



Estate Planning Involving Cultural Property and Possessory Interests in Reserve Land: More Will Drafting Tips for Indigenous Clients Who Live on Reserves

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Inspired by the British Columbia Law Institute's new *Guide to Wills and Estate Planning for First Nations Clients Living on Reserves*,¹ this month's Solicitor's Tip focuses on gifting two types of property – cultural assets and possessory interests in reserve land.² Care ought to be taken if a client wishes to dispose of such property interests in their will, as there are often legal restrictions on how such property may be distributed.

Limitations on the Disposition of Cultural Assets

If an Indigenous client belongs to a clan or kinship group and has culturally significant assets, the client may not be able to gift those assets in a will if their distribution is governed by “customary or enacted laws of [the] client's First Nation or the terms of a modern treaty.”³ For example, title as a hereditary chief cannot be the subject of a legally binding gift in a will, as “traditional titles are not subject to Canadian law,” making any will clause that purports to gift a hereditary title precatory only.⁴ Accordingly, if a client wishes to gift cultural assets through a will, it will be necessary to investigate whether such gifts are legally possible.

Limitations on the Disposition of a Possessory Interest in Reserve Land

Indigenous clients are also restricted in how they may dispose of possessory interests in reserve land. When such property is subject to the *Indian Act*, a possessory interest may only be left to beneficiaries who are entitled to reside on the reserve – essentially other band members.⁵ If the beneficiary or beneficiaries⁶ are not band members when the client passes away, the gift will only take effect if they obtain consent from the band, and also either become band members or resume their membership (if they were members previously).⁷ The Minister of Indigenous Services must also approve the transfer.⁸

If a possessory interest in reserve land is left to a beneficiary who is not entitled to reside on the reserve, they will likely receive compensation for the lost gift. The *Indian Act* directs such possessory interests to be sold by Indigenous Services Canada to the highest bidder in a sale open to all band members; if sold,

¹ British Columbia Law Institute, *Guide to Wills and Estate Planning for First Nations Clients Living on Reserves* (Vancouver: British Columbia Law Institute, February 2025), online: <<https://www.bcli.org/wp-content/uploads/Estate-Planning-On-Reserves-Final.pdf>> [Guide].

² For general will drafting tips for Indigenous clients, see Suzana Popovic-Montag, “Solicitor's Tip May 2025: Will Drafting Tips for Assisting Indigenous Clients Who Live on Reserves”, Hull & Hull LLP, online: <<https://hullandhull.com/2025/05/solicitors-tip-may-2025-will-drafting-tips-for-assisting-indigenous-clients-who-live-on-reserves/>>.

³ Guide, *supra* note 1 at 19.

⁴ Ibid.

⁵ Ibid at 12-13. Also see the *Indian Act*, RSC 1985, c I-5, s 50(1). The disposition of possessory interests in reserve land may also be subject to modern treaties, self-government agreements, or self-government legislation.

⁶ A client may gift a possessory interest in reserve land to multiple beneficiaries via joint tenancy or tenancy in common. A beneficiary may also receive a life interest in a possessory interest, with another receiving a remainder interest, so long as they are all band members. See the Guide, *ibid*, at 12-13.

⁷ Guide, *ibid* at 13-14.

⁸ Ibid at 13, citing the *Indian Act*, *supra* note 5, s 49.

the proceeds are paid to the beneficiary. If the land remains unsold after six months, the right to possession will revert to the band, in which case the beneficiary will receive compensation “in the Minister’s discretion for permanent improvements made on the land.”⁹

Confirming that the Client has a Possessory Interest in Reserve Land

When drafting a will that gifts a possessory interest in reserve land, drafting solicitors ought to confirm that the client actually has a possessory interest. Certificates of possession are issued for possessory interests and confirm that the band council allotted the interest with the approval of the Minister of Indigenous Services.¹⁰ If a client does not have a certificate of possession but there is evidence suggesting they have a possessory interest in reserve land, it is advisable to try to obtain a certificate and to register the client’s interest in the land; as noted in the *Guide*, an allotment may have been made, even if the client does not have a certificate. In this situation, the *Guide* suggests providing any evidence in the client’s possession which confirms their interest in the land to the band housing office, and speaking directly with officials about obtaining a certificate of possession.¹¹

Lawyers can also help clients obtain a certificate of possession if the land has been passed down through successive generations without actually being transferred. However, in this scenario, it will take time to obtain the certificate of possession, since the possessory interest must be transferred into the name of each person who successively held an interest in the land before a certificate can be issued to the client.¹²

Will Drafting Tips for Disposing of Possessory Interests in Reserve Land

When gifting a possessory interest in reserve land, the full legal description of the parcel of land should be included in the will, consisting of the parcel identification number, lot number, block number, and the Canada Land Surveys Records number.¹³ If the land has not been surveyed or has no address, the will could include a “metes and bounds description” of the land, or a map of the reserve which clearly marks the parcel of affected land could be attached to the will.¹⁴

If the client does not have a certificate of possession confirming their possessory interest in the reserve land, they may use their will to address how they would like their possessory interest to be distributed. However, the will clause may not be legally binding without a certificate of possession, meaning it will be up to the band to decide whether to honour the gift. Although the will clause will be precatory, in confirming the client’s wishes it may still “increase the probability of those wishes being honoured” by the band.¹⁵

Conclusion

When drafting a will for an Indigenous client who lives on a reserve, it is important to bear in mind that the client’s ability to gift specific types of property, such as cultural assets or possessory interests in reserve land, will likely be restricted. If the client wishes to gift such property, it is advisable to investigate at the outset whether the property may be gifted and, if so, whether there are restrictions as to who may receive it. With a possessory interest in reserve land, the client should also consider obtaining a certificate of possession in order to gift their interest, if the client does not already have a certificate.

⁹ *Guide*, *ibid* at 14. Also see the *Indian Act*, *ibid*, s 50(2).

¹⁰ *Guide*, *ibid* at 12.

¹¹ *Ibid* at 12, 15. Evidence could include council minutes, meeting notes, an email message, or any document emanating from the band that points to the client having a possessory interest.

¹² *Ibid* at 15.

¹³ *Ibid* at 19.

¹⁴ *Ibid* at 16. The *Guide* also notes that other means of identifying the land may be used.

¹⁵ *Ibid* at 15-16.