Federal Court  Cour fédérale

Date: 20140304

Docket: T-1236-10

Citation: 2014 FC 208

Ottawa, Ontario, March 4, 2014

PRESENT: The Honourable Madam Justice Gleason

BETWEEN:

CHARLES ROBERTSON

Plaintiff

and

KYLE BEAUVAIS AND MOHAWK COUNCIL OF KAHNAWAKE

Defendants

and

HER MAJESTY THE QUEEN

Third Party

REASONS FOR JUDGMENT AND JUDGMENT

[1] The plaintiff, Charles Robertson, operated a garage on the Mohawk Reserve at Kahnawake for over 30 years. The garage was located on two plots of land that Mr. Robertson

possessed under the land management regime established under the *Indian Act*, RSC 1985, c I-5 [*Indian Act*].

[2] Mr. Robertson eventually leased the lots and garage to the defendant, Kyle Beauvais, who ran a cigarette manufacturing operation there between 2007 and early 2011. In the spring of 2010, Mr. Robertson, who was then 70 years old, decided to sell the garage and had discussions with a number of potential buyers, including Mr. Beauvais. What happened thereafter is the subject of dispute between the parties and gives rise to this action.

[3] Mr. Robertson claims that he and Mr. Beauvais reached a verbal agreement for the sale of the garage and transfer of possessory rights to the lots for a purchase price of $350,000.00 and that Mr. Beauvais paid him only $5,000.00 as a deposit toward the sale price. Despite this, Mr. Robertson went to the Land Management Office of the defendant, the Mohawk Council of Kahnawake [the Council], and signed two Transfer of Land documents [the Transfers] that purported to confirm the transfer of the land on which the garage was situated to Mr. Beauvais. Mr. Robertson claims he signed the Transfers in error, alleging that he was confused and unable to read them.

[4] Mr. Beauvais, on the other hand, claims that he and Mr. Robertson reached an agreement to transfer the possessory rights to the lots and the garage for a total purchase price of $225,000.00 and that he paid the entire amount to Mr. Robertson, in cash. He therefore alleges that Mr. Robertson is trying to renege on the agreement, despite having been paid in full.

[5] Although the Council forwarded the two Transfers signed by Mr. Robertson to the Minister of Indian Affairs and Northern Development [the Minister], the Minister has not issued Certificates of Possession for the lots in favour of Mr. Beauvais and has deferred the issue of the validity of the Transfers to this Court for determination. Thus, the Certificates of Possession for the land at issue in this action remain in the name of Mr. Robertson.

[6] In this action, Mr. Robertson has sued both Mr. Beauvais and the Council. Her Majesty was named as a Third Party but took no part in the action and did not appear at trial.

[7] Mr. Robertson claims the following relief in this action:

(a) A declaration that the Certificates of Possession, issued to him under section 20 of the *Indian Act*, are valid "à toutes fins que de droit" and that he is therefore entitled to possessory title to the two lots in question;

(b) A declaration that the Transfer of Land documents that he signed in favour of Mr. Beauvais are annulled, cancelled and of no effect "à toutes fins que de droit";

(c) A declaration that that these Transfers of Land are unenforceable and unconscionable;

(d) A declaration that the decision of the Third Party, as represented by the Minister, to defer the approval or refusal of the Transfers is valid "à toutes fins que de droit" and that the Transfers be refused;

(e) Orders against both defendants for moral damages in the amount of $50,000.00, each, and for exemplary damages in the amount of $100,000.00, each, for breach of sections 6 and 49 of the *Charter of human rights and freedoms*, CQLR c C-12 [the

Québec Charter], for breach of their duties under the *Civil Code of Québec*, LRQ, c C-1991 [*Québec Civil Code* or CCQ], and also, in the Council's case, for the alleged breach of its fiduciary duties towards Mr. Robertson;

(f) An order that Mr. Beauvais pay the rent that Mr. Robertson claims to be owing, namely $4,500.00 per month from May 1, 2010 to the date Mr. Beauvais vacates the garage and the two lots;

(g) A declaration that the agreement of purchase and sale for the two lots in question be "resiliated", cancelled and declared to be of no effect "à toutes fins que de droit";

(h) A declaration that the lease agreement between Mr. Robertson and Mr Beauvais be "resiliated" and cancelled;

(i) An order that Mr. Beauvais vacate the premises and leave them in the condition that they were in at the beginning of the lease, reasonable wear and tear excepted, within three days of the date of judgment;

(j) An order for provisional execution notwithstanding appeal, under article 547 of the *Code of Civil Procedure*, CQLR c C-25 [the CCP]; and

(k) Costs against both defendants on a solicitor-client basis.

[8] The two defendants, on the other hand, seek to have the actions against them dismissed, with solicitor-client costs. Counsel for Mr. Beauvais additionally requested during closing argument that I find there to have been a valid contract between his client and Mr. Robertson, that Mr. Beauvais be found to have paid the entire purchase price and that the determination of whether new Certificates of Possession should be issued be remitted back to the Minister, who possesses discretion under the *Indian Act* as to whether or not to issue such certificates.

[9] During the course of a five day trial, seven witnesses testified, and much of their evidence was conflicting. Thus, the following legal and factual issues arise in this action:

1. What transpired between Mr. Robertson and Mr. Beauvais, and, more particularly, did they conclude a verbal agreement for the transfer of possessory rights to the garage and the lots and, if so, what were its terms? How much money did Mr. Beauvais pay Mr. Robertson?
2. Did Mr. Robertson understand what he was signing when he signed the two Transfer of Land documents that purported to transfer the lots in question to Mr. Beauvais?
3. Did the Council breach any duty it owes Mr. Robertson?
4. Does this Court have the jurisdiction to grant the remedies sought? If so, what remedies are appropriate in this case?
5. In considering an appropriate remedy, what is the legal effect of the two Transfers signed by Mr. Robertson, and if he was confused as to their effect, can he rely on his mistake or is he prevented from doing so by article 1400 of the *Québec Civil Code*, which categorizes some errors as "inexcusable"?
6. Should interest be awarded although it was not claimed in the Statement of Claim? and
7. What costs award is appropriate?

[10] Prior to examining these issues, it is useful to review the provisions of the *Indian Act* applicable to reserve lands and the evidence tendered regarding land ownership on the Mohawk

Reserve, as land is held differently on an Indian reserve than elsewhere in the country, which, as will be seen, has important implications for this case.

The provisions of the *Indian Act* relevant to land ownership on an Indian reserve and application of those provisions in Kahnawake

[11] By virtue of section 18 of the *Indian Act*, land that comprises an Indian reserve is held by Her Majesty for the use and benefit of the Indian band for which it was set apart. The legislation sets up a system by which the Minister possesses discretion to issue "Certificates of Possession" to members of Indian bands. A Certificate is evidence of the bearer's right to possess the land described in the Certificate. Subsections 20(1) and (2) of the *Indian Act* provide as follows in this regard:

Possession of lands in a reserve	Possession de terres dans une réserve
20. (1) No Indian is lawfully in possession of land in a reserve unless, with the approval of the Minister, possession of the land has been allotted to him by the council of the band.	20. (1) Un Indien n'est légalement en possession d'une terre dans une réserve que si, avec l'approbation du ministre, possession de la terre lui a été accordée par le conseil de la bande.
Certificate of Possession	Certificat de possession
(2) The Minister may issue to an Indian who is lawfully in possession of land in a reserve a certificate, to be called a Certificate of Possession, as evidence of his right to possession of the land described therein.	(2) Le ministre peut délivrer à un Indien légalement en possession d'une terre dans une réserve un certificat, appelé certificat de possession, attestant son droit de posséder la terre y décrite.

[12] Section 21 of the *Indian Act* requires the Minister to maintain a register, called the "Reserve Land Register", which details the particulars in respect of the Certificates of Possession issued by the Minister under section 20 of the *Indian Act*.

[13] By virtue of sections 18.1, 20, 24 and 25 of the *Indian Act*, only members of the Indian band for whom the reserve lands are held may be granted a Certificate of Possession for land on the reserve. Section 24 of the *Indian Act* recognises the right of Indians who are lawfully in possession of reserve lands to transfer those lands to the band or to another member of the band. Section 24 provides in this regard:

Transfer of possession	Transfert de possession
24. An Indian who is lawfully in possession of lands in a reserve may transfer to the band or another member of the band the right to possession of the land, but no transfer or agreement for the transfer of the right to possession of lands in a reserve is effective until it is approved by the Minister.	24. Un Indien qui est légalement en possession d'une terre dans une réserve peut transférer à la bande, ou à un autre membre de celle-ci, le droit à la possession de la terre, mais aucun transfert ou accord en vue du transfert du droit à la possession de terres dans une réserve n'est valable tant qu'il n'est pas approuvé par le ministre.

[14] Mr. Jean Boucher, Manager, Lands and Resources in the Québec regional office of the Department of Aboriginal Affairs and Northern Development Canada [AANDC] and Ms. Cheryl Diabo, a former employee at the Land Management Office [LMO] operated by the Council, both testified as to how these provisions are applied on the Kahnawake Reserve. They confirmed that the Council has chosen to use the Certificate of Possession system established under the *Indian Act* to

manage land transfers at Kahnawake. (Mr. Boucher indicated that the choice as to whether to use this system is optional and a matter for each First Nation to determine.)

[15] The Reserve lands at Kahnawake (or at least the lands in issue in this action) are divided into lots, and surveys have been conducted to delineate their parameters. Under the procedure established by AANDC and used by the Council, those in valid possession of lots are granted a Certificate of Possession by the Minister. When a band member wishes to transfer lands for which he or she holds a Certificate of Possession, the band member must go to the Council's LMO and sign a document entitled "Transfer of Land on an Indian Reserve". The member's signature is witnessed by an LMO employee, who completes an affidavit, attesting to the identity of the signatory and authenticity of the signature.

[16] The Transfer of Land document signed by a transferor is a one page document, which identifies the transferor, confirms that he or she is a member of the Mohawks of Kahnawake Indian Band and in lawful possession of the land to be transferred, contains a description of the land being transferred and then contains a short paragraph confirming the transfer of the land. This paragraph confirms there has been consideration for the transfer, sets out the name of the transferee, confirms receipt by the transferee of the named consideration and then states that the transferor has transferred to the transferee all of his or her "estate and interest in the said parcel of land granted to [the transferor] under the *Indian Act*".

[17] On the template Transfer of Land forms contained in AANDC's Indian Land Registration Manual, no amount is specified for the consideration to be paid for a transfer, and any

amount could thus be filled in when the transfer document is completed if the template is used. Mr. Boucher testified, however, that approximately ninety percent of the transfers received in his office show only a single dollar as being the amount of the consideration for the transfer.

[18] The pre-printed Transfer of Land forms used by the Council at the times material to this action stipulated one dollar as being the amount of the consideration for the transfer, and Ms. Diabo testified that all the transfers signed during her tenure at the LMO adopted this form. She thus stated that the actual amount (if any beyond $1.00) paid by a member of the band for a plot of reserve land was purely a private matter between the transferor and transferee and is not recorded on the Transfer of Land form.

[19] Ms. Diabo also testified that the work of her office consisted principally of verifying that the transferor was in valid possession of the land to be transferred (which requires verification of the Register maintained by the Minister), verification that both the transferor and transferee were members of the Mohawks of Kahnawake Indian Band and that the forms were appropriately completed. She indicated that the LMO did not inquire as to whether the agreed-upon purchase price had been paid for any transfer of land. The Council's procedures manual, applicable to the transfer of lots on the Reserve, contemplates that once these verifications are completed and the Transfer of Land form and affidavit of execution are completed at the LMO, the documents should then be sent to the Chairperson of the Band's Land Management Committee for approval. Ms. Diabo testified that at the end of the process, the completed forms are typically sent on Friday of each week to AANDC, for registration and issuance of Certificates of Possession.

[20] Mr. Boucher testified as to the procedures used by AANDC and confirmed that it verifies the documents submitted before issuing a Certificate of Possession to the transferee and listing the transferee in the Register maintained by the Minister under the *Indian Act*. Among the matters that AANDC verifies are that the documents are legible and appropriately completed and that the transferor is in valid possession of the land to be transferred. Mr. Boucher indicated that this requires verification of the Register to confirm that the transferor held the Certificate of Possession for the land at the time of the transfer. This, however, does not prevent the immediate transfer by a transferee to someone else (without the intervening step of the issuance of a new Certificate of Possession in the name of the transferee). Mr. Boucher testified in this regard that the documents submitted in this case were suitable for registration and would have resulted in the issuance of Certificates of Possession in favour of Mr. Beauvais but for the intervention of counsel for the plaintiff, who objected that Mr. Robertson had signed the Transfer of Land documents in error.

[21] As is more fully discussed below, for one of the lots in question, Mr. Robertson was not the holder of a Certificate of Possession when he signed the Transfer of Land document in favour of Mr. Beauvais as that lot had been transferred to Mr. Robertson the same day that he signed a transfer in favour of Mr. Beauvais. Mr. Boucher, however, indicated that this sort of transaction would qualify for approval by the Minister, thereby indicating that, at least as far as he is concerned, one need not necessarily be the holder of a Certificate of Possession to be recognised by the Minister as having the right to transfer a lot on an Indian reserve so long as there is a valid chain of transfer to the final transferee.

[22] Both these witnesses' testimony, the excerpts of the manuals filed and the *Indian Act*, itself, establish that Transfer of Land documents are not akin to deeds that are registered to transfer title to land outside a reserve. These transfers differ from deeds in three principal respects: first, the Transfer of Land documents do not convey title; second, they do not necessarily list the consideration actually paid for a lot on an Indian reserve; and third, they do not, of themselves, convey rights to possess reserve land, as the Minister has discretion as to whether or not to issue a Certificate of Possession under the *Indian Act* and the Certificates are merely evidence of the right of the person named in the Certificate to possess the land mentioned in the Certificate. Indeed, the jurisprudence has recognised that the regime applicable to reserve lands established under the *Indian Act* is *sui generis* (*Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193; *R v Vanderpeet*, [1996] 2 SCR 507, 137 DLR (4th) 289).

[23] With this backdrop in mind, it is now possible to review what occurred between Mr. Robertson and Mr. Beauvais.

Background to the agreement between Mr. Robertson and Mr. Beauvais

[24] In 1972, Mr Robertson acquired the land that is the subject of this action, which was then described as the Whole of Lot 3-8 Block B, Kahnawake Indian Reserve No. 14 and the Whole of Lot 3-10 Block B, Kahnawake Indian Reserve No. 14 [hereafter called, simply, Lots 3-8 and 3-10]. A few years later, Mr. Robertson constructed a garage on the two lots where, until 2005, he operated an auto body shop, an auto repair business and bought and sold used cars. In 1995, Mr. Robertson hired Nathalie Leduc, who worked for him until 2005. In 2001, she and Mr. Robertson

commenced a romantic relationship and became – and still are – common-law spouses. Ms. Leduc resides with Mr. Robertson at his house on the Kahnawake reserve.

[25] Both Ms. Leduc and Mr. Robertson testified that Ms. Leduc did all the reading and writing associated with running the garage and the auto repair/sale business because Mr. Robertson found reading difficult and had problems with transposing characters. They also testified that even after he ceased operating the garage in 2005, Mr. Robertson still had Ms. Leduc do his reading and writing for him by, for example, paying all the household bills.

[26] In addition to experiencing difficulty with reading, Mr. Robertson also developed vision problems and in 2007 underwent surgery on one of his eyes for glaucoma, secondary to diabetic retinopathy. A note from the ophthalmologist who treated him that was filed on consent indicates that as of 2008 (when he was last examined), Mr. Robertson had unimpaired vision in one eye but that his vision in the other eye was significantly impaired. During the trial, Mr. Robertson was able to read very large print, namely the large heading on Transfer of Land documents, but stated he could not decipher any of the rest of the document in smaller print. Despite this, he admitted to still driving a car on the reserve and thus is able to see to a certain extent.

[27] In 2005, as part of the settlement of previous litigation with one of his daughters in respect of monies that Mr. Robertson owed her, Mr. Robertson transferred Lots 3-8 and 3-10 to his daughter, Shelly Robertson. In 2007, she and her husband, Lester Norton, rented a portion of the garage situated on the Lots to Kyle Beauvais. Mr. Beauvais, along with his brother, Chris, and

another individual, Davis Rice, set up a cigarette manufacturing business in the premises and paid $2,500.00 per month in rent to Mr. Norton.

[28] In 2008, Mr. Robertson borrowed $40,000.00 from one of his sons-in-law, Clive McComber, to repay the monies Mr. Robertson owed to Shelly. After the repayment was made, Shelly signed two Transfer of Land documents at the LMO, to transfer Lots 3-8 and 3-10 back to Mr. Robertson.

[29] A brief written agreement was prepared by Ms. Leduc and Mr. McComber to indicate that the $40,000.00 was being loaned for only 30 days and that if it were not repaid Mr. Robertson would transfer the whole of Lot 3-8 to Mr. McComber. Mr. Robertson signed this agreement. Thereafter, he and Mr. McComber went to the LMO, where the Council's employees witnessed their signatures on the agreement and Mr. Robertson signed a Transfer of Land document to transfer the whole of Lot 3-8 to Mr. McComber.

[30] In their testimony, Mr. Robertson and Ms. Leduc explained that Mr. McComber required that the land be transferred as security for the loan, the agreement being that if monies were repaid, Mr. McComber would transfer all but a small part of Lot 3-8 back to Mr. Robertson. In lieu of interest, Mr. Robertson agreed to transfer a small portion of Lot 3-8 to Mr. McComber that was contiguous to other lands owned by Mr. McComber.

[31] The Council forwarded the Transfers of Land documents signed by Shelly for Lot 3-10 and for Lot 3-8 to AANDC. On December 15, 2008, the Minister issued a Certificate of Possession for Lot 3-10 to Mr. Robertson and issued a Certificate of Possession for Lot 3-8 to Mr. McComber.

[32] A little after the 30 day time period to repay the $40,000.00 had elapsed, Mr. Robertson repaid Mr. McComber the $40,000.00, this time with money borrowed from Angela, another of his daughters. On November 25, 2008, Mr. Robertson and Mr. McComber signed another brief written agreement, confirming the repayment of the monies and providing that the portion of Lot 3-8 that was to be returned to Mr. Robertson would be transferred back to him by Mr. McComber. Ms. Leduc also prepared this agreement and Mr. Robertson merely signed it.

[33] Mr. Robertson testified that he believed Mr. McComber had signed a Transfer of Land document to return the portion of Lot 3-8 that was to be transferred back to him. However, as it turned out, Mr. McComber did not actually do so until 2010 after Mr. Robertson determined to sell his garage, as is discussed below.

[34] Before any transfer could be accepted by the LMO in respect of the transfer back of the bulk of Lot 3-8 to Mr. Robertson, it was necessary that a plan of subdivision be prepared to delineate what part of the lot was being retained by Mr. McComber. It was also necessary that a fee be paid to the Council for the preparation of the plan of subdivision. The plan was prepared in February 2009 by a surveyor, but it was not filed with the LMO until 2010.

[35] From 2008 forward, however, Mr. Beauvais paid rent to Mr. Robertson. The rent was first $2,500.00 per month, the same amount that Mr. Beauvais had been previously paying to Mr. Norton. In mid-2008, Mr. Beauvais expanded his cigarette manufacturing operation and rented the entire garage from Mr. Robertson and, consequently, the rent increased to $4,500.00 per month. Both Mr. Robertson and Mr. Beauvais confirmed that this amount was paid each month in cash and that typically no receipts were given for the amounts paid. (Mr. Robertson did file two receipts that he claims were issued by Mr. Beauvais' employee, Garth Cross. It would appear, though, that it was the exception for receipts to be issued for the rent payments.)

[36] In late 2009 or early 2010, Mr. Robertson determined that he wished to sell his garage and to transfer possession of Lot 3-10 and the portion of Lot 3-8 that was supposed to have been returned to him by Mr. McComber. Mr. Robertson had a number of discussions with several potential buyers, where a purchase price of $400,000.00 was discussed, during which Mr. Robertson claims that none of the potential buyers balked at the price. This claim was corroborated by Darcy Lazore, another of Mr. Robertson's sons-in-law, who testified that he had attempted to broker a deal for third parties to acquire the premises to run a cigarette operation there. (This venture did not get off the ground as Mr. Lazore and the potential purchasers were from Akwesasne in New York State and therefore could not obtain Certificates of Possession for the lots under the *Indian Act* as they were not members of the Kahnawake Band. However, Mr. Lazore confirmed that the individuals he was involved with might have been willing to pay $400,000.00 for the garage and the lots.)

[37] Both Mr. Robertson and Mr. Beauvais concur that they had initial discussions regarding the sale of the garage and transfer of the lots in approximately February or March of 2010 and that Mr. Robertson initially indicated that he wanted to obtain $400,000.00 for the lots and garage.

[38] Mr. Beauvais testified that sometime prior to on April 1, 2010, he went to the LMO to review the state of the register with respect to Lots 3-10 and 3-8 and learned that Lot 3-8 was still in Mr. McComber's name. Mr. Robertson and Mr. Beauvais concur that some time before April 1st Mr. Beauvais informed Mr. Robertson of the fact that Mr. McComber had not transferred any portion of Lot 3-8 back to Mr. Robertson.

What transpired Between Mr. Robertson and Mr. Beauvais and how much money did Mr. Beauvais pay Mr. Robertson?

[39] The versions of events offered by Mr. Robertson and Mr. Beauvais from that point forward diverge.

[40] Mr. Robertson claims that sometime in March 2010, he went to the garage and had a discussion with Mr. Beauvais and that during this discussion Mr. Beauvais asked Mr. Robertson to agree to a lower price, reminding Mr. Robertson that his father had been a close friend of Mr. Beauvais' father. Mr. Robertson claims that during this conversation he agreed to sell the garage and to transfer the lots to Mr. Beauvais for $350,000.00 but that no closing date was agreed to. He also claims that Mr. Beauvais indicated to him that he would need financing to complete the purchase.

[41] Mr. Robertson testified that he went to the LMO on April 1, 2010 to sort out the right to possession of Lot 3-8, which had not been transferred back to him by Mr. McComber. At the LMO, Mr. Robertson spoke with Ms. Diabo. In his evidence, Mr. Robertson offered little detail regarding what he discussed with Ms. Diabo on that day, other than indicating that he learned from her that a transfer to him from Clive McComber of part of Lot 3-8 could not be processed as there was an outstanding $500.00 fee to be paid for the survey done to subdivide Lot 3-8 between the part to be retained by Mr. McComber and the part to be transferred back to Mr. Robertson.

[42] Ms. Diabo offered a bit more detail regarding her discussion with Mr. Robertson on April 1, 2010 and, in addition to confirming that she told him about the outstanding $500.00 fee, also indicated that Mr. Robertson told her that he intended to sell Lot 3-10 and his portion of Lot 3-8 to Mr. Beauvais. The documentary evidence bears this out as Ms. Diabo went ahead to prepare the paperwork to complete the two Transfer of Land documents for the two lots. She indicated that Mr. Beauvais did not come into the LMO after April 1st, so she must have learned of Mr. Robertson's intention to sell the lots to Mr. Beauvais from Mr. Robertson when he came to the LMO on April 1, 2010.

[43] Mr. Robertson went to the Council's main office on April 1, 2010 to pay the outstanding $500.00 and received a receipt for doing so, which he gave to Ms. Leduc when he returned home. Once the fee was paid, it was possible for the LMO to process the transfer from Mr. McComber to Mr. Robertson of the portion of Lot 3-8 that was to be returned to Mr. Robertson. (After it was subdivided the portion of Lot 3-8 that was to return to Mr. Robertson was designated as the Whole of Lot 3-8-1 Block B, Kahnawake Indian Reserve No. 14 [hereafter called Lot 3-8-1]).

[44] Ms. Diabo testified that she called Mr. McComber on April 7, 2010 to request that he come in and sign a Transfer of Land for Lot 3-8-1 in favour of Mr. Robertson. She indicated that during that conversation Mr. McComber told her that he had business he needed to clear up with Mr. Robertson before he would sign the transfer. Both Mr. Robertson and Ms. Leduc corroborated this, indicating that Mr. McComber wanted to obtain some tools that were in a locked storage bin on the lots before he would sign the transfer. The documentary evidence also corroborates that Ms. Diabo called Mr. McComber on April 7th.

[45] Mr. Robertson stated that he went back to the LMO on April 12th, possibly following a call from Ms. Diabo. (She testified that she had called him to come in.) Mr. Robertson stated that when he arrived at the LMO on April 12th, he asked Ms. Diabo if Mr. McComber had signed the Transfer of Lot 3-8-1 and spoke with Carol Goodleaf, Ms. Diabo's supervisor. According to both Mr. Robertson and Ms. Diabo, who overheard their conversation, Ms. Goodleaf first told Mr. Robertson that Mr. McComber had come to the LMO and had indeed signed the Transfer of Land document for Lot 3-8-1 to convey it back to Mr. Robertson. Ms. Goodleaf then explained to Mr. Robertson that he was required to grant Mr. McComber a right-of way over Lot 3-8-1 to allow Mr. McComber access to the portion of Lot 3-8 that he retained. The right-of-way was mentioned in the transfer from Mr. McComber to Mr. Robertson. Both Mr. Robertson and Ms. Diabo confirmed that Mr. Robertson became upset about the need for there to be a right-of-way. Ms. Diabo and Mr. Robertson, however, differ as to what happened next.

[46] Ms. Diabo testified that Mr. Robertson next spoke with her and asked to sign the documents to transfer Lots 3-10 and 3-8-1 to Mr. Beauvais. Mr. Robertson, on the other hand,

claims he asked no such thing and says he thought he was being given paperwork regarding the transfer back to him of Lot 3-8-1. However, he did proceed to sign the two Transfers for Lots 3-10 and 3-8-1 in favour of Mr. Beauvais. He claims that Ms. Diabo gave him two originals and two copies that she told him were for Mr. Beauvais, to use in connection with getting financing from the Caisse Populaire on the Reserve. He maintains, though, that he thought the Transfers merely documented the transfer back to him of Lot 3-8-1 by Mr. McComber.

[47] Ms. Diabo, on the other hand, testified that while she gave one set of originals to Mr. Robertson and one copy to Mr. Robertson to give to Mr. Beauvais, she made no mention of Mr. Beauvais' needing financing. She also testified that she read to Mr. Robertson the names of the transferor (Mr. Robertson) and the transferee (Mr. Beauvais) and the description of the lots to be transferred shown on the two Transfers before Mr. Robertson signed them. Mr. Robertson does not deny that this may have occurred but maintains that he simply did not understand what he was signing.

[48] Having heard both testify, and considering their evidence in light of the relevant documents filed as exhibits, I do not find there to be much real conflict between Mr. Robertson's and Ms. Diabo's versions of what transpired on April 12th at the LMO. They simply had a mis-communication about why Mr. Robertson was there. Ms. Diabo believed that Mr. Robertson had come in to get a copy of the transfer from Mr. McComber and to sign the Transfers in favour of Mr. Beauvais. Given the passage of time, it is likely impossible for her to recollect the exact words Mr. Robertson used, but she certainly understood him to be requesting that he be given the Transfers in favour of Mr. Beauvais so he could sign them. Mr. Robertson, on the other hand, believed he was

there to simply confirm the transfer back to him of land from Mr. McComber. He was upset about what Ms. Goodleaf had told him about the right-of-way and did not – and possibly could not – read the documents he signed. However, he signed them and was given a set of originals and a set of copies by Ms. Diabo. I find it unlikely, though, that she would have said anything about Mr. Beauvais' going to the Caisse Populaire as she had no idea whether Mr. Beauvais might have needed financing. Importantly, both Mr. Robertson and Ms. Diabo concur that Mr. Robertson did not mention that he could not read the documents he signed and did not indicate any confusion as to what was transpiring.

[49] Mr. Robertson claims that he did not give the Transfers to Ms. Leduc when he returned home on April 12th, but instead put the envelope containing the originals into his briefcase and left the copies in his car. He stated, though, that he told Ms. Leduc that he had received the transfer of Lot 3-8-1 back from Mr. McComber and that he was taking copies of the documents he had received to Mr. Beauvais to complete the transaction with him. He claims, moreover, that he had Ms. Leduc prepare a letter of reference for Mr. Beauvais, to confirm that Mr. Beauvais had always paid his rent, for Mr. Beauvais to use in connection with his application for a loan. Ms. Leduc corroborated this testimony and confirmed that she prepared a letter of reference, a copy of which was filed as an exhibit.

[50] Mr. Robertson then claims that he went to see Mr. Beauvais on April 13th to give him the letter of reference and copies of what he thought were documents confirming the transfer of land from Mr. McComber to him. (In actuality, they were copies of the Transfers in favour of Mr. Beauvais that Mr. Robertson claims he signed in error.) Mr. Robertson further testified that he asked

for a deposit during the meeting, that Mr. Beauvais directed Mr. Cross to see how much money they had in the safe at the garage, discovered that there was at least $5,000.00 and that Mr. Beauvais and Mr. Robertson agreed that Mr. Beauvais would provide a $5,000.00 deposit towards the purchase price of $350,000.00 that they had agreed upon. He also stated that they left the closing date undetermined as Mr. Beauvais still needed to go to the Caisse Populaire and indicated he would need some time to get the financing in place as there had been a death in the family. Ms. Leduc testified that once Mr. Robertson returned home from the meeting with Mr. Beauvais, she saw the receipt and counted the $5,000.00 deposit, which she put into the safe located in their home.

[51] The next event that transpired according to Mr. Robertson and Ms. Leduc is that Mr. Beauvais called Ms. Leduc on April 21, 2010 to request a meeting with Mr. Robertson. Mr. Robertson went to the garage on the 21st and claims Mr. Beauvais told him that Mr. Robertson had signed the Transfers, which transferred the land to Mr. Beauvais, that Mr. Beauvais did not intend to pay more because Mr. Robertson owed at least $400,000.00 to Mr. Beauvais' father and that Mr. Beauvais directed him to get off his property. Mr. Robertson claims that Mr. Beauvais' brother, Chris, then threatened him, saying that Mr. Robertson should not complain as "they had the muscle". Mr. Robertson says that he then went home, that he and Ms. Leduc read the original Transfers that he had in his briefcase, confirmed the error that he made, consulted a lawyer and went to the LMO to try and undo the transaction.

[52] While there is a certain divergence in the testimony from Ms. Diabo, Mr. Robertson and Ms. Leduc regarding what occurred at the LMO on April 21st, nothing turns on this. Suffice to say that Mr. Robertson and Ms. Leduc were very upset, tried to get the Transfers reversed and were told

by Ms. Diabo that there was nothing that could be done. Ms. Diabo volunteered that after they left she was so upset that she went into the bathroom to weep.

[53] After that, Ms. Leduc and Mr. Robertson went to the Peacekeepers' station on the Reserve to file a complaint against Chris Beauvais. In connection with that complaint, Ms. Leduc wrote a statement, which Mr. Robertson signed, that corroborates their version of events. They also left with Officer Stacey a copy of the Transfers that Mr. Robertson claims to have signed in error as well as a copy of the receipt that he claims Mr. Beauvais gave him.

[54] Mr. Robertson thus alleges that he has been paid only $5000.00 of the agreed-upon $350,000.00 purchase price and that he has been wrongfully denied possession of Lots 3-10 and 3-8-1.

[55] Mr. Beauvais, on the other hand, testified to completely opposite effect. He claims that he offered Mr. Robertson only $225,000.00 for the garage and that Mr. Robertson was initially unwilling to accept this amount. Mr. Beauvais further says that he learned from Clive McComber some time in the morning of April 12th that Mr. McComber had been to the LMO to sign a Transfer of Land document for Lot 3-8-1 in favour of Mr. Robertson, that Mr. Robertson came by the garage later on the 12th, told him that he was then willing to sell for $225,000.00 and that Mr. Robertson then agreed to this amount and that Mr. Beauvais then paid Mr. Robertson $225,000.00, in cash for the land and the garage. Mr. Beauvais claims that he regularly had between $300,000.00 to $500,000.00 in cash in the safe at the garage from the sale of cigarettes and that in this instance Garth Cross counted the cash and gave it to Mr. Robertson immediately after they agreed to the

purchase price on April 12th. He stated that his brother, Chris, was also there when the payment was made.

[56] Mr. Beauvais claims that he went to the LMO later that day to verify that Mr. Robertson had signed the Transfers to transfer the property to him. Mr. Beauvais moreover stated that he did not give Mr Robertson a deposit and that no receipt or letter of reference was given to him by Mr. Robertson.

[57] Mr. Beauvais agrees that he called Ms. Leduc to have Mr. Robertson come and see him on April 21st, but testified that he did so as he had learned that Mr. Robertson had made several attempts to contact him while he was away. He claims that when Mr. Robertson showed up at the garage on April 21st, he asked for more money, that Mr. Beauvais told him he was not willing to pay any more and that he asked Mr. Robertson to leave his property. He claims that he then went back into the garage so did not hear if his brother threatened Mr. Robertson but did confirm that his brother was upset.

[58] It is common ground between Mr. Robertson and Mr. Beauvais that Mr. Beauvais continued to occupy the garage until early 2011, when he ceased his cigarette manufacturing business. Mr. Beauvais then rented the property to another tenant or tenants, to run a heat exchanger service. As of the date of trial, the other tenant(s) were still renting the garage. No evidence was offered as to how much the other tenant(s) have paid Mr. Beauvais in rent since early 2011. Mr Beauvais claims that he made significant improvements to the garage, spending in excess of $50,000.00 to repair it, to make it suitable for rental to the other tenant(s).

[59] Of these two versions of events, I prefer Mr. Robertson's for several reasons.

[60] First, there is an important contradiction between what Mr. Beauvais testified to at trial and his testimony during his examination for discovery. In this regard, he made no mention during his examination for discovery that he had verified with Mr. McComber that Mr. McComber had re-conveyed the land to Mr. Robertson before he paid the $225,000.00 to Mr. Robertson. During cross-examination at trial, however, when he was pushed as to the unlikelihood of his paying out $225,000.00 without having even verified if Lot 3-8-1 was back in Mr. Robertson's name, Mr. Beauvais stated that he verified this with Mr. McComber before he paid the money on April 12th.

[61] Second, in one key respect, Mr. Beauvais' testimony was contradicted by Ms. Diabo, who is a largely independent witness as she no longer works for the Council. More specifically, when once again faced in cross-examination with the unlikelihood of his version of events, Mr. Beauvais claimed that he went to the LMO to check that Mr. Robertson had in fact signed the Transfers, shortly after he paid him the cash. Ms. Diabo, though, testified that Mr. Beauvais did ever not return to the LMO after his initial inquiry that was made before April 1, 2010.

[62] Third, Mr. Beauvais failed to call any witness to corroborate that he made the alleged $225,000.00 cash payment and failed to call Mr. McComber to confirm whether and when Mr. McComber told Mr. Beauvais that the land had been put back into Mr. Robertson's name. Counsel for Mr. Beauvais advised during the course of the trial that Mr. McComber was under subpoena, but he was not called to testify. Similarly, neither Mr. Cross nor Chris Beauvais was called to confirm that Mr. Beauvais paid the $225,000.00 in cash to Mr. Robertson as Mr. Beauvais claims.

[63] In the circumstances, I am entitled to draw an adverse inference from Mr. Beauvais's failure to call Mr. McComber, Mr. Cross or his brother to corroborate his version of events. In this regard, it is well-established that in civil cases, "an unfavourable inference can be drawn when, in the absence of an explanation, a party litigant … fails to call a witness who would have knowledge of the facts and would be assumed to be willing to assist that party" (Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 3d ed (Canada: LexisNexis Canada Inc, 2009) at §6.449).

[64] Fourth, although not determinative, it is noteworthy that Mr. Beauvais failed to plead the alleged payment of the $225,000.00 in his Statement of Defence. If the payment had in fact been made, one would have assumed that it would have been the centrepiece of any defence.

[65] Finally, the version offered by Mr. Beauvais is incredible in at least one respect. He claims that he sold cigarettes only to others on the Reserve. The ability of such a business (as opposed to a business that sold cigarettes to those who did not reside on the Reserve) to generate the type of cash that Mr. Beauvais claims to have earned is suspect.

[66] On the other side of the ledger, Mr. Robertson was unshaken in his version of events and to a certain extent his testimony was supported by Ms. Leduc , although much of her testimony rested on what Mr. Robertson had previously told her and thus cannot be considered to be independent corroboration.

[67] Thus, I find that Mr. Beauvais paid only $5,000.00 for the land, which through his own testimony is worth much more – at least $225,000.00, if not $350,000.00.

Did Mr. Robertson know he was signing Transfers in favour of Mr. Beauvais when he executed them?

[68] Given the foregoing finding, I also find that Mr. Robertson did not appreciate that he was signing Transfers in favour of Mr. Beauvais when he signed them on April 12th and that he did not appreciate what they were when he gave copies of them to Mr. Beauvais on April 13th. In this regard, I agree with counsel for Mr. Beauvais that the state of Mr. Robertson's knowledge is directly tied to the determination of whether the $225,000.00 was paid as it would make no sense for Mr. Robertson to have knowingly given the Transfers to Mr. Beauvais if he had not been paid.

[69] Mr. Robertson's claim of his inability to read is supported by Ms. Leduc's testimony and, to a certain extent, by the medical reports that were filed. In addition, all previous documents that Mr. Roberts signed were prepared by others, which likewise tends to indicate that he might not have been able to read the Transfers.

[70] Ms. Diabo's reaction of crying when she learned of the mistake also tends to corroborate Mr. Robertson's version of events, as Mr. Robertson and Ms. Leduc were upset enough on April 21st to make her cry. This is consistent with their only learning that day of the mistake and of a mistake having been made as, if Ms. Diabo did not believe Mr. Robertson had been legitimately mistaken, there would have been less reason for her to break down in tears.

[71] In addition, the fact that the documents were signed on the heels of the discussion about the right-of-way that upset Mr. Robertson makes it likely that he did not pay as much attention to what he was doing as he ought to have done when he signed the two Transfers.

[72] Finally, having had the opportunity to observe Mr. Robertson over the course of the day and a half during which he testified, I can well believe that he might have been confused when he signed the Transfers as, during the trial, he appeared to have some difficulty in understanding questions that were not that complex. Thus, I find that Mr. Robertson made a mistake when he signed the two Transfers in favour of Mr. Beauvais and did not appreciate their significance either when he signed them or when he handed them over to Mr. Beauvais.

[73] Counsel for Mr. Beauvais argues that I should not make this finding because it is unbelievable that Mr. Robertson would not have shown documents as important as the Transfers to Ms. Leduc and because Mr. Robertson admitted during cross-examination that he knew that normally only the transferor is required to sign a Transfer of Land document. While Mr. Robertson did make this admission, and while no good explanation was offered by either Ms. Leduc or Mr. Robertson for the failure to have Ms. Leduc look at the Transfers earlier – especially when she read or wrote everything else – neither of these matters is sufficiently strong for me to infer that Mr. Robertson knew what he was signing in light of the rest of the evidence. In short, given my finding that the $225,000.00 was not paid, it is not possible to infer that Mr. Robertson knowingly signed the Transfers or that he knowingly gave them to Mr. Beauvais as this is incompatible with his not having been paid for the land.

[74] I therefore find that Mr. Robertson signed the two Transfers in favour of Mr. Beauvais in error, that the verbal agreement Mr. Robertson and Mr. Beauvais made was for a purchase price of $350,000.00 and that Mr. Beauvais only paid $5,000.00 to Mr. Robertson but despite this retained the land and continued to occupy and then rent the garage.

Did the Council breach any duty it owed to Mr. Robertson?

[75] I turn next to Mr. Robertson's claim against the Council. He premises this claim on the assertion that the Council breached its fiduciary duties toward him in not ensuring the he understood the Transfers before he signed them and in not ensuring that the agreed-upon purchase price had been paid. Counsel for Mr. Robertson also suggested that the fact that the LMO forwarded the Transfers to AANDC on Thursday, as opposed to Friday, which is the day they typically send such documents to AANDC, should be viewed as demonstrating an intention on the part of the Council to deliberately act adversely to Mr. Robertson's interests, presumably by hastening the process for the issuance of Certificates of Possession in Mr. Beauvais' name.

[76] In my view, there is absolutely no basis to make any such finding nor to conclude that the Council breached its fiduciary obligations to Mr. Robertson. Generally speaking, a fiduciary is required to act in a manner consistent with the best interests of the party to whom the duty is owed and, more specifically, to avoid conflicts of interest (see e.g. *Annapolis Valley First Nations Band v Toney*, 2004 FC 1728, 267 FTR 186; *Wewayakai Indian Band v Chickite* (1998), [1999] 1 CNLR 14 (BCSC); *Blueberry Interim Trust, Re*, 2011 BCSC 769, [2011] BCWLD 6951; *Williams Lake Indian Band v Abbey*, [1992] 4 CNLR 21, [1992] BCWLD 1783 (BCSC)). The scope of the duty, however, does not extend so far as Mr. Robertson alleges because Ms. Diabo and Ms. Goodleaf, the two Council employees who interacted with Mr. Robertson, behaved reasonably.

[77] More specifically, there was no reason for them to have doubted Mr. Robertson's capacity to understand the Transfers, and Ms. Diabo followed the same procedure with Mr. Robertson that the LMO always adopted. Nor was there any need for the LMO to confirm that any

agreed-upon purchase price had been paid before accepting to register a Transfer of Land document. In short, I do not accept that the Council's duty to act in the best interest of band members requires it to chaperone band members through every step of the land transfer process. As for the suggestion that there is something sinister in the Transfers being sent to AANDC on a Thursday as opposed to a Friday, there is not a shred of evidence to support this assertion.

[78] I therefore find that the Council has not breached any duty it owes to Mr. Robertson and, accordingly, that the claim against the Council must be dismissed.

What remedies should be awarded?

[79] Turning, next, to consideration of the various remedies sought by Mr. Robertson in respect of the land and against Mr. Beauvais, it will be recalled that Mr. Robertson seeks several declarations, an order requiring Mr. Beauvais to return the land to him, damages equivalent to $4,500.00 per month from May 1, 2010 to the date Mr. Beauvais vacates the land, moral damages in the amount of $50,000.00, exemplary damages in the amount of $100,000.00, and an order for provisional execution notwithstanding appeal under article 547 of the CCP.

[80] Several of these claims raise complex issues concerning this Court's jurisdiction. In his interim ruling on a motion to strike this action for want of jurisdiction brought by Mr. Beauvais, my colleague, Justice Barnes, in 2011 FC 378 dismissed the motion, holding that it was not plain and obvious that there was no jurisdiction over the claims and referred the final determination of the extent of the Court's jurisdiction over the various claims made in the action to the trial judge. For the reasons set out below, I have determined that this Court does possess jurisdiction to award many of the remedies, including damages, sought by Mr. Robertson in this action.

i. What remedies are within this Court's jurisdiction to grant?

[81] In terms of the general scope of this Court's jurisdiction over claims made in an action, as the Supreme Court of Canada held in *ITO-International Terminal Operators v Miida Electronics*, [1986] 1 SCR 752, 28 DLR (4th) 641 [*ITO*] at para 12, three criteria must be satisfied for this Court to have jurisdiction over a matter:

1. there must be a statutory grant of jurisdiction by the federal Parliament;
2. there must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction; and
3. the law on which the case is based must be "a law of Canada" as the phrase is used in s. 101 of the *Constitution Act, 1867* (UK), c. 3.

[82] The case law also recognises that where this Court possesses jurisdiction under the foregoing criteria, but the *Federal Courts Rules*, SOR/98-106 [the Rules] or federal case law do not cover a subsidiary part of the claim, regard may be given to provincial law in the jurisdiction where the cause of action arose to fill the gap (see e.g. *ITO* at para 34; *Stoney Band v Canada (Minister of Indian & Northern Affairs)*, 2005 FCA 220 at paras 40-41, 74-75, [2006] 1 FCR 570; *St-Hilaire v Canada (Attorney General)*, 2001 FCA 63 at para 31, 204 DLR (4th) 103).

[83] The three criteria from the *ITO* case have been found to be satisfied in cases involving claims for a declaration regarding a defendant's trespass to land on an Indian reserve. More particularly, in *Roberts v Canada*, [1989] 1 SCR 322, 57 DLR (4th) 197 [*Roberts*], where one band sued another for trespass and the issue concerned which band had the rightful use and occupation of the reserve, the Supreme Court of Canada held that this Court had jurisdiction over the claim.

Writing for the Court, Justice Wilson first held that paragraph 17(3)(c)[1] (now subsection 17(4)) of the *Federal Courts Act*, RSC 1985, c F-7 [FCA] met the first branch of the *ITO* test. Section 17(4) of the FCA provides:

Conflicting claims against Crown	Demandes contradictoires contre la Couronne
(4) The Federal Court has concurrent original jurisdiction to hear and determine proceedings to determine disputes in which the Crown is or may be under an obligation and in respect of which there are or may be conflicting claims.	(4) Elle a compétence concurrente, en première instance, dans les procédures visant à régler les différends mettant en cause la Couronne à propos d'une obligation réelle ou éventuelle pouvant faire l'objet de demandes contradictoires.

[84] In dealing with this issue, Justice Wilson stated as follows at para 21 of *Roberts*:

> In my view, Hugessen J. took the right approach in analyzing s. 17(3)(c) itself in order to determine the scope of the jurisdiction conferred. As he pointed out, the section requires: a) a proceeding, b) to determine a dispute, c) where the Crown is or may be under an obligation, d) in respect of which there are or may be conflicting claims. Interpleader by the Crown would fit this description. Indeed, at first blush it is hard to envisage situations other than interpleader in which the requirements of s. 17(3)(c) will all be met. I believe, however, that the present case is one such situation. A proceeding is certainly involved to determine the dispute between the Plaintiff and Defendant Bands. The obligation owed by the Crown in this case results from the very nature of aboriginal title. This Court's most recent affirmation that the nature of the Indian interest in aboriginal lands is *sui generis* is found in *Canadian Pacific Ltd v Paul*, [1988] 2 SCR 654. As noted in *Guerin v The Queen*, [1984] 2 SCR 335, the obligation owed by the Crown in respect of lands held for the Indians is recognized in, although not created by, s. 18(1) of the *Indian Act*. The Crown must hold the land comprising Reserve No. 12 for the use and benefit of one of the Bands. The question is: which one? Finally, the case at bar falls within the wording of s. 17(3)(c) because

[1] Under the old s. 17(3)(c) of the FCA, the Federal Court had exclusive original jurisdiction. Under the current s. 17(4) of the FCA, this Court has concurrent original jurisdiction.

> the conflicting claims are undoubtedly in respect of the Crown's obligation. Each Band claims that the Crown, which holds the underlying title to the land, owes to it alone the obligation to hold the land for its exclusive use and occupancy.

[85] Justice Wilson went on to hold that the second and third branches of the *ITO* test were satisfied by the *Indian Act*, which sets aside Indian reserves for the use and occupancy of Indian bands, and by the common law of aboriginal title, which underlies the obligations of the Crown to Indian bands (at para 30).

[86] This Court applied *Roberts* in *Jones Estate v Louis*, 108 FTR 81, [1996] 3 CNLR 85 [*Jones Estate*], where Justice MacKay granted the plaintiff's action for declaratory relief with respect to possessory title to a lot on an Indian reserve. There, in a postscript to the decision, Justice MacKay, following the decision in *Roberts*, held that subsection 17(4) of the FCA grounded jurisdiction because the claim involved obligations of the Crown in relation to Indian people and the case involved a claim with respect to land on a reserve under the *Indian Act* in a situation where, like here, there were conflicting claims made as to entitlement to the land.

[87] Thus, this Court possesses jurisdiction over Mr. Robertson's claim for a declaration that he is entitled to possession of the two lots in question. Such a declaration, moreover, encompasses consideration of the effect of the previous rental agreement, of the terms of the verbal sale agreement, of the Certificates of Possession issued to Mr. Robertson and of the effect of the Transfers of Land signed by him. It also involves a determination that Mr. Beauvais is not in lawful possession of the lots, and, accordingly, not eligible to be issued Certificates of Possession by the Minister as subsection 20(2) of the *Indian Act* provides the Minister discretion to issue Certificates

of Possession only to Indians who are lawfully in possession of reserve lands. Thus, this Court does possess jurisdiction to issue the declaratory relief Mr. Robertson seeks in respect of his right to possess Lots 3-10 and 3-8-1.

[88] In terms of the request for injunctive relief, section 44 of the FCA provides this Court jurisdiction to grant an injunction on such terms as it deems appropriate in any case where it appears just and convenient to do so. Injunctions like that sought by Mr. Robertson have previously been granted by this Court (see e.g. *Abénakis de Wôlinak Band Council v Bernard* (1998), 160 FTR 13, 2 CNLR 51, in which Justice Blais (as he then was) ordered a defendant to vacate a house on an Indian reserve). Thus, the injunctive relief sought may likewise be granted.

[89] However, the situation is more complicated as concerns jurisdiction to award the damages claimed as the parties cited no authority on this point and the claims for damages depend to a large extent on provincial law.

[90] Although the issue does not appear to have squarely decided, there is authority which supports the conclusion that this Court does possess jurisdiction to award damages similar to those claimed by Mr. Robertson in this action as there are cases where similar damage awards have been made and there are also several decisions where this Court has declined to strike claims for damages made in connection with alleged wrongful possession of lands on an Indian reserve.

[91] In this regard, in *Watts v Kincolith Indian Band Council* (2000), 187 FTR 83, Prothonotary Hargrave found that the defendant band council had trespassed on the plaintiff's land on a reserve by constructing a radio antenna on land for which the plaintiff held a Certificate of

Possession. The prothonotary awarded the plaintiff damages for the trespass. In so doing, however, he did not discuss the Court's jurisdiction to make the requested remedial order as neither party appears to have raised the issue.

[92] Similarly, in *Hofer v Canada*, 2002 FCT 16, this Court assumed jurisdiction over a claim for damages related to a lease of reserve lands, but again the jurisdictional issue was not raised. There, the plaintiff, Mr. Hofer, a non-Indian farmer, claimed he had entered into an agreement to extend leases for reserve lands. Despite this, he was told that his lease permits had expired and was evicted. He tried to sue the band for damages for breach of contract with respect to the lease agreements but only two of the agreements were supported by a permit under s. 28 of the *Indian Act* (pursuant to which the Minister may grant a non-Indian the right to occupy reserve lands). In a preliminary decision, Justice Hugessen ruled that while the claim for damages might succeed with respect to the lands where permits had been issued under s. 28, the other agreements had no chance of success, and he accordingly struck those claims. The matter was subsequently resolved prior to trial.

[93] Thereafter, a band member who was set to lease land to Mr. Hofer sued the band for damages based on the loss of income from the lease. In *Gladstone v Blood Tribe*, 2004 FC 856, Justice Dawson assumed jurisdiction over the claim, dismissed it on the merits, but went on to conduct a provisional damages assessment. Although the Court assumed jurisdiction over the claim and provisionally adjudicated it on the merits, the jurisdiction of the Court to make a damages award was not specifically addressed.

[94] Thus, while the foregoing cases support the conclusion that I do possess jurisdiction to award the damages claimed, they deal with the issue only tangentially.

[95] In several other cases, this Court has refused to strike claims for damages related to occupation of lands on an Indian reserve. While these cases are not determinative of the jurisdictional issue as the test on a motion to strike is whether it is plain and obvious that a claim cannot succeed (see e.g. *Hunt v T & N plc*, [1990] 2 SCR 959, 74 DLR (4th) 321), these cases do provide some support for the conclusion that I do possess jurisdiction to award damages in this case.

[96] For example, in *Montana Band v Canada*, [1991] 2 FC 273, 44 FTR 183, aff'd [1993] 2 CNLR 134 (FCA), leave to appeal to SCC refused 155 NR 320 (SCC), a band sued the Crown for declaratory relief, an order for an accounting of the proceeds of the sale of the lands, damages and compensation for breach of fiduciary duty flowing from a decision to surrender reserve land to two adjacent bands. The Crown filed third party notices, joining the two other Indian bands and seeking contribution, indemnity, or relief over from the other bands. The third party bands brought a motion to strike the third party notice for want of jurisdiction. Justice Strayer dismissed the motion, holding that jurisdiction over the third party claim could be found in subsection 17(4) of the FCA.

[97] In a similar fashion, in *Paul v Kingsclear Indian Band* (1997), 148 DLR (4th) 759, 132 FTR 145, a married Indian couple obtained a Certificate of Possession as joint tenants for land on a reserve and built a residence there. They subsequently divorced. The man had been living outside the property for some years and no longer enjoyed physical access to the residence. He brought an

action against the Crown and the occupants of the residence for compensation for his contribution towards the construction costs of the family residence. The defendants (other than the Crown) brought a motion to stay the action for want of jurisdiction. Relying on *Roberts* and *Jones Estate*, Chief Justice Lufty dismissed the motion and held that it was not plain and obvious that the Court lacked jurisdiction as jurisdiction could well be rooted in s. 17(4) of the FCA.

[98] There are, however, cases going the other way. For example, in a relatively short decision in *Powless v Sandy* (1995), 95 FTR 57, 55 ACWS (3d) 1167, Justice Wetston dismissed a claim made by one member of an Indian band against another band member for return of monies paid under an agreement of purchase and sale with respect to reserve lands, holding that this Court lacked jurisdiction to hear a land dispute between two Indians regarding who had the right to ownership of lands on a reserve. However, he only considered section 17(2)(a) of the FCA (not section 17(4)) and made no mention of the Supreme Court decision of *Roberts*. The case also pre-dates the decision of Justice MacKay in *Jones Estate*.

[99] In *Lower Similkameen Indian Band v Allison* (1996), 111 FTR 199 [*Lower Similkameen Band*], the chief and councillor of an Indian band sued band members for trespass and conversion flowing from the claimed wrongful occupation of the band council's offices. Prothonotary Hargrave struck these claims, noting at para 17 that :

> Mr. Justice MacKay took a different but reconcilable view in *Jones Estate v. Louis*, an unreported decision of February 23, 1996, in Action T-1687-93 (Fed. T.D.). In that action the parties sought declaratory relief as to rights to a certain parcel of land located on Reserve lands. The Crown, in whom title to the Reserve was vested, was a party to the action and acknowledged the Court's jurisdiction to resolve the claims as to possessory title. Mr. Justice MacKay found that there was jurisdiction by reason of section 17(4) of the *Federal*

> *Court Act*, which confers jurisdiction on the Trial Division "... to hear and determine proceedings to determine disputes where the Crown is or may be under an obligation, in respect of which there are or may be conflicting claims.". He then pointed out the obligation concerned approval of possessory title to certain lands and of Indian lands and that the obligation arose in relation to Indian people, under the *Indian Act*, with regard to management of Indian lands. In the present instance, while the Plaintiffs may seek a declaration as to their proper election as Chief and Councillor, a claim for damages for trespass does not fit either within section 31 of the *Indian Act*, or within the framework of sections 17(2)(a) or 17(4) of the *Federal Court Act*.

[100] In that case, however, the Crown had not been named as a party and there was no issue concerning who was entitled to a Certificate of Possession under the *Indian Act*.

[101] In my view, the foregoing cases support the conclusion that I possess jurisdiction to award damages in this case both because the majority of them support this conclusion and because, on a principled basis, this conclusion flows from the decision of the Supreme Court in *Roberts*. In this regard, the claims for damages made by Mr. Robertson are accessory to and flow directly from a finding that Mr. Beauvais is not entitled to possess Lots 3-10 and 3-8-1. In other words, unlike the situation in *Lower Similkameen Band*, I am not faced with a stand-alone claim for trespass based on private civil law principles but, rather, with determining what remedies in addition to a declaration and injunction are appropriate to correct Mr. Beauvais' wrongful possession of the lots. The selection of the appropriate remedy is not a jurisdictional issue in my view because *Roberts* affords this Court subject matter jurisdiction over claims of wrongful possession of lands on an Indian reserve and, thus, plenary authority to remedy situations of wrongful possession. In short, the holding in *Roberts* is not limited to claims for declaratory relief but, rather, should be read as

grounding jurisdiction in this Court to grant all appropriate relief in cases where there is a dispute over entitlement to reserve lands in cases where the Crown is impleaded.

[102] To hold otherwise would cast an unwarranted burden on plaintiffs by requiring them to bifurcate their claims if they choose to invoke this Court's undoubted jurisdiction to grant declaratory and injunctive relief in cases such as the present. Proceeding in this fashion would also expose defendants to the costs of a second action before a provincial superior court and would result in duplicative proceedings, which are results that ought be avoided if at all possible. There are, therefore, sound policy reasons which likewise inform the determination that this Court possesses jurisdiction over damages claims like those made by Mr. Robertson in this case.

[103] I therefore find that I do possess jurisdiction to award the damages claimed. The fact that in so doing I may need to have regard to civil law principles or to the *Québec Charter* does not forestall this conclusion. In *ITO*, the Supreme Court determined that this Court may apply provincial law where the claim at issue, in pith and substance, falls within the Court's jurisdiction. Justice McIntyre, writing for the majority, held at para 34:

> The Federal Court is constituted for the better administration of the laws of Canada. It is not, however, restricted to applying federal law in cases before it. Where a case is in "pith and substance" within the Court's statutory jurisdiction, the Federal Court may apply provincial law incidentally necessary to resolve the issues presented by the parties: see *Kellogg Co v Kellogg*, [1941] SCR 242, 1 Fox Pat C 101, 1 CPR 30, [1941] 2 DLR 545 (SCC), where, in a case involving a dispute over patent rights, the effect of an employment contract had to be considered in the Federal Court, and see as well: *McNamara Construction (Western) Ltd v R*, where Laskin CJC suggested that the provincial law of contribution indemnity may be applied by the Federal Court where jurisdiction is otherwise founded on federal law.
>
> [emphasis added]

ii. What remedies should be awarded?

[104] Having determined that I possess jurisdiction to order the remedies sought, I turn now to consideration of what remedies ought to be awarded.

a) The parties' arguments

[105] Counsel for Mr. Robertson argues on the remedial issues that by mere virtue of the fact that his client has Certificates of Possession for the lots and that the Minister has not issued new ones to Mr. Beauvais, I should conclude that Mr. Robertson is entitled to all the remedies he seeks. He relies in this regard on *Jones Estate* where Justice MacKay found the plaintiff entitled to possession of the reserve land in that case because the Minister had not issued a Certificate of Possession to the defendant, who was relying on a transfer much like the ones signed by Mr. Robertson. In that case, Justice MacKay held that a Transfer of Land document does not cast a legally enforceable obligation on the transferor until the Minister approves the transfer due to the requirements of section 24 of the *Indian Act*. The section provides in relevant part that "no transfer or agreement for the transfer of the right to possession of lands in a reserve is effective until it is approved by the Minister".

[106] I agree with counsel for Mr. Robertson that due to section 24 of the *Indian Act*, Transfer of Land documents do not, of themselves, create legally enforceable obligations but disagree with his assertion that the Certificates of Possession that Mr. Robertson holds from AANDC must necessarily result in his being awarded the remedies he seeks. In this regard, Mr. Boucher testified that but for the intervention of counsel for Mr. Robertson, the Minister would have issued Certificates of Possession to Mr. Beauvais based on the Transfers signed by Mr. Robertson.

Correspondence from AANDC to counsel for Mr. Robertson moreover indicates that the Minister has referred to this Court the task of determining whether the Transfers are valid. It would therefore be entirely circuitous to avoid ruling on the terms of the contract between Mr. Beauvais and Mr. Robertson and on the validity of the Transfers by holding that Mr. Robertson is entitled to possession of the lots by virtue of the mere fact of holding Certificates of Possession for them. Rather, what is necessary is that I determine what the terms of the agreement were between Mr. Beauvais and Mr. Robertson, which I have done, and that I also determine the effect of the Transfers signed in error by Mr. Robertson.

[107] On this point, counsel for the defendants argue that Mr. Robertson cannot rely on his mistake in not appreciating the import of the Transfers because he is guilty of an "inexcusable error". Under the *Québec Civil Code*, a court may annul a contract if it finds that one of the contracting parties' consent was absent due to "error, fear or lesion" and the error was a material one, relating to the nature of the contract, the nature of its subject matter or any matter essential to valid consent having been given (arts. 1416, 1385, 1399 and 1400 CCQ). An "inexcusable error", however, cannot constitute a defect of consent under art. 1400 of the CCQ. In determining whether an error is inexcusable, the court must have regard to all circumstances present in the case and undertake an *in concreto* examination of the error. Factors to be taken into consideration include the age, the mental state, the intelligence and the professional or economic positions of the parties (Pierre-Gabriel Jobin & Nathalie Vézina, *Baudoin et Jobin: Les obligations*, 7th ed (Cowansville, Que: Yvon Blais, 2013) at 328). The primary question asked by the courts is whether there has been a high enough degree of negligence to characterize the error as inexcusable (in French, "une

négligence d'une certaine gravité") (see *Morin-Légaré c Légaré*, [2002] RJQ 2237 (QCCA) at para 58; *Lépine c Khalid*, [2004] RJQ 2415 (QCCA) at para 61).

[108] The behaviour of the co-contractant can also influence whether an error will be characterized as inexcusable. When there has been bad faith on the part of one party (for example misleading the other party or not providing information as required), an error that would otherwise have been inexcusable (such as not reading a contract) may be judged to be excusable (Jobin at 329).

[109] The failure to read a contract before signing it will usually be characterized as an inexcusable error, given that there is a general obligation to inform oneself before entering into contracts (see e.g. *Corporation First Capital (Carrefour Don Quichotte) inc c Massé*, 2008 QCCS 4080 at para 62). However, not having read the contract will not always lead to a finding of inexcusability, and courts will conduct an analysis based on the context, looking to factors such as the experience of the person committing the error and the relationship between the contracting parties.

[110] For example, in *Gingras Jacques Lajoie et Associés ltée c 9081-7263 Québec inc*, [2003] JQ no 18944 at para 37, the Court of Québec noted that the applicant was a young person with little business experience who had developed good relations with and therefore trusted the defendant. He also asked questions about the contract before he signed it but did not read it. The Court held his error was excusable in the circumstances. To somewhat similar effect, in *Banque nationale du Canada c Marcoux*, [1999] JQ no 174, the Superior Court of Québec annulled the

contract based on excusable error even though the applicant had failed to read the contract before signing, citing the applicant's blind faith in the bank, where she had been a client for many years.

[111] Here, I believe the concept of inexcusable error has no application for two reasons.

[112] First, the doctrine applies to contracts, but Transfer of Land documents do not constitute a contract and are not equivalent to deeds. Rather, these documents must be considered as only evidence of intention to transfer land. As noted, they do not have any legal force as was held in *Jones Estate*. Thus, the terms of the contract between Mr. Robertson and Mr. Beauvais are to be determined by what they agreed to. Here, as I have found, the terms of the contract were for a purchase price of $350,000.00, which implies that the land would be transferred only after the purchase price was paid. Thus, the fact that Mr. Robertson signed the Transfers without reading them does not bar him from relief.

[113] Second, even if the doctrine of inexcusable error were to apply, I do not accept that Mr. Robertson's error is inexcusable in light of all the pertinent facts. At the time of signing the Transfers, Mr. Robertson was 70 years old and likely distracted due to the discussion about the right-of-way. He has difficulty reading. While he previously operated a garage and second hand car business, most of the administrative tasks were done by Ms. Leduc and there is nothing before me to indicate any degree of sophisticated business knowledge on the part of Mr. Robertson. Indeed, my observations of him were to the opposite effect. In addition, given my factual findings, it is clear that Mr. Beauvais is seeking to profit from Mr. Robertson's error and that Mr. Robertson genuinely

did not appreciate that the documents he signed purported to record his intention to transfer the lots to Mr. Beauvais. In light of these facts, I believe Mr. Robertson's error was excusable.

b) Declaratory and injunctive relief

[114] Having dealt with the parties' remedial arguments, I turn now to consideration of what remedies I should award. In terms of the requested declarations, I believe only one is necessary, namely, a declaration that Mr. Robertson is lawfully entitled to possession of Lots 3-10 and 3-8-1. As already discussed, in light of this determination, it is not possible for the Minister to issue Certificates of Possession in favour of Mr. Beauvais and has already issued them in favour of Mr. Robertson.

[115] I also believe it appropriate to issue a mandatory order recognising Mr. Robertson's possessory rights, but given that tenant(s) were occupying the garage as at the date of the trial and are likely still doing so, these tenant(s) should be given the opportunity to negotiate for continued possession with Mr. Robertson. I have therefore ordered that from the date of this judgement, forward, the current tenant(s) of Lots 3-10 and 3-8-1 shall pay rent to Mr. Robertson as opposed to Mr. Beauvais and I will leave it to Mr. Robertson and the current tenant(s) to determine if and on what terms the lease of the garage will continue.

c) Compensatory damages

[116] As concerns compensatory damages, Mr. Robertson claims as against Mr. Beauvais lost rent, equivalent to $4,500.00 per month from May 1, 2010 to the date of judgment. There is evidence before me to support damages in this amount from May 1, 2010 until early 2011, when

Mr. Beauvais ceased operating his cigarette manufacturing business in the garage as the rent previously paid by Mr. Beauvais to Mr. Robertson was $4,500.00 per month. No evidence was tendered as to the exact date of the dissolution of the cigarette business, but the evidence does show it was in operation from May 1, 2010 to December 31, 2010, a period of eight months.

[117] Therefore, an amount of $36,000.00 in respect of this period is appropriate, subject to the adjustments discussed below.

[118] In terms of the period from January 2011 to present, the evidence does not allow me to quantify the damages Mr. Robertson suffered as no evidence was tendered regarding when the current tenant(s) began renting the premises. Nor is there evidence as to the amount of rent paid by those tenant(s) to Mr. Beauvais over this period, and there is no reason to assume that it is $4,500.00 per month. In addition, Mr. Beauvais testified that he made substantial improvements to the garage, spending at least $50,000.00 on them. Mr. Robertson is not entitled to benefit from these improvements without compensating Mr. Beauvais for them. Finally, $5000.00 must be deducted form the damages to account for the deposit that I have found Mr. Beauvais paid Mr. Robertson.

[119] In the circumstances, I believe the most just and expedient manner of finalizing assessment of the quantum of compensatory damages would be to allow Mr. Robertson and Mr. Beauvais an opportunity to settle the amount in accordance with the following directions. The quantum should be equal to $31,000.00 plus the amount of monthly rent paid by the tenants to Mr. Beauvais multiplied by 38.13 months (the period from January 1, 2011 to the date of this Judgment) less the value of the improvements made to the property by Mr. Beauvais. In the event Mr.

Robertson and Mr. Beauvais cannot settle what this amount is, either may request that the matter be returned to me to settle by way of reference under Rule 153 of the Rules.

d) Moral damages

[120] Mr. Robertson next claims moral damages from both Mr. Beauvais and the Council in the amount of $50,000.00, each. Moral damages, broadly speaking, are meant to address the non-pecuniary loss or pain and suffering that may be experienced by a plaintiff due to the fault of a defendant. While moral damages have been awarded for wrongful retention of real estate (see e.g. *Beaulieu v Vaillancourt*, EYB 2006-108100 (QCSC); *Lee c Leung*, 2010 QCCS 1538, EYB 2010-172586), I do not find it appropriate to make any award in this case because Mr. Robertson called virtually no evidence regarding the moral prejudice he claims to have suffered as a result of his being deprived of the garage. In this regard, no medical evidence was tendered and, at best, Ms. Leduc and Mr. Robertson testified only that Mr. Robertson might have been somewhat depressed by the situation and was not able to engage in the full range of leisure activities he had previously enjoyed due to lack of funds. In my view, this testimony falls short of establishing the sort of prejudice required to establish entitlement to moral damages and I therefore make no award of damages under this head.

e) Exemplary damages

[121] Mr. Robertson finally claims exemplary damages against Mr. Beauvais and the Council in the amount of $100,000.00, each. Punitive damages may be awarded under either art. 1621 of the *Québec Civil Code* or section 49 of the *Québec Charter* for an unlawful or intentional interference

with one of the rights guaranteed by the *Québec Charter*. Among these rights is the right to the peaceful enjoyment and free disposition of property enshrined in section 6 of the *Québec Charter*.

[122] As I have found that the Council did not breach any fiduciary duty it owes to Mr. Robertson, no exemplary damages against the Council are warranted.

[123] As concerns the claim for exemplary damages against Mr. Beauvais, the case law interpreting section 49 of the *Québec Charter* recognizes that exemplary damages are appropriately awarded where the defendant deliberately seizes and refuses to return the plaintiff's property (see e.g. *Markarian c Marchés mondiaux CIBC inc*, 2006 QCCS 3314; *Investissements Historia inc v Gervais Harding et ass inc*, JE 2006-955 (QCCA); *Pearl v Investissements Contempra ltée*, [1995] RJQ 2697 (SC); *Bilodeau v Dufort*, REJB 2000-16738 (SC)).

[124] Here, Mr. Beauvais deliberately and wrongfully retained possession of Lots 3-10 and 3-8-1 because, as I have found, he refused to pay Mr. Robertson the agreed-upon purchase price and refused to return the land to Mr. Robertson. In somewhat similar cases, damages in the range of approximately $3,000.00 to $10,000 have been awarded (see e.g. *Aubry v 3370160 Canada inc*, JE 2001-908 (CQ); *Ghaho c Germain*, 2013 QCCS 2604; *Paquin v Le Territoire des Lacs inc*, REJB 2002-38037 (SC)).

[125] I find that, in this case, the sum of $5,000.00 is appropriate, given the nature of the transgression and the respective circumstances of Mr. Beauvais and Mr. Robertson.

f) Provisional execution notwithstanding appeal

[126] As concerns the request for an order for provisional execution notwithstanding appeal under art. 547 of the CCP, those provisions are inapplicable to actions before this Court as the Rules deal comprehensively with this issue. In this regard, Rule 392 provides that as an order is effective from the time that it is endorsed in writing and signed, unless it states otherwise, and Rule 398 governs the process to obtain the stay of an order pending appeal, which requires the defendant to seek a stay. Thus, there is no basis for making the order sought by Mr. Robertson under this provision.

Interest and costs

[127] Turning, finally, to the issues of interest and costs, in closing submissions, counsel for Mr. Robertson requested an order for interest on the damages awarded. However, he made no such claim in the Statement of Claim. I therefore decline to award interest.

[128] In terms of costs, they shall follow the event and, as the case was of average complexity, shall be based on the mid-range of Column III of Tariff B to the Rules. Thus, based on this column in the Tariff, Mr. Beauvais should compensate Mr. Robertson for his costs, and Mr. Robertson, in turn, shall compensate the Council for its costs. There is no basis for an award of solicitor-client costs in this case.

[129] In the event the parties cannot agree as to the quantum of costs, they may file written submissions of no more than 15 pages, each, on the issue within 30 days of the date of judgment.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The plaintiff is lawfully entitled to possession of Lots 3-10 and 3-8-1 on the Kahnawake Indian Reserve;

2. The current tenant(s) (if any) of Lots 3-10 and 3-8-1 on the Kahnawake Indian Reserve shall pay rent to the plaintiff at their current rate, until such a time that the plaintiff and the current tenant(s), should they wish, reach a new agreement;

3. The plaintiff and Mr. Beauvais shall attempt to settle the amount of compensatory damages owed by Mr. Beauvais to the plaintiff in accordance with the following directions. The quantum shall be equal to $31,000.00 plus an amount equal to the monthly rent paid by the tenant(s) of Lots 3-10 and 3-8-1 to Mr. Beauvais for 38.13 months, less the value of the improvements made to the lots by Mr. Beauvais. In the event the plaintiff and Mr. Beauvais cannot settle the amount of compensatory damages payable, either may request that the matter be returned to me to settle by way of reference under Rule 153 of the Rules;

4. Mr. Beauvais shall pay the plaintiff exemplary damages in the amount of $5,000.00;

5. Mr. Beauvais shall pay the costs of the plaintiff in accordance with the mid-range of Column III of Tariff B to the Rules, and the plaintiff shall pay the costs of the Mohawk Council of Kahnawake in accordance with the mid-range of Column III of Tariff B to the Rules. In the event the parties cannot agree as to the quantum of costs, they may file

written submissions of no more than fifteen (15) pages each on this issue within thirty (30) days of the date of this judgment.

"Mary J.L. Gleason"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

Docket:	T-1236-10
STYLE OF CAUSE:	CHARLES ROBERTSON v KYLE BEAUVAIS AND MOHAWK COUNCIL OF KAHNAWAKE AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Montréal, Quebec
DATES OF HEARING:	OCTOBER 21, 22, 23, 24 AND 25, 2013
REASONS FOR JUDGMENT AND JUDGMENT	GLEASON J.
DATED:	March 4, 2014

APPEARANCES:

Mr. John Seymour Glazer	FOR THE PLAINTIFF
Mr. Joesph Elfassy Mr. Frédérick Pinto	FOR THE DEFENDANT KYLE BEAUVAIS
Mr. R. Alexandre Janin	FOR THE DEFENDANT MOHAWK COUNCIL OF KAHNAWAKE

SOLICITORS OF RECORD:

Mr. John Seymour Glazer Leithman and Glazer Advocates Montréal (Québec)	FOR THE PLAINTIFF
Mr. Joseph Elfassy Elfassy, Rose Barristers & Solicitors Montréal (Québec)	FOR THE DEFENDANT KYLE BEAUVAIS
Mr. Alexandre Janin Attorney Gasco Goodhue St-Germain, L.L.P. Montréal (Québec)	FOR THE DEFENDANT MOHAWK COUNCIL OF KAHNAWAKE