area of law. This chapter deals with some of the issues unique to Native people who are incarcerated, including rehabilitation, dislocation, and the use of spiritual ceremonies and objects.

State of the Law

Prisoner law is a very specialized area of law. The Legal Services Society must provide legal assistance up to and including disciplinary hearings where the outcome is likely to affect the residual liberty interests of prisoners (i.e., segregation, loss of earned remission, etc.): *Winters v. Legal Services Society.*

Practice Notes

What does legal aid cover?

The Prisoners’ Legal Services staff provides assistance to prisoners on matters that affect their liberty interests, such as disciplinary hearings and parole hearings. Phone Prisoners’ Legal Services at 1-888-839-8889 or 604-853-8712.

What rights do victims have?

The National Parole Board staff provides assistance to victims and their families and provides information about offenders.

Victims may be entitled to information not available to the public if the board decides that the victim’s interest clearly outweighs any invasion of the offender’s privacy.

Victims are not automatically informed when an offender is being considered for release. Victims must request this information.

Victims may also request to be kept informed of the offender’s status, for example, if the offender is moved from one institution to another or is granted a conditional release.
Aboriginal people are vastly over-represented in Canada’s prisons. The Royal Commission on Aboriginal Peoples found that “the over-representation of Aboriginal people in federal, provincial and territorial court systems and prisons casts a long shadow over Canada’s claim to be a just society.” It concluded that the criminal justice system has failed Aboriginal peoples.

The Supreme Court of Canada confirmed the commission’s finding. It stated that Aboriginal offenders result from unique systemic and background factors, are more adversely affected by incarceration, and are less likely to be rehabilitated because the internment milieu is often culturally inappropriate, and that discrimination towards Aboriginal offenders is often rampant in penal institutions: R. v. Gladue.

Which legislation applies to Aboriginal offenders in provincial prisons?

In BC, there is no provincial legislation in place that specifically deals with the unique issues facing Aboriginal offenders. When offenders enter a provincial prison facility, they are given a copy of the Correctional Centre Rules and Regulations. These rules and regulations set out the internal grievance process offenders may use.

Which legislation applies to Aboriginal offenders in federal prisons?

In the federal prison system, the Corrections and Conditional Release Act and Regulations provides for correctional policies, programs, and practices to be responsive to the special needs of Aboriginal peoples.

Some of Correctional Service Canada’s services and programs to address the needs of Aboriginal offenders include elders and Native liaison services, and programs on substance abuse and living skills. There are also family violence, violent offender, sex offender, mental health, and education programs.

In addition, under the Corrections and Conditional Release Act and Regulations:

- Aboriginal communities may make agreements with the institution to provide correctional services, including the transfer of care and custody to allow for the reintegration and re-entry of Aboriginal offenders into their Aboriginal community (s.81).
- Advisory committees may be set up to provide advice on the provision of correctional services to Aboriginal offenders (s.82).
Aboriginal spirituality and spiritual leaders are accorded the same status as other religions and religious leaders. The services of Aboriginal spiritual leaders may be made available to all Aboriginal inmates.

Aboriginal communities may become involved with the development of an Aboriginal offender’s conditional release plan, including the transfer of Aboriginal offenders into Aboriginal communities for supervision. The plan would provide for the release of an Aboriginal inmate into an Aboriginal community, if the inmate expressed genuine interest in this (s.84).

What does case law say about the rights of Aboriginal offenders?

The courts have established rights unique to Aboriginal offenders. Some courts have considered the distance of the penitentiary from an Aboriginal offender’s community when imposing a sentence. Forcing an Aboriginal woman from the Prairies to serve all or part of her sentence in the women’s federal penitentiary in Kingston, Ontario, far away from her community, violated rights guaranteed by the Charter of Rights and Freedoms: R. v. Daniels.

The courts have also recognized other Charter rights for Aboriginal offenders. Directives that deprive Aboriginal inmates of spiritual items such as a prayer bundle may offend the freedom of religion protected by the Charter: Bearshirt v. The Queen.

While freedom of religion may protect an Aboriginal inmate’s ceremonial use of tobacco, it does not preclude a general prohibition of smoking cigarettes and other tobacco products in prison: Regina Correctional Centre v. Saskatchewan.

Definitions

“Offender” means a person who has been convicted by a court of a criminal offence.

Relevant Legislation

Correction Act, R.S.B.C. 1996, c.74.
Correctional Centre Rules and Regulations, B.C. Reg.284/78.
Parole Act Regulation, B.C. Reg. 61/93.

Cases Cited

R. v. Daniels, [1990] 4 C.N.L.R. 51 (Sask.Q.B.)

Resources

National Parole Board Pacific Region. Phone: 604-870-2468
Prisoners’ Legal Services: 1-888-839-8889 or 604-853-8712
Common client problems

- Can a band-operated school refuse to enroll the client’s children?
- Can a band refuse to provide the client post-secondary education funding?
Summary

Depending on where they live, Aboriginal students may attend a school of their choice, including a band-operated school, private school, or provincial school.

Problems may arise if the student is suspended from school or wants to transfer to a different school. Indian and Northern Affairs Canada (INAC) provides funding for post-secondary training of Indian students. Normally, INAC transfers funding to bands; the band may administer tuition and living allowance for band-member students.

State of the Law

Schools

Under ss.4(3) and 114 to 122 of the Indian Act, the minister is responsible for the education of Indian children living on reserve. These sections provided the legislative basis for the residential school system.

Currently, the minister has the responsibility of providing funding to the province or to a band-operated school for elementary and secondary students. On-reserve, band-operated schools that receive INAC funding are regulated as to school size, number of teachers and teacher-accreditation, and curriculum specifications.

Funding system

INAC provides funds to schools on a per-capita basis for Indians who live on reserve. The band or school district reports the number of registered-Indian students attending provincial, independent, or band schools. They do this by completing an INAC Nominal Roll Student Census Report.

INAC then reimburses the band or school district for costs for on-reserve Indian students. INAC also funds instruction in First Nation schools and pays for student support services, including transportation, accommodation, counselling services, and student financing.

The per-capita amount paid for Indian students is slightly higher than that provided for other students. This is because programs to maximize the chance of success for Aboriginal students cost more.
What are the client’s rights in a dispute with a band school?

Occasionally, an Indian student will be the subject of a disciplinary action or proceeding by a band-operated school. The provincial School Act does not apply to band-operated schools located on reserve, so you need to get a copy of the school policy. The school is obliged to follow the principles of administrative fairness and natural justice.

Decision-makers must take the following steps in order to comply with the principles of administrative fairness and natural justice:

- Give adequate notice of the meeting and disclose the nature of the meeting.
- Provide the student with an opportunity to tell his or her side of the story, either orally or in writing.
- Advise the student of the decision and how the decision was reached.
- Provide an avenue of appeal for the student.

If a teacher is involved in the disciplinary hearing, the British Columbia Teachers Federation policies and standards may apply to them.

Some band-operated schools are designated as independent schools under the provincial Independent School Act. The independent school has to comply with the act and its Regulations when carrying out discipline.

Can the client transfer schools?

The client may wish to transfer his or her children to a public school. The public school cannot deny enrollment of an Indian child who lives on reserve. However, if an Indian child wants to enroll in a band-operated school, the school may or may not enroll the student. The band must apply its policy and follow the principles of administrative fairness and natural justice discussed above.

To assist the client, gather as much information as possible. Make a request under the Access to Information Act for information from the band and INAC about school policies.

Find out if the school is a band-operated school, an independent school, or a provincial school. You may not be able to find out which jurisdiction the school falls under just by looking at the type of school.

A school and its employees come under federal jurisdiction if:

- It is designed and operated for Indians.
- It is governed solely by Indians (whether or not provincially incorporated).
• Enrollment is limited to Indians.
• The object is to promote Indian traditions.
• The curriculum includes lessons in the Indian language.

If these elements apply, the school clearly has more than one element of “Indianness” in its operation. The school does not have to be located on reserve: *Qu’Appelle Indian Residential School Council v. Canadian Human Rights Tribunal*.

If the school does not have these elements, provincial laws of general application may apply to an on-reserve school.

Section 81 does not give the band by-law-making powers for the education of its members. There may be a Band Council Resolution (BCR) that establishes the policies of a band-operated school.

Policies or rules that may be in place may include:
• Enrollment entitlement
• Minimum educational services
• Suspensions
• Expulsions

**The client has been denied enrollment, suspended, or expelled**

If your client is denied enrollment, suspended, or expelled, an appeal process should be in place that applies to the situation. You may make a formal request for that policy to ensure that your client does not miss any internal limitation period.

If there are no policies and procedures in place or you are unable to obtain them and the issue cannot be resolved by dealing directly with the school, you will need to look at other remedies.

**The client has been denied funding for post-secondary education**

Funding for post-secondary students is an issue that comes up with increasing frequency. The federal government encourages the increased participation and success of status Indians in post-secondary education programs by providing financial support and services to each band. The band distributes these funds.

The minister has criteria that bands must follow in the distribution of post-secondary education funding. Band education administrators have a
budget that they administer and guidelines and policies to follow. Limits are set on the funding eligibility of a student.

Limits may include the following:

- There is a time limit for completion of the degree program.
- There is a minimum GPA requirement.
- Marks must be provided to the education department.
- The program must be accredited.
- The program must be progressive. For example, an Indian cannot get a degree in one subject area and then apply to be funded for quite a different type of certificate or diploma program.

An Indian who is turned down for post-secondary education funding may have recourse under administrative law principles.

A band council cannot discriminate against members who live off reserve. There is no case law concerning this specific issue, but it is a well-settled principle of law that a band council is considered a “federal tribunal” and is therefore subject to the rules of natural fairness and administrative fairness. This means that the decisions of the band council will be subject to judicial review.

The client may exercise the option of applying to the court to have the decision reviewed (Frank v. Bottle). If a client receives a decision that his or her post-secondary education funding application has been denied, the client has thirty days from the receipt of the decision to make an application for judicial review in the Federal Court.

Gather as much information as possible in order to decide what would best suit the client. You may wish to advise your client of the availability of other sources of funding such as student loans and bursaries. Most colleges and universities have Aboriginal advisors who can advise the client on alternative funding sources.

**Relevant Legislation**


## Cases Cited


## Resources


“Policy and Directives: School Site Development.” *Programs and Services: Infrastructure and Housing; Community Infrastructure and Housing; Document Listing*. Indian and Northern Affairs Canada. Revised November 14, 2001. 

<http://www.ainc-inac.gc.ca/ps/hsg/cih/dl/sch_e.html> or

<http://www.ainc-inac.gc.ca/ps/hsg/cih/dl/sch_e.pdf>

Social Development (Welfare)

Common client problem

- Is the client eligible for social assistance?

Note
This section is under development and will be issued at a later date.
Common client problems

- Is the client exempt from paying PST, GST, excise tax, and customs duties on his or her purchases?
- Is the client exempt from paying income tax on his or her income or unemployment benefits?
Under the *Indian Act*, registered Indians may be exempt from paying tax. This chapter reviews whether a client can benefit from the tax-exempt provision of the *Indian Act*.

Review the case carefully before you advise a client whether he or she is exempt from a particular obligation to pay tax. Gather as much information as you can about your client’s particular circumstances. Familiarize yourself with the policies of Canada Customs and Revenue Agency (CCRA). Although policies have no force in law, they help you to understand why a particular decision is made. There are important limitation dates for disputing a tax decision.

**State of the Law**

**Section 87 exemption for status Indians**

The status Indian’s tax status is derived from s.87 of the *Indian Act*, which states:

87. (1) Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to section 83, the following property is exempt from taxation, namely:

(a) the interest of an Indian or band in reserve or surrendered lands; and

(b) the personal property of an Indian or band situated on a reserve.

(2) No Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraphs (1)(a) or (b) or is otherwise subject to taxation in respect of any such property.

(3) No succession duty, inheritance tax or estate duty is payable on the death on any Indian in respect of any property mentioned in paragraphs (1)(a) or (b) or the succession thereto if the property passes to an Indian, nor shall any such property be taken into account in determining the duty payable under the Dominion Succession Duty Act, chapter 89 of the Revised Statutes of Canada, 1952, or the tax payable under the Estate Tax Act, chapter E-9 of the Revised Statutes of Canada, 1970, on or in respect of other property passing to an Indian.
This is further expanded by the deeming provisions of s.90 of the act, which states:

90. (1) For the purposes of sections 87 and 89, personal property that was
   (a) purchased by Her Majesty with Indian moneys or moneys appropriated by Parliament for the use and benefit of Indians or bands, or
   (b) given to Indians or to a band under treaty or agreement between a band and Her Majesty,
   shall be deemed always to be situated on a reserve.

The Supreme Court of Canada has stated that s.87 of the act is a legislative scheme to protect the entitlements of Indians of their reserve lands, and to ensure that the property on reserve is not used by the government to tax or for creditors to seize: Williams v. Canada.

**Practice Notes**

First, establish some preliminary facts about your client to find out if he or she qualifies for the exemption.

**Is the client an “Indian” under the Indian Act?**

The Indian Act defines “an Indian as a person who is registered as an Indian or is entitled to be registered as an Indian.” In order to be considered exempt from tax, the client must be an Indian (see the chapter on Indian status and membership for information about the criteria).

**Is the item in question “personal property”?**

The Supreme Court of Canada has concluded that income is property. Wages, business income, interest, dividends, rent, scholarships, and pensions are exempt from income tax under s.87 of the Indian Act: Nowegijick v. R.

**Is the personal property “situated on reserve”?**

For property, the basic rule is that it must be actually situated on reserve. The legal term for where the property is situated is “situs.”

For intangibles such as wages, the situs is found where the residence or place of origin is found: Metlakatla Ferry Service Ltd. v. B.C. (Gov’t).
The BC Court of Appeal also allowed for the possibility that property may be situated on reserve within the meaning of s.87 of the Indian Act, even though it may not be physically located on reserve at the time of purchase. The court found that various factors must be examined in order to determine the “paramount location” of the property: *Leighton v. B.C. (Gov’t)*.

**Connection to reserve**

“Connecting factors” are factors that connect the property to the reserve. Connecting factors may include: where the employer resides; where the work is performed; the nature of the employment duties; where the employer’s and employees’ bank accounts are located; and the residence of the client: *Williams v. Canada*. The more factors connecting the property to the reserve, the better the chance of obtaining a positive outcome from CCRA.

The weight given to each factor will vary depending on the client’s circumstances. In addition to the situs of the debtor test (employer’s and employees’ residences), all the facts of each situation must be examined: *Williams v. Canada*.

**Is the amount payable or paid a “tax”?**

Government user fees are becoming more common, and disputes are arising more frequently as to whether an exemption arises from an amount paid. There is some argument that some fees are actually taxes and that an exemption may apply. Some cases regarding the provincial Tobacco Tax Act have dealt with this issue. In the case of *R. v. MacLaurin*, the courts considered whether the provisions of the Tobacco Tax Act regulated the possession of tobacco products, or whether it imposed a tax.

**Income Tax**

Income tax is governed by the *Income Tax Act and Regulations*. CCRA puts into place very strict guidelines (or policies). While these guidelines do not have the force of law, the consequences for non-compliance are serious.

The *Income Tax Act* does not specifically mention Indians. However, the exemptions in paragraph 81(1)(a) of that act include an amount declared exempt by “any other enactment of the Parliament of Canada.” The *Indian Act* qualifies as such an enactment. This exemption does not provide a blanket exemption from taxation for Indians, but simply exempts from taxation certain interests in certain property.
CCRA has put in place policies that deal with the issues surrounding tax exemption. CCRA adopted the policies in response to the *Williams* case. These policies affect employment as of January 1, 1995.

1. If duties are performed on reserve, the employment income that relates to those duties will be exempt. Incidental duties performed off reserve should not affect this test.

2. Where “substantially all” of the duties are performed on reserve, all the employment income will be exempt. CCRA has defined substantially all as meaning at least 90 percent.

3. In all other cases, the employment income will be prorated between on- and off-reserve duties and the exemption will be applied to the on-reserve employment duties.

4. Employment income to complete off-reserve duties will normally be exempt where both the employer and the employee reside on reserve.

5. Where primarily greater than 50 percent of the duties are on reserve and either the employer or employee resides on reserve, the employment income will be exempt.

6. Duties performed off reserve will be considered exempt when all of the following factors are present:
   - The employer is an Indian band, a tribal council representing one or more Indian bands, or an Indian organization controlled by one or more such bands or tribal councils and dedicated exclusively to the social, cultural, or economic development of Indians who live primarily on reserve.
   - The duties of the employment are part of the non-commercial activities of the band, council, or organization.
   - The band, council, or organization is a resident on reserve.

7. Where one of the main reasons for the existence of an employment relationship is to establish a connecting factor, then the income may not be exempt.

8. Unemployment insurance benefits, retiring allowances, Canada Pension Plan payments, registered pension plan benefits, and wage loss replacement plan benefits will normally be exempt from income tax when the employment income that gave rise to those benefits was exempt from income tax.

9. An employer is a resident on reserve when the reserve is the place where the central management and control over the business is actually located.

10. Indians will be considered to reside on reserve where they live in a domestic establishment located on reserve that is their principal place of residence and the center of their daily routine.
11. Social, cultural, or economic development includes the provision of social services such as education, health care, or counselling.

These guidelines are not law, but are policies initiated by CCRA. These guidelines or policies have prompted actions in the Federal Court. The principles of Nowegijick have been re-established through the connecting factors test, and the court has decided that while the residence of the employee is not a deciding factor, it is a factor. Cases are decided on their fact patterns. The court looks at the facts involved in each case, and gives appropriate weight to the different facts: Shilling v. Canada (Minister of National Revenue – M.N.R.). The Federal Court of Appeal applied the Williams connecting factors test to business income. The court held that although a sole proprietor of a business lived on reserve and did administrative work out of his home for the business, the business was in the commercial mainstream and therefore was not exempt from taxation. This was because the major customer of the business was off reserve, and the services provided were off reserve. This decision indicates that an Indian who carries on business off reserve in the general mainstream is unlikely to benefit from the Indian Act exemption: Southwind v. Canada.

Another case adjudicating employment income stated that although a worker worked in a mill that was situated partly on reserve and had a policy of preferred employment for band members, there was not enough of a discernible nexus between the employment income and occupancy on reserve. Thus, the court held that the employment income was not situated on reserve and was therefore taxable income: Amos v. Canada.

CCRA also adopted an anti-avoidance policy aimed at deterring Indians from arranging their employment situations so as to be exempt from income tax. The anti-avoidance rule was scrutinized by the court, which held that a person may arrange his or her affairs to take the best advantage of his or her rights under s.87 of the Indian Act: Shilling v. Canada (Minister of National Revenue – M.N.R.). Note that an application for leave to appeal in Shilling was dismissed by the Supreme Court of Canada on March 14, 2002.

A cautionary note: the court will decide cases following Shilling based on the specific circumstances of each case, which may lead to an entirely different outcome from the one stated above.

If the client requires assistance regarding income tax paid in previous years, you must establish the limitation period. Your client must file an income tax return and receive a Notice of Assessment from CCRA. Reassessments may be done at the taxpayer’s request or may be the result of a CCRA audit.
A Notice of Objection must be filed within ninety days of receiving the assessment or reassessment. CCRA will review the objection and respond by way of written decision. An appeal of the CCRA may be filed with the Tax Court of Canada within thirty days of that decision.

**Employers**

The court has held that employers are obliged to withhold source deduction regardless of whether the income is tax exempt (R. v. National Indian Brotherhood). Failing to withhold and remit source deductions creates potential liability for penalties under s.227(8) of the Income Tax Act.

The client may ask that the employer request a waiver in order to be relieved of this obligation under the hardship provisions of the Income Tax Act: s.153(1.1).

**Indian Remission Order**

A remission order exempts all Indians from income tax on employment income where the duties performed were on reserve but the employer did not reside on reserve. A remission order was issued for 1983 to 1991 inclusive. After the decisions of Nowegijick and Williams, CCRA did not see the need for such an order. A remission order was issued for unemployment insurance benefits received from 1985 onward.

Unpaid taxes, together with interest and penalties, may be forgiven under a special remission order. If the client has been reassessed for income tax on income earned from an employment arrangement made before January 1, 1995, the client may be entitled to exemption.

**Employment Insurance**

The Employment Insurance (EI) program is a federal social insurance scheme that pays benefits to eligible workers who are involuntarily unemployed. Human Resources Development Canada (HRDC) administers the employment insurance scheme. Generally, however, many First Nations organizations and bands enter into contracts with HRDC to administer EI for Native persons. This part of the chapter deals with the Native aspect of employment insurance law.
One of the leading cases in taxation law affecting Aboriginal people is an employment insurance case, the *Williams* case. Insurance premiums are mandatory, so it is unlikely that a client who is working on reserve will be denied benefits because of a lack of contribution. It is more likely that the client is not subject to taxation on his or her employment insurance benefits. Your role will be to ascertain whether the client is subject to taxation and, if not, the steps to be taken to prevent taxation.

The administration of the act is based on hours to qualify, which is often difficult to calculate. The regional unemployment rate is set annually. The calculation of the unemployment rate in any particular region does not include the unemployment rate on reserve.

Whether the client is working for the band council or a company operated on reserve, the client is obligated to pay insurance premiums through deductions from payroll. If the worker contributes more than necessary, he or she may claim a refund on the personal income tax form. In addition, the employer is obligated to make contributions to the Canada Employment Insurance Commission on behalf of the employee. The receipt of EI benefits will usually be exempt from income tax when received as a result of employment income that was exempt from tax.

On receipt of a written decision affecting his or her employment insurance claim, the client may contact you for assistance. You should review the decision letter and ascertain the limitation period immediately. A decision by the commission may be appealed to the Board of Referees within thirty days of the written decision being received by the client.

An employer may appeal the commission’s decision. The commission may grant an extension of time if it decides that “special reasons” exist. “Special reasons” are not defined in the act or regulations but have been decided by case law. The client may request a decision of the commission that his or her EI benefits are income tax–exempt. If the commission refuses, that decision is appealable to the Board of Referees within thirty days. In this situation, a letter to the local EI office or public liaison officer in the region to clarify their authority to make that decision may be necessary.

If the client is unable to obtain a decision under the *Employment Insurance Act and Regulations*, the client may claim a refund on the personal income tax form. You must obtain the appropriate releases, and establish limitations that are different from limitations set for the purposes of appeals under the act and regulations.

In order for your client to be considered exempt from taxation on his or her EI benefits, you need to meet the connecting factors test that has been
established by case law. These connecting factors were discussed earlier in this chapter.

For the purpose of tax exemption for EI benefits, the connecting factor is that the employment income must be exempt. In other words, if the client worked for a business on reserve that is considered exempt, and the client then receives EI benefits from that employment, the EI benefits should be exempt. It is not always that simple, and each case should be examined on its own merit.

CCRA has implemented guidelines for all new employment arrangements since January 1, 1995. With reference to EI benefits, the guidelines include the following to be exempt from income tax:

- Unemployment insurance benefits
- Retiring allowances
- Canada Pension Plan payments
- Quebec Pension Plan payments
- Registered pension plan benefits
- Wage-loss replacement plan benefits

This is only policy, and has no force in law. However, it can serve as an advocacy tool while you are negotiating with CCRA on behalf of your client.

The best fact pattern will be as in the Williams case. Glen Williams was a status Indian residing on reserve. He was receiving employment insurance benefits based on premiums from employment duties performed on reserve. His employer was located on reserve, and Williams was paid on reserve. CCRA assessed his EI benefits as taxable. Williams appealed this ruling to the Supreme Court of Canada, which looked to the employment income that gave rise to the premiums that entitled Williams to EI benefits: Williams v. Canada.

Consumption taxes on reserve

The federal Excise Tax Act is silent on how the Goods and Services Tax (GST) applies to Indians, but CCRA has published information on how it will apply the tax to Indians, bands, and related entities. The provincial Social Services Tax Act imposes the Provincial Sales Tax (PST). Taxes are levied on purchases and leases of tangible personal property, purchases of legal services, telecommunication services, and taxable services within the province. Sales tax on tangible goods is not subject to the “paramount location” test, but is scrutinized under the “point of sale” test. This allows Indians living off reserve to purchase goods tax-free on reserve, regardless of where the goods are ultimately used: Union of New Brunswick Indians v. New Brunswick (Minister of Finance).
The exemptions on tax do not include purchases of hotel accommodation, motor fuel, or tobacco products. The client may be exempt from taxation when one of the following applies:

- It is a private sale between two Indians on reserve.
- The sales of goods are from stores located on reserve.
- The seller has brought the goods to the reserve.
- The goods were delivered to the reserve as a condition of the sale.
- The goods did not pass title to the purchaser until the goods were located on reserve.
- The transaction involved sales of items that are exempt under the Social Services Tax Act.

The client must produce a valid “Certificate of Indian Status” to show evidence of status. The seller will record information such as the address, the band’s name, and the registration number on a sales slip or a logbook kept for that purpose. The purchaser is required to sign the sales slip or logbook. This applies to a leaseholder on reserve, but the purchaser must prove that he or she lives on reserve. A driver’s licence should be sufficient proof of residence.

The seller or lessor of goods is ultimately responsible for ensuring that all the conditions are met, and that person may collect all the tax due. The client may apply to the Consumer Taxation Branch for a refund if the tax was paid.

The location of the transaction is a deciding factor. Provincial or federal taxes are imposed when the property is located off reserve and the point of sale is off reserve, whether or not the goods are destined for the reserve: *Union of New Brunswick Indians v. New Brunswick (Minister of Finance).* Taxes may be avoided by having the purchase delivered to the reserve and the transfer of ownership completed on reserve. These concepts apply to both PST and GST payments.

CCRA issues decisions by way of assessments or reassessments. When the client receives an assessment or reassessment, the client has ninety days to file an objection. He or she may do this by writing to CCRA in Ottawa, or to a regional BC office. An officer reviews the decision and may request more information. When CCRA has made its decision, the client may file an appeal in Tax Court.

The client may have received a decision from the Consumer Taxation Branch about a refund for tax paid. You should review the appropriate appeal processes after you establish that your client should be exempt from
taxation under s.87 of the Indian Act. You can contact the Ministry of Provincial Revenue, Revenue Programs Division, for further information.

This area of law is constantly changing. Section 87 exemptions cases go regularly before the courts. You need to remain up-to-date with cases that form the criteria for exemption. Related chapters in this manual are Bankruptcy, Debt Collections and Contracts, Housing, and Employment Law.

**Definitions**

“Band” means a body of Indians (a) for whose use and benefit in common, lands ... have been set apart ..., (b) for whose use and benefit in common, monies are held by Her Majesty, or (c) declared by the Governor in Council to be a band for the purposes of the Indian Act: Indian Act.

“CCRA” is Canada Customs and Revenue Agency.

“Indian” means a person who, under the Indian Act, is registered as an Indian or is entitled to be registered as an Indian: Indian Act.

“Reserve land” means land that qualifies as reserve land under the Indian Act, including land classified as designated reserve land.

“Certificate of Indian Status” is a card issued by the federal government showing the name, date of birth, and band number of the individual evidencing status.

**Relevant Legislation**


Indian Act, R.S.C. 1985, c.I-5.

Social Service Tax Act, R.S.B.C. 1986, c.431.

**Cases Cited**


*Metlakatla Ferry Service Ltd. v. B.C. (Gov’t)* (1987), 12 B.C.L.R.(2d) 308; [1987] 2 C.N.L.R. 95 (B.C.C.A.)


**Resources**


Torts and Negligence

Common client problems

• Can a client commence a tort action for a personal injury, in particular at a residential school or institution?

• How does a client lay a criminal complaint for having been abused at a residential school?
Summary

This chapter deals with the Native aspects of a tort or negligence action. Aboriginal people who have been injured by others often do not know their legal rights. Many Aboriginal people have been victims of abuse at residential schools, provincial institutions, and foster homes, and they want to commence legal proceedings against the parties involved.

Clients may need to know that an incident can lead to proceedings against the parties in criminal court and proceedings in a civil court. For example, victims of residential school abuse may make a criminal complaint to the RCMP and begin a civil action.

State of the Law

General

A tort action is a civil action that allows the client to claim financial compensation for damages. A tort is a wrong such as personal injury or damage to property, to one’s dignity, to business interests, to the environment, to one’s reputation, or to one’s privacy.

Examples of torts:

- Assault
- Trespass
- Breach of privacy
- Causing nervous shock or emotional distress, either intentionally or through neglect
- False imprisonment
- Intimidation
- Defamation.

Note: Contracts are not part of torts. They belong to another part of civil law.

The burden of proof in a civil action is less stringent than the test required in a criminal case. In a civil action, you have to prove the case “on the balance of probabilities.” This means that when the court considers the evidence, it is more likely than not that the tort was committed by the
defendant. In a criminal case, you have to prove the case “beyond a reasonable doubt.” This means that in looking at all the evidence, the court has no reasonable doubt that the accused is guilty.

You can begin a civil action against someone who has not been convicted of a criminal offence.

Damages in tort actions are awarded to compensate an injured party and, as much as possible, to return that person to the state he or she was in before the tort was committed. Since criminal proceedings do not seek to compensate the victim, the fact that the wrongdoer has been convicted of a crime does not affect whether a tort action can be brought or the amount of damages that may be sought.

**Limitation periods**

All provinces have laws that say you must begin a civil case within a reasonable time. In most cases, the time begins to run at the date the event takes place. A tort action must be begun **within two years** of the alleged wrong.

**What limitation dates apply to the client’s case?**

You need to find out if the client is within the time limit to begin an action. Note that no limitations apply in cases of sexual misconduct towards a minor (*Limitation Act*).

In cases of fraud, the limitation period begins when the client discovers the fraud or ought to have discovered it. The client does not have to prove intentional fraud, only that the conduct was unconscionable given the special relationship between the parties.

Limitation periods may not run where the client could not have reasonably known about the facts until they were actually discovered. The doctrine of “reasonable discoverability” allows actions to be brought years and sometimes decades later.

The running of time may be postponed because the client was under nineteen years of age, had a disability, or suffered from an educational or similar disadvantage at the time of the alleged wrong.
Residential school litigation

Two legal avenues deal with residential school abuse issues: (1) civil litigation, and (2) criminal prosecution.

Civil litigation

To date, thousands of Aboriginal people have taken legal action against the government of Canada and various church organizations. These lawsuits deal primarily with incidents of sexual abuse, although issues of loss of culture and physical and emotional abuse have also been claimed.

Litigation process: Residential school litigation is the same as any other litigation. Most cases proceed on a contingency plus disbursement fee basis. Contingency fee agreements are made between a client and his or her lawyer. The Law Society of BC has rules about the percentage that a lawyer may charge in a contingency fee agreement. The range for contingency fees is usually from 25 to 33.3 percent of the actual award.

Limitation period: Lower courts have decided that the thirty-year limitation period does not apply in these cases. This decision is currently under appeal.

Timeline: It may take up to two years for the case goes to trial. During this time, the court will hold interrogatories and examinations for discovery. Part of your role will be to explain the civil process to your client.

Liability issues and assessment of damages: The trial will determine if the defendant is liable. If the defendant is found liable, the court assesses vicarious liability and direct liability. The actual calculation of damages comes after this.

HAS THE CLIENT SIGNED ANY OTHER AGREEMENTS?

Law firms that specialize in civil actions against the federal government, the church, and individuals are found throughout the province. One of these firms may have already contacted your client. Be sure that you are aware of any prior agreements that the client may have signed. You may want to contact the Aboriginal Law Section of the Canadian Bar Association or the Lawyer Referral Service to obtain names of firms that specialize in this area of law.

DOES YOUR CLIENT HAVE A SUPPORT SYSTEM IN PLACE?

It is critical to advise your client of the several support programs available to survivors of residential school abuse. It is best to have this support
system in place before the trial process begins; the emotional toll of these types of proceedings is immense.

The Provincial Residential School Project is an organization that works with First Nations to provide counselling support through a healing journey and referrals to community-based services, and helps to raise community awareness. The organization can provide information for survivors seeking justice through criminal and civil processes. The client can contact the project at the victims’ toll-free line: 1-800-721-0066.

You can contact the project to request workshops or materials on the effects of the residential school system on Aboriginal people. The business line is 604-925-4464.

Criminal prosecution process

The RCMP has launched a task force on residential school investigations. Investigations are initiated by disclosure by complainants. Police forward the reports to the Crown counsel for review and charge approval. Investigations are conducted by officers with specific knowledge of the Aboriginal experience. The process is long, as the RCMP has to locate offenders and witnesses. The officers notify individuals as to the status of the case.

Crown counsel considers the request for charges and, if appropriate, lays such charges. Crown counsel ensures that the victim receives the financial support necessary to attend court appearances.

Foster care/provincial institution

Was the client abused or assaulted while in foster care or in a provincial institution?

The Residential Historical Abuse Program provides professional counselling services for BC residents who were abused while under the age of nineteen. The client does not have to prove he or she was (physically or mentally) abused or disclose the name of the abuser. No police complaint is necessary.

The client can get an application form to enter the program from the Attorney General’s toll-free line, 1-800-563-0808. The contents of the application are confidential. If other children are at risk, however, a professional is obliged to report abuses to appropriate authorities.
Definitions

“Tort” is a civil wrong, other than a breach of contract, that the law will redress by an award of damages.

“Class action” provides a means by which a large group of persons interested in a matter may sue or be sued as representatives of the class, without needing to join every member of the class. The trial court must certify the lawsuit as a class action.

“Contingency fee agreement” means an agreement between a client and a lawyer where the legal fees payable by the client to the lawyer are based on a percentage of the award or settlement payable to the client. The contingency fees are payable when the award is paid. Disbursements are usually not included, and are paid by the client as they are incurred.

“Vicarious liability” means liability of an employer for an employee’s actions.

“Direct liability” means direct liability for a person’s own actions.

Relevant Legislation

Limitation Act, R.S.B.C. 1996, c.266, s.3.

Resources

Provincial Residential School Project. Phone: 604-925-4464; Toll-free: 1-800-721-0066


Common client problems

- How do I prepare a will for an Indian client who lives on reserve and/or an Indian client who has an interest in land on reserve?
- How do I administer the estate of an Indian client?
Summary

This chapter deals with the drafting and the administration of a will for a registered Indian. The Minister of Indian Affairs and Northern Development has exclusive jurisdiction and authority over the estates of deceased Indians. The minister may transfer authority to the province to administer an estate of a deceased Indian who did not “ordinarily reside” on reserve.

State of the Law

Jurisdiction

The wills and estates of Indians are under the legislative jurisdiction of the federal government, except in cases where an Indian resides off reserve and there are no land holdings involved: s.4(3) of the Indian Act.

The minister has the exclusive authority to administer the estate of a deceased Indian. The minister must follow the rules of natural justice in exercising this discretion.

As with other jurisdictional issues, provincial laws apply as long as they are consistent with the Indian Act.

The Indian Act and the Indian Estates Regulations govern the administration of Indian estates.

- Sections 42 to 50 of the act provide the authority for the making of a will and the administration of the estates of a registered Indian who ordinarily resided on reserve before his or her death.
- Under ss.42 and 43, all authority and jurisdiction to deal with all matters concerning “matters and causes testamentary” lies with the minister.
- Under s.49, the minister has total authority to approve or disapprove of transmission of interests in reserve land.
- Section 51 gives the minister jurisdiction over the estates of mentally incapable Indians.

Regardless of the intentions of the testator or the rules of succession, no person has an unqualified right to inherit land on a reserve. For example, non-band members do not have a right to use and occupy reserve land unless authorized by a permit or lease under the act.
Would the minister assume jurisdiction for an Indian who lives off reserve?

Upon written request from the heir-at-law, the minister assumes jurisdiction for the estate of a deceased Indian who did not “ordinarily reside” on reserve, if all of the following criteria apply:

- The net value of the estate does not exceed $10,000.
- The estate does not include land located off reserve.
- The significant asset is land located on reserve.
- There are no complicated legal issues.
- All the heirs agree to the assumption of jurisdiction.

Practice Notes

What are the requirements for a valid will for an Indian?

Under the Indian Act, there are four requirements for a valid will for an Indian.

- The will must be written or typed.
- The person who makes the will (the “testator”) must sign it.
- The will must dispose of his or her property.
- The will takes effect when the person dies.

Unlike provincial provisions for a will, a will made under the act does not require the signatures of two witnesses to be considered valid. Under the Wills Act in British Columbia, witnesses do not have to be aware of the contents of the will; all they have to do is witness the signature.

Witnesses should not be beneficiaries of the client’s estate.

The will may be handwritten or typed. The property to be disposed of may include reserve land holdings evidenced by a certificate of possession, lease, or custom land holding.
What are the rules of inheritance?

**Land on reserve:** No person other than a band member may inherit reserve land. If the client has a certificate of possession or occupation and wishes to leave the property to a non-band member, it will be necessary to look at other options. These options include:

- A band member may hold the certificate of possession or occupation in joint tenancy with the non-band member.
- The non-band member may enter into a lease for a period up to 49 years.
- The property may be left to the non-band member in trust with a band member.
- The land may be held in trust by the non-member heir on behalf of minor children of the testator, if the children are band members: *Pronovost v. Canada (Minister of Indian Affairs and Northern Development).*

All transactions regarding property require INAC approval.

If property has been left to a non-band member and the above options are not available, the beneficiary has six months to sell the property in a public sale that is open only to band members.

Section 50 of the *Indian Act* provides the minister with authority to extend this period. If no purchaser is found, then the property reverts to the band. The beneficiary will be compensated for any permanent improvements that had been done by the holder of the certificate of possession or certificate of occupancy.

**Personal property:** A car, house, or bank account may be inherited if this personal property is not jointly owned. The minister must approve all transfers.

**Living wills:** Although there is no provision under the *Indian Act* or the *Indian Estates Regulations* for a living will, a living will can be executed by a registered Indian on or off reserve.

**Tips for preparing a will**

- Clients must have the capacity to understand what they are signing. You should interview the client alone, without any beneficiaries present. You must receive clear instructions from the client in order to prepare a will on his or her behalf.
• It is always good practice to complete a will on behalf of any competent client as quickly as possible, given the liability should the client die before you have completed the will.

• The will should include a revocation clause that cancels any previous wills or codicils.

• The will should appoint an executor.

• The will should name a guardian if your client has children and is the children’s sole caregiver.

• The will should name all beneficiaries by their full names.

• The will should include a clear list of assets, specifying serial numbers, descriptions, and locations of the property and assets.

Read each paragraph of the completed will to the client to ensure that he or she understands it. The client should initial each page and must sign the document.

When might a will be invalid?

Section 46 of the Indian Act stipulates that the minister may declare a will void in whole or in part if any of the following apply:

• The will was executed under duress or undue influence.

• The testator lacked capacity.

• The terms of the will impose hardship on persons legally entitled to be provided for.

• The will disposes of land in a manner contrary to the interests of the band or contrary to the Indian Act.

• The terms are so vague, uncertain, or capricious as to make it impossible or difficult to carry out its terms in accordance with the Indian Act.

• The terms are against the public interest.

File a Wills Notice

The minister has exclusive jurisdiction over the estates of deceased Indians, but INAC no longer stores wills.

File a Wills Notice with the provincial Wills Registry, Division of Vital Statistics. This records the existence and location of the will so that it can be located after the testator’s death.
Administration of Indian Estates

Under s.46 of the Indian Act, the minister has the power to vary the terms of a will. The courts will closely scrutinize the minister’s decision if this section is used in a way that limits the testamentary freedom of Indians: Pronovost v. Canada (Minister of Indian Affairs and Northern Development).

In addition, heirs can apply to the courts to vary the will. Grandparents, aunts, uncles, and cousins do not inherit when there is no will. If your client chooses one of these relatives as a beneficiary, it is crucial to have a valid will.

Section 43 of the Indian Act provides that the minister may:

- Appoint executors of wills and administrators of estates of deceased Indians
- Remove executors and administrators and appoint others in their place
- Carry out or authorize executors to carry out the terms of the wills of deceased Indians
- Administer or authorize administrators to administer the property of Indians who die intestate
- Make or give any order, direction, or finding that in his or her opinion is necessary or desirable to make regarding the estates of deceased Indians.

What does the client do when a family member dies?

1. When an Indian dies on reserve, the family or executor should immediately call INAC, at 1-888-917-9977, and ask for the estate officer, who will open a file. Whether or not there was a will, the estate must be settled according to the Indian Act.

2. If there is a will, the client should send the estate officer a copy of the original will. It may be sent by mail, fax, or courier. If the client cannot find a will, you or your client may do a will search through the Wills Registry in Victoria, at 1-800-663-8328. The client also needs to get an original of the death certificate and be prepared to provide the estate officer with information about the person who died, such as the person’s band membership, band number, and list of heirs.

3. The estate officer will look at the original will to make sure that the will complies with the Indian Act. If the will complies with the Indian Act, the estate officer will approve the will and appoint the person named as the executor to administer the estate. If the executor agrees to act, INAC will send to the executor the documents to start the
process of administering the estate. If your client is the executor and has not received the documents, you can get the forms needed to begin the process from the estate officer.

4. INAC may agree to transfer its jurisdiction to the province: if there are no reserve land holdings or where an estate does not involve a large sum of money, or if there are off-reserve assets and beneficiaries, and the heirs or executor agree to the transfer.

5. If no will exists, the estates officer will contact all heirs or immediate family members to see if anyone will agree to be the administrator of the estate. If no heir or immediate family member is willing and able to do it, INAC will administer the estate.

6. After an executor is appointed, INAC will release all assets held in trust to the executor and close the file. The executor then holds these assets in trust until they are distributed to the beneficiaries. When the estate is settled, an estate officer will become involved only if a beneficiary or heir complains or challenges the settlement.

7. The executor must notify creditors, heirs, and beneficiaries by a form titled “Notice to Creditors, Heirs and Other Claimants.” This form is available from INAC and must be posted in a public meeting place such as the band office or tribal council office. Copies of this form should be given to the deceased’s band and tribal council. Claimants have eight weeks to make a claim after the form has been posted.

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**Intestate Administration**

Section 48 of the *Indian Act* provides for the distribution of property when a registered Indian dies intestate:

- If the net value of the deceased’s estate is less than $75,000, the spouse receives the entire estate. If it is more that $75,000, the spouse receives the first $75,000 and the rest is divided between the spouse and any children.

- A child includes a person born in or out of wedlock, a legally adopted child, and a child adopted in accordance with Indian custom. Children named in the estate of a registered Indian are referred to in the act as “issue.” There must be a finding of a custom adoption before a custom-adopted child can inherit any part of the estate. An application must be made to the INAC Adoption Unit.

- If there is no spouse or issue, the estate will go to the mother and father in equal shares. If either or both the mother and/or the father is deceased, the equal shares will go to his or her survivors.
• Where there is no spouse, issue, mother, or father, the estate goes to the deceased’s brothers and/or sisters in equal shares.

• Section 14 of the Indian Estates Regulations states that the minister may direct that a woman shall be deemed to be the widow of a deceased Indian and that, if the couple have children, can deem them their children for the purposes of the regulations if one of the following applies:
  – She lived with the deceased for seven years (if one or both were married to someone else).
  – Neither had been married to anyone else and had lived together for at least two years.
  – Both were divorced and had lived with each other for two years.

If the deceased had no spouse, children, or grandchildren at the time of death, the next heirs in line are:
• Parents
• Sisters and brothers
• Nieces and nephews.

If none of the heirs are alive, the reserve land holding reverts to the band. Grandparents, aunts, uncles, and cousins do not inherit reserve land when there is no will.

Review of the minister’s decision

If the amount in question exceeds $500 or if the minister agrees, any person affected by the minister’s decision can appeal to the Federal Court to have the decision reviewed: Pronovost v. Canada (Minister of Indian Affairs and Northern Development).

Section 47 of the Indian Act states that there is a two-month limitation to appeal a decision made by the minister under ss.42, 43, or 46.

The Federal Court does not necessarily have exclusive jurisdiction over all aspects of the estate of a deceased Indian. Issues such as contract, trust, and default of duty against executors and administrators, including administrators appointed by the minister, can be brought in BC Supreme Court.
Definitions

“Indian” means a person who, under the Indian Act, is registered as an Indian or is entitled to be registered as an Indian: Indian Act.

“Indian Estate” means the estate of a person who is registered as an Indian or is entitled to be registered and ordinarily resides on reserve. See the Indian Estates Regulations.

“Ordinarily reside” means that the person has never lived off reserve, or he or she has lived off reserve only to work, go to school, or receive medical attention, or returned to live on reserve before his or her death.

Relevant Legislation

Indian Act, R.S.C. 1985, c.I-5.
Wills Act, R.S.B.C. 1996, c.489.

Cases Cited


Resources

Common client problems

• Does an employer have to pay into the Workers’ Compensation Board accident fund when he or she is operating a business on reserve?

• Is an employee covered by WCB benefits when the workplace is on reserve?

• Can a client claim WCB benefits if he or she is a child adopted by Indian custom or is a spouse through a marriage by Indian custom?
Summary

This chapter deals with the Aboriginal aspect of workers compensation legislation.

The Workers’ Compensation Board (WCB) is an independent administrative agency that administers the *Workers Compensation Act*. Workers compensation is funded by compulsory assessments on employers, and covers all workers in compulsory industries.

The act is applicable to Indians working on reserve for bands and other employers.

You should familiarize yourself with limitations, current policies of the WCB, and the numerous benefits and remedies available to workers injured at work. Workers’ Advisers are a useful resource. Visit their Web site at <http://www.labour.gov.bc.ca/wab/location.htm>

The report of the Royal Commission on Workers’ Compensation in BC can serve as guide to the history and inadequacies of the legislation.

State of the Law

Assessments for employers in certain industries are compulsory. The employers, not the employees, are obligated by the WCB to pay these assessments. An employee may still be covered by WCB even if the employer fails to pay premiums to the WCB.

The employer cannot arbitrarily deduct compensation premiums from an employee’s paycheck, nor can an employer contract out of a compensation claim. A worker cannot waive or assign his or her right to compensation.

If the employee makes a successful claim, he or she loses the right to take legal action against the employer. However, the WCB can sue a negligent third party in the worker’s name. This is referred to as “subrogation.”

The *Workers Compensation Act* defines an “employee” and an “employer.” It says that some workers and employers may be exempt from the provisions of this act. The authority to exempt a specific employer or employee lies with the WCB, which can make a decision to exempt an employer. The decision can be appealed to the Review Board within ninety days of the decision letter being received.
A decision of the Review Board can be appealed to the Appeal Division within thirty days from the date the decision was mailed (the date mailed will be indicated on the decision). The legislation provides for extension of time requests. Put any request in writing to protect your client’s interests.

In order for you to assist with a WCB issue, the client must sign a release authorizing the WCB to give you information. Ask the WCB for a copy of the claim file. You may make the request under the Freedom of Information and Protection of Privacy Act. It can take anywhere from six weeks to four months to process this request.

You should file a Part I Appeal within the ninety days to protect your client’s interest before you obtain the claim file. Part II will be due six months from the time Part I was filed, unless an extension of time has been granted.

Native Issues

Does the WCB apply on reserve?

Nothing in the Act exempts businesses operating on reserve from paying the compulsory assessments, or exempts an employee from being covered by the WCB while employed by a business operating on reserve.

As in any WCB matter, each case should be examined according to its particular circumstances.

Section 88 of the Indian Act incorporates provincial law into federal law, where there are no inconsistencies with federal law, the Indian Act, or treaty rights.

A BC Court of Appeal case provided that workers employed in Aboriginal operations on reserve have the same workers compensation coverage as all other workers in the province. If their employer is operating in a compulsory industry under the Workers Compensation Act, workers are covered regardless of whether their employer has registered with the WCB or paid assessments: Isaac v. Workers’ Compensation Board.

Note that the Appeal Division of the WCB follows this court decision (Workers’ Compensation Reporter).

Should the band be deemed not to be an “employer” as defined by the act, the client may have an action for damages against the band. Due to the
long appeal processes for the WCB, it may be necessary to make an application to court for damages relating to an accident that occurred while the client was performing contractual obligations for the band. This would be the case only if the limitation period for this type of action was at risk of expiring and the client had not successfully made a WCB claim.

**Does the client fit within the WCB definition of wife and/or child?**

WCB definitions for both of these categories are very complicated. The act defines “dependent spouse” and “dependent child” very narrowly. Some of the factors considered are:

- Actual dependence on the worker
- Length of time that common-law spouses resided together
- Ages of children and whether they are attending school
- Length of time the worker and spouse lived separately and apart, if separated
- Age of widow or widower at the date of death of the worker.

To find out what benefits are payable and what the criteria for eligibility are, you need to examine the relevant portions of the act that apply to the individual situation.

**Relevant Legislation**


*Workers Compensation Act, R.S.B.C. 1996, c.492.*

**Cases Cited**


Resources


Appendix A
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