Federal Court  Cour fédérale

Date: 20240917

Docket: T-1158-23

Citation: 2024 FC 1248

Ottawa, Ontario, September 17, 2024

PRESENT: The Honourable Madam Justice Blackhawk

BETWEEN:

CHARLOTTE ISABEL MITCHELL,
ANNA BELLE TRONSON,
GEORGE MERVIN JOE,
AND PIERRE JOSEPH WILLIAMS

Applicants

and

HIS MAJESTY THE KING IN RIGHT OF CANADA, as represented by the MINISTER OF INDIGENOUS SERVICES CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision of the administrator of the estate of Susan Joe (Estate) not to provide the Applicants with an accounting of the Estate (Decision).

[2] The Decision is predicated on a “practice” of Indigenous Services Canada (ISC) to attribute zero or negligible value to on-reserve property that is not the subject of a registered lease.

[3] For the reasons that follow, this application is granted. ISC’s practice of attributing a negligible value to on-reserve property is not reasonable. The Decision of the estate administrator not to provide the Applicants with an accounting of the Estate is also unreasonable.

[4] I remit this matter back to ISC to reconsider the value of the on-reserve assets in this Estate and to provide an accounting of the Estate to the Applicants.

[5] A brief note on the terminology used in my decision. The terms “Indian” and “Aboriginal” appear in the Canadian Constitution and in many other pieces of Canadian legislation, including legislation and policy relevant to this Application (see the *Indian Act*, RSC 1985, c I-5 [*Indian Act*]; *Indian Estates Regulations*, CRC, c 954 [*Regulations*]). Despite the fact that the terms “Indigenous” and “First Nation,” as appropriate, have largely supplanted these terms, where this decision references specific legislation or policy, the terminology from those sources is used. I do not intend any disrespect by my use of such terminology.

II. Background

[6] Susan Joe (Deceased) passed away on January 5, 2005. At the time of her death, the Deceased resided on-reserve at the Okanagan Indian Reserve No.1 with her spouse, Mr. Elmer Isaac George (Mr. George).

[7] The Applicants are the children of the Deceased. The Deceased's spouse, Mr. George, passed away in 2023. He is not a biological parent of the Applicants nor is he a member of Okanagan Indian Band, thereby engaging section 50 of the *Indian Act*.

[8] The Estate includes interests in several parcels of land in the Okanagan Indian Reserve No.1, located around the north end of Okanagan Lake, near Vernon, British Columbia (CP Interests). Specifically, the Estate includes the following CP Interests:

A. Certificates of Possession for:
    a. Lot 160-1 Block 2 RSBC 4134R (Lot 160), approximately seven hectares with frontage on Highway 97;and
    b. Lot 8 Block 4 RSBC 556 (Lot 8)
B. Partial interests in several parcels of land held by the Estate of Mary Powers, the Deceased's mother, who pre-deceased the Deceased, but whose estate has not yet been distributed:
    a. Lot 5 Block A Fry Sketch 319-37 (Lot 5);
    b. Lots 7-1, 7-2 and 7-3 Block 4 RSBC 4110R (Lot 7), approximately 47.2 hectares with frontage on Okanagan Lake; and
    c. Lot 8-2 Block 4 RSBC 4110R (Lot 8-2).

[9] A will purportedly made by the Deceased dated December 7, 2004, was produced after the Deceased's passing (Will). Members of the Deceased's family, including the Applicants, challenged the validity of the Will on the basis that the Deceased lacked the requisite testamentary capacity and/or had been unduly influenced to make the Will.

[10] ISC referred the issue of the validity of the Will to the British Columbia Supreme Court (BCSC), pursuant to section 44 of the *Indian Act*.

[11] The Will appointed Sherry Paul (Ms. Paul) as administrator of the Estate. The distribution of the Estate was not completed because of the validity challenges to the Will. On June 2, 2021, the BCSC opined that the Will was void because the Deceased lacked testamentary capacity.

[12] ISC declared the Will void on March 28, 2022, pursuant to section 46 of the *Indian Act*. Therefore, the Deceased died intestate. In letters to the above-named individual Applicants, ISC Senior Estates Officer Laurie Charlesworth (Ms. Charlesworth) advised that because the Deceased died intestate, the sole heir to the Estate is the Deceased's spouse, Mr. George, pursuant to section 48 of the *Indian Act*.

[13] On March 29, 2022, ISC issued a Ministerial Order pursuant to section 43(a) of the *Indian Act* removing Ms. Paul as the administrator and appointing Ms. Charlesworth to administer the Estate (Estate Administrator).

[14] On July 26, 2022, in an email to the Applicants' counsel, Ms. Charlesworth advised the Applicants' counsel that:

> When the assets of as [*sic*] estate include an interest in on-reserve land, unless there are registered leases attached to the property, it is our practice to consider the value of the land as negligible.…
>
> If a party wishes us to accept a higher value of the land, it is incumbent upon that party to provide evidence of why our valuation should be changed.…
>
> …

> When we are nearing the end of our administration of an estate, we provide an accounting to the heirs or beneficiaries.
>
> Please note, as well, that I was appointed as the administrator of this estate on March 29 of this year. The personal representative over the preceding seventeen years has not, despite our request, provided an accounting of her administration. We, unlike the Courts, have no way to compel an accounting.

[15] On September 28, 2022, counsel for the Applicants confirmed their position by email that an estate administrator is required to provide an accounting to them as potential beneficiaries and heirs of the Estate.

[16] On September 28, 2022, Ms. Charlesworth responded by email to Applicants' counsel:

> As you are probably aware, Ms Joe's Will has been overturned, leaving only heirs under s48 of the *Indian Act*. It is our position that section 48(1) applies to this estate, and that the sole heir is Elmer Isaac George; it is, therefore, to him, and him alone that we may divulge information in regard to the estate. Should your clients have different view, they are welcome to submit proof of their position.

[17] Applicants' counsel responded to Ms. Charlesworth the same day via email, indicating that as the Estate Administrator, she owed a fiduciary duty to the Estate and all potential heirs to provide an accounting of the Estate. Specifically, Ms. Charlesworth was informed that "[t]he other potential heirs are entitled to see whatever information you have relied upon, and whatever calculation or accounting you have prepared, in reaching the position that the estate's value does not exceed Mr. George's spousal preferential shares."

III. Issues and Standard of Review

[18] There are three reviewable issues in this case:

A. Is this application for judicial review timely?

B. Is the ISC "practice" of attributing a negligible value to on-reserve property in the context of the administration of an estate for an intestate status Indian ordinarily resident on-reserve reasonable?

C. Is the Decision of the Estate Administrator, that an accounting of the Estate to the Applicants is not required, reasonable?

[19] The parties submit, and I agree, that the applicable standard of review in this case is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 25, 86).

[20] Reasonableness review is a deferential standard and requires an evaluation of the administrative decision to determine if the decision is transparent, intelligible, and justified (*Vavilov* at paras 12–15, 95). The starting point for a reasonableness review is the reasons for decision. Pursuant to the *Vavilov* framework, a reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85).

[21] To intervene on an application for judicial review, the Court must find an error in the decision that is central or significant to render the decision unreasonable (*Vavilov* at para 100).

IV. Relevant Legislation

A. *Indian Act*

Minister may declare will void	**Le ministre peut déclarer nul un testament**
46 (1) The Minister may declare the will of an Indian to be void in whole or in part if he is satisfied that	**46 (1)** Le ministre peut déclarer nul, en totalité ou en partie, le testament d'un Indien, s'il est convaincu de

l'existence de l'une des circonstances suivantes :

(a) the will was executed under duress or undue influence;

a) le testament a été établi sous l'effet de la contrainte ou d'une influence indue;

(b) the testator at the time of execution of the will lacked testamentary capacity;

b) au moment où il a fait ce testament, le testateur n'était pas habile à tester;

…

[…]

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.

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.

…

[…]

Surviving spouse's share

48 (1) Where the net value of the estate of an intestate does not, in the opinion of the Minister, exceed seventy-five thousand dollars or such other amount as may be fixed by order of the Governor in Council, the estate shall go to the survivor.

Part du survivant

48 (1) Lorsque, de l'avis du ministre, la valeur nette de la succession d'un intestat n'excède pas soixante-quinze mille dollars ou tout autre montant fixé par décret du gouverneur en conseil, la succession est dévolue au survivant.

Idem

(2) Where the net value of the estate of an intestate, in the opinion of the Minister, exceeds seventy-five thousand dollars, or such other amount as may be fixed by order of the Governor in Council,

Idem

(2) Lorsque la valeur nette de la succession d'un intestat excède, de l'avis du ministre, soixante-quinze mille dollars ou tout autre montant fixé par décret du gouverneur en conseil, une somme de

seventy-five thousand dollars, or such other amount as may be fixed by order of the Governor in Council, shall go to the survivor, and

soixante-quinze mille dollars ou toute autre somme fixée par décret du gouverneur en conseil est dévolue au survivant et le reste est attribué de la façon suivante :

(a) if the intestate left no issue, the remainder shall go to the survivor,

a) si l'intestat n'a pas laissé de descendant, le solde est dévolu au survivant;

(b) if the intestate left one child, one-half of the remainder shall go to the survivor, and

b) si l'intestat a laissé un enfant, la moitié du solde est dévolue au survivant;

(c) if the intestate left more than one child, one-third of the remainder shall go to the survivor,

c) si l'intestat a laissé plus d'un enfant, le tiers du solde est dévolu au survivant,

and where a child has died leaving issue and that issue is alive at the date of the intestate's death, the survivor shall take the same share of the estate as if the child had been living at that date.

et lorsqu'un enfant est décédé laissant des descendants et que ceux-ci sont vivants à la date du décès de l'intestat, le survivant reçoit la même partie de la succession que si l'enfant avait vécu à cette date.

…

[…]

Estate not disposed of by will

(11) All such estate as is not disposed of by will shall be distributed as if the testator had died intestate and had left no other estate.

Biens non aliénés par testament

(11) Tous les biens dont il n'est pas disposé par testament sont distribués comme si le testateur était mort intestat et n'avait laissé aucun autre bien.

…

[…]

Non-resident of reserve

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.

Non-résident d'une réserve

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

(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.

Vente par le surintendant

(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

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

Les terres non vendues retournent à la bande

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

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

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

possession or occupation of the land until the possession is approved by the Minister.

avoir la possession ou l'occupation légitime de la terre tant que le ministre n'a pas approuvé la possession.

Regulations

50.1 The Governor in Council may make regulations respecting circumstances where more than one person qualifies as a survivor of an intestate under section 48.

Pouvoir réglementaire

50.1 Le gouverneur en conseil peut, par règlement, régir les cas où il existe plus d'un survivant à l'égard du même intestat visé à l'article 48.

B. *Indian Estates Regulations*

Inventory

4 (1) When he receives notice of the death of an Indian, or as soon thereafter as possible, the superintendent shall forward an itemized statement of inventory in the form prescribed, to the Minister, showing all the real and personal property of the deceased, the value of each item estimated as closely as possible, as well as all debts of or claims against the estate known at such time, and he shall also state therein whether the deceased left a will and give the names of all persons entitled to share in the estate and all such other information as may be required by the Minister.

Inventaire

4 (1) Dès notification du décès ou le plus tôt possible après le reçu de cet avis, le surintendant doit faire parvenir au ministre un état détaillé de l'inventaire en la forme prescrite, qui doit indiquer les biens meubles et immeubles du défunt, la valeur de chaque article appréciée aussi exactement que possible, et toutes les dettes de la succession et les réclamations des créanciers connues à ce moment-là et le surintendant doit aussi déclarer dans cet état si le défunt a fait un testament et donner les noms de toutes les personnes ayant droit à une part de la succession et toute autre information pertinente que peut exiger le ministre.

(2) For the purposes of this section, the superintendent shall act in the capacity of an administrator and shall take all necessary steps for the proper safekeeping or safeguarding of the assets of

(2) Aux fins du présent article, le surintendant doit agir en qualité d'administrateur et prendre toutes les mesures qui s'imposent pour assurer la bonne garde ou protection des biens du défunt et le

the deceased and for the collection of moneys due or owing to the deceased and shall dispose of the moneys so collected or held as the Minister may direct.

recouvrement des sommes dues ou exigibles et disposer des deniers recouvrés ou détenus, de la manière que détermine le ministre.

…

[…]

Powers and Duties of Administrators

Pouvoirs et devoirs des administrateurs

11 (1) The Minister may appoint an officer of the Indian and Eskimo Affairs Branch to be the administrator of estates and to supervise the administration of estates and of all the assets of deceased Indians, and may provide that for the purposes of closing an estate the administration thereof be transferred to the superintendent of the reserve to which the deceased belonged.

11 (1) Le ministre peut nommer un fonctionnaire de la Division des affaires indiennes et esquimaudes comme administrateur des successions et pour surveiller l'administration des successions et de tous les biens des Indiens décédés; afin de régler une succession, il peut autoriser que l'administration en soit transférée au surintendant de la réserve à laquelle appartenait la personne décédée.

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

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

…

[…]

(11) An administrator is empowered to do all that an executor is empowered to do

(11) Un administrateur est autorisé à exercer tous les pouvoirs conférés à un

where the executor refuses to act or is incapable of acting by reason of absence or sickness or for any other reason.	exécuteur si ce dernier refuse d'agir ou est incapable de le faire par suite d'absence ou de maladie ou pour toute autre raison.
…	[…]
(14) An administrator shall have all such powers as are required for the carrying out of the duties herein specified, and shall carry out any order or direction and abide by any finding made or given by the Minister with respect to any matter and cause testamentary.	**(14)** Un administrateur doit avoir tous les pouvoirs nécessaires pour s'acquitter des fonctions spécifiées ci-dessus et doit exécuter les ordres ou instructions et maintenir toute conclusion établie ou donnée par le ministre à l'égard de toute matière et cause testamentaires.

V. Analysis

A. *Timeliness of the Application*

[22] The Respondent submits that the Decision was made between March 28, 2022, and September 28, 2022. Both parties acknowledge that this matter is unlike a traditional administrative decision in that there is not a clear date of decision. Rather, the Estate Administrator communicated the Decision through letters and emails to the Applicants and their counsel on March 28, 2022, July 26, 2022, and September 28, 2022.

[23] This application was filed on May 29, 2023. The Applicants did not make a formal application for leave to extend the deadline to file the application; however, they did make submissions on this issue during oral argument. The Respondent conceded in oral argument that the Applicants could make a formal application for leave and that they would not oppose such an application. The Respondent advised that they were not seeking dismissal of the application because it was filed outside the 30-day limitation as set out in subsection 18.1(2) of the *Federal*

Courts Act, RSC 1985, c F-7 [*Federal Courts Act*]; rather, this was a "technical defect" that must be corrected.

[24] Subsection 18.1(2) of the *Federal Courts Act* establishes a time limitation of 30 days to bring an application for judicial review in respect of an administrative decision.

[25] The Court considers four factors in its exercise of discretion to grant an extension of time: (i) that there is a continuing intention to pursue the application; (ii) that the application has some merit; (iii) that there is no prejudice to the Respondent; and (iv) that a reasonable explanation for the delay exists: *Canada (Attorney General) v Hennelly* (1999), 167 FTR 158, 1999 CanLII 8190 (FCA) [*Hennelly*] at para 3.

[26] The Federal Court of Appeal has clarified that it is not always necessary to satisfy all four factors (*Whitefish Lake First Nation v Grey*, 2019 FCA 275 at para 3). As noted recently by Madam Justice Christine Pallotta in *Whitelaw v Canada (Attorney General)*, 2023 FC 1410 at para 50, "[t]he overriding consideration is whether it is in the interests of justice that the extension of time be granted."

[27] In my view, the Applicants have satisfied three of the factors set out in the *Hennelly* test. The Applicants have demonstrated a continuing intention to pursue this application, as evidenced by the ongoing and protracted litigation spanning two decades with respect to the administration of the Deceased's Estate. I am satisfied that the application has some merit. I am also satisfied that there is no prejudice to the Respondent, who conceded this point in oral argument.

[28] The explanation for the delay in filing in the application is a little less clear. The Applicants and the Respondent concede that this is not an ordinary administrative proceeding;

therefore, there is no clear "date of decision." Further, the Applicants submit that in the context of the administration of an estate, there is an ongoing common law duty to account.

[29] The Applicants submit that because the Decision was communicated in a series of exchanges over a period of months, they could re-initiate the correspondence chain and re-file the application within 30-days. In other words, there is no net benefit to dismiss the application for delay. The Respondent appeared to agree with this submission.

[30] As noted by the Federal Court of Appeal in *Key First Nation v Lavallee*, 2021 FCA 123 at paragraph 36:

> [36] It is only when the "matter" is a discrete decision or order that the time limit of 30 days set out in subsection 18.1(2) applies (*Krause* at paras. 20-23; *Air Canada* at para. 25). Where the "matter" under review constitutes a course of conduct (*Save Halkett Bay Marine Park Society v. Canada (Minister of the Environment)*, 2015 FC 302, 476 F.T.R. 195 at para. 77), as opposed to a discrete decision (see, e.g., *Apotex Inc. v. Canada (Minister of Health)*, 2011 FC 1308, 400 F.T.R. 28 at para. 18), the time limit of subsection 18.1(2) does not limit review of the initiating decision (*Servier Canada Inc. v. Canada (Minister of Health)*, 2007 FC 196, 2007 CarswellNat 2184 at para. 17; *Apotex Inc. v. Canada (Minister of Health)*, 2010 FC 1310, 2010 CarswellNat 4944 at para. 10).

[31] In light of the foregoing and consistent with subsection 18.4(1) of the *Federal Courts Act*, I am exercising my discretion to permit the late filing of this application, without the need for a formal motion. The Applicants have satisfied the criteria for the Court to exercise its discretion and I am granting the extension of time for the filing of this application.

B. *ISC's "practice" of attributing negligible value for on-reserve land*

[32] The Applicants submit that the ISC "practice" of assuming that on-reserve property has a negligible value if it is not subject to a registered lease is unreasonable.

(1) New Evidence

[33] In support of their position, the Applicants have submitted two new affidavits into evidence:

1. Affidavit of Mr. Michael Blackwell, a lawyer with Fulton & Company LLP, which sets out some general information concerning reserve lands and mechanisms that certificate of possession holders can use to "realize the value of on-reserve lands in a way that is similar to off-reserve fee simple lands" by way of leasing on-reserve land.
2. Affidavit of Ms. Jessica MacDonald, a legal administrative assistant with Fulton & Company LLP, that attaches the following documents:
    a. A letter from Ms. Charlesworth to one of the Applicants, Ms. Tronson, dated April 18, 2005;
    b. An online Google map of the Desert Cove Estates Development, located on Okanagan Indian Reserve No.1;
    c. A copy of the home page of the Desert Cove Estates website, found at https://www.desertcove.ca;
    d. A copy of an introductory page from the Desert Cove Estates website found at https://www.desertcove.ca/about-us/; and
    e. Select pages of the ISC "[Procedures Manual for Decedent Estates]" [sic]—title page to page xi; pages 8–82 and pages 104–156.

[34] Generally, the evidentiary record before this Court on an application is restricted to the record that was before the administrative decision-maker (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 [*Access Copyright*] at para 19).

[35] There are exceptions to the general rule, but only insofar as the receipt of the new evidence is consistent with the differing roles of the reviewing court and the administrative decision-maker. The three general exceptions are:

1. General background information that may assist the Court in its understanding of issues relevant to the judicial review. Courts must be careful to ensure that the affidavit does not provide evidence relevant to the merits of the matter to be determined on the application.
2. To bring the Court's attention to procedural defects that cannot be found in the evidentiary record of the administrative-decision maker; to permit a court to fulfill its role in reviewing allegations of procedural unfairness; and
3. To highlight the complete absence of evidence before the administrative decision-maker when it made a particular finding (*Access Copyright* at para 20).

[36] The Applicants argued that both affidavits fall within the above exceptions for new evidence because they provide general background information and highlight the complete lack of evidence before Ms. Charlesworth in the administration of the Estate and before making the Decision.

[37] The Respondent submitted that the Court should strike the affidavit of Mr. Blackwell and exhibits B–D in the affidavit of Ms. MacDonald because this evidence was not before Ms. Charlesworth, is opinion evidence, and/or is not relevant. Further, the Respondent noted that Ms.

Charlesworth invited the Applicants to provide additional information concerning the value of the Estate's CP Interests, and they did not provide such information prior to this proceeding. The Respondent submits this Court should therefore not consider the new evidence on judicial review.

[38] In my opinion, the affidavit of Mr. Blackwell does meet the exception of general background information. His affidavit sets out some general information concerning a technique utilized by First Nations and their members to lease on-reserve lands for economic development. This technique can create opportunities and significantly increase the value of on-reserve lands. This background information is relevant to assessing the reasonableness of the ISC "practice" of attributing a negligible value to on-reserve lands.

[39] The Applicants' argued that while the Estate Administrator may not have been an ISC "lands expert" it is reasonable to assume that she was or she ought to have been generally aware of these techniques, given the linkages to the valuation of estate assets. I agree. In addition, I note that in the cross-examination of her affidavit evidence for this proceeding, the Estate Administrator admitted that she was aware of these techniques, including "buckshee leases," which are informal leases of on-reserve lands.

[40] Regarding the Affidavit of Ms. MacDonald, exhibits B–D are struck as this information is irrelevant and does not fall within the one of the above-mentioned exceptions.

(2) Reasonableness of the ISC "practice" to assign nominal value to reserve lands

[41] The Respondent submitted that pursuant to section 48 of the *Indian Act*, where the Minister is of the opinion that the net value of the estate of a deceased individual is less than $75,000, the entire estate passes to the surviving spouse.

[42] The ISC Decedent Estates Procedures Manual (Manual) is an operational policy guide for ISC estate administrators. The Manual does not require an administrator to obtain an estimate of the value of on-reserve lands. Chapter 8 of the Manual sets out the "Role of the Departmental Administrator," with section 4 addressing the valuation and appraisal of assets:

> 4.0 Valuation of Assets
>
> A departmental administrator should obtain an estimate of the fair market value (the price for which an item could be sold on the open market) of each asset of significant value (except reserve land).
>
> 4.1 Appraisal Expertise
>
> Similarly as hiring a lawyer or accountant, a departmental administrator may need to hire an appraiser to assist in valuing items such as jewellery, antique furniture, or real property off-reserve.

[43] The Respondent submitted that ISC estate administrators are not required to value the on-reserve assets because reserve lands cannot be sold on the "open market" as they are for the benefit of a band and its members only per subsection 2(a) of the *Indian Act*.

[44] In addition, the Respondent submitted that ISC estate administrators do not have discretion to spend money for an appraisal absent statutory authorization. The Applicants have not provided information on the value of the CP Interests, despite Ms. Charlesworth inviting them to provide this information.

[45] The Respondent submitted that because the only assets in the Estate are the CP Interests, which can only be sold or transferred to members of the Okanagan Indian Band, their value will be determined when they are sold pursuant to section 50 of the *Indian Act*.

[46] The Applicants argued that the ISC "practice" of assuming on-reserve lands not subject to a registered lease are of negligible value is based on a long-obsolete assumption that on-reserve lands cannot be leveraged and have significant value. Modern techniques, such as long-term leases of lands, are ways in which Indigenous people can capitalize on the value of their lands.

[47] The Applicants argued that the ISC "practice" leads to significant prejudice to surviving children, such as the Applicants, where only surviving spouses inherit a deceased's estate under the spousal preferential share set out at section 48 of the *Indian Act*. The Applicants argue that this is contrary to the intention of section 48, which suggests anything other than a small estate ($75,000 or less) is distributed between the surviving spouse and children.

[48] Further, the Applicants submitted that the ISC "practice" appears to be contrary to subsections 4(1), 4(2), 11(1) and 11(2) of the *Regulations*. Accordingly, the assumption that on-reserve property is of negligible value is not reasonable.

[49] The Applicants submitted that notwithstanding the direction provided in the Manual at chapter 8, section 4, other sections of the Manual clearly anticipate valuation of on-reserve lands. The Manual sets out procedures for the sale of on-reserve lands at chapter 8, section 5: "Authority and Discretion to Sell On-Reserve Property," and section 10: "Reserve Land as Asset," therefore rebutting the presumption that on-reserve lands have no or negligible value.

[50] In my view, the ISC "practice" to attribute no or negligible value to on-reserve lands that are not subject to a registered lease is not reasonable. This practice fails to take into account modern techniques that are available to capitalize on the value of reserve lands.

[51] I understand that only members of the Okanagan Indian Band may possess the CP Interests. I also acknowledge that the CP Interests in this case are in respect of undeveloped lands. However, it does not follow that these lands are of negligible value.

[52] In the absence of an appraisal or some other information from ISC or the Estate Administrator, it is impossible to assess what the value of these CP Interests are. As noted above, it is not reasonable to assume that CP Interests have zero or nominal value.

[53] Finally, I will note that Exhibit A of the affidavit of Ms. MacDonald is a letter to one of the Applicants, Ms. Tronson, dated April 18, 2005, from Ms. Charlesworth. It appears that as early as 2005, Ms. Charlesworth had determined that the Estate of the Deceased was worth less than $75,000:

> In response to your letter of April 7, 2005, I write to advise that we may accept a challenge to a will from an heir, beneficiary, or creditor. As you are none of these, I regret that I am unable to take any action on this matter.
>
> I remind you that in the event the will was [*sic*] successfully challenged, Ms Joe's sole heir would be her survivor, Elmer I George.

[54] It is not clear from the record that ISC had information concerning the valuation of the Estate assets at the time of this communication in 2005.

[55] Further, it is not clear if further work was undertaken to determine the value of the Estate after ISC took over the administration of the Estate in 2022. It is not clear how the Estate Administrator determined the value of the Estate.

[56] Briefly, in the context of the administration of an estate off-reserve in British Columbia, it is the responsibility of the executor to find, secure, and protect estate assets. To conduct these duties, estate administrators are permitted to recover reasonable expenses they incur in the carrying out of their duties (see Aubrie Girou, B.C. Executor's Guide to Probate and Estate Administration (2021) (Vancouver: Canadian Association of Gift Planners, Greater Vancouver Chapter, 2021), at page 17 [BC Executor's Guide]).

[57] In addition, estate administrators are entitled to compensation for performance of their duties. Where there is no will or the will is silent on administrator compensation and fees, section 88 of the *Trustee Act*, RSBC 1996, c 464 governs (BC Executor's Guide at pages 18–19).

[58] The Respondent argued that ISC estate administrators cannot have the on-reserve estate lands appraised because they cannot spend public moneys. However, there is nothing in the *Indian Act* or the *Regulations* that would prevent ISC estate administrators from taking steps to recover reasonable expenses incurred as part of the administration of an intestate estate. A review of the Manual supports this interpretation:

> Introduction, section 6:
>
> 6.0 Provincial/Territorial Laws of General Application
>
> The Paramountcy of any treaty, or Act of Parliament of Canada, over provincial (and territorial) legislation is established by Section 88 of the *Indian Act*, 'general provincial laws applicable to Indians'.

> Provincial and territorial laws, consistent with the *Indian Act* or regulations, apply to Indians in that province/territory both on and off-reserve. The degree to which provincial/territorial laws apply will depend upon the extent to which the *Indian Act*, subsequent regulations or courts provide for that subject matter.
>
> Chapter 8, section 1.5:
>
> 1.5 Administrator Exercise of Discretion
>
> An administrator has discretion (the power to decide) to carry out certain tasks and duties for an estate (e.g. when and how to sell an asset). However, the administrator must be able to prove (in a court, if necessary) that their exercise of discretion was properly and reasonably conducted (e.g. the decision to sell an asset was made with market conditions, and other relevant factors, in mind).
>
> [Emphasis added.]

C. *Accounting of the Estate to potential heirs and beneficiaries*

[59] The Respondent submitted that it was reasonable for the Estate Administrator to conclude that she did not have to provide an accounting of the Estate to the Applicants because they do not qualify as heirs pursuant to subsection 48(2) of the *Indian Act*. Further, the Manual does not require estate administrators to provide an accounting to persons who are not heirs or beneficiaries. Finally, the Respondent noted that privacy interests prevent Ms. Charlesworth from disclosing information, including estate accounts, to persons who are not heirs or beneficiaries.

[60] The Applicants submitted that the duty to account is a core responsibility of any trustee, including an estate administrator. The Applicants argued, and I agree, that the duty to account applies not only to persons who are entitled to benefit from an estate, but also applies to those persons who may not be so entitled (*Smith, Re* (1951), 1951 CarswellOnt 388, [1952] OWN 62 at para 1; *Girouard v Robichaud*, 2023 NBKB 145 at para 30).

[61] Further, in the administration of an off-reserve estate in British Columbia, executors are obliged to prepare a full accounting of the estate, including a record of all assets on hand, the sales of any assets, all liabilities owing and paid out by the executor, and a proposal for distribution. Accounts are to be provided to all residual beneficiaries (BC Executor's Guide at page 16). There is nothing in the *Indian Act*, *Regulations*, or Manual that appears to prohibit the Estate Administrator from providing an accounting of the Estate to all potential heirs and beneficiaries, being the Applicants here. In my view, this would be consistent with the general duty of an estate administrator to account. I note that chapter 8 of the Manual states:

> 1.0 The departmental administrator, appointed pursuant to Section 43 of the *Indian Act*, may be called upon to accomplish a number of tasks which include:
>
> …
>
> - report to heirs/beneficiaries on the administration of the estate;
>
> …
>
> 1.1 Valuation of an Estate
>
> Generally, a Regional Officer is appointed administrator of an estate when no one in the family is willing to be the administrator and the known net value of an estate is under $75,000. <u>All possible heirs, or the next-of-kin, need the opportunity to comment on estate value.</u>
>
> …
>
> 1.6 Accounting and Disclosing Information Including Inventory and Control of Assets
>
> …
>
> 1.6.1 A departmental administrator must provide a full accounting of the estate administration to known heirs/beneficiaries with Letter A-10 (Letter to Heirs/Beneficiaries – Interim List of Assets) including a listing of:

> i) assets in the estate at the outset;
>
> ii) money received during the estate administration;
>
> iii) expenses to administer the estate;
>
> iv) investments that were made by the decedent;
>
> v) assets left and the proposed distribution of same; and
>
> vi) where a final tax return was completed for a decedent estate.
>
> 1.6.2 Upon request, an administered must be prepared to account to and disclose any and all information which relates to their tasks and duties in the administration of an estate.
>
> [Emphasis added.]

[62] I do not agree with the Respondent's assertions regarding privacy concerns. Paragraph 8(2)(a) of the *Privacy Act*, RSC 1985, c P-21 permits disclosure of information for the purpose for which it was obtained or compiled or for a use consistent with that purpose. In the case at bar, the information was obtained to administer the Estate and the Applicants, as potential beneficiaries, are requesting that information. Accordingly, it appears that such disclosure is permissible.

[63] As such, for the reasons set out above, the Estate Administrator's refusal to provide an accounting of the Deceased's Estate to the Applicants is unreasonable.

VI. Conclusion

[64] I will close with similar observations made by this Court in *Jack v Wildcat*, 2024 FC 1 at paragraphs 62–67. I am troubled that ISC has developed a Manual and practices that effectively affords fewer protections to potential heirs where the deceased held interests in reserve lands as compared to potential heirs where the deceased had an interest in off-reserve lands. Effectively,

the ISC “practice” treats Indigenous persons with reserve lands less fairly than similarly placed off-reserve landholders (*Pronovost v Minister of Indian Affairs*, [1985] 1 FC 517, 1984 CanLII 5325 (FCA) at pages 528–29).

[65] I am concerned that the Estate Administrator has blindly assessed the value of the Deceased’s Estate based on the ISC “practice” without turning her mind to the value the land may have to other members of the Okanagan Indian Band. This in turn supported the Decision to refuse to provide the Applicants with an accounting of the Estate. With respect, the circular chain of logic applied in this case with no supporting evidence is not reasonable.

[66] In conclusion, the ISC “practice” of attributing zero or negligible value to on-reserve land not subject to a registered lease is not reasonable. As a result, the conclusion by the Estate Administrator that the Deceased’s Estate was worth less than $75,000 is not reasonable. The refusal to provide an accounting of the Estate to the Applicants as potential heirs and/or beneficiaries is not reasonable.

JUDGMENT in T-1158-23

THIS COURT'S JUDGMENT is that:

1. The Applicants are granted an extension of time to pursue this application for judicial review.

2. This application for judicial review is granted and the valuation of the Deceased's Estate is remitted back to the Minister for re-determination within 90 days of this Order.

3. The Estate Administrator, Ms. Charlesworth, must provide an accounting of the Deceased's Estate to the Applicants within 30 days of the completed, revised valuation of the Estate.

"Julie Blackhawk"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	MITCHELL ET AL. v HMK
PLACE OF HEARING:	HEARD BY VIDEOCONFERENCE
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APPEARANCES:

Tyson McNeil-Hay	FOR THE APPLICANTS
Joshua Ingram	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Fulton & Company LLP Barristers and Solicitors Kamloops, British Columbia	FOR THE APPLICANTS
Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT