Federal Court  Cour fédérale

Date: 20191004

Docket: T-1878-16

Citation: 2017 FC 1116

Ottawa, Ontario, October 4, 2019

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

WILLIAM THORNE

Appellant

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA, as represented by the MINISTER OF INDIGENOUS AND NORTHERN AFFAIRS CANADA, MARILYN STACY PAGE in her capacity as Executor for the estate of Eugene Thorne deceased, MARILYN STACY PAGE in her capacity as Executor of the estate of Roberta Tracy Page deceased, MARILYN STACY PAGE, CURTIS WILLIAM THORNE, and CLIFFORD PHILIP THORNE

Respondents

AMENDED JUDGMENT AND REASONS

I. Introduction

[1] When the Minister of Indigenous and Northern Affairs Canada [respectively Minister and INAC] retained jurisdiction of Eugene Thorne's testamentary matters and approved his will, the Minister did so despite allegations of duress, undue influence, lack of capacity, and hardship. Eugene Thorne's son, William Thorne, appealed the Minister's decision to the Federal Court pursuant to section 47 of the *Indian Act*, RSC 1985, c I-5 [*Indian Act*], which means he must show the Minister's decision is unreasonable, or breached procedural fairness. Because the Minister considered all the relevant evidence and interpreted the *Indian Act* in a manner consistent with Parliament's intent, this Court finds the Minister's decisions were reasonable and procedurally fair. I will dismiss this appeal for the reasons that follow.

II. Background

[2] Eugene Thorne was an "Indian" within the meaning of the *Indian Act* and ordinarily resident on the Cowichan Indian Reserve. He had three children: William Thorne [the Appellant], Roberta Tracy Page (who pre-deceased Eugene Thorne), and Eugene Thorne Jr. Eugene Thorne also had three grand-children (all children of Roberta Tracy Page): Marilyn Stacy Page (now Marilyn Stacy Alpine), Curtis William Thorne, and Clifford Philip Thorne.

[3] Prior to his passing, Eugene Thorne wrote two wills. In his will written on February 18, 2002 [the 2002 Will], Eugene left all his possessions to the Appellant, and named him the executor of the estate. In Eugene Thorne's most recent will written on January 24, 2011 [the 2011 Will], the Appellant received nothing. The beneficiaries in the 2011 Will are: Roberta

Page, Marilyn Stacy Page, Curtis William Thorne, and Clifford Philip Thorne. The executrix named in the 2011 Will is Marilyn Stacy Page. Eugene Thorne wrote the 2011 Will approximately 8 months after suffering a stroke on May 19, 2010. The stroke left him partially disabled and requiring physical assistance.

[4] Eugene Thorne was 87 years old when he died on January 30, 2016. On March 18, 2016 the Appellant wrote to INAC objecting to the 2011 Will on the basis of duress, undue influence, testamentary capacity, and hardship. He asked for the Minister to transfer the matter to the Supreme Court of British Columbia [BCSC].

[5] On April 29, 2016, INAC responded to the Appellant and provided him with a *Request for Consent to a Transfer of Jurisdiction* form within which to make his transfer request. On May 9, 2016, the Appellant submitted this form to the INAC.

[6] On June 14, 2016, Marilyn Stacy Page objected to the transfer request, and provided affidavit evidence to INAC of Eugene Thorne's testamentary capacity at the time of the 2011 Will. The evidence included a letter from Eugene Thorne's doctor dated June 13, 2016, which stated the doctor's belief "that if [Eugene Thorne] had signed a will during the interval in question he would've had clear understanding of its content." An estimate of the limited value of the estate was also submitted to INAC at this time.

[7] On July 12, 2016, INAC confirmed the Minister would retain jurisdiction. The Minister refused to transfer jurisdiction to the BCSC because no evidence was submitted "in regard to

allegations of undue influence or hardship." INAC also explained it received "evidence that Eugene Thorne had testamentary capacity at the time the Will was signed." The letter further advised that the Minister intended to approve the 2011 Will.

[8] As a result, on July 13, 2016, the Appellant requested the Minister postpone the will approval until the Appellant submitted evidence. On July 14, 2016, the Appellant submitted an affidavit outlining his concerns, including why he felt his father lacked testamentary capacity at the time the 2011 Will was executed. He also attached a letter from Eugene Thorne's former physician, dated March 4, 2016. The letter stated that after the stroke Eugene Thorne "had a marked aphasia which left him unable to express himself verbally. Communication from that time on was extremely difficult as his speech was very limited."

[9] On August 8, 2016, INAC explained that the Appellant's evidence was premature— the evidence he provided related to will voidance under section 46 of the *Indian Act* rather than its approval under section 45. INAC explained that evidence of the factors under section 46 of the *Indian Act* was unnecessary unless the Minister approved a will. INAC then invited the Appellant to submit evidence that did not relate to section 46.

[10] On August 22, 2016 and September 6, 2016, the Appellant wrote to INAC pointing to evidence of Eugene Thorne's incapacity and again requested that the Minister transfer jurisdiction to the BCSC.

[11] On September 19, 2016, INAC approved the 2011 Will, and appointed Marilyn Stacy Page as executrix. An explanatory email was sent to William Thorne on September 29, 2016, advising that the Minister had approved the 2011 Will because "insufficient evidence was provided to warrant a determination that the Will not be approved pursuant to Section 45 of the Indian Act."

[12] On November 4, 2016, the Appellant appealed the Minister's decision to the Federal Court pursuant to section 47 of the *Indian Act.*

III. Issues

[13] The Applicant raises the following issues:

A. Did the Minister misunderstand the applicable law, and in particular the basis for approval of a will under section 45 of the *Indian Act*?

B. Did the Minister breach a duty of procedural fairness to the Appellant by refusing to refer the matter to the Supreme Court of British Columbia?

IV. Standard of Review

[14] I rely on my determination in *Longboat v Canada (Attorney General),* 2013 FC 1168 [*Longboat*], aff'd 2014 FCA 223, and find that the appropriate standard of review to the Minister's discretionary decisions in matters of an Indian's will is reasonableness.

[15] Issues of procedural fairness are reviewed on a standard of correctness (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12).

V. Analysis

A. *Did the Minister misunderstand the applicable law, and in particular the basis for approval of a will under section 45 of the Indian Act?*

[16] Section 45 and 46 of the *Indian Act* is as follows:

Wills	**Testaments**
Indians may make wills	**Les Indiens peuvent tester**
45 (1) Nothing in this Act shall be construed to prevent or prohibit an Indian from devising or bequeathing his property by will.	45 (1) La présente loi n'a pas pour effet d'empêcher un Indien, ou de lui interdire, de transmettre ses biens par testament.
Form of will	**Forme de testaments**
(2) 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.	(2) Le ministre peut accepter comme testament tout document écrit signé par un Indien dans lequel celui-ci indique ses désirs ou intentions à l'égard de la disposition de ses biens lors de son décès.
Probate	**Homologation**
(3) No will executed by an Indian is of any legal force or effect as a disposition of property until the Minister has approved the will or a court has granted probate thereof pursuant to this Act.	(3) Nul testament fait par un Indien n'a d'effet juridique comme disposition de biens tant qu'il n'a pas été approuvé par le ministre ou homologué par un tribunal en conformité avec la présente loi.
Minister may declare will void	**Le ministre peut déclarer nul un testament**
46 (1) The Minister may declare the will of an Indian to be void in whole or in part if he is satisfied that	46 (1) Le ministre peut déclarer nul, en totalité ou en partie, le testament d'un Indien, s'il est convaincu de l'existence de l'une des circonstances suivantes :
(a) the will was executed under duress or undue influence;	a) le testament a été établi sous l'effet de la contrainte ou d'une influence indue;
(b) the testator at the time of execution of the will lacked testamentary capacity;	b) au moment où il a fait ce testament, le testateur n'était pas habile à tester;
(c) the terms of the will would impose hardship on persons for whom the testator	c) les clauses du testament seraient la cause

had a responsibility to provide;

(d) the will purports to dispose of land in a reserve in a manner contrary to the interest of the band or contrary to this Act;

(e) the terms of the will are so vague, uncertain or capricious that proper administration and equitable distribution of the estate of the deceased would be difficult or impossible to carry out in accordance with this Act; or

(f) the terms of the will are against the public interest.

Where will declared void

(2) Where a will of an Indian is declared by the Minister or by a court to be wholly void, the person executing the will shall be deemed to have died intestate, and where the will is so declared to be void in part only, any bequest or devise affected thereby, unless a contrary intention appears in the will, shall be deemed to have lapsed.

de privations pour des personnes auxquelles le testateur était tenu de pourvoir;

d) le testament vise à disposer d'un terrain, situé dans une réserve, d'une façon contraire aux intérêts de la bande ou aux dispositions de la présente loi;

e) les clauses du testament sont si vagues, si incertaines ou si capricieuses que la bonne administration et la distribution équitable des biens de la personne décédée seraient difficiles ou impossibles à effectuer suivant la présente loi;

f) les clauses du testament sont contraires à l'intérêt public.

Cas de nullité

(2) Lorsque le testament d'un Indien est déclaré entièrement nul par le ministre ou par un tribunal, la personne qui a fait ce testament est censée être morte intestat, et, lorsque le testament est ainsi déclaré nul en partie seulement, sauf indication d'une intention contraire y énoncée, tout legs de biens meubles ou immeubles visé de la sorte est réputé caduc.

[17] The Appellant relies on *Johnson v Pelkey*, (1997) 17 ETR (2d) 242 (BCSC) [*Johnson*], to support the position that the Minister should have—and failed to—assess the true intention of Eugene Thorne prior to approving the 2011 Will. He argues that the Minister confused this test with that contained in section 46 of the *Indian Act*. According to the Appellant, the Minister ignored evidence that Eugene Thorne was unable to communicate due to his stroke and that the 2011 Will did not reflect his true intentions. Further, he says that the Minister had no evidence from the witnesses to the 2011 Will or the circumstances under which he executed that will. The Appellant submits this case is similar to *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] in

that the Minister did not even consider the common law rules. Accordingly, the Appellant argues that the 2011 Will should be set aside.

[18] The Appellant submits that section 45 of the *Indian Act* creates an obligation on the Minister to assess the true intention of the testator prior to approving an Indian's will. He submits this is an exercise which the Minister should conduct irrespective of whether the testator had testamentary capacity. The Appellant's position is that section 46 comes into play when the will is approved; is a challenge to the approval; and has nothing to do with a separate section 46 application. He states that testamentary intent and testamentary capacity are separate legal concepts.

[19] Justice Dawson in *Morin v Canada*, 2001 FCT 1430 at paragraphs 45-54 [*Morin*], discusses and breaks down the jurisdiction that was conferred on the Minister and what Parliament intended to be the superior court's jurisdiction. This is an instructive decision, and when *Morin* is reviewed it is clear that the Minister has the power to transfer a particular file to the BCSC, approve a will, and to void a will.

[20] In the case before me, the Minister recognized that the discretion to transfer jurisdiction existed, but did not exercise this discretion. The Minister's reasons explain that INAC retained jurisdiction because the Appellant did not support his allegations with any evidence. At the time the Minister made the decision to retain jurisdiction, the only evidence submitted was evidence from the Respondent, Marilyn Stacy Page. Her submissions included independent evidence from

Eugene Thorne's former family physician which spoke directly to Eugene Thorne's cognitive status after his May 2010 stroke.

[21] Given the limited resources of the estate, it was reasonable for the Minister to decide to retain jurisdiction to prevent the estate from being spent on litigation when no evidence was provided to support the Appellant's allegations, and given that the parties who objected to the transfer did provide medical evidence from his doctor of capacity.

[22] The Minister then went on to decide whether the 2011 Will should be approved under section 45 of the *Indian Act.* Before making this decision, and at the Appellant's request, the Minister allowed the Appellant further time to submit evidence to support his argument that the 2011 Will should not be approved. The Appellant did submit evidence, including an affidavit and a doctor's letter, but the Minister explained this evidence related to a section 46 will voidance application and not the current issue before him (whether to approve the 2011 Will under section 45 of the *Indian Act*).

[23] Whether the Minister reasonably decided that a section 45 will approval is separate from a section 46 will voidance is a question of whether the Minister reasonably interpreted the enabling statute.

[24] To determine whether the Minister reasonably interpreted the enabling statute, I again turn to *Longboat*, which explained that the *Indian Act* creates a special regime for the administration of the estates of Indians under sections 42 and 43 of the *Indian Act*. Section 45

does not grant the Minister any powers. The Minister's powers to approve an Indian's will under section 45 are obtained under section 42.

[25] This regime is important because Parliament also provided that sections 46 and 42 are separate grounds for appeal to the Federal Court under section 47 of the *Indian Act*. Thus, Parliament expressly created section 46 of the *Indian Act* as a distinct challenge to an Indian's will—a challenge distinct from an approval under section 45 pursuant to section 42. When creating this separate section, it could not have been Parliament's intent to impose redundancy on the Minister to consider section 46 factors both prior to will approval pursuant to sections 45 and 42 of the *Indian Act*, and later in a section 46 voidance application.

[26] I find the Minister reasonably interpreted the *Indian Act* to mean that issues under section 46 are appropriately addressed in a separate application to void a will if the Minister first approves a will.

[27] The Minister's decision to approve the 2011 Will was a discretionary decision. *Longboat* explained that, when reviewing discretionary decisions in matters of an Indian's will, the Courts are guided by the *Indian Act* itself.

> [40] Where the exercise of ministerial discretion under the Act has been at issue, both this Court and the Federal Court of Appeal have looked to the Act itself to determine conditions applicable to guiding that discretion (*Tsartlip*, above, at para 51; *Sandy Bay Ojibway First Nation Band v. Canada (Minister of Indian & Northern Affairs)*, 2004 FCA 229 (F.C.A.), at para 30; *Morin*, at paras 45-51)

[28] Looking to the *Indian Act* itself, the wording of section 45(2) sets out the four components the Minister must consider prior to approving a will:

1) Is the will in writing?
2) Is the will signed?
3) Does the will indicate the testator's wishes or intentions?
4) Does the will dispose of property on death?

[29] The Appellant wants the Court to go behind the signing of the 2011 Will, as the BCSC did in *Johnson*. However, *Johnson* is distinguishable because the Minister in that case did transfer jurisdiction to the BCSC for probate, pursuant to section 44 of the *Indian Act.* In addition, *Johnson* involved applications under sections 45 and 46 of the *Indian Act.* On our facts there has not been a section 46 application to void the will.

[30] Furthermore, Parliament's intent was for the *Indian Act* to allow for approval of wills with minimal formalities. This is apparent when section 15 of the *Indian Estates Regulations*, CRC, c 954 [Regulations] is read together with *Indian Act* section 45. Section 15 of the Regulations reads as follows:

> Section 15
>
> Any written instrument signed by an Indian may be accepted as a will by the Minister whether or not it conforms with the requirements of the laws of general application in force in any province at the time of the death of the Indian.

[31] While the Appellant argues that his evidence was ignored, the Minister's reasons explain the 2011 Will was approved because the Appellant submitted insufficient evidence pertaining to the approval decision under section 45. The Appellant was given every opportunity to participate in the process and his submissions were considered. The Minister reviewed all the evidence,

which is apparent as INAC told the Appellant his evidence pertained to a section 46 voidance application. Since it would be redundant to consider section 46 factors in a will approval decision, the Minister considered only the relevant evidence while deciding whether to approve the 2011 Will under section 45 of the *Indian Act*.

[32] I find that the Minister's decision was reasonable. I do not find that the Minister misapplied the law and do find that sections 45 and 46 of the *Indian Act* are separate processes or steps.

B. *Did the Minister breach a duty of procedural fairness to the Appellant by refusing to refer the matter to the Supreme Court of British Columbia?*

[33] Sections 4(3), 44(1) and (2) reads as follows:

Application of Act	**Application de la loi**
4 (1) A reference in this Act to an Indian does not include any person of the race of aborigines commonly referred to as Inuit.	4 (1) La mention d'un Indien, dans la présente loi, exclut une personne de la race d'aborigènes communément appelés Inuit.
Act may be declared inapplicable	**Pouvoir de déclarer la loi inapplicable**
(2) The Governor in Council may by proclamation declare that this Act or any portion thereof, except sections 5 to 14.3 or sections 37 to 41, shall not apply to	(2) Le gouverneur en conseil peut, par proclamation, déclarer que la présente loi, ou toute partie de celle-ci, sauf les articles 5 à 14.3 et 37 à 41, ne s'applique pas :
(a) any Indians or any group or band of Indians, or	a) à des Indiens ou à un groupe ou une bande d'Indiens;
(b) any reserve or any surrendered lands or any part thereof,	b) à une réserve ou à des terres cédées, ou à une partie y afférente.
and may by proclamation revoke any such declaration.	Il peut en outre, par proclamation, révoquer toute semblable déclaration.
Authority confirmed for certain cases	**Confirmation de la validité de certaines**

(2.1) For greater certainty, and without restricting the generality of subsection (2), the Governor in Council shall be deemed to have had the authority to make any declaration under subsection (2) that the Governor in Council has made in respect of section 11, 12 or 14, or any provision thereof, as each section or provision read immediately prior to April 17, 1985.

Certain sections inapplicable to Indians living off reserves

(3) Sections 114 to 117 and, unless the Minister otherwise orders, sections 42 to 52 do not apply to or in respect of any Indian who does not ordinarily reside on a reserve or on lands belonging to Her Majesty in right of Canada or a province.

Courts may exercise jurisdiction with consent of Minister

44 (1) The court that would have jurisdiction if a deceased were not an Indian may, with the consent of the Minister, exercise, in accordance with this Act, the jurisdiction and authority conferred on the Minister by this Act in relation to testamentary matters and causes and any other powers, jurisdiction and authority ordinarily vested in that court.

Minister may refer a matter to the court

(2) The Minister may direct in any particular case that an application for the grant of probate of the will or letters of administration of a deceased shall be made to the court that would have jurisdiction if the deceased were not an Indian, and the Minister may refer to that court any question arising out of any will or the administration of any estate.

déclarations

(2.1) Sans que soit limitée la portée générale du paragraphe (2), il demeure entendu que le gouverneur en conseil est réputé avoir eu le pouvoir de faire, en vertu du paragraphe (2), toute déclaration qu'il a faite à l'égard des articles 11, 12 ou 14, ou d'une disposition de ceux-ci, dans leur version antérieure au 17 avril 1985.

Certains articles ne s'appliquent pas aux Indiens vivant hors des réserves

(3) Les articles 114 à 117 et, sauf si le ministre en ordonne autrement, les articles 42 à 52 ne s'appliquent à aucun Indien, ni à l'égard d'aucun Indien, ne résidant pas ordinairement dans une réserve ou sur des terres qui appartiennent à Sa Majesté du chef du Canada ou d'une province.

Les tribunaux peuvent exercer leur compétence, avec le consentement du ministre

44 (1) Avec le consentement du ministre, le tribunal qui aurait compétence si la personne décédée n'était pas un Indien peut exercer, en conformité avec la présente loi, la compétence que la présente loi confère au ministre à l'égard des questions testamentaires, ainsi que tous autres pouvoirs et compétence ordinairement dévolus à ce tribunal.

Le ministre peut déférer des questions au tribunal

(2) Dans tout cas particulier, le ministre peut ordonner qu'une demande en vue d'obtenir l'homologation d'un testament ou l'émission de lettres d'administration soit présentée au tribunal qui aurait compétence si la personne décédée n'était pas un Indien. Il a la faculté de soumettre à ce tribunal toute question que peut faire surgir un testament ou

l’administration d’une succession.

[34] The Appellant’s arguments on procedural fairness come down to arguing for a specific procedure. The procedure the Appellant seeks is for the Minister to transfer jurisdiction to the BCSC as provided for in section 44 of the *Indian Act*. The Appellant’s arguments then move away from procedural fairness arguments and turn into arguments for equality under section 15 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c11 [*Charter*].

[35] The Appellant argues that it is not fair or proportionate to deal with the wills of Indians ordinarily resident on reserve differently from those who are not ordinarily resident on reserve. The Appellant argues this matter cries to be transferred to the BCSC as there were doctor’s letters from both sides, and so a court was needed to balance two sets of evidence. In addition, the Appellant argued that to determine testamentary intent, the 2011 Will must be proved in solemn form in a superior court; it required handwriting analysis and all the other expertise that the BCSC brings in a probate estate matter.

[36] The Appellant’s position is that he is not getting equal benefit of the law under section 15 of the *Charter* since he is being treated differently under the *Indian Act.* The Appellant submits that the BCSC would be the appropriate forum had his father not been ordinarily resident on reserve, and the 2011 Will therefore would have received the BCSC’s expertise. He says this is neither fair nor proportionate and this Court should therefore direct that jurisdiction over the 2011 and 2002 wills be transferred to the BCSC.

[37] The *Charter* challenge is couched in the language of procedural fairness. The Appellant says he is not challenging the validity of the legislation, but argues the legislation is discriminatory. I note that there were no *Charter* notices served as required under Notice of Constitutional questions: *Federal Courts Act* RSC, 1985, c F-7 at section 57; *Federal Courts Rules*, SOR/98-106 at rule 69 and form 69. However, the Appellant says he knows the legislation is valid and instead argues that since the *Indian Act* is discriminatory I should be sensitive to this unfair treatment.

[38] I find that, even if there had been compliance with the Notice of Constitutional questions, it is unnecessary for this Court to consider whether subsection 4(3) of the *Indian Act* is discriminatory according to section 15 of the *Charter*. There are two reasons for this. First, in *Longboat*—a decision upheld by the Federal Court of Appeal—this Court confirmed that the testamentary provisions of the *Indian Act* are constitutionally valid at para 39:

> While administration of a private estate is a matter that normally falls within provincial jurisdiction, the Supreme Court has held that the testamentary provisions of the Act, including sections 42 and 43, are constitutionally valid and oust the jurisdiction of provincial courts (*Canard*, above, at 202, 209, and 211).

[39] Second, the onus is on the Appellant to establish his section 15 *Charter* right is breached (*Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at para 21). In this case, the Appellant did not identify an enumerated or analogous ground upon which the law creates a distinction, nor has he demonstrated how this distinction is discriminatory. Further, the Appellant has suffered no inequality and has been treated in the same manner as each of the Respondents in this matter.

[40] With respect to the Appellant's argument on procedural fairness, he was provided with numerous opportunities to make submissions which were fully and fairly considered.

[41] Parliament was clear in its intention that this is the way that Indian wills and estates are to be dealt with and I find that the Minister was reasonable in the treatment of this estate and will.

[42] I find the decision to be reasonable and that there is no procedural unfairness.

[43] The appeal is dismissed.

VI. Costs

[44] Costs were sought by each party and I asked the parties for argument and to provide the Court with a lump sum figure. The Appellant indicated that a lump sum award in the amount of $3,000.00 would be appropriate for costs. Counsel for the Respondent Attorney General of Canada indicated they were seeking costs. The counsel representing the remaining Respondents indicated that they did not have instructions to propose a lump sum. No bill of costs was filed by either of the Respondents. I will award costs to the Respondents to be paid by the Appellant in the total amount of $1,000.00 to be divided $500 to Canada and the remaining $500.00 to be divided equally amongst the remaining Respondents.

JUDGMENT in T-1878-16

THIS COURT'S JUDGMENT is that:

1. The appeal is dismissed;

2. Costs are awarded to the Respondents in the total amount of $1,000.00. This amount is to be divided $500.00 to the Respondent Attorney General of Canada and the remaining $500.00 to be divided equally amongst the remaining Respondents.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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