Federal Court  Cour fédérale

Date: 20240102

Docket: T-1302-22

Citation: 2024 FC 1

Ottawa, Ontario, January 2, 2024

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

DELPHINE STELLA JACK

Appellant

and

ALICE WILDCAT
ROBERT STRUTHERS
BRIAN ROBERTS
THE MINISTER OF INDIGENOUS SERVICES

Respondents

JUDGMENT AND REASONS

I. Overview

[1] The Appellant, Delphine Stella Jack, appeals the Minister of Indigenous Service's decision (the "Decision") to deny her request to void her mother's will, pursuant to section 47 of the *Indian Act*, RSC 1985, c I-5 (the "Act").

[2] A note on terminology. The terms “Indian” and “Aboriginal” appear in the Canadian Constitution and in many other pieces of Canadian legislation. The former appears in the title of the Act.

[3] These terms are products of history, rather than reason. A term in English that more respectfully denotes those who lived on this land before settlers arrived is “Indigenous Peoples.” I find this is supported by this terminology’s use in the *United Nations Declaration on the Rights of Indigenous Peoples*, UNGA, 61st Sess, UN Doc A/RES/61/295 (2007) GA 61/295, recently adopted by Canada in the *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14. Other courts have also noted that the term “Indigenous” has now supplanted the historical term “Aboriginal” (see *Bogue v Miracle*, 2022 ONCA 672 at para 2).

[4] Respecting this language is no trivial matter. It represents, at a basic level, an attempt to recognize the identity of those encountering law. This is especially true for communities of people whose identity has often not been recognized before Canada’s law, including, for example, rights to their lands having been “virtually ignored” by it (*R v Sparrow*, [1990] 1 SCR 1075 at 1103).

[5] Therefore, where the terms “Indian” or “band” are used in this judgment, it is only when necessary to relay the terminology of the legislation.

[6] The Appellant submits that the Minister breached the requirements of procedural fairness by denying her a right of reply. The Appellant also alleges that a reconsideration of her position with proper procedural protections could lead to a different result.

[7] For the reasons that follow, I grant this appeal and remit the matter back to the Minister for reconsideration. The Decision did not meet the requirements of procedural fairness.

II. **Facts**

A. *Background*

[8] The Appellant is a 79-year-old member of the Okanagan Indian Band.

[9] The Appellant was raised primarily by her grandparents, Alice and Pierre Jack. As an adult, she settled in Oroville, Washington, where she was in a common-law relationship with Ted Milner, who passed away in 2003. Following her partner's death, she resided on the Okanagan Reserve from approximately 2008-2012. She then returned to Oroville, where she resides today.

[10] The Appellant had a poor education at 6 Mile Indian Day School, which she states has excluded her from many jobs. After her common-law spouse died, she was evicted and had little to no assets or income. She states that she has lived her adult life in poverty. She has an income of $472 USD monthly.

[11] Christine Jack, the mother of the Appellant, was an "Indian" within the meaning of the Act and a registered member of the Okanagan Indian Band. Christine died on March 10, 1994, in Vernon, British Columbia. For ease of reference, I have used Christine Jack's first name throughout this judgment, as three of her children also share the same last name.

[12] Christine had five children: the Appellant, Isabelle Jack and Terry Jack, Jack Struthers (who was also known as "John" or "Jackie"), and Robert Struthers (also known as "Sidney"). The Appellant's sister, Isabelle Jack, married Lawrence Wildcat and together they had five children: Ben, Patricia, Todd, Vincent, and one of the Respondents, Alice. The Court pauses to recognize that Alice Wildcat has since passed, as have Isabelle Jack and Jack Struthers.

[13] The Jack family has allegedly owned ranch properties from the early 1950s, as well as considerable land holdings that are near the Vernon airport. Part of those lands are the subject of the Decision and this appeal.

[14] On March 20, 1991, Christine Jack executed the will in question (the "Will"). On November 24, 1995, Indian and Northern Affairs Canada ("INAC") appointed Terry Jack, the brother of the appellant, executor of Christine's estate, pursuant to the Will's directions.

[15] Dirk Sigalet (Mr. "Sigalet") was the attorney who drafted and executed the Will, and provided a letter outlining the events of the Will's creation. He describes taking instructions from Christine for her Will while she was in hospital, drafting the Will, reading it to her, and then witnessing Christine execute the Will in his presence.

[16] Dustine Tucker (Ms. "Tucker"), a social worker, also witnessed the Will alongside Mr. Sigalet. Mr. Sigalet states that he "believes" that Ms. Tucker was present when he provided an oral overview of the Will for Christine. Ms. Tucker's signature is alongside Mr. Sigalet's in the margins of the Will, corresponding to any interlineations that were added. Ms. Tucker also provided an accompanying Affidavit to the Will attesting to Christine's illiteracy, insofar as she did not have the opportunity for a formal education.

[17] In his letter, Mr. Sigalet confirmed that Christine could not read or write and the interlineating "Xs" denote her signature. Furthermore, the handwritten additions on the Will are Mr. Sigalet's handwriting that reflects Christine's desired changes, as he believed her death was imminent. He also explained that Christine "did not want her daughter Delphine to receive any of the property that [Christine] was including in the Will. [He does] not recall what [Christine] said about her reasons for not including Delphine." In November 2022, Mr. Sigalet provided an affidavit that attests to the signature and his handwritten additions.

[18] Robert Struthers—one of Christine's children and another Respondent—provided a statutory declaration explaining that it was "always" the intention of his grandparents to give the ranch properties to Terry Jack, as he had operated it during their lifetime. However, Alice and Pierre Jack were unable to gift the ranch until Terry Jack obtained his band membership and as such, the ranch properties passed to Christine. A further Respondent and Terry Jack's spouse, Brian Roberts, attests to this fact.

[19] On March 27, 2021, Terry Jack died without having completed the transfers or subdivisions of the land.

[20] On May 4, 2021, the Minister removed Terry Jack as the Executor of Christine's estate and appointed Laurie Charlesworth (Ms. "Charlesworth"), a Senior Estates Officer at Indigenous Services Canada ("ISC"), as Administrator, with the Will annexed in his place.

[21] On June 4, 2021, the Appellant wrote to Ms. Charlesworth, seeking to have the Will voided under paragraphs 46(1)(a)-(f) of the Act. The Appellant later narrowed this in her formal complaint to allegations regarding paragraphs 46(1)(c) and (e).

B. *The Will*

[22] The salient aspects of the Will that the Appellant takes issue with are related to the "Bequests" section. The Will provides that Christine in her lifetime transferred and conveyed certain parcels of real property to Jack, Robert, and Terry.

[23] Clause 4.1 provides that Lot 64 should be divided into 69 lots (the "New Lots") to be transferred to Christine's children "as directed above." Clause 4.0 specifies transfers of each of the New Lots between Jack, Robert, and Terry, and provides that if the "transfers have not been finally completed pursuant to the provisions of the Indian Act and the Indian Lands Registry for whatever reasons, then I direct my Trustee, at the expense, if any, of my estate, to complete the transfers." Clause 4.1 also directs the trustee to complete the subdivision, and if the subdivision did not occur by May 1, 1995, then Lot 64 must be conveyed to each of her children by

percentage approximately equal to the area of land the children would have owned if the subdivision had occurred.

[24] Clause 4.1 explicitly excludes the Appellant from receiving the individual percentage interest in the event that the trustee does not complete the subdivision. The Appellant's exclusion is handwritten into the will and two sets of initials, as well as an interlineated "X", are found in the top left margins of that page of the Will.

C. *The Land Transfers*

[25] Although Christine intended the transfer of the lots, Terry, as the appointed trustee, never transferred the lots. Therefore, the lots were transferred from Christine's name only after his death, at the direction of Ms. Charlesworth.

[26] On October 19, 1995, Mr. Sigalet responded to the INAC letter informing him that Christine had passed away. Attached to his letter are the following original and duplicate original land transfer forms:

- Lot 60 transferred to John (a.k.a. Jackie) Carl Struthers;
- Lot 61 transferred to Sidney Robert Struthers;
- Lot 62 transferred to Terry Joseph Jack; and
- Yet-to-be subdivided Lot 64 which, when subdivided, is to be transferred to various persons as indicated on the transfer form.

[27] In a letter dated April 5, 1991, Mr. Sigalet illustrates Christine's intention to transfer the lots. The letter states: "we have assisted you to start the process for transferring the lots and you have signed the 'Transfer of Land in an Indian Reserve' form" [emphasis added].

[28] It appears that although Christine commenced the transfer process, it was not completed. The evidence indicates that the transfer of the land was never registered with INAC. As noted above, Ms. Charlesworth of ISC completed the registration process.

[29] On May 20, 2021, ISC confirmed that Christine's lawyer had submitted the following transfers in March of 1991:

Lot	Transferred to
Lot 60 Block B Sketch Plan 319-36	John Carrol Struthers also known as John (Jackie) Carl Struthers (died May 12, 1994) • Sidney Robert Struthers as the Administrator, appointed in 1996.
Lot 61 Block B Sketch Plan 319-36	Sidney Robert Struthers
Lot 62 Block B Sketch Plan 319-36	Terry Joseph Jack
Lot 64 Block B Fry Sketch 319-36	• Sidney Robert Struthers, 2/69 undivided share; • Estate of John Carl Struthers 2/69 undivided share; and • Estate of Terry Joseph Jack an undivided 65/69 share.

D. *Decision under Review*

[30] In a decision dated April 25, 2022, the Minister dismissed the Appellant's submissions under paragraphs 43(1)(c) and (e) of the Act.

[31] Before the Minister, the Appellant made two submissions with respect to the Will: first, that it was unclear, being vague, uncertain, and capricious such that the proper administrative and equitable distribution of the estate would be difficult or impossible to carry out; and second, that the terms of the Will would impose hardship on the Appellant, for whom the testator had a responsibility to provide.

[32] The Appellant submitted that Part 4 of the Will contained vagueness and uncertainty. Clause 4.0 lists properties that, according to the Will, had been "transferred and conveyed absolutely" during Christine's lifetime. But to the Appellant, two points arose: first, Christine had not transferred or conveyed the properties prior to her death; and second, Christine could not have validly "transferred and conveyed" the new lot properties, which were yet to exist.

[33] In addition, the Appellant submitted that Clause 4.1 suffered from two serious issues. First, it directs the trustee to complete the process of subdividing the 69 New Lots from Lot 64, but does not append, attach, or refer to a subdivision plan. Second, the contingency plan in Clause 4.1 directs the trustee to divide Lot 64 amongst the children in equal percentage interests to what they would have received had the subdivision been completed. In the Appellant's view, the Will's failure to incorporate the subdivision plan and because an unspecified part of Lot 64

was to remain un-subdivided, it is impossible to know from the Will what percentage of Lot 64 each child would have received. The Appellant also claimed uncertainty with regard to the interlineations that were applied to the Will, as, in her view, it is possible these were added after the Will was signed. The Appellant submitted that one could not discern whether the interlineations were validly adopted by Christine's signature.

[34] Turning to hardship, the Appellant submitted that Christine was a "person for whom the testator had a responsibility to provide." The Appellant argued that hardship had resulted and would continue to as she had lived in poverty most of her adult life. The significant size of the estate could provide a more comfortable life and she would benefit tremendously from being able to share in the lands. To the Appellant, these facts allowed the Minister to invoke the powers afforded under paragraph 46(1)(c) of the Act to void the will.

(1) Minister's Denial of the Applicant's Request to Reply

[35] Before the Decision was issued, the Appellant raised concerns about procedural fairness regarding her right to reply to the beneficiaries' submissions.

[36] On April 20, 2022, ISC provided the Appellant with Alice Wildcat's submissions, which responded to the Appellant's allegations that the Will should be voided. On April 22, 2022, the Appellant's counsel responded requesting "the right to prepare and present reply or rebuttal evidence and submissions to the Minister's delegate decision-maker." On April 25, 2022, an ISC representative responded with the following:

> The Minister, and her delegates, exercise quasi-judicial authority. Our process allows submissions based on Section 46 of the Indian Act.
>
> I'm afraid our process does not allow for rebuttal, retort or additional submissions.
>
> We have an obligation to inform named beneficiaries of the application to void a will. They have equal opportunity to respond; also they have the choice not to respond.
>
> All submissions are organized and provided to the decision maker. The Regional Director General (RDG) makes a decision based on what has been provided.
>
> Your client was informed of the sub-sections on which to provide an application and your office did just that.
>
> Lastly, it is your client's submission that is challenging the will. It is Ms. Delphine Jack's submission that is attempting to displace the department's confidence in the will.
>
> The other parties, tied to the Estate, have a full right to respond, provide submissions and object to this. [Emphasis added]

[37] That day, counsel for the Appellant expressed surprise that the adjudicative process did not allow a party making the claim to have a right to reply to evidence and submissions presented by a responding party. The Minister's representative responded by stating that if the Appellant wished to challenge the Decision, she may do so in this Court, as "the judiciary provides all parties the access to the principles of fundamental justice and an appeal mechanism."

(2) Determination Regarding Paragraph 46(1)(e) of the Act

[38] The Minister concluded that there was no evidence that the terms of the will are so vague, uncertain, or capricious that the proper administration of the estate would be difficult or

impossible to carry out in accordance with the Act. The Minister found that the intention of the testator was clear, with transfers to Christine's three sons having been executed, despite none having been registered.

[39] With respect to Lot 64, the Minister found that Christine had initiated the subdivision of the Lot and provided instructions in the Will, including direction if the subdivisions were not completed by May 1, 1995. The Minister also determined that Terry was appointed as executor but passed away without having completed the transfers or the subdivisions. The Minister relied on Clause 4.0 of the Will that confirms Christine's wishes regarding the land: "[i]f, when I die, these transfers have not been finally completed pursuant to the provisions of the Indian Act and the Indian Lands Registry for whatever reason, then I direct my Trustee… to complete the transfers."

[40] The Minister also found that there was no confusion about when the interlineations were applied to the Will. The Minister stated that the argument regarding interlineations in the Will is not a relevant consideration under section 46 of the Act, but should instead have been raised under section 45 of the Act, which deals with formal validity of a will. Regardless, the Minister found that the interlineations were brought to the attention of Christine and she approved them.

[41] The Minister concluded that "[t]he testator executed land transfers, bequeathed the parcels in the will; and provided instructions in the will that the transfers be completed, if not completed prior to her death." As such, the Appellant's submissions on paragraph 46(1)(e) failed.

(3) Determination Regarding Paragraph 46(1)(c) of the Act

[42] The Minister found that it had not been established that the Will caused the Appellant's circumstances to deteriorate in any way. The Minister concluded that there was no proof of a duty to provide, nor was any proof of contract or arrangement provided by the Appellant, nor proof of financial dependency. The Minister noted that the application was submitted 27 years after Christine's death. The Minister dismissed this submission and the Will voidance application.

III. **Legislative Scheme**

[43] Subsection 46(1) of the Act provides that the Minister may declare a will void in the following circumstances:

Minister may declare will void	**Le ministre peut déclarer nul un testament**
46 (1) The Minister may declare the will of an Indian to be void in whole or in part if he is satisfied that	**46 (1)** Le ministre peut déclarer nul, en totalité ou en partie, le testament d'un Indien, s'il est convaincu de l'existence de l'une des circonstances suivantes :
(a) the will was executed under duress or undue influence;	**a)** le testament a été établi sous l'effet de la contrainte ou d'une influence indue;
(b) the testator at the time of execution of the will lacked testamentary capacity;	**b)** au moment où il a fait ce testament, le testateur n'était pas habile à tester;
(c) the terms of the will would impose hardship on persons for whom the testator had a responsibility to provide;	**c)** les clauses du testament seraient la cause de privations

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

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

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

pour des personnes auxquelles le testateur était tenu de pourvoir;

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

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

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

[44] Subsection 42(1) and section 43 of the Act provide the Minister with the ability to deal with applications to void a will:

Powers of Minister with respect to property of deceased Indians

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

…

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

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

…

Particular powers	**Pouvoirs particuliers**
43 Without restricting the generality of section 42, the Minister may	**43** Sans que soit limitée la portée générale de l'article 42, le ministre peut :
(a) appoint executors of wills and administrators of estates of deceased Indians, remove them and appoint others in their stead;	**a)** nommer des exécuteurs testamentaires et des administrateurs de successions d'Indiens décédés, révoquer ces exécuteurs et administrateurs et les remplacer;
(b) authorize executors to carry out the terms of the wills of deceased Indians;	**b)** autoriser des exécuteurs à donner suite aux termes des testaments d'Indiens décédés;
(c) authorize administrators to administer the property of Indians who die intestate;	**c)** autoriser des administrateurs à gérer les biens d'Indiens morts intestats;
(d) carry out the terms of wills of deceased Indians and administer the property of Indians who die intestate; and	**d)** donner effet aux testaments d'Indiens décédés et administrer les biens d'Indiens morts intestats;
(e) make or give any order, direction or finding that in his opinion it is necessary or desirable to make or give with respect to any matter referred	**e)** prendre les arrêtés et donner les directives qu'il juge utiles à l'égard de quelque question mentionnée à l'article 42.

[45] Section 47 of the Act provides the Appellant's right to appeal to this Court:

Appeal to Federal Court	**Appels à la Cour fédérale**
47 A decision of the Minister made in the exercise of the jurisdiction or authority conferred on him by section 42, 43 or 46 may, within two months from the date thereof, be appealed by any person	**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

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.	personne y intéressée, si la somme en litige dans l'appel dépasse cinq cents dollars ou si le ministre y consent.

[46] In this appeal, the Minister relies on section 15 of the *Indian Estates Regulations*, CRC, c 954, which states "any written instrument signed by an Indian may be accepted as a will by the Minister whether or not it conforms with the requirements of the laws of general application in force in any province at the time of the death of the Indian." In the Minister's view, this provision, when read together with section 45 of the Act, indicates Parliament's intent to encourage testamentary freedom, rather than the Act being a wills variation statute.

IV. **Issues and Standard of Review**

[47] The first issue in this appeal is whether the Minister met the requisite degree of procedural fairness required in the circumstances in relation to the Appellant's right of reply. However, the Appellant has raised another issue, which she has phrased as follows:

> Could a reconsideration of the Appellant's Application with proper procedural fairness protections, and/or on consideration of *[Brooks v Canada*, 2022 FC 1064 ("*Brooks*")], lead to a different result?

[48] The Minister submits that the Court need not make a determination regarding this issue, as only the procedural fairness question is at issue. I agree. This proposed issue improperly asks the Court to act as a substitute first instance decision-maker. The question in this appeal is not

whether a different outcome would result from reconsideration with a different procedure, but whether the Minister rendered a procedurally unfair decision.

[49] Accordingly, this appeal raises the following issues:

A. *Where the Minister reviews a will under section 46 of the Act, what is the content of the duty of procedural fairness?*

B. *Should the Minister have granted the Appellant a right of reply?*

C. *Did the Minister commit an error by denying the application to void the Will under paragraphs 46(1)(e) and 46(1)(c)?*

[50] The parties agree that this is a statutory appeal and the appellate standards of review apply (*Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*") at para 37; *Law Society of Saskatchewan v Abrametz*, 2022 SCC 29 at para 28). I agree. The appellate standards of review are provided in *Housen v Nikolaisen*, 2002 SCC 33 ("*Housen*"). Questions of law are reviewed on a standard of correctness, and questions of mixed fact and law where there is no readily extricable question of law are reviewed on a standard of palpable and overriding error (*Housen* at paras 10, 36).

[51] The issue of procedural fairness is to be reviewed on the correctness standard (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 ("*Canadian Pacific Railway Company*") at paras 37-56). I find that this conclusion accords with the Supreme Court of Canada's decision in *Vavilov* at paragraphs 16-17.

[52] Correctness is a non-deferential standard of review. The central question for issues of procedural fairness is whether the procedure was fair having regard to all of the circumstances, including the factors enumerated in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 ("*Baker*") at paragraphs 21-28 (*Canadian Pacific Railway Company* at para 54).

V. **Analysis**

[53] The Appellant submits that the Minister's decision breached procedural fairness in denying the opportunity to respond to the submissions and evidence raised against her application. I agree. The procedural fairness owed to applicants under section 46 of the Act is on the higher end of the spectrum in these decisions. The Minister's procedure here did not meet this threshold. I therefore find it unnecessary to consider the submissions about the substance of the Minister's decision to void the applications under paragraphs 46(1)(e) and (c).

A. *The Content of the Duty of Procedural Fairness in Will Applications under Section 46 of the Act*

[54] No other decision from this Court has dealt with the content of procedural fairness required under the relevant provisions of the Act, with section 47 providing a broad statutory right of appeal. As such, it is necessary to conduct a fulsome procedural fairness analysis.

[55] In *Baker*, the Supreme Court of Canada set out a non-exhaustive list of factors to be considered when determining the contents of the duty of fairness in a given circumstance. They are:

1. The nature of the decision and the process followed in making it;
2. The nature of the statutory scheme;
3. The importance of the decision to those affected;
4. The legitimate expectations of those challenging the decision; and
5. The tribunal's choice of procedure.

[56] It is important to note, however, that the duty of procedural fairness is "flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected" (*Baker* at para 22). The simple and overarching concern is always fairness, as the duty thereof is "not a 'one-size-fits-all' doctrine" (*Canada (Attorney General) v Mavi*, 2011 SCC 30 ("*Mavi*") at para 42).

[57] I first address the content of the duty of procedural fairness owed in the Minister's assessment of a section 46 application to void a will under the Act. It is necessary to determine the level of procedural fairness owed to the Appellant, as a party's entitlement to reply will depend on this level (see e.g., *Islam v Nova Scotia (Human Rights Commission)*, 2012 NSSC 67 at para 24; *Mercier v Canada (Human Rights Commission)*, 1994 CanLII 3472 (FCA) at 12). In light of the degree of procedural fairness owed to the Appellant, I then address whether she should have been entitled to a right of reply.

(1) The nature of the decision and the process followed

[58] The Appellant maintains that the Decision is substantive and at the very least quasi-judicial, if not judicial in nature, thereby indicating that a higher degree of procedure fairness was required.

[59] The Minister does not expressly address this *Baker* factor but acknowledged in its communications to the Appellant that the process followed under section 46 of the Act is quasi-judicial in nature.

[60] I agree with the Appellant that subsection 46(1) decisions do not involve the application of a technical standard but involve the weighing of evidence, the application of law to the evidence, and, in the case of paragraph 46(1)(c), the consideration and balancing of different interests. These considerations show the procedure to bear the judicial components of individual rights being affected, applying substantive rules to individual cases, and having an adversarial process (*Minister of National Revenue v Coopers and Lybrand*, [1979] 1 SCR 495, 1978 CanLII 13 (SCC) at 504). Therefore, the Minister's procedure followed under section 46 of the Act approaches judicial decision-making, indicating a higher degree of procedural fairness (*Baker* at para 23).

[61] Furthermore, the Appellant highlights that section 46 decisions are also the type of decisions typically made by courts. For example, section 60 of the *Wills, Estates and Succession Act*, SBC 2009, c 13 ("*Wills Act*") in British Columbia allows a spouse or child to commence a proceeding to vary a will to be "adequate, just and equitable in the circumstances." Proceedings under section 60 of the *Wills Act* can proceed in a multitude of ways, operating under the

Supreme Court Civil Rules, BC Reg 168/2009. I find that this supports the conclusion that a higher degree of procedural fairness ought to be afforded under section 46 of the Act.

[62] On the nature of the decision, the Appellant raises the troubling issue that, given the superior courts provide a more fulsome process in these types of applications, section 46 applications for Indigenous applicants may receive a lower level of procedural fairness than non-Indigenous applicants seeking to challenge a will in a provincial court.

[63] I agree. It is troubling that section 46 as applied in the Decision enabled the Minister to create a process that affords fewer procedural protections than provincial superior courts. Adopting this interpretation would lead to Indigenous beneficiaries of estates administered under the Act to be treated differently than beneficiaries of estates administered outside of the Act.

[64] This Act cannot be read such that Indigenous Peoples' ability to create wills is lesser than non-Indigenous individuals' by virtue of Indigenous individuals creating wills under the Act. A fundamental purpose underlying the Act is the preservation of the land base or ancestral territories for the benefit of a band and its members (*Okanagan Indian Band v Bonneau*, 2003 BCCA 299 at para 32). To interpret this Act in a manner that narrows Indigenous Peoples' rights and abilities belies this purpose and risks a paternalistic and archaic approach to the creation of wills under the Act. In turn, such an interpretation risks dispossessing Indigenous Peoples of a legal freedom afforded to non-Indigenous people and placing undue procedure-creating power in the hands of the Minister. As this Court held in *Morin v Canada*, 2001 FCT 1430 ("*Morin*") at paragraph 52 (CanLII), 213 FTR 291 (*Morin* cited to CanLII):

> [52] Section 45, by contrast, is not a provision which confers power on the Minister. Section 45 makes express that Indians may devise or bequeath property by will, that Indians are not bound by the same formal requirements found in provincial wills legislation, and requires that no will is of legal force or effect until either approved by the Minister or admitted to probate by a court. The purpose of section 45 is to make certain the rights of Indians, not to grant power to the Minister.
>
> [Emphasis added]

[65] *Pronovost v Minister of Indian Affairs*, 1984 CarswellNat 98, 1984 CanLII 5325 (FCA) at paragraph 9 also makes this point clear:

> It seems to me that precisely because Indians enjoy the same testamentary freedom as other individuals they must be recognized as having the same right as others to make gifts accompanied by a substitution.
>
> [Emphasis added]

[66] I agree with the Minister that the Act should not be read as constraining Indigenous Peoples' testamentary freedom, and find that the interpretation above supports such a reading. I further recognize that the Minister is not intended to become a court and that the Minister can refer matters to the provincial superior courts. Indeed, as demonstrated by this matter, the process followed by the Minister may differ from a given court's process—for example, the Minister considered the section 46 application on written submissions alone, unlike other types of actions made under the *Wills Act*.

[67] However, comparable procedural protections must be provided under section 46 applications. Further to a fundamental purpose of the Act noted above, courts must strictly

interpret provisions of the Act that deny Indigenous peoples the testamentary rights enjoyed by other Canadians (see e.g. *Johnson v Pelkey*, 1997 CanLII 2935, 36 BCLR (3d) 40 at para 105).

[68] The Minister claims that the Act is not a wills variation statute. However, it is unclear why this should make a difference to the procedural protections in an application to void a will. Both a will variation and an application to void a will attract procedural fairness considerations. The distinction here is that the process does not have to be the same (for example, written versus oral submissions), but the procedural protections afforded should be comparable, otherwise a distinction arises simply because an individual is an Indigenous applicant.

[69] In addition, the Minister's response to the Appellant's counsel's request for a reply indicates that the prescribed internal process at ISC is not to provide a right of reply. The email states:

> I am obliged to pass on, and execute, the process used by the department of Indigenous Services Canada in respect to Will voidance applications.

[70] If there is never a circumstance in which an applicant is entitled to a reply, a lower procedural fairness standard for wills made by Indigenous Peoples is necessarily created. Consequently, beneficiaries of estates administered under the Act are treated differently than beneficiaries of estates administered outside of the Act. I echo my colleague Justice McVeigh's comments that this Court has recognized that the Minister's jurisdiction in Indigenous testamentary matters goes above and beyond the jurisdiction of historic probate courts of common law (*Longboat v Canada (Attorney General)*, 2013 FC 1168 at para 39; see e.g. *Earl v Canada (Minister of Indian and Northern Affairs)*, 2004 FC 897 at para 13). The Minister

should thus be intimately aware of the importance of adequate procedural fairness considerations.

[71] I acknowledge that the Appellant has raised a constitutional argument in light of the above. However, no Notice of Constitutional question has been brought before this Court. I am unable to provide any constitutional deliberations.

[72] Accordingly, given the quasi-judicial nature of the Minister's decision-making process and how interpretation of these provisions of the Act should not unfairly constrain Indigenous Peoples' testamentary rights, the procedural protections for applicants under the Act are at the higher end of the procedural fairness spectrum.

(2) The nature of the statutory scheme and the terms of the statute pursuant to which the decision-maker operates

[73] The Appellant does not directly address the nature of the statutory scheme but does claim that the terms of the Act favour a higher degree of procedural fairness for section 46 decisions. Specifically, the Appellant claims that the legislation allowing for the Minister to refer the matter to a court shows that the legislature anticipated that a full litigation process would be required for at least some subsection 46(1) decisions to be made in a fair manner.

[74] The Minister submits that these decisions warrant fewer procedural protections due to the nature of the statutory scheme, as section 47 of the Act provides an avenue for review through appeal. In addition, the Minister submits that the Act does not describe any particular procedure

to be followed when the Minister exercises its discretion to void a will under section 46 of the Act.

[75] The Minister is correct that in circumstances where an appeal mechanism is provided, fewer procedural protections are afforded because the decision is not final in nature (*Baker* at para 24).

[76] However, this must be balanced against other considerations under the statutory scheme.

[77] In *Carter v Northwest Territories Power Corp*, 2014 NWTSC 19 ("*Carter*") the Northwest Territories Supreme Court conducted a detailed *Baker* analysis that evaluated the applicants' right to a reply. *Carter* involved a judicial review application of a decision rendered by the Mackenzie Valley Land and Water Board. The Mackenzie Valley Water Board had legislative authority to hear applications and issue Type "A" water licences under the *Northwest Territories Waters Act*, SC 1992, c 39 ("*Waters Act*"). In *Carter*, the Northwest Territories Power Corporation ("NTPC") applied to the board to renew its Type "A" water licence, where individual applicants sought compensation and intervention before the board. Following public hearings, the board issued the water licence to NTPC.

[78] The court considered a number of indicia that supported the fact that the applicants were entitled to procedural protections at the higher end of the spectrum. One of those indicia was that the legislation contemplated that the board hearing and deciding a matter had procedures similar to those used in civil trial courts. There, section 25 of the *Waters Act* bestowed the same

powers, rights, and privileges as the court to the board. As such, this significant consideration supported greater procedural protections.

[79] Unlike the *Waters Act*, the Act here does not assign the Minister the same powers, rights, and privileges as the court to the board. However, the Minister does play a role that is comparable to the traditional jurisdiction of the superior courts in assessing the validity of Indigenous wills. The Minister also has the ability to refer a matter to a court:

Minister may refer a matter to the court	**Le ministre peut déférer des questions au tribunal**
44 (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.	**44 (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.

[80] The Minister provides a function that comparably operates in parallel to a court's assessment of a will's validity, as both the Minister and the provincial superior courts serve the same role—to assess the Will's validity under section 46 of the Act. I find that the statutory scheme, weighing both the Minister's powers and the right of appeal, shows a moderate degree of procedural fairness.

(3) The importance of the decision to the individual affected

[81] There is no dispute that this is a significant Decision with high stakes for all of the parties involved. The Minister agrees that the importance of the Decision is not trivial and merits procedural fairness.

[82] I note that this Decision and other will validity decisions may go beyond monetary considerations and financial consequences, and include personal, sentimental, property, and familial considerations. The issues raised in these applications, and their disposition, can affect individual's self-worth, self-esteem, and remembrance of their family. Individuals may have to live with asking themselves whether a given will reflects how much—or how little—their family loved them, and they loved their family.

[83] As an additional factor, and as noted above, preserving Indigenous land forms an underlying consideration of the Act. The Minister must be vigilant in ensuring procedural safeguards are in place to protect this preservation. This raises another unique type of importance for decisions made under subsection 46(1), and the Minister as decision-maker thus bears a significant interest in these decisions. The importance of the decision to both parties indicates a higher degree of procedural fairness.

(4) The legitimate expectation of the individual challenging the decision

[84] The Appellant does not make any submissions suggesting that she had a legitimate expectation to a right of reply. I agree with the Minister that once a specific procedure was

communicated, an expectation was set that those procedures would be followed (*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 ("*Agraira*") at para 95). The Minister created a "clear, unambiguous and unqualified" representation via its email communications (*Agraira* at para 96). This factor therefore indicates a lower level of procedural fairness.

(5) Deference to the procedural choices made by the decision-maker

[85] The Appellant does not provide submissions on this factor. The Minister submits that the reviewing court should respect the decision-maker's choice of procedure, particularly when the choice is subject to few statutory constraints (*Pelletier v Canada (Attorney General)*, 2008 FC 803 at para 58).

[86] I accept the Minister's argument in part. While the Minister's choice of procedure is to be respected (*Baker* at para 27), I do not agree that the fairness analysis ends there. Specifically, I do not agree that a choice inherently affording fewer procedural protections for Indigenous wills than non-Indigenous wills necessitates that procedural fairness be on the lower end of the spectrum.

[87] Procedural fairness is committed to attending to all of the circumstances (*Baker* at para 21), and courts cannot unthinkingly defer to a chosen procedure as a shield against a decision that is fundamentally unfair. I am bound by the Supreme Court of Canada's ruling that in questions of procedural fairness, "the simple overarching requirement is fairness, and this 'central' notion of the 'just exercise of power' should not be diluted or obscured by

jurisprudential lists developed to be helpful but *not* exhaustive" (*Mavi* at para 42). And as held by Justice Rennie of the Federal Court of Appeal, albeit in the context of discussing the proper standard of review for issues of procedural fairness: "No matter how much deference is accorded administrative tribunals in the exercise of their discretion to make procedural choices, the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond… Procedural fairness is not sacrificed on the altar of deference" (*Canadian Pacific Railway Company* at para 56).

[88] Respectful deference cannot slip into heedless reverence when examining a chosen procedure holistically against the fundamental standard of fairness. And so the Minister's choice of procedure is to be respected, but this respect must be tempered by the demands of fairness for Indigenous applicants having the opportunity to know the case to meet and have a full and fair chance to respond. I therefore find that the *Baker* factor of deference to the Minister's choice of procedure, balanced against overarching concerns for fairness, indicates a moderate degree of procedural fairness in these will applications.

[89] Upon considering all of the *Baker* factors in relation to the overarching requirement of fairness, and especially with regard to the nature of the decision and the importance of the decision to the parties involved, I conclude that the degree of procedural fairness required in the circumstances falls at the high end of the spectrum. The Act's silence on process cannot override the nature of the decision and the importance of the decision—both of which are paramount in the context of will validity applications under the Act.

B. *Should the Minister have Granted the Appellant a Right of Reply*

[90] Before turning to the right of reply arguments, I deal first with the Appellant's assertion that where a decision is substantive and not merely technical or procedural in nature, an oral hearing should be afforded, relying on *Labelle v Chiniki First Nation*, 2022 FC 456 ("*Labelle*") at paragraphs 103-107. The Minister submits that an oral hearing or "trial-like" process is not always required (*Baker* at para 33).

[91] I agree with the Minister. It will not always be the case that an oral hearing is required. Unlike *Labelle*, the Appellant has raised this issue without fully arguing or explaining why an oral hearing was required in the circumstances. Given that the Appellant has provided only a conclusory statement regarding requiring oral hearing and that she has not raised this as a standalone issue for this Court's consideration, I do not consider this issue in detail. I also note that the Appellant did not request an oral hearing before the Minister.

[92] Turning to the issue of a right of reply, the Appellant maintains that the Minister's chosen procedure was procedurally unfair because it did not allow her to respond to or challenge the evidence raised against her request to void the Will. In the Appellant's view, the Minister's elected procedure denied her the opportunity to know the case against her and make representations accordingly (see e.g. *Davidson v Canada (Attorney General)*, 2019 FC 997 at para 32). The Appellant also explains how a right of reply would allow her to examine the opposing party witnesses and make further legal submissions.

[93] The Minister maintains that there was no breach of procedural fairness in denying a right to reply, as the expected procedure was followed. This is because the Estate Officer's early communication with the Appellant provided a representation of the administrative process that would follow once her submissions were received:

> Once received, the department would then contact all the beneficiaries and heirs at-law, and advise them of the complaint against the will. Those individuals would have thirty days to make representations and provide evidence of their own. At the end of the thirty days, all the submissions are summarized and combined with the evidence received. This package goes through a number of levels of review, ultimately going to our Regional Director General, who decides whether the evidence submitted dictates that the Will should be voided. When a request to void a Will is received, the Department begins with the premise that the Will is valid. The burden of proof is on the complainant to prove, under the terms of S46, that the will should be declared void.

[94] The Minister submits that the Appellant knew the case to meet and had a fair opportunity to answer. The Minister maintains that, based on the record, the Appellant was given an opportunity to provide submissions and evidence in her application. The remaining Respondent in this appeal who provided submissions, Brian Roberts, submitted that the Appellant had an opportunity to provide all of the evidence and arguments supporting the voiding of the testator's will.

[95] First, and though it may be beneficial for the Court to understand how the right of reply would be used, it is not relevant to this Court's assessment of procedural fairness. The question here is, in light of the level of procedural fairness owed, whether the Minister breached procedural fairness by denying the Appellant a right of reply.

[96] Some jurisprudence deals solely with the question of a right of reply without a detailed discussion of the degree of procedural fairness required in the circumstances. Nevertheless, these cases provide helpful guidance for this Court's consideration.

[97] In *Goyal v Canada (Minister of Employment and Immigration)* (1992), 4 Admin LR (2d) 159 (FCA), 1992 CarswellNat 190, the Federal Court of Canada – Appeal Division explained the right of reply in the administrative law context as follows (at para 6):

> It is common ground that at oral hearings it is the invariable practice to allow reply by the party bearing the onus. It is not easy to see why this practice should vary where the representations are made in writing, except that in that case the reply might perhaps also be in writing. Indeed, the adjudicator in the case at bar would appear to have already anticipated such a situation — and at the same time to have exercised his discretion in this case — when he indicated to the applicant's then counsel at the hearing of May 5, 1980, that, if the counsel presented written submissions, the C.P.O. might present submissions either orally or in writing, and that (Case at p. 139):
>
> ... then you will still have an opportunity to respond ... orally ...
>
> [Emphasis added]

[98] The Appellant also relies on *CW Casino World Ltd v British Columbia (Gaming Commission)*, 1996 Carswell BC 1795, [1996] BCWLD 2278 ("*CW Casino*" cited to Carswell), which involved a casino closure after its lease had expired, where the landlord refused to renew the license. The casino applied to the gaming commissioner for approval of a different location. An oral hearing took place and the involved parties provided submissions, wherein the commission then requested more information from the casino. The casino subsequently

provided the requested information. The party of adverse interest was allowed to respond to this information, but the commission denied the casino the right to respond.

[99] The British Columbia Supreme Court held that because of the new material in the company's reply to the casino's information, the casino should have been able to respond to those new materials (*CW Casino* at para 45):

> Counsel for the Commission has referred me to *Forest Industrial Relations Ltd. v. I.U.O.E., Local 882*, [1962] S.C.R. 80. The respondent union sought certification to represent certain workers in ten lumber plants. After a full hearing and a view of two of the plants, the Labour Relations Board advised the interested parties it would consider further written submissions. The respondent made written submissions which were sent to the appellant company and the appellant union, who then replied in writing. Those replies were not sent to the respondent union so it had no opportunity to answer them. The Supreme Court found that both parties had been given a full opportunity to reply. Judson J. said at p. 83:
>
> > After hearing from one side and hearing from the other side in reply, it is not a departure from the rules of natural justice for the Board to hold that the debate had gone on long enough and that it was time to stop. (Emphasis added)
>
> However, it is clear from reading the entire judgment that there was no new material in the replies which the respondent union was not given to answer.
>
> [Emphasis added]

[100] The court therefore ordered that the commission rehear the casino's application for relocation and that the commission could not consider any arguments or material to which the casino had not had the opportunity to reply. The British Columbia Court of Appeal agreed with this conclusion in *CW Casino World Ltd v British Columbia (Gaming Commission)*, 1997

CarswellBC 784, 145 WAC 241 (BCCA). Overall, *CW Casino* indicates that where an opposing party introduces new information or evidence, this strongly supports granting a right to reply.

[101] In *Carter*, the applicants argued that they had been denied procedural fairness because the board erred by refusing to allow them to reply to NTPC's submissions, amongst other procedural unfairness allegations. The Northwest Territories Supreme Court concluded that the board's procedure failed to comply with its own *Rules of Procedure* and was therefore inherently unfair (at para 108):

> Considering the factors in *Baker*, the logical conclusion is that the contents of procedural fairness in this case included a requirement that Carters be allowed to make submissions on NTPC's response to the Information Request. They were denied this and they were thus denied procedural fairness. The Board erred in denying the Carters this opportunity.
>
> [Emphasis added]

[102] Together, these cases support granting a right of reply in an adversarial process where the decision-maker makes findings of fact and weighs evidence.

[103] Having reviewed the beneficiaries' responses to the Appellant's application, their materials likely raised new evidence and issues for the Appellant's consideration, thus warranting a reply. Several people provided statutory declarations, setting out their memory and understanding of events. This is a complex matter that dates back to the 1990s, where there is some confusion over the events that took place. Unlike other cases, such as *Begin v Canada (Attorney General)*, 2009 FC 634, a reply may have served a useful procedural purpose that allowed the Appellant to respond to these new issues and evidence. In my view, this would

better attend to the demand that an individual have the opportunity to know their case and respond to it (*Canadian Pacific Railway Company* at para 56).

[104] Together, the jurisprudence, coupled with my conclusion that procedural fairness here falls on the high end of the spectrum, indicate that the Minister did not accord the requisite procedural fairness. The Minister should have provided the Appellant with the opportunity to reply.

[105] A final remark. The Appellant says that she will orally examine several people and parties to this appeal upon remission of this matter. The Appellant recognizes, however, that the Minister is not a court and is therefore not well positioned as the venue for the "sort of full-blown litigation process that may be required to resolve this matter." My determinations on the right of the Appellant to a reply should not be taken as generally endorsing a view that the Minister's decision-making forum can be turned into a court-like litigation process. Rather, my findings are focused on the demands of procedural fairness in decisions like the one made here.

[106] As the Appellant has aptly noted, the Minister may transfer the matter to the British Columbia Supreme Court under subsection 44(2). The Appellant also relies on *Brooks* for authority that the Minister should consider transferring jurisdiction. Unlike *Brooks*, however, the Appellant did not ask in the first instance for a transfer. Again, my comments should not be taken as instructive one way or another regarding transfer of the matter but rather seen as placing an emphasis on the fact that the discretion to transfer remains with the Minister in light of its departmental policy, not the Court.

[107] Weighing all of the factors in this case, I find that the Minister's process did not meet the requirements of procedural fairness warranted under the relevant provisions of the Act, which are on the higher end of the procedural fairness spectrum. The Minister's application of the Act here unduly denies Indigenous Peoples testamentary freedom by placing this power in the hands of the Minister, and affords less procedural protection to Indigenous Peoples crafting their wills because they are Indigenous. Such an effect of the Act cannot stand. In light of the requirements of procedural fairness in these types of decisions, I further find that the Minister owed the Appellant a right to reply, which was not provided here.

[108] Having found that there was a breach of procedural fairness, I do not find it necessary to consider whether the Minister made any palpable or overriding errors in the decision.

VI. **Conclusion**

[109] This appeal is allowed. The Minister failed to accord the requisite procedural fairness to the Appellant. The Decision is quashed and remitted for reconsideration.

[110] No costs were sought in this matter, and I award none.

JUDGMENT in T-1302-22

THIS COURT'S JUDGMENT is that this appeal is granted without costs.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	DELPHINE STELLA JACK v ALICE WILDCAT, ROBERT STRUTHERS, BRIAN ROBERTS AND THE MINISTER OF INDIGENOUS SERVICES
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