

Federal Court



Cour fédérale

**Date: 20180704**

**Docket: T-1469-17**

**Citation: 2018 FC 682**

**Ottawa, Ontario, July 4, 2018**

**PRESENT:** The Honourable Madam Justice Gagné

**BETWEEN:**

**THOMAS BRADFIELD, EXECUTOR FOR  
THE ESTATE OF CECELIA BRADFIELD,  
DECEASED**

**Appellant**

**and**

**MINISTER OF INDIAN AFFAIRS AND  
NORTHERN DEVELOPMENT**

**Respondent**

**JUDGMENT AND REASONS**

**I. Nature of the Matter**

[1] On an appeal brought pursuant to section 47 of the *Indian Act*, RSC 1985, c I-5, Thomas Bradfield challenges the decision of the Deputy Minister of the Department of Indigenous and Northern Affairs Canada [Minister] to reject his application for possession of a parcel of land on South Saanich Indian Reserve No. 1.

[2] The Appellant's main argument, both in his application and in this appeal, is based upon his interpretation of section 12 of the *Indian Estates Regulations*, CRC, c 954 [Regulations], which is entitled "Transfer of Possession". He states that this section permits the Minister to issue him a Certificate of Possession for the parcel of land in question, based on adverse possession, since he inherited the land from his mother, Cecilia Bradfield, who lived on the parcel for over thirty years.

[3] The Minister rejected the Appellant's application, based on her interpretation that section 12 does not permit the Minister to issue Certificates of Possession for unallotted band lands. Section 12 of the Regulations has not yet been judicially interpreted by a Canadian court.

## II. Preliminary Matter

[4] At the hearing of the appeal, counsel for the Respondent requested a change in the style of cause to properly reflect the Respondent's legal name. The Minister of Indian Affairs and Northern Development will therefore be substituted in place of the Minister of Indigenous and Northern Affairs Canada as Respondent in this case.

## III. Facts

[5] Cecilia Bradfield, the Appellant's mother, died on October 31, 2014. At the time of her death, Mrs. Bradfield was a member of the Tsartlip First Nation [TFN] living on a five-acre parcel of land described as Lot 3, Block 1, CLSR Plan No. 5096 on South Saanich Indian Reserve No. 1 [Reserve], with a civic address of 7541 West Saanich Road on Vancouver Island,

in British Columbia [Property]. The Reserve is held by Her Majesty the Queen in Right of Canada for the use and benefit of the TFN, in accordance with the provisions of the *Indian Act*.

[6] Mrs. Bradfield resided on the Property from 1979 until her death in 2014. She and her husband built a home and made various other improvements to the Property over the years. In 1982, Mrs. Bradfield believed that she purchased the Property from her brother, Art Cooper, for a sum of \$15,000. In 1990, she applied to the TFN band council for a Certificate of Possession for the Property. As per section 20 of the *Indian Act*, a Certificate of Possession is evidence of an Indian's lawful possession of land in a reserve, and is issued by the Minister once a band council allots land from the reserve to an individual band member. Following her application, Mrs. Bradfield was informed by the TFN band council that Mr. Cooper never owned the Property, was never issued a Certificate of Possession for it and that it remained band land.

[7] In July 2004, Mr. Cooper received a letter from the TFN band council informing him that that the Property was surveyed band land to be used for the collective good of the TFN and its members, and requesting that he cease all personal activity on the Property. A copy of that letter was sent to Mrs. Bradfield.

[8] Mrs. Bradfield corresponded with the TFN band council on several occasions in 2009, hoping to resolve the issues with the Property and to be issued a Certificate of Possession. She did not receive a response to her entreaties.

[9] When she died in 2014, she left any interest that she held in the Property to the Appellant, who is also a member of the TFN. The Minister approved Mrs. Bradfield's will and appointed the Appellant as the executor named in the will, pursuant to subsection 43(a) and section 45 of the *Indian Act*.

[10] The Appellant subsequently applied to the Minister for the issuance of a Certificate of Possession for the Property, based on section 12 of the Regulations and on his mother's will. Over two years later, the Minister sent a letter to the Appellant's counsel, rejecting his application.

[11] The Appellant appeals this decision pursuant to section 47 of the *Indian Act*.

#### IV. Legislative Context

[12] The relevant legislative provisions are found in Annex A attached to these reasons.

Section 12 of the Regulations is also reproduced below:

**Transfer of Possession**

**Transfert de possession**

**12 (1)** Where the deceased Indian had been in peaceable, public and useful possession of land on a reserve for a continuous and uninterrupted period of 30 years, transfer of possession may, at the discretion of the Minister, be presumed to have taken place and in such event the onus of proving that prescription did not run or of disproving the transfer shall be upon any person claiming adverse possession.

**(2)** For the purposes of this section, in calculating the 30-year period, the period of possession of the deceased, his predecessors in title and that of his heirs, may be cumulated.

**12 (1)** Si l'Indien décédé a eu la possession paisible, publique et utile d'une terre dans une réserve pendant une période constante et ininterrompue de 30 ans, le transfert de possession peut, à la discrétion du ministre, être réputé avoir eu lieu et, dans ce cas, le soin de prouver que le droit ne s'est pas prescrit ou de contester le transfert incombe à toute personne qui réclame, sous forme d'opposition, le droit d'occuper.

**(2)** Aux fins du présent article, le calcul de la période de 30 ans peut cumuler la période de possession de l'Indien décédé, de ses prédécesseurs au titre de propriété et celle de ses héritiers.

## V. Impugned Decision

[13] The Minister informed the Appellant that section 12 of the Regulations does not permit the issuance of Certificates of Possession for unallotted band lands, despite Mrs. Bradfield's continuous residence on the Property. Since the TFN band council did not allot the Property to Mr. Cooper or to Mrs. Bradfield, it remains band land in a reserve for the use and benefit of the TFN.

[14] The Minister explained that section 12 of the Regulations cannot contradict or override the scheme of the *Indian Act*, specifically i) section 20 which permits band councils to allot land to individual band members, and ii) section 24 which allows band members who have been

allotted land and granted a Certificate of Possession to transfer that right of possession to another band member.

[15] The Regulations, enacted by virtue of subsection 42(2) of the *Indian Act*, cannot override the landholding regime enshrined in the *Indian Act*, where land is held by Her Majesty the Queen in Right of Canada for the use and benefit of Indian bands like the TFN. The interpretation proposed by the Appellant allowing the Minister to issue a Certificate of Possession based on section 12 of the Regulations would therefore be contrary to section 20 of the *Indian Act*. Additionally, the Minister stipulated that section 12 of the Regulations cannot be used as a means to establish adverse possession, a concept that is inapplicable to reserve lands.

[16] The Minister provided an example of where section 12 of the Regulations has been used in the past: to allow the Minister to cure a defect in the transfer of Certificates of Possession of land already allotted by a band council (i.e., a transfer via section 24 of the *Indian Act*), by issuing a Certificate of Possession where one had never before been issued, but should have been.

## VI. Issues

[17] This appeal raises the following issues:

- A. *What is the applicable standard of review?*
- B. *Did the Minister err in rejecting the Appellant's interpretation of section 12 of the Regulations and his application for possession of a parcel of land on the Reserve?*

C. *If the second issue is answered in the affirmative, what is the appropriate remedy?*

## VII. Analysis

A. *What is the applicable standard of review?*

[18] I agree with the Respondent that the Minister’s interpretation of section 12 of the Regulations should be reviewed on the standard of reasonableness. However, the outcome of this appeal does not turn on the question of the applicable standard of review. I believe that the Minister’s interpretation of section 12 of the Regulations does not warrant interference by this Court under either standard. In my view, the interpretation of section 12 of the Regulations only allows for one “defensible outcome”, and that is the one reached by the Minister (*Wilson v Atomic Energy of Canada Ltd*, 2016 SCC 29 at para 35).

[19] However, given that the standard of review for a Minister’s interpretation of section 12 of the Regulations has not yet been established, I will nevertheless carry out an analysis of the factors that make it possible to identify the proper standard of review (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 62).

[20] The analysis begins with the presumption that the standard of review is reasonableness. The Appellant cites the decision of the Federal Court of Appeal in *Canada (Fisheries and Oceans) v David Suzuki Foundation*, 2012 FCA 40, for the principle that the reasonableness standard of review does not apply to the interpretation of a statute by a Minister responsible for its implementation. However, I agree with the Respondent that more recent case law now

stipulates that the presumption of reasonableness for when an administrative body interprets its home statute extends to ministerial statutory interpretation. The triad of cases provided by the Respondent makes this point very clearly (*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36; *Canada (Citizenship and Immigration) v Kandola*, 2014 FCA 85; *Teva Canada Limited v Pfizer Canada Inc*, 2016 FCA 248).

[21] The *Kandola* case stands out for the way that it settles the jurisprudential debate over whether or not the presumption of reasonableness applies to questions of law decided by a Minister. Justice Marc Noël concludes: “In my respectful view, the question whether all decisions, including those properly labelled as Ministerial, are presumed to be reasonable was open to debate before *Agraira* as the Supreme Court had only applied the presumption in the context of decisions made by adjudicative tribunals [citations omitted]. However, it now seems clear that the presumption extends to Ministerial decisions” (at para 40). The *Kandola* case is one where the presumption of reasonableness for ministerial statutory interpretation is rebutted; in the *Teva* case, the presumption of reasonableness is confirmed.

[22] The next step is whether the presumption of reasonableness should be rebutted in the present case. The presumption of reasonableness may be rebutted on two separate bases: (a) where the question falls within one of the four categories of exceptions set out in *Dunsmuir* at paragraphs 58-61; or (b) on the basis of a contextual analysis (*McLean v British Columbia (Securities Commission)*, 2013 SCC 67 at para 22).



[23] The four categories of exceptions that rebut the presumption of reasonableness are: (a) constitutional questions regarding the division of powers; (b) issues both of central importance to the legal system as a whole and outside the decision-maker's specialized area of expertise; (c) true questions of jurisdiction or *vires*; and (iv) issues regarding the jurisdictional lines between two or more competing specialized tribunals (*Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47 at para 24).

[24] Only the third category has the potential to apply in this case. However, I agree with the Respondent that the Minister's decision does not raise a true question of jurisdiction, given how rarely such questions have arisen in the past – if they ever actually did (see *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at paras 34-41) – and given the fact that the Minister was interpreting her own home statute and one of its regulations (*Edmonton East*, above at para 26).

[25] The next step is the contextual analysis, which allows courts to rebut the presumption of reasonableness where “the legislature clearly intended not to protect the tribunal's jurisdiction in relation to certain matters” (*Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16 at para 46; *Barreau du Québec v Quebec (Attorney General)*, 2017 SCC 56 at para 23).

[26] In this case, a contextual analysis of the Minister's decision, the *Indian Act* and the Regulations also does not lead to a rebuttal of the presumption of reasonableness. To illustrate this point, I will use three cases where the presumption of reasonableness was rebutted and explain how, in my view, this case differs from those three.

[27] The first case is *Takeda Canada Inc v Canada (Health)*, 2013 FCA 13, where Justice David Stratas writes (in dissent, though his analysis on standard of review is adopted by the majority):

[29] In my view, the presumption is overcome. All of the factors relevant to determining the standard of review lean in favour of correctness review. In this case, the nature of the question is purely legal. There is no privative clause. The Minister has no expertise in legal interpretation. There is nothing in the structure of the Act, this regulatory regime or this particular legislative provision that suggests that deference should be accorded to the Minister's decision. This analysis of the factors mirrors that in *Canada (Fisheries and Oceans) v. David Suzuki Foundation*, 2012 FCA 40.

[Citations omitted.]

[28] The second case is *Kandola*, discussed above. In that case, the presumption was rebutted since the question posed to a citizenship officer was one of pure statutory construction with no discretionary element, and for which the officer had no expertise. The question was characterized as “challenging” and it was held that “nothing in the structure or scheme of the Act suggests that deference should be accorded to the immigration officer on the question which he had to decide” (at paras 43-44).

[29] Finally, in *Save Halkett Bay Marine Park Society v Canada (Environment)*, 2015 FC 302, Chief Justice Paul Crampton concludes that the presumption of reasonableness should be rebutted on the following basis:

[54] The purely legal component concerns subsection 127(1) of the Vessel Pollution Regulations and certain provisions in the CEPA, which the Society states establish an outright ban on TBTs. This Court's review of whether those provisions in fact establish an outright ban on TBTs in Canada that rendered the issuance of the Permit contrary to law is conducted on a correctness standard. This is because this is “a pure question of statutory construction

embodying no discretionary element,” the Minister “cannot claim to have any expertise over and above” that of the Court in respect of such questions, and there is no privative clause in the CEPA (*Canada (Citizenship and Immigration) v Kandola*, 2014 FCA 85 (CanLII), at para 43). Moreover, insofar as the Vessel Pollution Regulations are concerned, they were passed pursuant to the CSA, above, which is not the Minister’s “home statute” and no evidence was adduced to demonstrate that she has any particular familiarity with that statute (*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 (CanLII), at para 50).

[30] When considering the Minister’s decision in the present case as compared to the three presented above, there is one thing that all four have in common: a question of pure statutory construction. In the present case, the Minister decided that she could not issue a Certificate of Possession pursuant to the Appellant’s application because section 12 of the Regulations does not permit such action for unallotted band lands, since doing so would be contrary to section 20 of the *Indian Act*. This question is undoubtedly legal in nature.

[31] However, and as will be discussed in greater detail below, what distinguishes the Minister’s decision in this case from the three above is that the *Indian Act* and the Regulations do suggest that deference should be accorded to the Minister’s decision.

[32] Additionally, the jurisprudence has further evolved since the three cases discussed above were decided. Most recently, the Federal Court of Appeal in *Teva*, above, clarified that the presence of a legal question coupled with a lack of suggested deference do not automatically rebut the presumption of reasonableness:

[51] Having concluded that it should be presumed that the decision of the Minister interpreting the PMNOC Regulations is reviewable on the standard of reasonableness, neither the fact that this raises a legal question nor the fact that the PMNOC

Regulations do not suggest deference point away from the reasonableness standard.

[52] Since *Dunsmuir*, the Supreme Court has stated that the interpretation of unclear language in an administrative decision-maker's home statute (or regulation) is usually best left to the administrative decision-maker (*McLean*, at paragraph 33). The proper inquiry is whether the PMNOC Regulations evidence Parliament's intention that decisions of the Minister interpreting the Regulations be reviewed on a less deferential standard of review (*Tervita*, at paragraphs 38-39).

[Emphasis added.]

[33] Applying the *Teva* directions to this case leads me to the conclusion that the presumption of reasonableness should not be rebutted. The Regulations, as well as the relevant provisions of the *Indian Act*, do not indicate that the Minister's interpretation of the Regulations should be reviewed on a less deferential standard of review. According to subsection 42(1) of the *Indian 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." Furthermore, the very language of section 12 of the Regulations points to deference, as decisions under this section are made "at the discretion of the Minister."

[34] Several other factors support deferring to the Minister on her interpretation of section 12 of the Regulations. I agree with the Respondent that the Minister is intimately familiar with the *Indian Act* and the complex landholding regime for reserve lands that it sets out and regulates. The Minister is equally familiar with the provisions of the *Indian Act* and the Regulations that relate to testamentary matters. I agree with the Respondent that this familiarity places the

Minister in the best position to appreciate the wider policy implications involved in interpreting section 12 of the Regulations.

[35] Finally, this Court's decision in the case of *Morin v Canada*, 2001 FCT 1430, gives further credence to treating the Minister's interpretation of the Regulations with deference. In that case, it was held that section 42 of the *Indian Act* (the Regulations' enabling provision) confers upon the Minister "jurisdiction similar to that exercised by the surrogate or probate courts" with regard to testamentary matters (at para 45). I agree with the Respondent that this grant of jurisdiction indicates that Parliament intended the Minister, not the courts, to be the primary decision-maker related to testamentary matters and issues addressed in the Regulations.

[36] For all of the above reasons, the standard of reasonableness should govern the review of the Minister's decision in this case.

B. *Did the Minister err in rejecting the Appellant's interpretation of section 12 of the Regulations and his application for possession of a parcel of land on the Reserve?*

[37] In my view, the Minister did not err in rejecting the Appellant's interpretation of section 12 of the Regulations. She correctly employed the principles of statutory interpretation and her decision is reasonable. As mentioned above, I view the decision reached by the Minister as the only defensible outcome following an examination of section 12 of the Regulations, and its place within the statutory scheme of the *Indian Act*.

[38] While the parties agree on the principles of statutory interpretation, they disagree on their application to the legislation at bar.

[39] As well recognized in Canadian jurisprudence, the modern approach to statutory interpretation is that “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament” (Elmer A Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87, as cited in *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21).

[40] Furthermore, the provisions of a statute dealing with the same subject should be read together, where possible, in order to avoid conflict (*MacKeigan v Hickman*, [1989] 2 SCR 796 at 825). Similarly, “[w]hen provisions are grouped together under a heading it is presumed that they are related to one another in some particular way, that there is a shared subject or object or a common feature to the provisions” (Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham, Ontario: LexisNexis Canada, 2014) at 463).

[41] Regulations must also be interpreted in accordance with the modern principle of statutory interpretation, though their scope will be constrained by their enabling legislation (Driedger, above at 247, as cited in *Bristol-Myers Squibb Co v Canada (Attorney General)*, 2005 SCC 26 at para 38). A regulation must accord with the purposes and objects of its enabling legislation (*Waddell v Schreyer et al* (1983), 5 DLR (4th) 254 (BCSC), as cited in *Friends of the Canadian Wheat Board v Canada (Attorney General)*, 2007 FC 808 at para 37).

[42] Finally, statutory interpretation also presumes that Parliament did not intend to produce absurd results (*Rizzo*, above at para 27).

[43] I am in agreement with the Respondent's submissions on the reasonableness of the Minister's decision and her interpretation of section 12 of the Regulations. This interpretation is well supported by the statutory scheme governing reserve lands and individual rights of possession in the *Indian Act*.

[44] On the other hand, the Appellant's interpretation is inconsistent with the scheme and purpose of section 20 of the *Indian Act*. It would be inconsistent to interpret the Regulations as permitting a new method of obtaining a right of individual land possession over communal reserve lands that bypasses the band council and the section 20 process. Reserve lands are held collectively by Indian bands unless specifically allotted under section 20. I believe that it is inconceivable, as well as contrary to the principles of statutory interpretation, to conclude that the Governor in Council has hidden away a provision in one of the *Indian Act*'s numerous regulations that establishes a secondary landholding regime that conflicts with the one otherwise set out in the Act.

[45] It is even more inconceivable that this secondary, hidden landholding regime would be one based upon the common law device of adverse possession. Adverse possession is a legal construct that is incompatible with the statutory scheme governing reserve land held communally by Her Majesty the Queen in Right of Canada for the use and benefit of Indian bands. As stated

by the British Columbia Court of Appeal in the case of *Joe v Findlay* (1981), 122 DLR (3d) 377

(QL):

[7] That right to squat exercised individually and unilaterally by a Band member cannot be sustained by authority. The legal title to the reserve lands vests in Her Majesty the Queen in right of Canada. By virtue of the interpretation of s. 2 and s. 18 of the Indian Act R.S.C. 1970, c. 1-6, the use and benefit of reserve lands accrues to and comes into existence as an enforceable right (subject to the consent of the Minister of Indian Affairs and Northern Development, hereinafter called the “minister”) vested in the entire Band for which such reserve lands have been set apart. In that statute “Band” is a noun singular in form used with a plural implication and in a context which admits only of a plural use and application. This statutory right of use and benefit, often referred to in the cases as a usufruct (not a true equivalent borrowed from Roman law), is a collective right in common conferred upon and accruing to the Band members as a body and not to the Band members individually. For a discussion on the nature of this possessory right, see *St. Catherine’s Milling, etc., Co. v. R.* (1888), 14 A.C. 46.

[46] As of 1990, Mrs. Bradfield was aware that she held no right of individual possession in the Property and that the TFN band council considered the Property to be communal band land intended for the collective good of the TFN and its members. This message from the TFN band council was reiterated in 2004 and again, though implicitly this time, in 2009, when the band council did not reply to her request for a Certification of Possession. As the Respondent writes: “The Appellant’s interpretation would allow him to attempt to do indirectly what the statute precluded Cecilia Bradfield from doing directly while she was still alive, namely obtaining rights of individual lawful possession to the Property without the agreement of the Band Council”. Such a result would be absurd and cannot be justified based on the language in section 12 of the Regulations, or any of the landholding provisions in the *Indian Act*.



[47] I am therefore of the view that section 12 of the Regulations only applies to pre-existing rights of individual lawful possession and does not apply to communal reserve lands.

[48] Second, the Appellant's interpretation of section 12 of the Regulations is also inconsistent with the purpose of its authorizing provision, section 42 of the *Indian Act*. Subsection 42(2) grants the Governor in Council authority to pass regulations in the context of the administration of estates pursuant to subsection 42(1). In using the term "matters and causes testamentary" in subsection 42(1), Parliament has conferred on the Minister jurisdiction equivalent to that exercised by the surrogate or probate courts with respect to the grant and revocation of probate of wills and of administration. The main duty of such courts is to decide whether or not a document is entitled to probate as a testamentary instrument and to decide who is entitled to be constituted the personal representative of the deceased (*Morin*, above at para 45).

[49] Therefore, any regulation passed under subsection 42(2) of the *Indian Act* should relate to how the Minister exercises her jurisdiction over matters and causes testamentary and matters incidental to that jurisdiction. By allowing an heir to obtain legal possession over communal reserve lands through the application of section 12 of the Regulations, the Minister would give that heir more rights than the deceased had or could ever have obtained through the application of the relevant provisions of the *Indian Act*. This would lead to an absurd result.

C. *If the second issue is answered in the affirmative, what is the appropriate remedy?*

[50] Given my opinion that the Minister did not err in any way, it is not necessary to determine an appropriate remedy.

VIII. Conclusion

[51] The Minister did not err in rejecting the Appellant's interpretation of section 12 of the Regulations and in rejecting his application for possession of a parcel of land on the Reserve. The Minister's determination that section 12 of the Regulations does not permit the issuance of a Certificate of Possession for land that has not already been allotted for individual possession by the band council pursuant to section 20 of the *Indian Act* is reasonable and the only defensible interpretation of section 12. Section 12 of the Regulations does not set out a separate process for an individual band member to acquire individual lawful possession of band land based on adverse possession.

**JUDGMENT in T-1469-17**

**THIS COURT'S JUDGMENT is that:**

1. This appeal is dismissed;
2. The style of cause is amended to replace the “Minister of Indigenous and Northern Affairs Canada” with the “Minister of Indian Affairs and Northern Development” as the Respondent;
3. Costs in the amount of \$1,000 inclusive of disbursements and taxes are granted in favour of the Respondent.

“Jocelyne Gagné”

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Judge

## ANNEX A

Legislative Provisions***Indian Estates Regulations  
Règlement sur les successions d'Indiens*****Transfer of Possession**

**12 (1)** Where the deceased Indian had been in peaceable, public and useful possession of land on a reserve for a continuous and uninterrupted period of 30 years, transfer of possession may, at the discretion of the Minister, be presumed to have taken place and in such event the onus of proving that prescription did not run or of disproving the transfer shall be upon any person claiming adverse possession.

**(2)** For the purposes of this section, in calculating the 30-year period, the period of possession of the deceased, his predecessors in title and that of his heirs, may be cumulated.

**Transfert de possession**

**12 (1)** Si l'Indien décédé a eu la possession paisible, publique et utile d'une terre dans une réserve pendant une période constante et ininterrompue de 30 ans, le transfert de possession peut, à la discrétion du ministre, être réputé avoir eu lieu et, dans ce cas, le soin de prouver que le droit ne s'est pas prescrit ou de contester le transfert incombe à toute personne qui réclame, sous forme d'opposition, le droit d'occuper.

**(2)** Aux fins du présent article, le calcul de la période de 30 ans peut cumuler la période de possession de l'Indien décédé, de ses prédécesseurs au titre de propriété et celle de ses héritiers.

***Indian Act  
Loi sur les Indiens*****Reserves to be held for use and benefit of Indians****Les réserves sont détenues à l'usage et au profit des Indiens**

**18 (1)** Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.

**Use of reserves for schools, etc.**

(2) The Minister may authorize the use of lands in a reserve for the purpose of Indian schools, the administration of Indian affairs, Indian burial grounds, Indian health projects or, with the consent of the council of the band, for any other purpose for the general welfare of the band, and may take any lands in a reserve required for those purposes, but where an individual Indian, immediately prior to the taking, was entitled to the possession of those lands, compensation for that use shall be paid to the Indian, in such amount as may be agreed between the Indian and the Minister, or, failing agreement, as may be determined in such manner as the Minister may direct.

**18 (1)** Sous réserve des autres dispositions de la présente loi, Sa Majesté détient des réserves à l'usage et au profit des bandes respectives pour lesquelles elles furent mises de côté; sous réserve des autres dispositions de la présente loi et des stipulations de tout traité ou cession, le gouverneur en conseil peut décider si tout objet, pour lequel des terres dans une réserve sont ou doivent être utilisées, se trouve à l'usage et au profit de la bande.

**Emploi de réserves aux fins des écoles, etc.**

(2) Le ministre peut autoriser l'utilisation de terres dans une réserve aux fins des écoles indiennes, de l'administration d'affaires indiennes, de cimetières indiens, de projets relatifs à la santé des Indiens, ou, avec le consentement du conseil de la bande, pour tout autre objet concernant le bien-être général de la bande, et il peut prendre toutes terres dans une réserve, nécessaires à ces fins, mais lorsque, immédiatement avant cette prise, un Indien particulier avait droit à la possession de ces terres, il doit être versé à cet Indien, pour un semblable usage, une indemnité d'un montant dont peuvent convenir l'Indien et le ministre, ou, à défaut d'accord, qui peut être fixé de la manière que détermine ce dernier.

[...]

**Possession of lands in a reserve**

**20 (1)** No Indian is lawfully in possession of land in a reserve unless, with the approval of the Minister, possession of the land has been allotted to him by the council of the band.

**Certificate of Possession**

**(2)** The Minister may issue to an Indian who is lawfully in possession of land in a reserve a certificate, to be called a Certificate of Possession, as evidence of his right to possession of the land described therein.

**Location tickets issued under previous legislation**

**(3)** For the purposes of this Act, any person who, on September 4, 1951, held a valid and subsisting Location Ticket issued under The Indian Act, 1880, or any statute relating to the same subject-matter, shall be deemed to be lawfully in possession of the land to which the location ticket relates and to hold a Certificate of Possession with respect thereto

**Temporary possession**

**(4)** Where possession of land in a reserve has been allotted to an Indian by the council of the band, the Minister may, in his discretion, withhold his

[...]

**Possession de terres dans une réserve**

**20 (1)** Un Indien n'est légalement en possession d'une terre dans une réserve que si, avec l'approbation du ministre, possession de la terre lui a été accordée par le conseil de la bande.

**Certificat de possession**

**(2)** Le ministre peut délivrer à un Indien légalement en possession d'une terre dans une réserve un certificat, appelé certificat de possession, attestant son droit de posséder la terre y décrite.

**Billets de location délivrés en vertu de lois antérieures**

**(3)** Pour l'application de la présente loi, toute personne qui, le 4 septembre 1951, détenait un billet de location valide délivré sous le régime de l'Acte relatif aux Sauvages, 1880, ou de toute loi sur le même sujet, est réputée légalement en possession de la terre visée par le billet de location et est censée détenir un certificat de possession à cet égard.

**Possession temporaire**

**(4)** Lorsque le conseil de la bande a attribué à un Indien la possession d'une terre dans une réserve, le ministre peut, à sa discrétion, différer son

approval and may authorize the Indian to occupy the land temporarily and may prescribe the conditions as to use and settlement that are to be fulfilled by the Indian before the Minister approves of the allotment.

approbation et autoriser l'Indien à occuper la terre temporairement, de même que prescrire les conditions, concernant l'usage et l'établissement, que doit remplir l'Indien avant que le ministre approuve l'attribution.

### **Certificate of Occupation**

**(5)** Where the Minister withholds approval pursuant to subsection (4), he shall issue a Certificate of Occupation to the Indian, and the Certificate entitles the Indian, or those claiming possession by devise or descent, to occupy the land in respect of which it is issued for a period of two years from the date thereof.

### **Certificat d'occupation**

**(5)** Lorsque le ministre diffère son approbation conformément au paragraphe (4), il délivre un certificat d'occupation à l'Indien, et le certificat autorise l'Indien, ou ceux qui réclament possession par legs ou par transmission sous forme d'héritage, à occuper la terre concernant laquelle il est délivré, pendant une période de deux ans, à compter de sa date.

### **Extension and approval**

**(6)** The Minister may extend the term of a Certificate of Occupation for a further period not exceeding two years, and may, at the expiration of any period during which a Certificate of Occupation is in force

**(a)** approve the allotment by the council of the band and issue a Certificate of Possession if in his opinion the conditions as to use and settlement have been fulfilled; or

### **Prorogation et approbation**

**(6)** Le ministre peut proroger la durée d'un certificat d'occupation pour une nouvelle période n'excédant pas deux ans et peut, à l'expiration de toute période durant laquelle un certificat d'occupation est en vigueur :

**a)** soit approuver l'attribution faite par le conseil de la bande et délivrer un certificat de possession si, d'après lui, on a satisfait aux conditions concernant l'usage et l'établissement;

**(b)** refuse approval of the allotment by the council of the band and declare the land in respect of which the Certificate of Occupation was issued to be available for re-allotment by the council of the band.

**b)** soit refuser d'approuver l'attribution faite par le conseil de la bande et déclarer que la terre, à l'égard de laquelle le certificat d'occupation a été délivré, peut être attribuée de nouveau par le conseil de la bande.

### **Register**

**21** There shall be kept in the Department a register, to be known as the Reserve Land Register, in which shall be entered particulars relating to Certificates of Possession and Certificates of Occupation and other transactions respecting lands in a reserve.

### **Registre**

**21** Il doit être tenu au ministère un registre, connu sous le nom de Registre des terres de réserve, où sont inscrits les détails concernant les certificats de possession et certificats d'occupation et les autres opérations relatives aux terres situées dans une réserve.

### **Improvement on lands**

**22** Where an Indian who is in possession of lands at the time they are included in a reserve made permanent improvements thereon before that time, he shall be deemed to be in lawful possession of those lands at the time they are included.

### **Améliorations apportées aux terres**

**22** Un Indien qui a fait des améliorations à des terres en sa possession avant leur inclusion dans une réserve, est considéré comme étant en possession légale de ces terres au moment de leur inclusion.

### **Compensation for improvements**

### **Indemnité à l'égard des améliorations**



**23** An Indian who is lawfully removed from lands in a reserve on which he has made permanent improvements may, if the Minister so directs, be paid compensation in respect thereof in an amount to be determined by the Minister, either from the person who goes into possession or from the funds of the band, at the discretion of the Minister.

#### **Transfer of possession**

**24** An Indian who is lawfully in possession of lands in a reserve may transfer to the band or another member of the band the right to possession of the land, but no transfer or agreement for the transfer of the right to possession of lands in a reserve is effective until it is approved by the Minister.

#### **Indian ceasing to reside on reserve**

**25 (1)** An Indian who ceases to be entitled to reside on a reserve may, within six months or such further period as the Minister may direct, transfer to the band or another member of the band the right to possession of any lands in the reserve of which he was lawfully in possession.

#### **When right of possession reverts**

**23** Un Indien qui est légalement retiré de terres situées dans une réserve et sur lesquelles il a fait des améliorations permanentes peut, si le ministre l'ordonne, recevoir à cet égard une indemnité d'un montant que le ministre détermine, soit de la personne qui entre en possession, soit sur les fonds de la bande, à la discrétion du ministre

#### **Transfert de possession**

**24** Un Indien qui est légalement en possession d'une terre dans une réserve peut transférer à la bande, ou à un autre membre de celle-ci, le droit à la possession de la terre, mais aucun transfert ou accord en vue du transfert du droit à la possession de terres dans une réserve n'est valable tant qu'il n'est pas approuvé par le ministre.

#### **Indien qui cesse de résider sur la réserve**

**25 (1)** Un Indien qui cesse d'avoir droit de résider sur une réserve peut, dans un délai de six mois ou dans tel délai prorogé que prescrit le ministre, transférer à la bande, ou à un autre membre de celle-ci, le droit à la possession de toute terre dans la réserve, dont il était légalement en possession.

#### **Le droit de possession non transféré retourne à la bande**

(2) Where an Indian does not dispose of his right of possession in accordance with subsection (1), the right to possession of the land reverts to the band, subject to the payment to the Indian who was lawfully in possession of the land, from the funds of the band, of such compensation for permanent improvements as the Minister may determine.

[...]

### **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.

### **Regulations**

(2) The Governor in Council may make regulations providing that a deceased Indian who at the time of his death was in possession of land in a reserve shall, in such circumstances and for such purposes as the regulations prescribe, be deemed to have been at the time of his death lawfully in possession of that land.

### **Application of regulations**

(2) Lorsqu'un Indien ne dispose pas de son droit de possession conformément au paragraphe (1), le droit à la possession de la terre retourne à la bande, sous réserve du paiement, à l'Indien qui était légalement en possession de la terre, sur les fonds de la bande, de telle indemnité pour améliorations permanentes que fixe le ministre.

[...]

### **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.

### **Règlements**

(2) Le gouverneur en conseil peut prendre des règlements stipulant qu'un Indien décédé qui, au moment de son décès, était en possession de terres dans une réserve, sera réputé, en telles circonstances et à telles fins que prescrivent les règlements, avoir été légalement en possession de ces terres au moment de son décès.

### **Application des règlements**

**(3)** Regulations made under subsection (2) may be made applicable to estates of Indians who died before, on or after September 4, 1951.

**(3)** Les règlements prévus par le paragraphe (2) peuvent être rendus applicables aux successions des Indiens morts avant ou après le 4 septembre 1951 ou à cette date.

### **Particular powers**

### **Pouvoirs particuliers**

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

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

**(a)** appoint executors of wills and administrators of estates of deceased Indians, remove them and appoint others in their stead;

**a)** nommer des exécuteurs testamentaires et des administrateurs de successions d'Indiens décédés, révoquer ces exécuteurs et administrateurs et les remplacer;

**(b)** authorize executors to carry out the terms of the wills of deceased Indians;

**b)** autoriser des exécuteurs à donner suite aux termes des testaments d'Indiens décédés;

**(c)** authorize administrators to administer the property of Indians who die intestate;

**c)** autoriser des administrateurs à gérer les biens d'Indiens morts intestats;

**(d)** carry out the terms of wills of deceased Indians and administer the property of Indians who die intestate; and

**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.

[...]

[...]

### **Indians may make wills**

### **Les Indiens peuvent tester**

**45 (1)** Nothing in this Act shall be construed to prevent or

**45 (1)** La présente loi n'a pas pour effet d'empêcher un

prohibit an Indian from devising or bequeathing his property by will.

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.

[...]

[...]

### **Appeal to Federal Court**

### **Appels à la Cour fédérale**

47 A decision of the Minister made in the exercise of the jurisdiction or authority conferred on him by section 42, 43 or 46 may, within two months from the date thereof, be appealed by any person affected thereby to the Federal Court, if the amount in controversy in the appeal exceeds five hundred dollars or if the Minister consents to an appeal.

47 Une décision rendue par le ministre dans l'exercice de la compétence que lui confère l'article 42, 43 ou 46 peut être portée en appel devant la Cour fédérale dans les deux mois de cette décision, par toute personne y intéressée, si la somme en litige dans l'appel dépasse cinq cents dollars ou si le ministre y consent.

[...]

[...]

### **Devisee's entitlement**

### **Droit du légataire**

**49** A person who claims to be entitled to possession or occupation of lands in a reserve by devise or descent shall be deemed not to be in lawful possession or occupation of those lands until the possession is approved by the Minister.

**49** Une personne qui prétend avoir droit à la possession ou à l'occupation de terres situées dans une réserve en raison d'un legs ou d'une transmission par droit de succession est censée ne pas en avoir la possession ou l'occupation légitime tant que le ministre n'a pas approuvé cette possession.

#### **Non-resident of reserve**

#### **Non-résident d'une réserve**

**50 (1)** A person who is not entitled to reside on a reserve does not by devise or descent acquire a right to possession or occupation of land in that reserve.

**50 (1)** Une personne non autorisée à résider dans une réserve n'acquiert pas, par legs ou transmission sous forme de succession, le droit de posséder ou d'occuper une terre dans cette réserve.

#### **Sale by superintendent**

#### **Vente par le surintendant**

**(2)** Where a right to possession or occupation of land in a reserve passes by devise or descent to a person who is not entitled to reside on a reserve, that right shall be offered for sale by the superintendent to the highest bidder among persons who are entitled to reside on the reserve and the proceeds of the sale shall be paid to the devisee or descendant, as the case may be.

**(2)** Lorsqu'un droit à la possession ou à l'occupation de terres dans une réserve est dévolu, par legs ou transmission sous forme de succession, à une personne non autorisée à y résider, ce droit doit être offert en vente par le surintendant au plus haut enchérisseur entre les personnes habiles à résider dans la réserve et le produit de la vente doit être versé au légataire ou au descendant, selon le cas.

#### **Unsold lands revert to band**

#### **Les terres non vendues retournent à la bande**

**(3)** Where no tender is received within six months or such further period as the Minister may direct after the

**(3)** Si, dans les six mois ou tout délai supplémentaire que peut déterminer le ministre, à compter de la mise en vente du

date when the right to possession or occupation of land is offered for sale under subsection (2), the right shall revert to the band free from any claim on the part of the devisee or descendant, subject to the payment, at the discretion of the Minister, to the devisee or descendant, from the funds of the band, of such compensation for permanent improvements as the Minister may determine.

#### **Approval required**

**(4)** The purchaser of a right to possession or occupation of land under subsection (2) shall be deemed not to be in lawful possession or occupation of the land until the possession is approved by the Minister.

droit à la possession ou occupation d'une terre, en vertu du paragraphe (2), il n'est reçu aucune soumission, le droit retourne à la bande, libre de toute réclamation de la part du légataire ou descendant, sous réserve du versement, à la discrétion du ministre, au légataire ou descendant, sur les fonds de la bande, de l'indemnité pour améliorations permanentes que le ministre peut déterminer.

#### **Approbation requise**

**(4)** L'acheteur d'un droit à la possession ou occupation d'une terre sous le régime du paragraphe (2) n'est pas censé avoir la possession ou l'occupation légitime de la terre tant que le ministre n'a pas approuvé la possession.

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1469-17

**STYLE OF CAUSE:** THOMAS BRADFIELD, EXECUTOR FOR THE  
ESTATE OF CECELIA BRADFIELD, DECEASED v  
MINISTER OF INDIAN AFFAIRS AND NORTHERN  
DEVELOPMENT

**PLACE OF HEARING:** VANCOUVER, BRITISH COLUMBIA

**DATE OF HEARING:** MAY 28, 2018

**JUDGMENT AND REASONS:** GAGNÉ J.

**DATED:** JULY 4, 2018

**APPEARANCES:**

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