

Federal Court



Cour fédérale

Date: 20220719

Docket: T-825-21

Citation: 2022 FC 1064

Ottawa, Ontario, July 19, 2022

**PRESENT:** The Honourable Mr. Justice Zinn

**BETWEEN:**

**BRENDA BROOKS**

**Appellant**

**and**

**HER MAJESTY THE QUEEN IN RIGHT OF  
CANADA, AS REPRESENTED BY THE  
MINISTER OF INDIGENOUS SERVICES  
CANADA, ARLENE HUNTER, IN HER  
PERSONAL CAPACITY AND CAPACITY  
AS CO-EXECUTOR OF THE ESTATE OF  
SAMUEL JOSEPH PAUL, DECEASED, AND  
BERNADETTE SCOTT, IN HER  
PERSONAL CAPACITY AND CAPACITY  
AS CO-EXECUTOR OF THE ESTATE OF  
SAMUEL JOSEPH PAUL, DECEASED**

**Respondents**

**JUDGMENT AND REASONS**

[1] This is an appeal, under section 47 of the *Indian Act*, RSC 1985, c I-5, by Brenda Brooks of three decisions of Indigenous Services Canada relating to the will of her late father, Samuel Joseph Paul [the Deceased], a member of the Shuswap Indian Band living on reserve land.

[2] In the first decision, dated October 16, 2020, the Appellant's request to void the will of the Deceased under paragraph 46(1)(c) of the *Indian Act* on the basis that its terms imposed hardship on the Appellant for whom the Deceased had a responsibility to provide was refused [the Paragraph 46(1)(c) Decision].

[3] In the second decision, dated April 12, 2021, the Appellant's request to render a decision on her application to void the will of the Deceased under paragraph 46(1)(e) of the *Indian Act* on the basis that its terms 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 was denied [the Paragraph 46(1)(e) Decision].

[4] In the third decision, also dated April 12, 2021, the Appellant's request to transfer jurisdiction over the will to the Supreme Court of British Columbia under section 44 of the *Indian Act* was refused [the Section 44 Decision].

## **Background**

[5] For ease of reference, the relevant provisions of the *Indian Act* are reproduced in Annex A.

### *The Parties*

[6] As noted above, the Appellant is a daughter of the Deceased. The Respondent, the Minister of Indigenous Services Canada [the Minister], is a party to this proceeding because she

is responsible for the administration of wills of Indians living on reserve lands under the *Indian Act*. The two remaining Respondents, Arlene Hunter [Ms. Hunter] and Bernadette Scott [Ms. Scott], are respectively the daughter and sister by custom adoption of the Deceased and the co-executrixes of his estate. They are named as Respondents in their personal capacities and in their capacities of executrixes [the Estate]. The will also named the deceased's granddaughter, Roseanne Paul, as an executrix, but she renounced all of her rights.

*Family of the Deceased*

[7] The Deceased was married to Mary Pauline Paul [Ms. Paul], who pre-deceased him. Together, they had five children: Debra Davis [Ms. Davis] (born 1961), the Appellant (born 1963), Samuel Thomson [Mr. Thomson] (born 1965), the Co-Respondent Ms. Hunter (born 1969), and Betty Burgoyne [Ms. Burgoyne] (born 1971). Ms. Paul also had three children prior to those she had with the Deceased.

[8] Mr. Thomson was apprehended at birth in October 1965 by Child Welfare and was subsequently adopted. He never lived with his biological family.

[9] The Appellant and her older sister, Ms. Davis, were apprehended in December 1967 by Child Welfare, removed from the care of the Deceased and Ms. Paul, and placed into foster care. The Appellant was a few weeks shy of her fourth birthday when this occurred.

[10] Ms. Hunter and Ms. Burgoyne were born after 1967. They were raised by the Deceased and Ms. Paul.

[11] For most of her childhood, the Appellant was raised by the same foster family. Her parents did not attempt to contact her or regain custody. They did not consent to her legal adoption by her foster parents until she was 17 years old, close to the age of being an adult. No adoption ever occurred, and the Appellant remained a permanent ward of the Crown until she reached the age of majority.

[12] According to the Appellant, she tried to re-establish a relationship with her parents when an adult, but they rebuffed her.

*Death of the Deceased and the Will*

[13] The Deceased passed away on January 20, 2019. He left a will dated October 6, 2017 [the Will].

[14] The Will instructs that in the event that Ms. Paul pre-deceased the Deceased, which she did, the residue of the estate after payment of debts and expenses is to be distributed equally to Ms. Paul, Mr. Thompson, and Ms. Scott, provided they survived the Deceased, which they did.

[15] Clause 17 of the Will specifically disinherits the Appellant and Ms. Davis. Under the heading “Persons Not Included” the Will states:

I am aware of the provision of the *Wills, Estates and Succession Act* [SBC 2009, s 13] with respect to the adequate provision and proper maintenance and support of children. I make no bequest to my children, **BRENDA PAUL** (“**BRENDA**”) and **DEBBY DAVID** (“**DEBBY**”), for the following reasons:

- (a) I believe that, given their station in life, **BRENDA** and **DEBBY** have adequate means and is [sic] in fact capable of supporting themselves;
- (b) **BRENDA** and **DEBBY** are not reliant on or accustomed to any financial support from me;
- (c) **BRENDA** and **DEBBY** are estranged from me and they should not expect anything from my estate; and
- (d) I had **BRENDA** and **DEBBY** at a very young age, and my understanding is that they were taken away from me and became wards of the state and were subsequently adopted by other parents. It is my understanding that I have no further legal rights, obligations, or duties with respect to them.

*Initial Correspondence to the Minister*

[16] On January 31, 2019, the Appellant wrote to the Minister expressing concerns with respect to the estate of the Deceased including her “unanswered questions as far as viewing his will, the legalities of the process and protocol with the Department of Indian Affairs.” She copied her correspondence to the chief and council of the Shuswap Indian Band and a member of the band’s lands department.

[17] Having received no response, the Appellant sent a follow up letter on August 22, 2019, requesting a response and stating, “I am officially contesting the Last Will and Testament of my father.”

[18] On September 3, 2019, Laurie Charlesworth, Senior Estates Officer at Indigenous Services Canada [the Officer] replied to the Appellant. She informed the Appellant that the Will

had not yet been received and therefore no steps had been taken. She advised the Appellant of the process for contesting a will:

[O]nce a Will is approved, if you wish to contest it, please advise us in writing, stating under which subsection of section 46 of the *Indian Act* you are asking for the will to be voided, and including any evidence of your allegations that you wish us to consider. We will then contact all the affected parties, advising them of your request, and offering them thirty days in which to comment and submit their own evidence. At the expiration of the thirty days, the submissions will be compiled and forwarded to the Regional General Director for a decision.

[19] On October 3, 2019, the Will was approved for the Minister by William Brown, Manager, Estates Unit [the Manager].

[20] On October 31, 2019, the Appellant sent a letter to the Officer stating that she was “officially contesting [the] Will” and was doing so under paragraphs 46(1)(c) and (e) of the *Indian Act*. She writes that the part of the Will she is contesting is clause 17, Persons Not Included. In this letter, the Appellant sets out her personal circumstances and her relationship, or lack thereof, with her father.

[21] On November 7, 2019, the Officer replied to the Appellant. In her response, she acknowledges that the Appellant is seeking to void the Will under paragraphs 46(1)(c) and (e) of the *Indian Act*. She asks the Appellant to submit, within thirty days, “any evidence you wish us to consider in support of your claim that the deceased had a duty to provide for you, and also clarify what terms of the Will you consider vague, uncertain, or capricious.”

[22] The Appellant replied on November 22, 2019, and provided further submissions. The Appellant writes:

In response to your letter dated November 7, 2019, I find the Will of Samuel Joseph Paul to be vague and uncertain in it's [sic] entirety, the wording in the will doesn't list any of his Assets so we have no idea what he is leaving to anyone listed.

[23] The Appellant then indicates that "[t]he part of the Will I am contesting is **Persons Not Included**" [emphasis in original], recites the section of the Will relevant to her, and makes submissions why the Deceased's factual assertions in this section of the Will are incorrect:

(a) I believe that, given their station in life, **BRENDA**, has adequate means and is infact [sic] capable of supporting themselves.

**I am on permanent disability and live on very limited income**

(b) **BRENDA** is not reliant on or accustomed to any financial support from me

**He has never given me any financial support from the time I was apprehended on December 14, 1967. As a child and being his daughter he should have financially supported me until I reached the age of majority which he chose not to do.**

(c) **BRENDA**, is estranged from me and they should not expect anything from my estate; and

**It was not my choice to be estranged from him, not once in all the years growing up did he ever try to come and visit me, or even try to get me back, let alone find me, it seems that I was thrown away and forgotten.**

(d) I had **BRENDA** at a very young age, and my understanding is that she was taken away from me and became wards of the state and were subsequently adopted by other parents. It is my understanding that I have no further legal rights, obligations, or duties with respect to her

**In the above paragraph he states that I was adopted out by other parents and this is a lie. It is also stated that he states that he has no further legal rights, obligations, or duties with**

**respect to her, I am forwarding a Certified Copy of my Live Birth Record showing that Samuel Joseph Paul is intact [sic] my Legal father from birth to now. I am also enclosing a Certified Copy of my long form Birth Certificate also showing that Samuel Paul is intact [sic] my legal father.**

[emphasis in original]

[24] She concludes by writing that she feels that she should inherit part of her father's estate:

as an equal share with everyone else who is named as Beneficiaries due to the fact that while in his care I suffered physical and mental abuse from him not just once but whenever he felt the need to do which is listed below:

(1) He locked me in a closet whenever he felt the need and made me stay there for countless hours not once but numerous times and to this day I am still scared of the dark.

(2) He felt the need numerous times to punish me by making me sit behind the wood stove for countless hours or until he passed out and my sisters took me out so I wouldn't get burnt.

(3) He failed to provide an adequate amount of edible food for us to eat and we were therefore forced to cut chunks of meat off a rotting deer or elk carcass [sic] for sustenance or to eat whatever we could find that we thought was edible and therefore I suffer stomach issues when I eat certain foods.

(4) He chose to leave me in the hospital for a week before coming to get me after a logging truck driver found me sitting and crying on a logging road in the dark after I got separated from my siblings on our way home.

(5) He made us watch as he raped my older sister anywhere he chose to, not once but numerous times, he didn't care how much he hurt her and he didn't care that he was scaring the hell out of me, when I used to see drunk native men walking down the streets I would scream and wouldn't quit screaming until my foster parents crossed the streets and I would still cry even after we crossed the street, to this day I am still afraid of drunk Native men, at a young age I started suffering from migraines and anxiety issues which I still suffer from to this day, I still suffer from stomach issues too if I am under stressful situations.



[25] The Appellant included with her letter a CD containing records regarding her childhood as a Crown ward. She asked that the CD “not be shared with anyone and that you keep it private and confidential.”

[26] Notwithstanding the procedure outlined by the Officer in her letter of September 3, 2019, there is nothing in the record indicating that any of the affected parties were notified of the Appellant’s application to void the Will at this time, although it does appear that the Officer did inform the executrixes.

*The December 2, 2019 Letter*

[27] The Manager replied to the Appellant by way of letter on December 2, 2019 [the December 2, 2019 Letter]: “In accordance with your request to Ms. Charlesworth, I have not reviewed the CD you included with your last letter” [emphasis in original]. The Manager confirms that the Appellant requested that the Will “be voided under sections 46(1)(c) and 46(1)(e) of the *Indian Act*.”

[28] The Manager then writes the following:

In regard to section 46(1)(e) it states that “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.” The Will quite clearly directs that Mr. Paul's debts be paid, and that whatever is left be paid to his wife, or, failing her, to specific issue. The fact that his assets are not itemized or categorized does not hinder the proper administration or equitable distribution of the estate.

In regard to section 46(1)(c) it states “the terms of the will would impose hardship on persons for whom the testator had a

responsibility to provide.” Your personal narrative is compelling, and one might conclude that the deceased might have, in all good conscience, been expected to leave a bequest to you. However, you have offered no proof that he had a legal responsibility to provide for you, or that you had a previous arrangement of support or responsibility prior to his passing.

In summary, the Will of your late father can be properly administered under the terms of the *Indian Act*. Furthermore, his wish to disinherit you, and two others, although regrettable, is not sufficient grounds to deem the Will void.

I know this is not the outcome you had hoped for, but because you have not provided clear evidence of your position, we are unable to proceed in any action toward voiding the Will, in whole or in part, of your late father.

[emphasis added]

[29] The Court notes that the Manager is mistaken when he writes that the Deceased disinherited the Appellant and two others; he disinherited the Appellant and one other, her sister Ms. Davis. They were taken into care together by Child Welfare as young children.

[30] The Court also notes that the Manager reads the phrase “for whom the testator had a responsibility to provide” in paragraph 46(1)(c) of the *Indian Act* as meaning a legal responsibility, although there is nothing in the plain and ordinary meaning of the word “responsibility” suggesting such a restricted interpretation. Arguably, it would include a moral responsibility as well.

*Further Communications between the Appellant and the Minister*

[31] The Appellant responded to this letter on December 7, 2019. She indicated that her intention in asking that the CD be kept confidential was that it was to be used as evidence but that it

not be shared with anyone who was not dealing with the Will. The Appellant requested that the Manager review the evidence in the CD.

[32] On December 20, 2019, the Officer wrote to the executrixes, informing them that the Appellant's application "although initially dismissed, has now been revived" [emphasis added].

[33] On December 24, 2019, the Officer sent a letter to the Appellant. In this letter, she writes:

You allege that Mr. Paul had a responsibility to provide for you in his Will, and you assert that this responsibility has not been met by its terms. Can you please confirm that you are requesting the Will of Samuel Joseph Paul, dated October 6, 2017, to be voided under section 46 (1) (c)

[...]

If these are the grounds you wish to pursue, the process now will be to submit your application, and evidence, to the Estates Unit. In turn, the Regional Director General (RDG) will make a decision on whether or not to uphold or void the will of the deceased.

[34] In reply, on January 20, 2020, the Appellant sent additional submissions to the Officer, along with paper copies of the contents of the CD, as she had been told that electronic evidence would not be reviewed. The Appellant writes in these submissions:

As I have sent previous letters to you regarding my late father Samuel Joseph Paul's Will and Estate, you still inform me that I haven't provided you sufficient proof as to the fact that my father (Samuel Joseph Paul) had imposed hardship upon myself whom he had a responsibility to provide for, I am sending you the evidence that he had a responsibility to provide for me and chose not too during my whole life.

[emphasis added]

[35] After referring to key documents from the CD and making submissions about factual errors in the Will along with her father's behaviour towards her in her adulthood, the Appellant writes:

**I believe that the evidence I have provided should be sufficient ground to deem the Will void, that Sub-section 46 of the Indian Act: Section C : that the terms of the Will would impose Hardship on myself and that part of the Will that I originally contested Persons Not Included should be VOIDED as my evidence should prove that my father Samuel Paul Knowingly LIED in his Will.**

[emphasis in original]

[36] After receiving this letter, the Officer on January 24, 2020, informed Ms. Hunter, Ms. Scott, Ms. Burgoyne, Ms. Davis, and Mr. Thomson of the Appellant's application to void the Will. The Appellant, as a potential heir, also received a notification of her application. The letter reads in relevant part:

The alleged reasons for voiding the will (OR: specific clauses) may be summarized as follows:

That the terms of the Will impose hardship on Ms. Brooks, and that Mr. Paul had a duty to provide for her.

[37] Ms. Hunter, Ms. Scott, Ms. Burgoyne, and Mr. Thomson all sent responses opposing the application to void the Will. Meanwhile, a child of Ms. Paul but not of the Deceased (who was not informed of the Appellant's application) and Ms. Davis both sent their own requests to void the Will.

*The October 2020 Decision*

[38] On October 16, 2020, the Regional Director General for the British Columbia Region, on behalf of the Minister, rejected the Appellant's application to void the Will. The October 2020 Decision states that the voidance application was made under paragraph 46(1)(c) of the *Indian Act*. The October 2020 Decision states the application was dismissed because “[t]here is no evidence to show that Mr. Paul had a legal responsibility to provide for you nor has it been demonstrated that failure to do so posed hardship” [emphasis added]. The October 2020 Decision informs the Appellant that she has “the right to appeal this decision to the Federal Court of Canada within sixty (60) days of the date of this letter.”

[39] Prior to issuing this decision, the Regional Director General was provided with a memorandum from the Manager [the Briefing Note] recommending that the application to void the Will under paragraph 46(1)(c) be dismissed. Attached to that memorandum are:

1. The Will.
2. The Appellant's letter dated August 22, 2019.
3. The letter to the Appellant from the Officer dated September 3, 2019.
4. The letter from the Appellant to the Officer dated January 20, 2020.

5. “89 pages of [the Appellant’s] provincial Ministry of Human Resources Child in Care file”. In fact, only pages 1–8, 10–14, 32–35, 38, 44–46, 50–52, 56–59, 61–65, 68, 71–78, and 88–89 were attached.

6. The letters from Ms. Scott, Ms. Hunter, Ms. Bourgoyne, and Mr. Thompson objecting to the Appellant’s application, respecting which the Manager writes: “All of these writers are adamant that Ms. Brooks and the deceased had no contact or relationship to speak of, and they all maintain that she has no right to a share of the estate.”

7. Correspondence from Ms. Davis and the other person contesting the Will, respecting which the Manager writes: “Both of the complainants were informed of the process to contest a Will, and given thirty days in which to advise us under which section of the Indian Act they were asking the Will to be voided, and to provide evidence of their allegations. Neither responded.”

[40] Ms. Davis has not filed any appeal in this Court; however, no decision was made on her application, as it was never placed before the Regional Director General for decision. The record contains the original statement from Ms. Davis, as follows:

I also contest Samuel Joseph Paul's will. He has made my life a hardship: the constant beatings of my mother Mary Pauline Paul. We were left at home a 6yr old, a 4 year old and a baby. To fend for ourselves. I lived in terror the first 4 -5 years of my life under his roof. Being forced to watch him Rape my oldest sister over and over through out the short life span. My oldest sister begging him to stop, begging for him to leave her alone. I can use whatever money's he has or his property gets to seek counseling.

He was a monster. If we end up with nothing the knife is just twisted one more time and once again him and his sick daughter win again. You all know what kind of a man he was right up until his death.

[41] Her statement confirms that of the Appellant regarding the conduct of the Deceased vis-à-vis his children.

[42] In response, the Officer informed her by email of the provisions of paragraphs a to f of subsection 46(1) of the *Indian Act* as grounds to void a will and wrote: “Kindly advise under which subsection you wish to contest the Will, and submit any evidence in support of your allegations you wish us to consider, within thirty days of this email.”

[43] Contrary to the Briefing Note prepared by the Manager, Ms. Davis responded on March 14, 2020 “46 a and c.” The Officer corresponded with the Manager regarding this correspondence and uncharitably writes:

I'm attaching 3 emails that came in on Saturday from Debra Davis – she's one of the Samuel Paul group, but I'm not sure if she was his biological daughter, or only his wife's, and if she was adopted out. In any event, after I sent out the letters to the h/b in regard to Brenda's application to have the will voided, she wrote a vitriolic email saying that she, too, wanted it voided. I explained the process and gave her 30 days to advise under which section of the Act she was requesting voidance, and to submit any evidence she wished us to consider. These emails came in on the 30<sup>th</sup> day, but as they include no evidence, I don't think we need to include them in the memo I've given you do you agree?

[emphasis added]

[44] The Manager responded: “If there is no evidence or anything but a rant we won’t accept it.”

[45] The statement of the abuse visited on Ms. Davis by her father when she was a child is not a rant nor ought it to have been so callously discarded. Like the Appellant, Ms. Davis was cut out as a beneficiary.

[46] The Court notes that the Manager failed to include all relevant correspondence with the Briefing Note. Specifically, he included none of the early correspondence to and from the Appellant in which she asserts that she is seeking to void the Will under both paragraph 46(1)(c) and (e); nor any explanation as to how the application, in his view, came to be limited to paragraph 46(1)(c).

*Further Communication from the Appellant*

[47] The Appellant retained legal counsel. On February 16, 2021, the Appellant, through her counsel, wrote to the Minister. The Appellant argued that the Minister had not made any decision with respect to the Appellant’s application to void the Will under paragraph 46(1)(e) of the *Indian Act*. The Appellant also, for the first time, requested that the Minister transfer the matter to the Supreme Court of British Columbia under section 44 of the *Indian Act*.

[48] Subsection 44(2) of the *Indian Act* provides that the Minister may refer a testamentary matter to the court that would have jurisdiction if the deceased were not an Indian:



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.

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.

*The April 2021 Decision*

[49] On April 12, 2021, the Manager rejected the Appellant's requests. He found that the Appellant "did not submit a Will avoidance application under paragraph 46(1)(e)." He wrote that the Appellant's January 20, 2020 submissions make it apparent that her application was pursuant to paragraph 46(1)(c) of the *Indian Act*, and that she was asked to confirm that this was the provision under which she was applying.

[50] With respect to the request to transfer jurisdiction, the Manager noted that the Appellant had filed a "notice of appeal [sic] in the Federal Court, seeking judicial review on the Will avoidance application." He stated that that "[t]his forum is appropriate to advance any further submissions on behalf of your client."

## Issues

[51] The Appellant raised five grounds of appeal and the Respondents raised several defences in reply. In the Court's view, this appeal turns on the answers to the following three questions:

1. What is the appropriate standard of review to be applied to this appeal?
2. Is the Court without jurisdiction to adjudicate with respect to all or any of the three decisions under appeal?
3. Under which paragraph(s) of subsection 46(1) of the *Indian Act* did the Appellant apply to void the Will?

## Analysis

1. *The appropriate standard of review to be applied to this appeal*

[52] The parties agree on the appropriate standard of review. The appellate standard applies to the substance of the Minister's decision (see *Louie v Canada (Minister of Indigenous Services)*, 2021 FC 650 at para 13). Questions of law are reviewed on a correctness standard, while questions of fact are reviewed on the palpable and overriding error standard. Questions of mixed fact and law are reviewed on the palpable and overriding error standard, unless there is an extricable question of law.

2. *Is the Court without jurisdiction to adjudicate with respect to all or any of the three decisions under appeal?*

[53] The Estate submits that the Appellant failed to appeal within the two month period prescribed by section 47 of the *Indian Act*:

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.

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.

[54] The Estate notes that the October 2020 Decision was made on October 16, 2020; however the Appellant did not file her Notice of Appeal until May 18, 2021. The Estate notes that despite this late filing, the Appellant has not sought an extension of time to appeal.

[55] At the hearing the Appellant explained that she had originally filed an application for judicial review, but upon being informed by the Minister that the proper route was to appeal the decision pursuant to section 47, they agreed that she would discontinue the judicial review application and file a notice of appeal, and the Minister agreed that she would not raise the issue of the delay in filing the appeal.

[56] An examination of the Court registry shows that on December 20, 2020, the Appellant filed an application for judicial review (docket no. T-1504-20) naming as respondent Canada

(Indigenous Services Canada). A notice of discontinuance was filed on May 18, 2021, the same day as the Notice of Appeal was filed in this Appeal.

[57] While the Minister may have been aware of this procedural history and not prejudiced by the Appellant's late filing, the Estate was not named as a party in the Appellant's application (as required by Rule 303 of the *Federal Courts Rules*). Therefore, the Estate may have been under the impression that the voidance application was fully resolved and not subject to further challenge.

[58] There is no jurisdiction in the *Indian Act*, or elsewhere, permitting an extension of time to file a notice of appeal.

[59] For these reasons, I find that the Court has no jurisdiction to entertain the appeal of the Paragraph 46(1)(c) Decision rendered on October 16, 2020.

[60] The Estate also submits that this Court has no jurisdiction to consider the Section 44 Decision made by the Manager relating to the Appellant's request to transfer the administration of the Will to the British Columbia Supreme Court.

[61] Section 47 of the *Indian Act* provides for an appeal to this Court of a "decision of the Minister made in the exercise of the jurisdiction or authority conferred on him by section 42, 43 or 46" of the *Indian Act*.

[62] Decisions respecting transfer to other courts are made pursuant to the authority conferred on the Minister under section 44 of the *Indian Act*. Accordingly, no appeal lies to this Court from such a decision. The appropriate forum to challenge a decision under section 44 of the *Indian Act* is an application for judicial review. The Appellant did not bring an application for judicial review of the Section 44 Decision.

[63] For these reasons, I find that the Court has no jurisdiction to entertain the appeal of the Section 44 Decision rendered on April 12, 2021.

[64] The Court does have jurisdiction to address the Paragraph 46(1)(e) Decision rendered on April 12, 2021. It was made pursuant to section 46 of the *Indian Act* and the Appellant appealed the Paragraph 46 (1)(e) Decision within the statutory deadline.

3. *Under which paragraph(s) of subsection 46(1) of the Indian Act did the Appellant apply to void the Will?*

[65] The Appellant says that she made an application to void the Will under both paragraphs 46(1)(c) and (e) of the *Indian Act* in her original correspondence with the Minister on October 31, 2019, after the Will was approved. The Appellant submits that the Manager's December 2, 2019 Letter, which purports to deny the Appellant's application, in fact, was not a decision. She submits that no decision was rendered by the Minister with respect to paragraph 46(1)(e) until April 2021.

[66] The Appellant submits that when the Officer requested the Appellant to confirm that she was seeking to void the Will under paragraph 46(1)(c) of the *Indian Act* on December 24, 2019, the Officer did not inform her that in so doing the Minister would consider her to have abandoned her voidance application under paragraph 46(1)(e).

[67] The Estate says that the December 2, 2019 Letter was a final decision denying the Appellant's request to void the Will. Despite this decision, the Minister agreed to give the Appellant a second chance to void the Will.

[68] The Estate submits that in this second application, the Appellant was specifically asked to confirm that she was seeking to void the Will under paragraph 46(1)(c) of the *Indian Act*. The Estate submits that in her submissions to the Minister after this request for confirmation, the Appellant only addressed paragraph 46(1)(c), which clearly indicates that she had abandoned her attempt to void the Will under paragraph 46(1)(e).

[69] The Minister says that the December 2, 2019 Letter was not a final decision, but instead “a determination that Ms. Brooks had not provided any evidence of her position” [emphasis added]. The Minister submits that only the Appellant's letter on January 20, 2020, represented her formal application to void the Will. In this letter, the Appellant only raised paragraph 46(1)(c) of the *Indian Act*, there was no reference to paragraph 46(1)(e), and there was no argument or evidence to support the contention that the Will was vague.

[70] The Minister confirmed at the hearing that the only person having authority to issue a decision for the Minister on a voidance application under the *Indian Act* is the Regional General Director. Accordingly, the December 2, 2019 Letter, made by the Manager and not the Regional General Director, is not a decision by the Minister or her delegate on the Appellant's voidance request made in her October 31, 2019 letter.

[71] I do not accept the Estate's characterization of the Appellant having made two separate claims, the first of which was resolved in December 2019. The procedure followed in this process indicates that this was a preliminary administrative assessment. I take this view because in the Officer's letter of September 3, 2019, the Appellant was informed of the procedure that would be followed. This procedure included contacting all of the affected parties, the ability for them to comment, and a final decision from the Regional General Director. Prior to the December 2, 2019 Letter, none of the affected parties were contacted. No opportunity to respond was provided. Furthermore, the letter is from the Manager and not the Regional General Director.

[72] That being said, the Officer did claim to the executrixes on December 20, 2019, that the Appellant's application had previously been dismissed and had now been revived, suggesting, incorrectly, that the December 2, 2019 Letter was in fact a decision on the Appellant's voidance application.

[73] Like much of the correspondence in this matter, the December 2, 2019 Letter could have been much clearer. It could have and should have said that the contents of the letter were the

initial assessment of the Manager that the application had no merit, but that the Appellant could provide additional information or opt to proceed regardless and have her application for voidance decided by the Regional General Director.

[74] In her letter dated December 24, 2019, the Officer asks the Appellant to confirm that she is claiming under paragraph 46(1)(c) of the *Indian Act*. In response to this request for confirmation, she provided submissions only with respect to paragraph 46(1)(c).

[75] As noted by the Minister on this Appeal, the Appellant's submissions on January 20, 2020, do not make direct reference to paragraph 46(1)(e) of the *Indian Act*, nor do they make any arguments that the Will is vague, uncertain, or capricious. The Appellant's January 20, 2020, submissions are, on their face, directed only to paragraph 46(1)(c).

[76] However, the January 20, 2020 letter from the Appellant must be read in the context of the previous correspondence.

[77] The Appellant had applied to void the Will under both subsections. The Manager responded advising that he had not reviewed the evidence she submitted on a CD and that "because you have not provided clear evidence of your position, we are unable to proceed in any action toward voiding the Will, in whole or part, of your late father" [emphasis added].



[78] The Appellant quickly responded, writing: “If you had read the letter to Ms. Charlesworth dated November 22, 2019, it explains my reasons and what I was contesting.” That letter refers to the grounds set out in both paragraphs of subsection 46(1) of the *Indian Act*.

[79] The Officer responds stating that she is enclosing a copy of section 46 of the *Indian Act*, which states the possible grounds for voiding a Will. It is noted that the letter indicates that section 48, not section 46, is enclosed. The Officer then writes that “[y]ou allege that Mr. Paul had a responsibility to provide for you in his Will ... Could you please confirm that you are requesting the Will ... be voided under section 46(1)(c).”

[80] I accept the submission of the Appellant that she never informed the Minister or her officials that she was seeking voidance only under paragraph 46(1)(c) and was abandoning her claim under paragraph (e). It is beyond question that the Appellant’s application to void the Will was made pursuant to both paragraph 46(1)(c) and (e) of the *Indian Act*. Her letter dated October 31, 2019, “officially contesting” the Will specifically states that. Additionally, the correspondence from the Officer and Manager dated November 7, 2019, and December 2, 2019, affirm that both provisions are in play.

[81] The initial application to void the Will pursuant to paragraph 46(1)(e) was made by the Appellant on October 31, 2019, but has never been addressed by the Regional Director General. The Appellant initially asserted that the entire Will was void because “the Will doesn’t list any of his Assets so we have no idea what he is leaving to anyone listed.” However, that must be

considered to have been expanded by the Appellant's counsel in her letter dated February 16, 2021, where she writes:

In particular we note that the section of the will our client has referred you to references the British Columbia Wills, Estates and Succession Act ("WESA"), a statute that does not apply to Indian wills. Further there is a mistake in the application of WESA. WESA does not apply and the basis to rely on WESA (if it did apply) is incorrect. Both errors have a reasonable chance of causing either that section or the will as a whole to be found void.

[82] Additional grounds for voidance under paragraph 46(1)(e) may be found in the Appellant's November 22, 2019 letter. The Will indicates that the Appellant and Ms. Davis were disinherited by the Deceased for four reasons, which the Appellant challenges as inaccurate. The Appellant asserts that contrary to one stated assertion in the Will, she is not capable of supporting herself as she is on permanent disability and lives on a very limited income. Perhaps more importantly, contrary to the Deceased's understanding that he has no further legal rights, obligations, or duties with respect of the Appellant because she was adopted, she was never adopted. As was stated at the hearing, that the Deceased made provision for his son who was adopted but not his daughters who were not, appears to be capricious, within the meaning of paragraph 46(1)(e), potentially warranting voiding that clause.

[83] The Manager in his letter dated April 12, 2020, writes, "Ms. Brooks did not submit a Will voidance application under paragraph 46(1)(e)." That is a palpable and overriding error. The Appellant applied to void the Will under both paragraphs 41(1)(c) and (e) of the *Indian Act*.

[84] Accordingly, the Minister must consider the Appellant's application to void the Will under paragraph 46(1)(e) of the *Indian Act*.

[85] The Court observes, given the Appellant's submissions on paragraph 46(1)(e) and the obvious conflict among the children of the Deceased, that this is a circumstance where transfer of jurisdiction to the provincial court ought to be considered and may be appropriate. This would be in keeping with Departmental policy that recommends transfer when "the estate has demonstrated high level of conflict that has arisen amongst the heirs/beneficiaries that may be better placed in a court setting for resolution." I note that there is nothing in the *Indian Act* that prevents the Appellant from bringing a second request to transfer jurisdiction in light of this Court's findings.

[86] Both the Appellant and the Estate seek costs; the Minister does not. In light of the divided success on the appeal, no order as to costs will be made.

**JUDGMENT in T-825-21**

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

1. This appeal is allowed in part;
2. The Appellant's application to void the Will entirely, or in part, is referred back to the Minister for decision; and
3. Each party shall bear its own costs.

“Russel W. Zinn”

---

Judge

## Annex A

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

#### **Descent of Property**

[...]

#### **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.

#### **Orders relating to lands**

**(3)** A court that is exercising any jurisdiction or authority under this section shall not without the consent in writing of the Minister enforce any order relating to real property on a reserve.

#### **Wills**

#### **Transmission de biens par droit de succession**

[...]

#### **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.

#### **Ordonnances visant des terres**

**(3)** Un tribunal qui exerce sa compétence sous le régime du présent article ne peut, sans le consentement écrit du ministre, faire exécuter une ordonnance visant des biens immeubles sur une réserve.

#### **Testaments**

### **Indians may make wills**

**45 (1)** Nothing in this Act shall be construed to prevent or prohibit an Indian from devising or bequeathing his property by will.

#### **Form of will**

**(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.

#### **Probate**

**(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.

#### **Minister may declare will void**

**46 (1)** The Minister may declare the will of an Indian to be void in whole or in part if he is satisfied that

- (a)** the will was executed under duress or undue influence;
- (b)** the testator at the time of execution of the will lacked testamentary capacity;
- (c)** the terms of the will would impose hardship on persons for whom the testator 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

### **Les Indiens peuvent tester**

**45 (1)** La présente loi n'a pas pour effet d'empêcher un Indien, ou de lui interdire, de transmettre ses biens par testament.

#### **Forme de testaments**

**(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.

#### **Homologation**

**(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.

#### **Le ministre peut déclarer nul un testament**

**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)** le testament a été établi sous l'effet de la contrainte ou d'une influence indue;
- b)** au moment où il a fait ce testament, le testateur n'était pas habile à tester;
- c)** les clauses du testament seraient la cause 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

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.

### **Appeals**

#### **Appeal to Federal Court**

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.

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.

### **Appels**

#### **Appels à la Cour fédérale**

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.

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

**DOCKET:** T-825-21

**STYLE OF CAUSE:** BRENDA BROOKS v HER MAJESTY THE QUEEN  
IN RIGHT OF CANADA AS REPRESENTED BY, THE  
MINISTER OF INDIGENOUS SERVICES CANADA,  
ARLENE HUNTER, IN HER PERSONAL CAPACITY  
AND CAPACITY AS CO-EXECUTOR OF THE  
ESTATE OF SAMUEL JOSEPH PAUL, DECEASED,  
AND BERNADETTE SCOTT, IN HER PERSONAL  
CAPACITY AND CAPACITY AS CO-EXECUTOR OF  
THE ESTATE OF SAMUEL JOSEPH PAUL,  
DECEASED

**PLACE OF HEARING:** BY VIDEOCONFERENCE

**DATE OF HEARING:** APRIL 25, 2022

**JUDGMENT AND REASONS:** ZINN J.

**DATED:** JULY 19, 2022

**APPEARANCES:**

Chrystie Stewart FOR THE APPELLANT

Joshua Ingram FOR THE RESPONDENT  
HER MAJESTY THE QUEEN IN RIGHT OF  
CANADA AS REPRESENTED BY THE MINISTER  
OF INDIGENOUS SERVICES CANADA

Christopher Harvey, Q.C. FOR THE RESPONDENTS  
ARLENE HUNTER, IN HER PERSONAL CAPACITY  
AND CAPACITY AS CO-EXECUTOR OF THE  
ESTATE OF SAMUEL JOSEPH PAUL, DECEASED,  
AND BERNADETTE SCOTT, IN HER PERSONAL  
CAPACITY AND CAPACITY AS CO-EXECUTOR OF  
THE ESTATE OF SAMUEL JOSEPH PAUL,  
DECEASED



**SOLICITORS OF RECORD:**

Stewart & Springford LLP  
Kamloops, British Columbia

FOR THE APPELLANT

Attorney General of Canada  
Vancouver, British Columbia

FOR THE RESPONDENT  
HER MAJESTY THE QUEEN IN RIGHT OF  
CANADA AS REPRESENTED BY THE MINISTER  
OF INDIGENOUS SERVICES CANADA

Mackenzie Fujisawa LLP  
Vancouver, British Columbia

FOR THE RESPONDENTS  
ARLENE HUNTER, IN HER PERSONAL CAPACITY  
AND CAPACITY AS CO-EXECUTOR OF THE  
ESTATE OF SAMUEL JOSEPH PAUL, DECEASED,  
AND BERNADETTE SCOTT, IN HER PERSONAL  
CAPACITY AND CAPACITY AS CO-EXECUTOR OF  
THE ESTATE OF SAMUEL JOSEPH PAUL,  
DECEASED