SUPREME COURT OF YUKON

Citation: *Dickson (Estate of)*, 2012 YKSC 71

Date: 20120829
S.C. No. 11-P0030
Registry: Whitehorse

IN THE MATTER OF THE ESTATE

OF

LIZZIE DICKSON, DECEASED

Before: Mr. Justice L.F. Gower

Appearances:

Stephen L. Walsh — Counsel for the Administrator
Alexander Benitah — Counsel for the Attorney General

REASONS FOR JUDGMENT

INTRODUCTION

[1] In this matter, the Attorney General of Canada ("Canada") has applied to set aside an order by Mr. Justice Veale of this Court dated August 2, 2011, granting letters of administration of the estate of Lizzie Dickson to her sister Mary Rita Johnny. Canada's argument is twofold:

(1) Veale J. had no jurisdiction to make the order because the Minister of the Department of Indian Affairs and Northern Development ("DIAND") had previously appointed an administrator for the estate and had exclusive jurisdiction under s. 42 of the *Indian Act*, R.S.C. 1985, c.I-5, to do so; and

(2) Ms. Johnny did not give notice to the Minister of her application for letters of administration.

[2] Ms. Johnny opposes the application on the factual basis that, at the time of her death, Ms. Dickson was no longer ordinarily resident in the community of Ross River, Yukon, on land owned by Canada, and therefore s. 42 of the *Indian Act* does not apply. However, as a preliminary matter, Ms. Johnny has also cross-applied to dismiss Canada's application on the basis that Canada should have pursued its relief here by way of a Statement of Claim under Rule 65 of the *Rules of Court*, and not an application under Rule 64.[1]

FACTUAL BACKGROUND

[3] Ms. Dickson was a registered status Indian of the Ross River First Nation. She lived in the community of Ross River until January 15, 2009, when she moved to Whitehorse to be placed in the long-term care facility at Macauley Lodge. This move was facilitated by Ms. Dickson's sister, Mary Johnny, and was necessary because of Ms. Dickson's deteriorating health.

[4] Ms. Dickson was subsequently moved to Copper Ridge Place on September 10, 2009.

[5] There is some evidence that Ms. Dickson was in a common-law relationship with Jimmy Ladue for about three years prior to her move to Whitehorse, however Ms. Johnny disputes that Mr. Ladue regularly resided in the same house as Ms. Dickson. Ms. Johnny deposed that Mr. Ladue "moved into Lizzie's house in Ross River after she moved into long term care".

[1] I fail to understand why it was necessary for Ms. Johnny to bring a cross-application for this reason. It seems to me that she could just as easily have raised this issue in response to Canada's application, which may have simplified matters considerably and could have saved the parties from the filing of unnecessary additional materials.

[6] Ms. Dickson died intestate on September 13, 2010, at the age of 81.

[7] On September 21, 2010, Tammy Bazylinski, a DIAND manager, met with Ms. Johnny about Ms. Dickson's death. Ms. Johnny indicated to Ms. Bazylinski that Ms. Dickson had been in a common-law relationship with Mr. Ladue.

[8] Ms. Bazylinski wrote to Mr. Ladue to inquire whether he would be interested in being appointed as an administrator of Ms. Dickson's estate. She received no reply.

[9] On December 17, 2010, Ms. Bazylinski appointed Trace Joe, a DIAND officer, to be the administrator of Ms. Dickson's estate.

[10] On January 18, 2011, Ms. Joe wrote to Ms. Johnny advising of her appointment as the estate's administrator. In that letter, Ms. Joe indicated to Ms. Johnny that, pursuant to the *Indian Act*, Ms. Dickson's estate would ordinarily be passed on to her first recognized next of kin, which in this case would be her common-law partner, Mr. Ladue. However, Ms. Joe also referred to a discussion she had with Ms. Johnny regarding Ms. Dickson's verbal wishes regarding the administration of the estate, and that Ms. Johnny may wish to contact Mr. Ladue to discuss the matter.

[11] Ms. Johnny has deposed that Ms. Dickson confided in her that she wanted Ms. Johnny to receive all of her money upon her death and that she did not want Jimmy Ladue to receive any of it.

[12] On July 7, 2011, Ms. Johnny filed a Notice of Application for letters of administration under Rule 64 ("Administration of Estates (Non-Contentious)"). She did not provide notice of this application to the Minister or to the Whitehorse DIAND office.

[13] On August 2, 2011, Veale J. granted letters of administration for Ms. Dickson's estate to Ms. Johnny (the "Veale order").

[14] On August 9, 2011, Ms. Johnny advised the Whitehorse DIAND office of the Veale order.

[15] On or about September 12, 2011, Trace Joe went on leave from DIAND.

[16] On November 16, 2011, the Minister appointed Ms. Bazylinski to replace Ms. Joe as administrator of Ms. Dickson's estate.

[17] On November 22, 2011, Canada filed this application.

[18] On February 14 and April 3, 2012, Canada's application was addressed in chambers and was adjourned to allow Ms. Johnny to consult with counsel.

[19] On April 19, 2012, Ms. Johnny's counsel filed the cross-application to dismiss Canada's application.

ANALYSIS

1. The Rule 65 Argument

[20] Rule 65 is entitled "Administration of Estates (Contentious)". Sub-rule (3) reads:

> "A probate action shall be commenced by statement of claim and shall contain a statement of the interest of the plaintiff and of each defendant in the estate of the deceased." (my emphasis)

Further, Rule 65 (1) reads:

> "In this rule "probate action" means an action for the grant of probate of the will of, or grant of administration of the estate of, a deceased person, or for the revocation of a grant or for an order pronouncing for or against the validity of an alleged testamentary paper, but does not include a proceeding governed by Rule 64." (my emphasis)

[21] As I said earlier, Ms. Johnny originally applied for the Veale order under Rule 64, which is entitled "Administration of Estate (Non-Contentious)".

[22] Ms. Johnny's counsel characterizes Canada's application as one brought under Rule 64 seeking to revoke the grant administration to Ms. Johnny by the Veale order. Counsel notes here that Canada's Notice of Application, filed November 22, 2011, states that it will be relying on, among other authorities, Rules 64 and 65.

[23] Ms. Johnny's counsel further points to Rule 1(11), which provides that the *Interpretation Act*, R.S.Y. 2002, c.125, applies to the *Rules of Court*, except where a contrary intention appears. Section 5(3) of the *Interpretation Act* provides that the expression "shall" shall be read as imperative. Accordingly, argues Ms. Johnny's counsel, Canada can only pursue the relief it seeks in this application under Rule 65.

[24] Canada's response to this argument is initially to point out that s.106 of the *Estate Administration Act*, R.S.Y. 2002, c. 77, required Ms. Johnny to comply with the *Rules of Court* in her application for the Veale order. Section 106 provides:

> "106. All proceedings in court in respect of a matter dealt with by this Act must be governed by the Rules of Court and the practice of the court in respect of pleading, amendment, evidence, discovery, trial, appeals, and procedure generally, except if otherwise provided by the rules or by this Act."

[25] Further, Canada submits that it is undisputed that Ms. Johnny was aware that the Minister had appointed an administrator for Ms. Dickson's estate under the *Indian Act* prior to her application for the Veale order. Therefore, Ms. Johnny should have pursued an appeal of that decision to the Federal Court under s. 47 of the *Indian Act*, rather than resorting to this Court for a remedy. However, having chosen to come to this Court, Canada argues it is Ms. Johnny (and not Canada) who should have proceeded with a "probate action" under Rule 65 if she was unhappy with the Minister's decision to appoint an administrator.

[26] Finally, Canada argues that, having decided to apply for the Veale order under Rule 64, Ms. Johnny was obliged to seek the consent of the Minister under s. 44 of the *Indian Act*, pursuant to Rule 64(7), which reads:

> "Where the deceased was subject to the administration of the *Indian Act*, a consent of the Minister of Indian Affairs under s. 44 of the *Indian Act* must be filed."

At the very least, Canada says Ms. Johnny was required to provide notice to the Minister of her application, as the Minister was a person "who may be affected by the order sought". This is because of Rule 47(5), which reads:

> "Unless these rules provide otherwise, the applicant must deliver to each party of record and must serve on each other person, other than a party, who may be affected by the order sought
>
> (a) a copy of the notice of application, [and]
>
> (b) a copy of each affidavit in support of the application that has not already been filed and served, …" (my emphasis)

[27] It is uncontested that Ms. Johnny applied for the Veale order without providing notice to the Minister. Given Canada's position that the Minister should have at least been given notice, it ultimately relies on Rule 50(16), which reads:

> "On the application of a person affected by an order made without notice, the court may vary or set aside the order."

[28] I agree with Canada's argument. Ms. Johnny was aware of the Minister's appointment of an administrator for Ms. Dickson's estate. If she was unhappy about that appointment, she had the option of appealing the Minister's decision to the Federal Court under s. 47 of the *Indian Act*. Having chosen to come to this Court, Ms. Johnny should have commenced a probate action under Rule 65 to seek a "revocation" of the Minister's

appointment. At the very least, having chosen to proceed under Rule 64, Ms. Johnny was obliged to provide the Minister with notice of her application for the Veale order, if not further obliged to get the Minister's consent, pursuant to the combined effect of Rules 47(5) and 64(7). Having failed to do so, it is open to Canada to seek to set aside the Veale order pursuant to Rule 50(16).

[29] I note that Rule 1(6) states:

> "The object of these rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits and to ensure that the amount of time and process involved in resolving the proceeding, and the expenses incurred by the parties in resolving the proceeding, are proportionate to the court's assessment of
>
> (a) the dollar amount involved in the proceeding,
>
> (b) the importance of the issues in dispute to the jurisprudence of the Yukon and to the public interest, and
>
> (c) the complexity of the proceeding." (my emphasis)

[30] I also note that Rule 2(1) provides:

> "Unless the court otherwise orders, a failure to comply with these rules shall be treated as an irregularity and does not nullify a proceeding, a step taken or any document or order made in the proceeding."

[31] In my view, it was Ms. Johnny who was initially "offside" procedurally by applying for the Veale order without notice to the Minister. It was she who was obliged to comply with the *Rules of Court* pursuant to s. 106 of the *Estate Administration Act*. Having failed to do so, it is open to Canada to seek a "just, speedy and inexpensive" remedy. Conversely, it is not open to Ms. Johnny to argue that Canada was obliged to bring its application to set aside the Veale order by the much more circuitous route of a probate

action commenced by a statement of claim under Rule 65. I agree with Canada's counsel here that such a requirement would be procedurally unfair at a minimum, and perhaps even an abuse of process.

[32] Before leaving this argument, I would simply add my observation that Canada's application to set aside the Veale order should not be viewed as an application "for the revocation of a grant of administration" as that language is used in Rule 65(1). Rather, because the application is based on jurisdictional grounds, it is more properly characterized as an application to set aside an order which is allegedly a nullity and not a legitimate "grant of administration".

2. The "Ordinarily Resident" Argument

[33] Having determined that I can hear Canada's application, I note that the case of *Money in the Minute Auto Loans Ltd.* v. *Price*, 2001 BCSC 864, provides that on an application under Rule 52(12.3) of the Supreme Court of British Columbia *Rules of Court*, which is worded identically to Yukon Rule 50(16), the court is to proceed to hear the matter "*de novo* as to the law and facts of the original application" (para. 14).

[34] The issue here arises from s. 4(3) of the *Indian Act*, which states:

> "Sections 114 to 122 and, unless the Minister otherwise orders, sections 42 to 52 do not apply to or in respect of <u>any Indian who does not ordinarily reside</u> on a reserve or <u>on lands belonging to her Majesty in right of Canada</u> or a province." (my emphasis)

[35] Section 42 (1) of the *Indian Act* provides:

> "Subject to this Act, <u>all jurisdiction and authority in relation to matters and causes testamentary, with respect to deceased Indians, is vested exclusively in the Minister</u> and shall be exercised subject to and in accordance with regulations of the Governor in Council." (my emphasis)

[36] Section 43 of the *Act* empowers the Minister to, among other things, appoint an administrator to administer the property of aboriginal persons who die intestate.

[37] Ms. Johnny's counsel concedes that, if Ms. Dickson had been, at the time of her death, ordinarily resident in Ross River, then the Minister would have had exclusive jurisdiction under ss. 42 and 43 of the *Indian Act* to appoint an administrator for her estate.

[38] It is undisputed that Ms. Dickson resided on land owned by Canada in Ross River prior to her move to Whitehorse. However, Ms. Johnny's counsel argues that the deceased's move to extended care facilities in Whitehorse approximately 1 1/2 years prior to her death was a permanent one, and therefore she did not "ordinarily reside" on lands belonging to Canada, as that term is used in s. 4(3) of the *Indian Act*, at the time of her death. Accordingly, ss. 42 and 43 of the *Indian Act* did not apply to the administration of her estate.

[39] Both counsel agree that the leading case interpreting the meaning of the words "ordinarily resident" is *Canard v. Canada (Attorney General)*, [1976] 1 S.C.R. 170. There, the deceased was an aboriginal man who had been living on a reserve in Manitoba with his family since 1964. He was employed for several weeks each summer on a farm off the reserve, and on those occasions he and his family would move to the farm temporarily. In 1969, while employed and living on the farm he died in a traffic accident. He died intestate and his wife applied for and received letters of administration from the Manitoba Superior Court, without the Minister's consent under the *Indian Act*. The wife claimed that the *Indian Act* did not apply to the deceased because he did not ordinarily reside on a reserve at the time of his death. The Supreme Court held that the deceased

was ordinarily resident on a reserve when he died and that s. 4(3) of the *Indian Act* did not apply. Beetz J., at page 16, adopted the reasons of the Manitoba Court of Appeal on this issue:

> "… Dickson J.A., as he then was, speaking for the Court, had this to say on the meaning of the words "ordinarily reside on a reserve":
>
> > The words "ordinarily resident" have been judicially considered in many cases, principally income tax cases or matrimonial causes. Among the former: Thomson v. Minister of National Revenue, [1946] S.C.R. 209, in which Rand J. said p. 224: "It is held to mean residence in the course of the customary mode of life of the person concerned, and it is contrasted with special or occasional or casual residence"; Levene v. Inland Revenue Comrs., [1928] A.C. 217 in which Viscount Cave said, p. 225: "... I think that it connotes residence in a place with some degree of continuity and apart from accidental or temporary absences". Among the latter: Stransky v. Stransky, [1954] 2 All E.R. 536, in which Karminsky J. applied the test, p. 541: "where was the wife's real home?" Perdue J.A., of this Court, in Emperor of Russia v. Proskouriakoff (1908), 18 M.R. 56 at p. 72, held that the words "ordinarily resident" simply meant where the person had "his ordinary or usual place of living".
>
> Applying any of these tests it would seem to me that at the time of his death Alexander Canard was ordinarily resident on the reserve. He normally lived there, with some degree of continuity. His ordinary residence there would not be lost by temporary or occasional or casual absences." (my emphasis)

[40] Beetz J. then went on to consider the meaning of "ordinarily resident" in the context of s. 77 of the *Indian Act*, which establishes rules governing band elections. He adopted those rules as appropriate for guidance in interpreting "ordinarily resident" in s. 4(3) of the *Act*. At pages 16 and 17, he stated:

> "When one seeks to interpret the phrase "ordinarily resident" within the context of the Indian Act one is reenforced in the view which I have expressed. Section 77(1) of the Act gives a

band member “ordinarily resident on a reserve” the right to vote for the chief of the band and for councillors. Parliament could not have intended that an Indian would lose such voting rights, and lose the right to have his children schooled pursuant to ss. 114 et seq. if he left the reserve during the summer months to guide or gather wild rice or work on a nearby farm.

The words “ordinarily resident” as used in s. 77 of the Act have been interpreted by Order in Council SOR/54-425, P.C. 1954-1367, which establishes Rules Governing Band Elections, a subject covered in more general terms in s. 77 of the Act. Admittedly rules contained in Regulations affecting one section of the Act do not govern the meaning to be given to the word different section of the Act. However, I am content to adopt the rules found in those Regulations as appropriate for guidance in interpreting the words “ordinarily resident” as found in s. 4(3) of the Act. Such rules accord with the general objects sought to be achieved by the Indian Act and there is the added advantage of maintaining consistency in the interpretation to be given to the words “ordinarily resident” whether in s. 77 or s. 4(3) of the Act.

These rules read:

> “3. The following rules apply to the interpretation of the words “ordinarily resident” in respect of all matters pertaining to the right of an elector to vote in an election:
>
> (a) Subject to the other provisions of this section, the question as to where a person is or was ordinarily resident at any material time or during any material period shall be determined by reference to all the facts of the case;
>
> (b) The place of ordinary residence of a person is, generally, that place which has always been, or which he had adopted as, the place of his habitation or home, whereto, when away therefrom, he intends to return and, specifically, where a person usually sleeps in one place and has his meals or is employed in another place, the place of his ordinary resident is where that person sleeps;

> (c) A person can have one place of ordinary resident only, and he shall retain such place of ordinary residence until another is acquired;
>
> (d) Temporary absence from a place of ordinary residence does not cause a loss or change of place of ordinary residence."
>
> If one applies the foregoing rules, one would, I think conclude that the late Mr. Canard was ordinarily resident on the Reserve." (my emphasis)

[41] *Canard* was considered by Martineau J. in the Federal Court decision of *Earl v. Canada (Minister of Indian and Northern Affairs)*, 2004 FC 897. *Earl* is a British Columbia estate case where the deceased was a member of the Okanagan Indian Band, and had been a lifetime resident of the Okanagan Indian Reserve prior to his admission to a nursing home on the Westbank Indian Reserve in 1994. He was declared mentally incompetent by a court order in 1995. He was then moved into an extended care facility off reserve in Vernon, where he died in 2001. His will made no provision for any of his several daughters. The Minister appointed one of the deceased's sons as the executor of the estate. Two of the daughters appealed to the Federal Court, arguing that the deceased did not ordinarily reside on a reserve at his death and that the Minister had no jurisdiction to probate the will. Martineau J. dismissed this argument on other grounds, but additionally recognized that the Minister had evidence to support his conclusion that the deceased was "ordinarily resident on a reserve" at the time of his death. At paras. 23 and 24, he stated:

> "23 … the appellants have not brought before this Court conclusive evidence demonstrating that Frank Jack should not be considered to be ordinarily resident on a reserve. Indeed, the Minister had evidence to support this fact when he approved the will in the form of a Report of Death dated February 13, 2001 (provided to INAC by the Okanagan Indian

> Band) stating that Frank Jack had been a lifetime resident of the Indian reserve. The evidence indicates that Frank Jack lived in his home on the Priest Valley Okanagan Indian Reserve prior to his admission to Pine Acres Home, on the Westbank Indian Reserve, and then was admitted to Polson Extended Care Facility due to medical necessity.
>
> 24 I therefore accept the submission made by Respondent the Queen that Frank Jack was 'ordinarily resident' on the reserve pursuant to the definition of that term in the Act, which has been determined to mean residence in the customary mode of life of the person, as opposed to special or occasional or casual residence (Canada (AG) v. Canard, [1976] 1 S.C.R. 170 (S.C.C.), (1975), 52 D.L.R. (3d) 548 (S.C.C.)). That being said, I note that subsection 4(3) of the Act only requires that Frank Jack ordinarily be resident on a reserve, not the reserve or any particular reserve. In addition, the laws governing descent of property should not vary when an individual is required to live off reserve due to illness and residence in a medical facility is not a customary mode of life but rather is a special residence. …" (my emphasis)

[42] Ms. Johnny's counsel submits that this passage from *Earl* is *obiter dicta* and is based on a misinterpretation of *Canard*. In his Outline, he writes "It is important to note that, in *Earl*, the extended care facility which the deceased was residing in upon his death was, in fact, located on a "reserve"." With respect, this statement is factually incorrect. As I read the judgment, the deceased was a lifelong resident on the Priest Valley Okanagan Indian Reserve prior to his admission to the nursing home on the Westbank Indian Reserve, where he resided for nine years prior to being admitted to an extended care facility in Vernon due to medical necessity. That was the facility in which he died, and there is no suggestion that this facility was on reserve land.

[43] In any event, in arguing that *Earl* misinterpreted *Canard,* Ms. Johnny's counsel emphasizes Beetz J.'s reference in the latter to the rules governing band elections and his statement that one's ordinary residence "would not be lost by temporary or occasional

or casual absences." In the case at bar, counsel submits that the evidence establishes that Ms. Dickson's move from Ross River to Whitehorse was permanent and her residence in the eldercare facilities here cannot be considered temporary, occasional or casual.

[44] Ms. Johnny's counsel also asks me to distinguish *Earl* because the deceased in that case left one reserve to live in an extended care facility on another reserve. If what counsel is suggesting here is that the deceased ultimately died on reserve land, as was stated in his Outline, then once again, I disagree. The deceased in *Earl* was living off reserve at the extended care facility in Vernon for four months before his death (para. 1). Therefore, contrary to counsel's submission, the case is directly comparable to the one at bar. Presumably, the same argument could have been made in *Earl*, i.e. that the final move to the facility in Vernon was permanent, in the sense that there was no expectation the deceased would move elsewhere. Nevertheless, the court had no difficulty in concluding that the deceased was ordinarily resident on reserve land prior to that final move.

[45] I also find that the argument of Ms. Johnny's counsel fails to acknowledge the importance of Dickson J.A.'s use of the words "residence in the course of the customary mode of life of the person concerned", which is contrasted with "special or occasional or casual residence"; language which was apparently approved of by the entire court in *Canard*. Indeed, it is those words which Martineau J. relied upon in concluding that residence in a medical facility (such as Copper Ridge Place) is not a customary mode of life, but rather a "special residence" (para. 24). I agree with this reasoning.

[46] There is also other evidence to support the conclusion that Ms. Dickson's ordinary residence remained in Ross River at the time of her death, although it is not clear whether this evidence was known to the Minister when he originally assumed jurisdiction over Ms. Dickson's estate. First, the original Certificate of Death, dated September 21, 2010, describes the "Regular Residence" of the deceased as Ross River, Yukon. A subsequent Certificate of Death (dated April 20, 2011), in which the regular residence was described as Whitehorse, was filed at the hearing of these applications. However, it is interesting to note that it was the earlier Certificate which Ms. Johnny used in her application to this Court for Letters of Administration.

[47] Second, in an affidavit sworn by Ms. Johnny in her application for Letters of Administration, she stated that Mr. Ladue (the alleged common-law spouse) "moved into Lizzie's house in Ross River after she moved" to Whitehorse. While this statement is not necessarily conclusive, I agree with Canada's counsel that it does tend to suggest that Ms. Dickson maintained a residence in Ross River at the time of her death.

[48] In any event, I am satisfied that, for the purposes of Canada's application, the Minister had a sufficient basis to believe that Ms. Dickson ordinarily resided in Ross River at the time of her death. While I heard no submissions from either counsel about the standard of review of the Minister's decision to assume jurisdiction over the estate, I conclude that he had reasonable grounds for doing so. Further, if Ms. Johnny was unhappy about that decision, then her remedy was an appeal under s. 47 of the *Indian Act.*[2]

[2] Section 47 requires that the appeal be commenced within two months of the Minister's decision. However, Canada's counsel indicated at the hearing that the Minister may be open to a request to extend that time, should Ms. Johnson wish to pursue such an appeal.

CONCLUSION

[49] Ms. Johnny's application filed April 19, 2012 is dismissed. Canada's application filed November 22, 2011, is granted and the Veale order is set aside.

[50] Costs were neither pled nor argued, so I decline to make any order in regard.

Gower J.