

Chapter 7: Indigenous Cultural Property

Introduction

The issue of Indigenous cultural property was raised in Phase 1 of the *Family Law Act* Modernization project, and the Ministry of Attorney General's (the Ministry) research and analysis work continues into Phase 2. Phase 1 included a review of the property division provisions in Part 5 of the *Family Law Act* (FLA), titled [Property Division](#). Part 5 addresses how spouses divide family property between them when they separate. During Phase 1, feedback was received from an Indigenous organization that suggested the FLA needed to address the issue of how property is divided between spouses if the property has an Indigenous cultural value or significance.

The Ministry intends to propose changes concerning Indigenous cultural property as part of the Phase 2 amendments. The feedback, engagement and analysis has suggested that the following changes could recognize the importance of certain Indigenous property and ensure it is appropriately addressed, particularly if spouses cannot agree and courts are required to assist:

- explicitly adding Indigenous cultural property to the list of property that is “excluded property” under the Act, which is generally not divided between spouses, ensuring an appropriate starting point for consideration of the property;
- further identifying a sub-set of excluded Indigenous cultural property which is never to be divided between spouses under any circumstances;
- adding money paid to an Indigenous spouse as part of a financial settlement that is related to them as an Indigenous person to the list of excluded property under the Act would assure that the recipient continues to receive the intended personal benefit of those funds.

Key Changes and How They Help Families

Proposed change: Add Indigenous cultural property to the list of “excluded property” under the Act and identify a further sub-set of Indigenous cultural property that is never divided.

How this helps families: The Act will recognize that the starting point for property that has an Indigenous cultural importance or significance for at least one of the spouses is that it will not be divided between them when they separate.

The division of property regime in the FLA creates two types of property – “excluded property” and “family property”. Excluded property is defined by a list of categories is generally not divided between spouses when they separate except as provided for in the Act, which is only intended to be in limited and defined circumstances. Family property, on the other hand, is generally divided between separating spouses.

There is certain property that may be possessed or owned by an Indigenous spouse that has significant importance for them and their Indigenous community. Feedback suggests that it would be culturally inappropriate for this type of property to be divided or transferred to the other spouse upon separation, regardless of whether it is currently considered excluded property or family property under the FLA. Although this type of property may fit within existing categories of excluded property such as property that was acquired by a spouse before the start of their relationship or property that was inherited or gifted to the spouse by a third party, these categories are unlikely to capture all of the property it should. Therefore, creating an explicit category for Indigenous cultural property will ensure that all of the property that should be captured, is captured.

Currently, the FLA allows for excluded property to be divided in certain restricted circumstances. However, engagement suggests that there are some types of culturally significant property that should never be put at risk of becoming the property of a non-Indigenous. Ceremonial regalia may make up a large proportion of this type of property but also suggests that room needs to be made within the definition of the term for similar personal property associated with an Indigenous community’s governance, ceremonies and customs that may not be considered as “regalia” to that community.

The proposed changes will also ensure that if the property is to be subject to division in restricted circumstances that a court must consider the extent of the significance of the property to the Indigenous spouse as part of their decision.

The proposed changes will include ways for the unique legal orders, customs and traditions of the relevant Indigenous First Nation or community to always be considered. Engagement has emphasized that, while there may be common aspects relevant to many Indigenous communities, there are also many unique characteristics that have relevance to determining whether certain property should be considered as being part of this category. This may include mandatory room for Indigenous communities to convey their knowledge with a court that must decide a contested matter in whatever way the knowledge is best shared.

Proposed change: Add any Indigenous financial settlement as a separate category of excluded property under the Act.

How this helps families: Specifying that money paid to an Indigenous spouse as part of a financial settlement they are entitled to as an Indigenous person is excluded property adds certainty that the recipient continues to experience the intended personal benefit of those funds.

Although initial feedback highlighted the need to examine whether certain type of property should be excluded from division between spouses based on its connection to Indigenous customs and tradition, further feedback highlighted another type of property that also could benefit from clarifying amendments within the Act. In discussing the type of property which may have ties to the Indigeneity of a person, the issue of payments made to individual Indigenous people based on settlement or awards including ones tied to Residential Schools abuses was brought up.

Currently, the FLA's excluded property list includes "a settlement or an award of damages to a spouse as compensation for injury or loss". However, clarifying whether these types of payments fit within the existing section would remove any doubt and align with the intention to add clarity in relation to Indigenous cultural property.

Care will be taken to ensure the category includes all of the various type of existing settlement payments and future settlements. Other provincial statutes identify these funds for other purposes and consideration of those provisions will inform drafting of these intended amendments.