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Margaret Hall, LLB, LLM

ELDERLAW: RELATIONSHIP AND RELEVANCE TO THE NEEDS OF ABORIGINAL ELDERS

1. Introduction: What is "Elderlaw"?

The topic of law and aging, or "Elderlaw," has emerged in the last decade as a distinct legal topic in Canada, gathering momentum as the Canadian population ages. Elderlaw is now a feature of the Canadian legal landscape: the Canadian Bar Association has an Elderlaw section, and the third Canadian Conference on Elderlaw was held in fall 2007, to name just two examples.

Elderlaw issues include:

- Capacity and guardianship
- Abuse, exploitation, and neglect
- Regulation in supportive housing and institutional care
- Intergenerational family law
- Enduring powers of attorney and health care directives
- End-of-life matters.

These issues are not, of course, new. But brought together under the umbrella of Elderlaw, they are recognized as those that disproportionately affect older adults and that relate to special characteristics associated with aging. (Note that although wills and estates are also identified as Elderlaw issues, and which are discussed in this paper, Elderlaw generally focuses on justice and quality of life *during* the life of the older adult.)

To what extent has Elderlaw, at this point in its development as a distinct legal topic, addressed the needs of Aboriginal elders? This is an important question to ask as the Aboriginal population ages. Currently, the Aboriginal population is notably younger

than the Canadian population overall, but recent statistics indicate that the number of Aboriginal elders in Canada is expected to more than double by 2017.[1] If the particular situation and needs of Aboriginal elders has not been a focus of Canadian Elderlaw in the past, it must be in the future.

This paper focuses on four specific Elderlaw issues:

- Supportive housing
- Adult guardianship and substitute decision making
- Adult protection: abuse and neglect
- Wills and estates

These topics have been the focus of the Elderlaw discussion in Canada, and all have been the subject of reform initiatives in provincial legislatures across the country.

This paper does *not* address health care and access to health care, although these issues are closely connected to many of the legal issues affecting Aboriginal elders (abuse and neglect for example). Because of lower life expectancies in the Aboriginal community and the earlier onset of chronic conditions, "old age" generally begins earlier for Aboriginal persons (defining "old age" as "whenever health and functioning deteriorate to a level that results…in decreasing independence and mobility").[2] For many Aboriginal elders, access to health care is a crisis issue because of the dearth of services in their communities, particularly continuing care and long-term care. At present, too many "[t]erminally-ill Aboriginal people or elders, uprooted from their communities in a traumatic medevac flight to a city hospital all alone died sooner than those who went home to die."[3]

[1] M. Turcotte and G. Schellenberg, *A Portrait of Seniors in Canada 2006* (Ottawa: Statistics Canada, 2007), at 223. http://www.statcan.ca/english/freepub/89-519-XIE/89-519-XIE2006001.pdf (accessed March 25, 2008).
[2] S.J. Ship and R. Tarbell, "Our Nations Elders Speak—Ageing and Cultural Diversity: A Cross-Cultural Approach" (Kahnawake, QC: National Indian and Inuit Community Health Representatives Organization, 1997), http://www.niichro.com/Elders/Elders7.html (accessed March 25, 2008); *Sustaining the Caregiving Cycle: First Nations People and Aging*. A Report from the Assembly of First Nations to the Senate Special Committee on Aging (May 2007), at 6. http://www.afn.ca/misc/SCC.pdf (accessed March 25, 2008).
[3] *Sustaining the Caregiving Cycle: First Nations People and Aging*, *ibid*., 15.

"Home" for many Aboriginal elders is on reserve. In fact, according to the 2001 Canadian Census, Aboriginal elders are more likely than younger persons to live on reserves and considerably less likely to live in urban areas.[4] For these people, the relevant legislation is the *Indian Act*[5] and its provisions dealing with housing, aspects of adult guardianship, and wills and estates. Over time, as new systems of governance develop to replace the *Indian Act,* the law relating to the issues considered here will change accordingly. This change has already occurred in some areas. For example, the Westbank First Nation Self-Government Agreement provides for Westbank First Nation to have jurisdiction in relation to wills and estates ("estates" here including the property of mentally incompetent persons), and the *Sechelt Indian Band Self-Government Act*[6] confers on the band council the power to make laws relating to the transfer of property after death of band members on Sechelt lands. As well, special provisions regarding the transfer of Nisga'a property after death have been incorporated into provincial legislation (see discussion below, under "Wills and Estates").

The process of developing areas of the law affecting Aboriginal elders within systems of self-governance is still in its earliest stages. However, as this process continues, there is opportunity to create new structures that meet the particular needs of Aboriginal communities. One objective of this paper is to assist with that process.

2. Supportive Housing

"Supportive housing" is a relatively new term used to describe a range of housing options that accommodate the needs of older adults through design features, housing management, and access to support services. Although the terminology used varies among provinces, supportive housing is generally defined as "assisted living" and as offering higher levels of personal service for more frail individuals with greater needs. In contrast, "long-term care" in a care facility or nursing home refers to a form of health care, not housing (and therefore is not supportive housing). This distinction is key to the concept of supportive housing. In short, supportive housing is intended for

[4] *A Portrait of Seniors in Canada 2006*, *supra* note 1, at 225.
[5] R.S. 1985, c. I-5.
[6] S.C. 1986, c. 27 s. 14(1)(q)

vulnerable older adults who need support but who do not need the institutional health care setting of the care facility.[7]

Supportive housing may be a particularly important alternative for Aboriginal elders. A Statistics Canada study released in 2007 reported that as of 2001, 22% of Aboriginal elders were living in homes requiring major repairs compared with 6% of non-Aboriginal seniors, and more than one in three Aboriginal elders living on reserve were living in dwellings requiring major repairs.[8] As well, Aboriginal elders are more likely to suffer from degenerative diseases associated with old age and to have experienced the loss of spouse, friends, or relatives earlier in life.[9] Many of those who attended residential schools (between 43% and 47%) will also have experienced loss of self-esteem and cultural knowledge, isolation from family and community, and verbal and emotional abuse. The need for a positive, healthy, and safe environment that can be provided by supportive housing is especially urgent given the serious issues faced by too many Aboriginal elders.

Legislatures across Canada have struggled to determine what law should apply to supportive housing and to find the most appropriate way to protect residents without reproducing the heavily regulated environment of the care facility.

a. On reserve

An assisted living program for elders on reserve is funded and managed by Indian and Northern Affairs Canada (INAC). "Assisted living," for the purposes of this program, consists of in-home care (homemaking services), foster care (care and supervision in a family setting), and facility or institutional care.[10] None of these options meet the definition of supportive housing, however, which would bring elders together in a safe environment with social supports in addition to personal (as opposed to health) care

[7] M.I. Hall, *A Legal Framework for Supportive Housing for Seniors: Options for Canadian Policy Makers* (Ottawa: Canadian Mortgage and Housing Corporation, 2005), http://www.cmhc-schl.gc.ca/odpub/pdf/63975.pdf (accessed March 25, 2008).
[8] *A Portrait of Seniors in Canada 2006*, *supra* note 1, at page 24).
[9] *Sustaining the Caregiving Cycle: First Nations People and Aging*, *supra* note 2, at 6.
[10] *Ibid*., 14.

services. Currently, there appear to be no proposals to develop supportive housing (as opposed to long-term care) for Aboriginal elders on reserve.

It is not clear at this time what regulatory scheme would apply to supportive housing for Aboriginal people developed on reserve land. In British Columbia, the courts have interpreted the *Residential Tenancy Act* to find that a provision of that Act which affects the "use and occupation" of reserve lands will not apply on reserve,[11] although it seems clear that were a band to develop *commercial* supportive housing the *Residential Tenancy Act* would apply. Just as the provincial legislatures continue to develop the regulation of supportive housing, therefore, self-governing bodies and the federal government will need to consider how this form of housing should be regulated on Aboriginal lands and reserves, perhaps following the model chosen by the British Columbia legislature.

The compelling reasons put forward by the Aboriginal Housing Management Association (AHMA) for developing supportive housing for Aboriginal elders off reserve (see discussion below) would seem to apply equally to elders living on reserve or in areas coming under self-governance, and the issue of regulation will need to be tackled in these contexts also.

b. Off reserve

Provincial legislation applies to supportive housing off reserve. Two distinct forms of supportive housing are recognized in British Columbia: supported living and assisted living. Supported living is intended for people who do not require significant support and assistance but who find wholly independent living uncomfortable or difficult. In contrast, assisted living is intended for older adults with more significant needs for support and assistance at a relatively intense level.

[11] *Anderson v. Triple Creek Estates* [1990] B.C.J. No. 1754 (QL) (S.C.); *Matsqui Indian Band v. Bird*, [1993] 3 C.N.L.R. 80 (B.C.S.C.).

The distinction is important because supported living and assisted living are governed in British Columbia by different legislation:

- Health and safety issues in assisted living settings are regulated by the *Community Care and Assisted Living Act*.[12]
- Amendments to the *Residential Tenancy Act*[13] (approved by the legislature in May 2006) apply to supported living and to non-health and safety matters in assisted living (hospitality services such as meals, for example). Regulations, policies and procedures associated with the amendments are currently being developed in consultation with landlords and groups representing tenants and potential tenants of supported and assisted living.

The provincial government, through the program Independent Living BC (ILBC), actively promotes the development of supported and assisted living by both for-profit and not-for-profit groups. Many new developments have been built across the province, including residences serving older members of particular ethnic groups. The Nikkei Home, for example, which opened in Burnaby in 2002, provides supportive housing primarily to Japanese-Canadians. The National Nikkei Heritage Society, through a grant from the Japanese Canadian Redress Foundation, provided land valued at $1.6 million and raised $800,000 toward the capital costs of Nikkei Home. The Canada Mortgage and Housing Corporation (CMHC), BC Housing, and the Fraser Health Authority provided additional funding. This successful project provides a precedent that should be followed for Aboriginal elders living off reserve.

The federal government was historically involved in the provision of housing for Aboriginal people living off reserve through CMHC. In 1996, however, CMHC decided to devolve all social housing in Canada to the provinces including urban and rural Aboriginal housing programs. In 2004, BC Housing and the Minister of Community, Aboriginal and Women's Services signed an agreement for the transfer of the provincial non-reserve Aboriginal housing portfolio to the member societies of the Aboriginal Housing Management Association (AHMA).

[12] S.B.C. 2002, c. 75.
[13] S.B.C. 2002, c. 78.

The AHMA is currently seeking funding from the Aboriginal Healing Foundation to develop a supportive housing project for Aboriginal elders. If successful, this would be the first such development in the province. The AHMA proposal draws specific attention to the role of Aboriginal elders within the community as holders and transmitters of traditional knowledge, and to the potential of the supportive housing model to support elders in this role.

This housing proposal, in keeping with the purpose of the Aboriginal Healing Foundation, connects with the goal of community recovery from the disruptive and harmful effects of the residential school experience: "A community of Aboriginal seniors in supportive housing could be an invaluable resource for the large[r] community and a personal link to cultural connection and support for each individual resident. This opportunity could offer residents a chance to talk about [past and] present experiences and also how to strategize for success in the future."[14]

The proposal describes a "healing place," including a communal room for traditional activities such as healing circles. A community of elders living in supportive housing would provide opportunities for community gatherings, ceremonies, feasts, and potlatches. One elder consulted by the AMHA noted the possibilities for intergenerational support, as members of the supportive housing community could be available to act as grandparent figures.

3. Adult Guardianship and Substitute Decision Making

The law dealing with adult guardianship and substitute decision making applies when adults are deemed to be incapable of making decisions in their own best interests. Older adults are more likely to be in need of guardians or substitute decision makers because of illnesses associated with aging that may compromise their mental capabilities.

[14] *Seniors/Elders Supportive Housing—Backgrounder* (Victoria: Aboriginal Housing Management Association, 2006), http://www.ahma-bc.org/backgrounder_sup_senior.htm (accessed March 25, 2008).

a. On reserve

The *Indian Act* provisions dealing with incompetent persons, like the provisions for wills and estates, apply only to a person registered or entitled to be registered as an Indian and ordinarily resident on reserve land. An exception applies to a person who is living off reserve for medical reasons (including residence in a nursing home or care facility). In that case, the person is considered to be living in a "special residence" and, if he or she is otherwise a lifetime resident of a reserve, is considered to still be "ordinarily resident"[15] and the *Indian Act* continues to apply.

Guardianship of *property only* is provided for in the *Indian Act*. Section 51(1) states that "all jurisdiction and authority in relation to the property of mentally incompetent Indians is vested exclusively in the Minister." Section 51(2) states that the Minister may do any of the following:

> (a) appoint persons to administer the estates of mentally incompetent Indians;
>
> (b) order that any property of a mentally incompetent Indian shall be sold, leased, alienated, mortgaged, disposed of or otherwise dealt with for the purpose of
>
> (i) paying his debts or engagements,
>
> (ii) discharging encumbrances on his property,
>
> (iii) paying debts or expenses incurred for his maintenance or otherwise for his benefit, or
>
> (iv) paying or providing for the expenses of future maintenance; and
>
> (*c*) make such orders and give such directions as he considers necessary to secure the satisfactory management of the estates of mentally incompetent Indians.

[15] *Earl v. Canada (Minister of Indian and Northern Affairs),* 2004 FC 897, 256 F.T.R. 84.

The *Indian Act* does not provide for finding or declaring a person to be "incompetent," so this determination is made in accordance with the provincial *Patients Property Act*[16] (discussed below, under "Off reserve"). Once a certificate of incapability or court order is made under the *Patients Property Act,* the Department of Indian and Northern Affairs Canada (INAC) assumes responsibility. If and when Part 2 of the provincial *Adult Guardianship Act* comes into effect (discussed below) the finding of incompetence or incapability will be made under that legislation.

As the *Indian Act* confers jurisdiction over the *property* of the incompetent person only, court appointment of a guardian of the *person* (in the language of the *Adult Guardianship Act* Part 2) or a "committee of the person" (in the language of the *Patients Property Act*) takes place under the provincial legislation. A committee/guardian of the person has the authority to make personal decisions on behalf of the individual concerned excluding financial and legal matters.

This limitation to guardianship over property only makes the practical difference between the *Indian Act* and provincial legislation less significant than it would otherwise be. One potentially important area of difference is set out in Division 4 of the *Adult Guardianship Act Part 2*, "Review, Replacement and End of Guardianship" (see discussion, below "Off reserve"). The *Indian Act* contains no similar provisions, although there would seem to be no legislative impediment to adopting a review process of this kind as a matter of protocol.

Note that Part VIII of the Westbank First Nation Self-Government Agreement ("Wills and Estates") applies to the property of mentally incompetent persons through its definition of "estate" to include the "property of deceased persons, mentally incompetent persons, and infants."[17] Guardianship of the person is not provided for.

[16] R.S.B.C. 1996, c. 349.
[17] Westbank First Nation Self-Government Agreement between Her Majesty the Queen in Right of Canada and Westbank First Nation, Part VIII "Wills and Estates", s. 78. http://www.ainc-inac.gc.ca/nr/prs/s-d2003/west_e.pdf (accessed March 25, 2008).

b. Off reserve

Under the *Patients Property Act*, a "committee" may be appointed by the court if it is satisfied that the person in question is no longer capable of managing his or her estate and/or person. Under the Act, "committee refers to a person who is empowered to make decisions on behalf of another" (a role more commonly referred to as a "guardian" or "substitute decision maker.")

Legislation that would replace the *Patients Property Security Act*[18] *Act* (Part 2 of the *Adult Guardianship Act*)[19]was passed in 1993 but has yet to come into effect. It is anticipated that, as amended in the intervening years, this new law will finally come into force with the *Adult Guardianship and Personal Planning Statutes Amendment Act, 2006*. [20]

The new legislation distinguishes between "personal guardians" and "property guardians" who are empowered to make different kinds of decisions on behalf of the incapable adult. Section 16 of the Act sets out a range of different kinds of decisions that a personal guardian may be authorized to make: decisions regarding where the adult is to live, whether the adult should work, or whether the adult should have contact with another person. The court may authorize the personal guardian to make one or more of these decisions, or may confer a more global decision-making power to "do anything the personal guardian considers necessary in relation to the personal care or health care of the adult." Property guardians, on the other hand, are given a more global authority under section 17 of the Act. Division 4 of Part 2 ("Review, Replacement and End of Guardianship") provides that a guardian must apply to the court for review of the guardianship order if the older adult's needs, circumstances, or ability to make decisions has changed significantly and a change to the order appears to be in the adult's best interests.

[18] *Patients Property Act,* R.S.B.C. 1996, c. 349).
[19] R.S.B.C. 1996, c. 6.
[20] Bill 32, *Adult Guardianship and Personal Planning Statutes Amendment Act, 2006*, 2nd Sess., 38th Parl., British Columbia, 2006.

c. *Power of Attorney Act* **and** *Representation Agreement Act*

The guardianship provisions of the *Indian Act,* the *Patients Property Act,* and the *Adult Guardianship Act* apply to individuals who have been declared by a court to be incapable of managing their property and/or person. In contrast, the *Power of Attorney Act*[21] and *Representation Agreement Act*[22] make it possible for individuals to choose for themselves who will make decisions on their behalf should it become necessary at some future date.

The former allows for a power of attorney to be used by a substitute decision maker regarding financial matters. The latter anticipates a personal planning document, called a representation agreement, that enables individuals to appoint someone to make personal and health care decisions for them when necessary. If no representative has been appointed, the *Health Care (Consent) and Care Facility (Admission) Act*[23] sets out a hierarchy of individuals who must be consulted regarding health care decisions if an individual is incapable of making a decision

There is no equivalent to the power of attorney and representation agreement provided for in the *Indian Act*. However, the provisions of the *Indian Act* regarding the property of "mentally incompetent Indians" would seem to invalidate the appointment of a decision maker under a power of attorney to make property and financial decisions for a person who has become incapable. No case law dealing with this point has been found to date, although there is clearly a potential conflict between the individual's right to choose his or her own substitute decision maker (enjoyed by Aboriginals and other Canadians off reserve) and the assertion of "all jurisdiction and authority" by the Minister under the *Indian Act*. In terms of personal decision making, however, an individual's ability to choose his or her own substitute decision maker on and off reserve is clear.

While the power of attorney is valuable as a relatively simple, straightforward, private and inexpensive method of providing for one's affairs by choosing a substitute decision

[21] R.S.B.C. 1996, c. 370.
[22] R.S.B.C. 1996, c. 405.
[23] R.S.B.C. 1996, c. 181.

maker, legitimate concerns have been voiced over its potential for abuse. Because the power of attorney is private and gives the decision maker wide powers to use the individual's property, even after the individual becomes incapable and cannot protect his or her own best interests, it may create opportunity for misuse and abuse. Some of these concerns have been addressed in legislation and in other initiatives (discussed below).

4. Adult Protection: Abuse and Neglect

As awareness of elder abuse and neglect has increased, adult protection has become the subject of legislative reform. Abuse and neglect are not dealt with in the *Indian Act* or, to date, in self-government mechanisms; therefore, the provincial law applies to these matters both on and off reserve. Note, however, that the *Nisga'a Final Agreement Act*[24] gives the Nisga'a government legislative jurisdiction and authority over social services, and there may be future development in this area regarding adult abuse and neglect.

In British Columbia, adult abuse and neglect, including elder abuse and neglect, is dealt with in the *Adult Guardianship Act*. (Other jurisdictions treat the matters of adult abuse and neglect in legislation separate from adult guardianship.) Part 3, which has been in force since 2000, allows for a "designated authority" to investigate potential situations of abuse or neglect. (As noted earlier, Part 2, dealing with court-appointed substitute decision making, has yet to be proclaimed).

Under Part 3 of the Act, the representative of the designated authority is to make contact and carry out an initial assessment of the situation once a complaint of abuse or neglect has been received. Health authorities are empowered to act as designated authorities.

[24] S.B.C. 1999, c. 2.

There are two aspects to abuse and neglect requiring or justifying intervention under the Act:

- The "abuse" or "neglect" as defined in the Act has occurred
- The person being abused or neglected is incapable of seeking support or assistance for him- or herself because of physical restraint, a physical handicap that limits the ability to seek help, or an illness, disease, injury, or other condition that affects the person's ability to make decisions about the abuse or neglect.

"Abuse" is defined as the deliberate mistreatment of an adult that causes the adult physical, mental, or emotional harm or damage to or loss of assets. It includes intimidation, humiliation, physical assault, sexual assault, overmedication, withholding needed medication, censoring mail, invasion or denial of privacy, or denial of access to visitors.

"Neglect" is defined as any failure to provide necessary care, assistance, guidance, or attention to an adult that causes, or is reasonably likely to cause within a short period of time, serious physical, mental, or emotional harm or substantial damage to or loss of assets, including self-neglect.

Once an assessment is made that a person is suffering from abuse or neglect, that person is offered support and assistance, which he or she has the right to refuse unless found to be mentally incapable. This standard is in keeping with the overarching principle that individuals are presumed capable and therefore able to make autonomous choices about their lives (even if those choices seem unwise or even dangerous to others). Thus the older woman who appears to be exploited by a younger man, perhaps giving him lavish gifts and allowing him to use her home as a "clubhouse" for his friends, may not wish to be helped out of the relationship; perhaps in her mind the excitement and companionship he provides makes for a fair exchange. An exception is made, however, where an individual is not capable of making a decision about whether to refuse services. On refusal, therefore, the designated authority will assess the individual to determine the question of capability. Importantly, this assessment is not meant to be a determination of "global"

incapability or incapacity; the narrow question here is the capacity to refuse services offered under the Act.

Unlike some other jurisdictions, British Columbia has opted not to develop a separate "ground-up" adult protection bureaucracy (the traditional child-welfare model). Instead, the designated authority representative works to connect the individual with existing social supports and organizations. This approach focuses on developing existing community strengths and capacity. British Columbia's unique "community response networks" (described below) were created to facilitate this process. If appropriate and necessary, the Office of the Public Guardian and Trustee may also become involved to protect a person's property interests.

Community response networks bring together existing community resources to identify areas of need and meet those needs in a way that will be appropriate and workable in their particular community. The intent of this approach is to avoid the problems associated with bureaucratic "top-down" responses to need and to build capacity within communities and draw on existing strengths. The problems of access that are so significant in more remote communities are less problematic where services are developed and provided locally. Trust is also stronger where assistance is sought from within the community and not from an outside authority such as a provincial government body or the police. This element of trust is especially significant in cases of domestic abuse, where elders may fear that speaking out to protect themselves will result in harm to their children or other close relatives or friends.

The Collaborative Dialogue with First Nations on Providing Support and Assistance for Abused and Neglected Adults, initiated in 2005 by the BC Adult Abuse/Neglect Prevention Collaborative and the Office of the Public Guardian and Trustee, is intended to encourage and assist with the development of community-based support systems such as community response networks in Aboriginal communities, and to spread information about adult abuse and neglect legislation in British Columbia. The immediate focus for the Dialogue is preventing of re-victimization of residential school survivors receiving money through the settlement process. The financial abuse of

former students is coming to the attention of community members both on and off reserve, and is a cause for grave concern.

5. Wills and Estates

Wills and estates are governed under provincial legislation and, for those registered or entitled to be registered as Indians, under the *Indian Act.* There are important differences between the provincial legislation and the relevant provisions of the *Indian Act.*

First, the *Indian Act* provisions are directed to the special nature of reserve land and regulate how it can be disposed of on death. As well, the formal requirements for making a will are less stringent under the *Indian Act* than under provincial legislation.

Self-governing agreements are also relevant to the discussion of wills and estates. The Westbank First Nation Self-Government Agreement and the *Sechelt Indian Band Self-Government Act* each contain provisions giving jurisdiction over matters of wills and estates to the First Nation governing bodies, although to date no legislation has been created to provide for this jurisdiction.

The *Nisga'a Final Agreement Act* provides that the Nisga'a government has jurisdiction over the devolution of cultural property, and to this end, in 1999, the provincial *Estate Administration Act*[25] was amended to include the following:

> **2.1** (1) In any judicial proceeding under this Act in which the validity of a will of a Nisga'a citizen, or the devolution of the cultural property of a Nisga'a citizen, is at issue, the Nisga'a Lisims Government has standing in the proceeding as provided in paragraph 117 of the Nisga'a Government Chapter of the Nisga'a Final Agreement.
>
> (2) In a proceeding to which subsection (1) applies, the court must consider, among other matters, any evidence or representations in respect of Nisga'a laws and customs dealing with the devolution of cultural property as provided in paragraph 119 of the Nisga'a Government Chapter of the Nisga'a Final Agreement.
>
> (3) As provided in paragraph 120 of the Nisga'a Government Chapter of the Nisga'a Final Agreement, the participation of the Nisga'a Lisims Government in a

[25] R.S.B.C. 1996, c. 122.

> proceeding to which subsection (1) applies must be in accordance with the applicable Rules of Court and does not affect the court's ability to control its process.

The *Wills Variation Act*[26] was also amended in 1999 to include provisions applying to the will or cultural property of a Nisga'a citizen:

> 1.1 (1) As provided in paragraph 118 of the Nisga'a Government Chapter of the Nisga'a Final Agreement, the Nisga'a Lisims Government may commence an action under this Act in respect of the will of a Nisga'a citizen that provides for the devolution of cultural property.
>
> (2) In any judicial proceeding under this Act in which the validity of a will of a Nisga'a citizen, or the devolution of the cultural property of a Nisga'a citizen, is at issue, the Nisga'a Lisims Government has standing in the proceeding as provided in paragraph 117 of the Nisga'a Government Chapter of the Nisga'a Final Agreement.
>
> (3) In a proceeding to which subsection (2) applies, the court must consider, among other matters, any evidence or representations in respect of Nisga'a laws and customs dealing with the devolution of cultural property as provided in paragraph 119 of the Nisga'a Government Chapter of the Nisga'a Final Agreement.
>
> (4) As provided in paragraph 120 of the Nisga'a Government Chapter of the Nisga'a Final Agreement, the participation of the Nisga'a Lisims Government in a proceeding to which subsection (1) applies must be in accordance with the applicable Rules of Court and does not affect the court's ability to control its process.

The definition of cultural property includes:

- Communal interests in Nisga'a lands, or assets owned by the Nisga'a central government
- Ceremonial regalia and similar personal property associated with a Nisga'a chief or clan
- Other personal property that has cultural significance to the Nisga'a nation.

These provisions reflect the special nature of both cultural property itself and the idea of ownership as it can and does apply to cultural property.

[26] R.S.B.C. 1996, c. 490.

a. The Indian Act

The Minister of Indian and Northern Affairs Canada has jurisdiction over an estate if the deceased person was ordinarily resident on a reserve or on federal crown land at the time of death and if he or she was registered as an Indian or entitled to be registered as an Indian. Further, the Minister has a discretionary power to assume jurisdiction over the estate of a person registered or entitled to be registered as an Indian but *not* ordinarily resident on reserve land where the following conditions are met:

- The reserve land is the only significant asset in the estate
- The estate does not contain off-reserve land
- There has been a written request to the Minister by one or more heirs or beneficiaries and no heirs or beneficiaries object, and where an heir or beneficiary is able and willing to administer the estate unless impractical in the circumstances

Even where the Minister has no jurisdiction over the estate, he or she retains authority over the transfer of reserve lands.[27]

Sections 45 and 46 of the *Indian Act* apply specifically to wills. Section 45(2), "Form of will," provides that the "Minister may accept as a will any written instrument signed by an Indian in which he indicates his wishes or intention with respect to the disposition of his property on his death." In other words, the only formal requirement to making a will is that it be in writing.

On the one hand, the relaxation of formal requirements makes it less likely that a person's intentions regarding the distribution of his or her estate will be thwarted. Section 45(2) may be intended to take into account the remote rural situation of many reserves, where it may be difficult to access a lawyer or notary for the purpose of drafting a will. It would be particularly unfair, in this setting, if wills not complying with formalities were automatically considered invalid. On the other hand, formalities

[27] Subject to the *First Nations Land Management Act*, S.C. 1999, c. 24

do serve a purpose and help ensure that a will is truly valid. Without formal requirement there is increased likelihood of multiple documents purporting to be an individual's final will, which makes it more difficult to determine which will is the valid one. There is some anecdotal evidence that this is indeed one consequence of the lack of formal requirements in the *Indian Act*.

Section 46 gives the Minister the authority to declare the will of an Indian to be null and void if he or she is satisfied that one of the following conditions exists:

- That the will was executed under duress or undue influence
- That the person making the will (the testator) at the time of execution of the will lacked "testamentary capacity" (i.e., the legal and mental ability to make a valid will)
- That the terms of the will would impose hardship on persons for whom the testator had a responsibility to provide
- That the will purports to dispose of land in a reserve in a manner contrary to the interest of the band or contrary to the *Indian Act*
- That the terms of the will are so vague, uncertain, or capricious that proper administration of the estate of the deceased would be difficult or impossible to carry out
- That the terms of the will are against the public interest

Unlike provincial legislation (the *Wills Variation Act*, discussed below), the *Indian Act* does not provide for a will to be changed by the courts. If the will contains one of the conditions listed above, it will simply be declared void, either in whole or in part. The class of persons who can challenge the will on the basis that it does not provide for them is relatively broad ("persons for whom the testator had a responsibility to provide"). However, anyone who challenges a will under the *Indian Act* must show that the exclusion "impos[ed] hardship" on him or her. This is not the case for someone applying for variation under the *Wills Variation Act*.

Where a will is declared void (or where there is no will), section 48 of the *Indian Act* sets out a hierarchy of relations (including spouses, common-law spouses, and persons

adopted legally or according to Indian custom) who will be considered heirs. If no heir can be found, reserve land will vest in the Crown for the benefit of the band.

A person who is not entitled to reside on a reserve cannot acquire the right to possess or occupy reserve land through a will. If the testator leaves reserve land to someone not entitled to reside on a reserve (section 50), or if no valid will exists and the heir is not entitled to reside on the reserve, the rights to possession or occupation are to be offered for sale to the highest bidder among persons who *are* entitled to reside on the reserve. Proceeds of the sale go to the person who would otherwise inherit the property. If no bid is received within six months (or longer, at the Minister's discretion) the right to possession or occupation reverts to the band. The Minister may, in his or her discretion, provide compensation to the person who would otherwise inherit the property for any permanent improvements made to the land. (Such compensation is to be made out of band funds.)

b. Off reserve: provincial legislation

Several pieces of provincial legislation are relevant to wills and estates as the apply off reserve:

- The *Estate Administration Act* creates a hierarchy of people entitled to inherit when a person dies without a will. It also sets out the powers and duties of both executors and administrators (those people given the responsibility of settling the estate after the death).
- The *Wills Act*[28] sets out the rules of inheritance, which are fundamentally different from those contained in the *Indian Act*, reflecting the distinct systems of property holding involved. The formal requirements for valid wills are also very different and, indeed, the strict formalities required under the *Wills Act* (the will being void if formal requirements are not met) have been a focus for criticism.
- The *Wills Variation Act* allows wills to be varied or altered by the court where the will does not make "adequate provision" for the spouse or children of the testator.

[28] R.S.B.C. 1996, c. 489, s. 4.

As with the other areas of Elderlaw considered in this paper, the law applying to wills and estates has been the subject of recent provincial legislative reform initiatives. In June 2006, the British Columbia Law Institute (BCLI) issued a report entitled *Wills, Estates and Succession: A Modern Legal Framework*[29] The Report sets out a comprehensive scheme for changes in this area and to replace what it identifies as archaic and confusing legislation that has resulted in a sometimes contradictory body of case law. The Report is currently under consideration by the provincial government.

Two proposed changes and their relationship to current provincial legislation are discussed here: formal requirements for valid wills and wills variation. These proposed changes deal with matters that are treated quite differently under the provisions of the *Indian Act* than under current provincial legislation, and are therefore of particular relevance. The proposed changes relax the formality requirements of the *Wills Act* without doing away with them altogether, and incorporate the idea of economic need into wills variation. Whether these proposals are ultimately adopted by the provincial legislature or not, First Nations legislating in this area may find their approach to be useful and relevant, combining the more positive elements of the approach taken under the wills and estates provisions of the *Indian Act* with positive features of the existing provincial legislation in these areas (the flexibility of wills variation, for example, with the idea of economic need as a relevant factor within a widened category of dependants).

i. Formal requirements

The present *Wills Act* sets out certain formal requirements for creating a will:

- The will must be signed by the testator or signed in the testator's name by some other person in the testator's presence and by the testator's direction
- The testator must make or acknowledge the signature in the presence of two or more witnesses who are present at the same time
- Two or more of the witnesses must sign the will in the presence of the testator

[29] Report No. 45 (Vancouver: British Columbia Law Institute, 2006), http://www.bcli.org/pages/projects/succession/Wills_Estates_and_Succession_Report.pdf (accessed March 25, 2008).

- The will be in writing

If these requirements are not met, the will is not valid.

An exception is created (section 5) for a member of the Canadian Forces on active service. In that case, the testator can simply sign the will; it does not have to be witnessed. Alternatively, another person can sign the will in the testator's presence and under his or her direction (but in this case, the testator's signature must be witnessed).

The change recommended by the BCLI Report would give the court the power to recognize a will if it was satisfied that it represents the intentions of the deceased person even if the formal requirements are not met. The exception for Canadian Forces members would no longer be needed and so would be abolished. Courts would also be given the power to rectify a will if it did not accurately reflect the testator's intentions due to an accidental slip or omission, a misunderstanding of the testator's instructions, or a failure on the part of the individual preparing the will to follow those instructions.

The objective of this recommendation is to avoid situations in which the intentions of the testator are not followed because of the failure of the person drafting the will. These changes would retain formal requirements that do bring certainty to the question of whether a will is valid, while giving some flexibility to give effect to a will where, despite a "formal" failure, the testator's intentions are clear.

ii. Wills variation

The BCLI Report also recommends significant changes to the province's wills variation legislation. The *Wills Variation Act* provides that the court may order "adequate, just and equitable" provision to be made for the testator's spouse or children out of the estate if the will does not make "adequate provision" for their maintenance and support. The legislation does not limit the power to apply for variation to minor or dependent children. The courts have interpreted the *Wills Variation Act* with reference to the testator's "moral and legal obligations" and not to the need of the

person making the claim (who may be a self-sufficient adult child). This means that a parent cannot generally disinherit an adult child in British Columbia unless that child has done something or behaved in a way that gives the parent making the will a moral reason for disinheritance.[30]

The *Wills Variation Act* has been a focus of controversy for many years, criticized as encouraging legal action by disappointed would-be heirs and thwarting testators' intentions. The changes proposed by the BCLI Report would continue the unrestricted rights of spouses and minor children to claim for variation of a will under the *Wills Variation Act*, but would restrict the category of adult children able to claim to those unable to become self-supporting because of illness, mental or physical disability, or other special circumstances. This restriction would make British Columbia's legislation consistent with similar legislation in most other Canadian provinces.

6. Conclusion

This is an exciting time in the development of new First Nations governance systems in British Columbia. The question of how the Elderlaw issues discussed above will be dealt with within these systems will come to the fore as this process continues to take shape. The discussion that has accompanied the provincial reforms may be useful to those guiding this development.

Elderlaw issues are important for Aboriginal elders wherever they live, on Aboriginal lands, both on and off reserve. Yet there has been little communication to date between Elderlaw organizations and First Nations communities (with the notable exception of the First Nations Dialogue/abuse prevention initiative referred to above). This needs to change, to develop an inclusive Canadian Elderlaw that considers and addresses the needs and concerns of Aboriginal Elders.

[30] *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807 at 813. See also discussion, *Wills Estates and Succession: A Modern Legal Framework*, *ibid.*, 80.

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