Federal Court Cour fédérale

Date: 20131118

Docket: T-1608-11

Citation: 2013 FC 1168

Ottawa, Ontario, November 18, 2013

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

MARVIN LONGBOAT

Applicant

and

ATTORNEY GENERAL OF CANADA
AND ESTATE OF CASSIE BOMBERRY

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an appeal brought under section 47 of the *Indian Act*, RSC, 1985, c. I-5 (the Act) of a July 29, 2011 decision by a delegate of the Minister of Indian and Northern Affairs (the Minister) ordering Marvin Longboat (the Appellant), removed as administrator of the estate of George Bomberry. Under section 43 of the Act, the Minister is vested with the power to remove administrators from the estates of deceased Indians.

[2] The Appellant is the Applicant in the style of cause and will be referred to as the Appellant in the reasons.

I. Background

[3] On August 30, 1995, the Appellant was appointed as administrator of the estate of his uncle George Bomberry. George Bomberry was a status Indian who died without a will.

[4] Where an Indian dies intestate, section 48 of the Act, sets out rules for distributing estate property among the heirs and their descendants.

[5] Among the heirs of George Bomberry was his sister, Cassie Bomberry, who died some time after George Bomberry.

[6] In addition to some minor assets, the main assets of the estate of George Bomberry are two undivided parcels of land within the Tuscarora Band located on the Six Nations Indian Reserve No. 40, in the province of Ontario. Those parcels are a ¼ interest in Lot 11-9 River Range Township (River Range Property) and a ¾ interest in Lot 6-17 in Concession 6 Township.

[7] The 3/4 interest (Concession 6) land included the homestead of the Appellant's grandparents of which they held since 1947. The land is approximately 50 acres that could be used for farming and has a creek and a wooded area. The River Range Property was owned by the Appellant's grandmother since 1938 and is a narrow strip of land over approximately 6 acres. The estate lands have not been used for sometime now.

[8] Between the parties it is uncontested that nearly 16 years after the appointment of the Appellant as administrator of George Bomberry's estate, the estate and land remained undivided among the heirs.

[9] On July 29, 2011, the Minister ordered the Appellant removed as administrator of the estate based on: (1) the refusal of the Appellant to fulfill his duties as estate administrator despite numerous requests from officials with the Department of Indian and Northern Affairs (the Department), and (2) a letter received by the Department from Archie Bomberry, the estate administrator of the estate of Cassie Bomberry, complaining of the Appellant's failure to act and requesting his removal as estate administrator so he could complete his duties as administrator of Cassie Bomberry's estate.

[10] The Appellant seeks an appeal of the Minister's decision as he maintains this decision was incorrect as he was seeking to obtain a consensus to partition the land among the heirs. To do so he needed support, assistance and time from the Minister and needed to be accorded procedural fairness.

[11] The Appellant wishes there was an agreement so that present or future family members could use this land of which he has many fond childhood memories rather than allowing undivided interests to continue to multiply (fractionation) as they are passed on to generations. To do what the Act says would freeze the land and prevent productive use. He feels that if he does not reach an

agreement that no one will be in a position to do so and this ancestral aboriginal land will continue to sit unused and be a source of family tension.

[12] The Appellant says the undivided problem exists of reserves across Canada but does not exist in the off reserve context in Ontario because of the *Partition Act*, RSO 1990, c.P.4, s2, s3. The Appellant's position is that there is no legislation or guidelines to assist with this issue.

[13] The Appellant has attempted to reach an agreement with family members over the 16 years and had hoped the passage of time would assist in reaching the agreement as tensions would pass but subsequent health issues and deaths of heirs only delayed the process. The Appellant said the long process is not unusual and his desire to respect the various family members personalities made it a "slower pace".

II. Issues

[14] The issues are whether the Minister's decision to remove the Appellant as administrator was reviewable and if the Minister met the duty of fairness in removing the Appellant as administrator.

III. Standard of review

[15] The parties submit that the existing jurisprudence has not provided sufficient guidance for determining the standard of review applicable to the Minister's decision to remove the Appellant as administrator of the George Bomberry's estate.

[16] I disagree and I find the jurisprudence has established that the standard is reasonableness.

[17] *Dunsmuir* teaches that where the jurisprudence has determined in a satisfactory manner the degree of deference to be accorded to a given question, that standard applies (*Dunsmuir v New Brunswick*, 2008 SCC 9, at para 62; *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, at paras 48-49).

[18] Moreover, the Supreme Court says that "the objective should be to get the parties away from arguing about standard of review to arguing about the substantive merits of the case" (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, at para 38 (*Alberta Teachers'*)).

[19] The role of the reviewing court is to first inquire "whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question" (*Nor-Man Regional Health Authority Inc v Manitoba Association of Health Care Professionals*, 2011 SCC 59, at para 30 (*Nor-Man*); citing *Dunsmuir*, above, at para 62; *Smith v Alliance Pipeline Ltd*, 2011 SCC 7, at para 24).

[20] In this case the issue is whether the authority exercised by the Minister to remove the Appellant as administrator of the George Bomberry's estate, was in accordance with subsection 43(2) of the Act.

[21] I find that is a question for which prior jurisprudence has adequately established that the standard of review is reasonableness.

[22] The Supreme Court of Canada has held that the provisions of the Act dealing with testamentary capacity and the administration of estates grant substantial discretionary jurisdiction to the Minister (*Canard v Canada (Attorney General)*, [1976] 1 SCR 170, at pages 187 and 203 (*Canard*)).

[23] Both the Federal Court of Appeal and Federal Court have already conducted pragmatic and functional analyses and determined that the standard of review applicable to discretionary ministerial decisions made under the Act are reviewable on a reasonableness standard.

[24] The Federal Court of Appeal has held that deference is owed to ministerial decisions made in the context of Aboriginal rights that establish rights between private parties where those decisions require considerable appreciation of the circumstances of the parties involved (*Tsartlip Indian Band v Canada (Minister of Indian Affairs and Northern Development)*, [2000] 2 FC 314 (FCA), at para 46 and 48 (*Tsartlip*)).

[25] Moreover, I note the discretionary authority of the Minister to remove administrators of an estate in section 43 of the Act is among the broad discretionary authority conferred on the Minister to make a number of decisions surrounding property and wills found at sections 42 to 46 of the Act. This Court has previously endorsed reasonableness as the applicable standard to discretionary decisions of the Ministers made under those provisions (*Sappier v Canada (Minister of Indian Affairs and Northern Development)*, 2007 FC 178, at para 26 (*Sappier*); *Morin v Canada*, 2001 FCT 1430, at paras 58-59 (*Morin*)), where the Court found that the purpose of the provisions granting the

Minister the discretion to declare a will void or accept a will under sections 45 and 46 of the Act are to balance individual rights and thus Minister's authority was reviewable on a reasonableness standard.

[26] I find the correctness standard of review put forward in *Leonard v Canada (Minister of Indian and Northern Affairs)*, 2004 FC 665, at para 29, as applicable to estate administration matters under the Act is no longer applicable today when considered in relation to the approach establishing the standard of review put forward by the Supreme Court in *Dunsmuir*, *Alberta Teachers'* and *Nor-Man*, above.

[27] At issue here is the Minister's decision to remove the Appellant as administrator of the estate of George Bomberry under section 43 of the Act. Like *Tsartlip*, *Sappier* and *Morin*, this is a decision that requires balancing the rights of the parties and involves examination of the circumstances for which the heirs of George Bomberry seek removal of the Appellant as administrator, and consideration of the underlying land rights. Consequently, I find reasonableness to be the standard of review applicable to the Minister's decision.

[28] With respect to whether the Minister met the duty of fairness owed to the Appellant and gave him sufficient information of the allegations made against him prior to his removal as administrator amounts to a question of procedural fairness and is reviewable on a standard of correctness *(Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, at para 43).

IV. Analysis

[29] The Department has an internal manual called "Decedent Indian Estates Procedures Manual" (manual), for use in their decision making for estates under their jurisdiction. Chapter Seven deals with the removal of an administrator for cause. It sets out the Department's quasi judicial role and the steps to follow if a complaint is received. The Department followed the steps and was satisfied the removal was justified.

[30] From the record it is apparent that the Minister, on numerous occasions and acting on complaints, communicated concerns to the Appellant over his failure to administer the estate. The concern with delay was first raised with the Appellant in 1998 and he gave his reasons for the delay.

[31] A Department official in correspondence dated September 20, 2001, again told the Appellant of a complaint received regarding the delay and that he would be removed if he did not conclude the estate. On October 28, 2002, the Department expressed to the Appellant their concerns over the delay of seven years in administering the estate.

[32] On December 13, 2002, the Department corresponded with the Appellant and articulated that they could not let the estate go on forever and it need concluded. As well this correspondence told the Appellant of "another inquiry from one of the heirs to this estate."

[33] In August 2003, the Department received a complaint letter regarding the delay that was signed by all of the heirs except the Appellant's mother.

[34] The last complaint letter was dated August 11, 2010, and following this complaint the Minister began the process to remove the Appellant as administrator.

[35] It is apparent that the removal came after no fewer than six written requests from the Minister and three discussions with the Appellant asking the Appellant to complete the estate land transfer form. Letters from the Minister to the Appellant are dated August 30, 2010, October 14, 2010, January 18, 2011, January 20, 2011, June 8, 2011 and July 13, 2011. The Appellant responded on May 26, 2011, but did not meet the June 30, 2011 deadline. Discussions took place on January 13, 2011, July 7, 2011 and July 13, 2011.

[36] In five of the Minister's requests, the Appellant was given a deadline in which to complete the land transfers, and was informed that failure to comply with the deadline would result in his removal as administrator. The original deadline was set for October 29, 2010, but following meetings with the Appellant, the October deadline was extended three times. First to June 30, 2011, then later to July 8, 2011, and finally to July 28, 2011.

[37] The Appellant had to complete a "Transfer of Land by Personal Representative" form to finalize the estate and it is that document that he was given deadlines to complete and of which he has to date not done.

[38] Sections 42 and 43 of the Act create a special regime for the administration of the estates of Indians which grants all jurisdiction and authority exclusively to the Minister in testamentary

matters of Indians, including the authority to appoint and remove estate administrators (see Annex A).

[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). This court has recognized that this jurisdiction in Indian testamentary matters goes above and beyond the jurisdiction of historic probate courts of common law (*Earl v Canada (Minister of Indian and Northern Affairs)*, 2004 FC 897, at para 13; *Morin*, above, at paras 49-50). Consequently, I am not persuaded that legal principles set out in the authorities relied upon by the parties, namely *Elliot Estate (Re)*, [1976] OJ No317, at paras 10-11; *Radford v Radford Estate*, [2008] OJ No 3526, at paras 97-108, with respect to the high threshold required for the removal of trustees in a private law context are necessarily applicable to the case at bar.

[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 (*Tsartslip*, above, at para 51; *Sandy Bay Ojibway First Nation v Canada*, 2004 FCA 229, at para 30; *Morin*, at paras 45-51).

[41] Section 42 is clear that the Minister's discretion with respect to estate administration is that the discretion be exercised in accordance with the regulations issued by the Governor in Council.

[42] The *Indian Estates Regulations*, CRC, c 954, (the Regulations) at section 11, set out the powers and duties of administrators in administering the estates of Indians. In particular, the administrator is responsible to the Minister and is obliged to carry out any order or direction given by the Minister (subsections 11(2), 11(14), 11(15)). Moreover, the Regulations provide for situations where the heirs don't agree. In those situations the administrator is required to obtain approval of the Minister for an alternative distribution of assets (subsection 11(7)) (see Annex B).

[43] Between receipt of the complaint on August 11, 2010 and the removal of the Appellant as administrator on July 29, 2011, the Minister allowed the Appellant an additional year to achieve consensus among the heirs. Ultimately, the Appellant did not follow the Minister's requests. This followed nearly 15 years during which time the Appellant was administrator and failed to achieve consensus. The Appellant retained counsel in January 1999 to assist him but he says that the land division issues are too esoteric and most lawyers would not understand what was at stake. I find that over the course of the 16 years the Minister did its best to assist and support the Appellant.

[44] At the end of the day, nearly 16 years after his appointment as administrator, the Appellant failed to both distribute the estate assets and follow the orders of the Minister, as he was required to do under the Regulations. Under such circumstances, removal of the Appellant as administrator amounts to a reasonable use of the Minister's discretion under the Act.

[45] The Appellant maintains that the Minister failed to meet the duty of procedural fairness because the Appellant had a right to be informed of the complaints against him so that he could respond to the allegations. He finds it especially unfair as in the decision it is unclear which of the

complaint letters were relied on. The Appellant feels he is owed a higher duty of fairness because of his personal interest in carrying out his family duties.

[46] I disagree on both points.

[47] I do not agree he is owed a higher duty because of his personal interest as his only duty is to administer the estate and his personal interests, though noble, are not legislated as the administrator of the estate.

[48] All but one of the heirs had complained to the Minister at various times about the delay. The Appellant was well aware of the complaints and that no matter how well intended his attempts at an agreement were it was not reached.

[49] The record demonstrates that the Appellant was aware of the objections raised by the heirs. In 2001 he was copied on correspondence complaining to the Minister of delays and in 2002 he was informed in writing by the Minister of the impact on the ability of two other administrators to conclude the estates they were responsible for by his delay in settling this estate.

[50] The Appellant was aware of the factors relied on by the Minister (which did not include inflammatory allegations) that were used to remove him. Even though the Appellant was not provided with copies of all of the actual complaint letters, he did not suffer any prejudice as he was aware that the complaint was that he was not performing his duties in a timely matter. The Appellant was able to submit his position and the Minister considered his position.

[51] The Supreme Court has held that the particular legislative and administrative context informs the duty of procedural fairness (*Canada (Attorney General) v Mavi*, 2011 SCC 30, at para 41 (*Mavi*)).

[52] Under sections 42 and 43 of the Act, the authority conferred on the Minister amounts to a discretionary administrative decision to remove an administrator. I note they do not empower the Minister to adjudicate a dispute between the administrator and the heirs. Contrary to what the Appellant asserts, the Minister's task was not to provide the Appellant with an opportunity to address the allegations of the complaint; rather, the Minister's task was to determine whether the administrator was executing his duties as required by the Act and Regulations.

[53] The requirements of the duty in particular cases are driven by their particular circumstances and the simple overarching requirement is fairness (*Mavi*, above, at para 42).

[54] In these circumstances, I find the Appellant has been treated fairly by the Minister. The Minister found the Appellant had not executed his duties to distribute the assets of the estate. As discussed above, prior to removing the Appellant, the Minister provided numerous notices, meetings and extensions informing the Appellant of the possibility of his removal, the steps he could take to avoid removal, and the consequences should he fail to follow the Minister's requests.

[55] A final argument of the Appellant was that he felt that in the past he had been given extensions to reach an agreement and he had an expectation that he would continue to be granted

extensions. This argument fails as the doctrine of legitimate expectations only gives rise to an expectation that a specific procedural safeguard would apply and does not involve an expectation of a substantive outcome (*Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)*, 2001 SCC 41, at paras 35 and 38).

[56] I see no error was made in proceeding as such and dismiss this application.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Application is dismissed;

2. No Costs are awarded.

"Glennys L. McVeigh"

Judge

ANNEX A

Indian Act, RSC, 1985, c. I-5

Powers of Minister with respect to property of deceased Indians

42. (1) Subject to this Act, all jurisdiction and authority in relation to matters and causes testamentary, with respect to deceased Indians, is vested exclusively in the Minister and shall be exercised subject to and in accordance with regulations of the Governor in Council.

(…)

Particular powers

43. Without restricting the generality of section 42, the Minister may

- (*a*) appoint executors of wills and administrators of estates of deceased Indians, remove them and appoint others in their stead;
- (*b*) authorize executors to carry out the terms of the wills of deceased Indians;
- (*c*) authorize administrators to administer the property of Indians who die intestate;
- (*d*) carry out the terms of wills of deceased Indians and administer the property of Indians who die intestate; and

Pouvoirs du ministre à l'égard des biens des Indiens décédés

42. (1) Sous réserve des autres dispositions de la présente loi, la compétence sur les questions testamentaires relatives aux Indiens décédés est attribuée exclusivement au ministre; elle est exercée en conformité avec les règlements pris par le gouverneur en conseil.

(…)

Pouvoirs particuliers

43. Sans que soit limitée la portée générale de l'article 42, le ministre peut :

- *a*) nommer des exécuteurs testamentaires et des administrateurs de successions d'Indiens décédés, révoquer ces exécuteurs et administrateurs et les remplacer;
- *b*) autoriser des exécuteurs à donner suite aux termes des testaments d'Indiens décédés;
- *c*) autoriser des administrateurs à gérer les biens d'Indiens morts intestats;
- *d*) donner effet aux testaments d'Indiens décédés et administrer les

biens d'Indiens morts intestats;

- (*e*) make or give any order, direction or finding that in his opinion it is necessary or desirable to make or give with respect to any matter referred to in section 42.

- *e*) prendre les arrêtés et donner les directives qu'il juge utiles à l'égard de quelque question mentionnée à l'article 42.

ANNEX B

Indian Estates Regulations, CRC, c 954

POWERS AND DUTIES OF ADMINISTRATORS

11.

(…)

(2) The administrator appointed pursuant to this section or the person acting as administrator in accordance with section 4 shall be responsible to the Minister for the proper preparation of the inventory, the giving of all notices and the carrying out of all inquiries and duties that may be necessary or be ordered with respect to any matter referred to in these Regulations.

(…)

(7) Where a partial distribution cannot be made, or where the heirs cannot agree as to distribution, the administrator may, with the approval of the Minister, convert the net assets into cash and pay those assets to the Receiver General to be credited to the estate pending final distribution to the persons entitled thereto.

(…)

(14) An administrator shall have all such powers as are required for the carrying out of the duties herein specified, and shall carry out any order or direction and abide by any finding made or given by the Minister with respect to any matter and cause testamentary.

POUVOIRS ET DEVOIRS DES ADMINISTRATEURS

11.

(…)

(2) L'administrateur nommé conformément au présent article ou la personne qui agit en qualité d'administrateur en vertu de l'article 4 doit rendre compte au ministre de la préparation adéquate de l'inventaire, de la signification de tous les avis et de l'exécution de toutes les enquêtes et fonctions qui peuvent s'imposer ou être ordonnées à l'égard de toute question mentionnée dans le présent règlement.

(…)

(7) Lorsqu'il est impossible d'effectuer une distribution partielle ou lorsque les héritiers ne peuvent tomber d'accord quant à la distribution, l'administrateur peut, avec l'approbation du ministre, convertir les valeurs nettes en espèces et les verser au receveur général afin qu'elles soient créditées à la succession en attendant la distribution finale aux ayants droit.

(…)

(14) Un administrateur doit avoir tous les pouvoirs nécessaires pour s'acquitter des fonctions spécifiées ci-dessus et doit exécuter les ordres ou instructions et maintenir toute conclusion établie ou donnée par le ministre à l'égard de toute matière et cause testamentaires.

(…)

(15) An administrator shall be accountable to the Minister for his administration.

(…)

(15) Un administrateur doit répondre au ministre de son administration.

FEDERAL COURT

SOLICITORS OF RECORD

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