Federal Court  Cour fédérale

**Date: 20200109**

**Docket: T-449-00**

**Citation: 2020 FC 25**

**Ottawa, Ontario, January 9, 2020**

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

**BETWEEN:**

**NEAL ROTHERHAM AS THE ADMINISTRATOR OF THE ESTATE OF DOREEN DUMAIS, VERA DUMAIS, LENA DUMAIS, LORNA-MARIE DUMAIS, NANCY YARMUCH, CHRISTOPHER DUMAIS, CECILE WILBERG, WILLIAM DUMAIS, CHRISTINA DUMAIS, AND PHYLLIS DUMAIS, AS THE ADMINISTRATOR OF THE ESTATE OF JOSEPH DUMAIS**

**Plaintiffs**

**and**

**HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT, THE KEHEWIN BAND, AND THE KEHEWIN BAND COUNCIL**

**Defendants**

**ORDER AND REASONS**

## I. Overview

[1] This is a motion for default judgment by members of an Indian band against the band and band council.

[2] The action arises from the historical gender discrimination that existed against women with registered Indian status under the enfranchisement, or "marrying out", provisions of the *Indian Act*, SC 1956, c 40 [*Indian Act*, 1956]. These enfranchisement provisions deprived generations of Aboriginal women and their descendants of Indian status and band membership based on their marriages to men who did not have Indian status. Enfranchised women and their children, including the Plaintiffs, were alienated from their families and home communities and deprived of access to their language and culture; they faced discrimination in their communities.

[3] In 1985, *An Act to Amend the Indian Act*, SC 1985, c 27, also known as Bill C-31, amended *Indian Act*, 1956 to be consistent with section 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. Bill C-31 automatically restored band membership to the women who had lost their Indian status directly through enfranchisement [Acquired Rights Individuals].

[4] The Plaintiffs, Neal Rotherham, as the Administrator of the Estate of Doreen Dumais, Vera Dumais, Lena Dumais, Lorna-Marie Dumais, Nancy Yarmuch, Christopher Dumais, Cecile Wiberg, William Dumais, Christina Dumais, and Phyllis Dumais, as the Administrator of the

Estate of Joseph Dumais [together, the Plaintiffs] are or represent Acquired Rights Individuals who are, by law, members of the Kehewin Band.

[5] The Defendants, the Kehewin Band and Kehewin Band Council [together, Kehewin], refused to recognize Bill C-31 or accept any Acquired Rights Individuals or their children as band members.

[6] As a result, the Plaintiffs commenced the underlying action in 2000 seeking declaratory relief and damages against Kehewin and Her Majesty the Queen in Right of Canada, as represented by the Minister of Indian Affairs and Northern Development [Canada] [together, the Defendants]. The Plaintiffs claim the Defendants owed a fiduciary duty towards them to ensure the provision of monies and other benefits properly payable or accruing to their benefit as members of the Kehewin Band, and that the Defendants breached their duty.

[7] In 2012, after Kehewin's Statement of Defence was struck, the Plaintiffs sought default judgment against Kehewin on the discrete issue of entitlement to band membership pursuant to Rule 210 of the *Federal Courts Rules*, SOR/98-106 [*Rules*]. The Court granted the Plaintiffs' motion, declaring their entitlement to membership in the Kehewin Band.

[8] The Plaintiffs now seek default judgment for damages resulting from Kehewin's discrimination and associated denial of all tangible and intangible benefits of band membership. The action against Canada has been held in abeyance pending disposition of the present motion.

[9] For the following reasons, I must regrettably dismiss the Plaintiffs' motion, not on the merits of their grievances against Kehewin, but rather because this Court has no jurisdiction to entertain them.

## II. Background

[10] It is important to consider the context in which the action was brought before turning to the issue of this Court's jurisdiction to grant the relief requested. The affidavit evidence filed by the Plaintiffs in support of the present motion is reliable and sufficient to make the following findings.

[11] Christina Dumais (née Gladue) (now deceased), a status Indian, married Francis Dumais, a non-status Indian. Christina Dumais lost her Indian status along with the Indian status of the children she had during the marriage as a result of paragraph 12(1)(b) of the *Indian Act, 1956*.

[12] Christina Dumais and Francis Dumais had several children: before marrying, they had William Dumais and Joseph Dumais (now deceased); and after marrying, they had Nancy Yarmuch (née Dumais), Lena Dumais, Lorna-Marie Dumais, Doreen Dumais (now deceased), Christopher Dumais, Cecile Wiberg (née Dumais), Vera Dumais and Patrick Dumais.

### A. *Facts Giving Rise to the Action*

[13] In 1984, Kehewin attempted to take control of its membership lists through *Kehewin Law #1*. At that time, Bill C-31 had not received royal assent and there were no provisions permitting Kehewin to take control of its membership lists. Canada therefore issued an Order of Disallowance

regarding *Kehewin Law #1*. Kehewin was advised that *Kehewin Law #1* would not be approved in any event because it failed to recognize the membership rights of Acquired Rights Individuals.

[14] Bill C-31 provided bands with the option of taking control of their membership lists following the approval of a membership code by the (then) Minister of Indian Affairs and Northern Development. Bands that failed to take control of their membership lists through the Bill C-31 process by June 28, 1987 remained subject to the membership rules in the *Indian Act*, RSC 1985, c I-8 [*Indian Act*]. Those rules required bands to treat Acquired Rights Individuals as members of the bands.

[15] Kehewin made no attempt to resubmit *Kehewin Law #1* or another membership code once Bill C-31 came into force. Kehewin received reminders from the (then) Department of Indian Affairs and Northern Development [DIAND] about the impending June 28, 1987 deadline to submit a membership code for approval. Kehewin maintained its opposition to Bill C-31 and did not regard the deadline as having any application to its membership laws. Therefore, Kehewin never formally took control of its membership lists.

[16] Kehewin rebuffed all attempts to restore membership to the Plaintiffs, refusing to comply with Bill C-31 or recognize Canada's authority.

[17] In May 1987, the Kehewin Band Council passed a Band Council Resolution asserting its opposition to Bill C-31 as "a law imposed unilaterally by the Federal Government which blatantly

violates and derogates from our inherent and treaty right to decide our citizenship". The Band Council Resolution stated Kehewin's membership laws were not subject to the laws of Canada.

[18] Once Bill C-31 came into force, women who "married out" were restored as status Indians, and any children of those women and their non-status Indian husbands could also be registered as Indians pursuant to section 6 of Bill C-31.

[19] Bill C-31 also restored band membership to those women. Bands were required to accept those Acquired Rights Individuals back into their membership. Though several bands challenged that requirement, none of those challenges proved successful.

[20] Despite taking the position that it was not subject to the provisions of the *Indian Act*, Kehewin used mechanisms under the *Indian Act* to protest the addition of the Acquired Rights Individuals to the DIAND membership lists. Kehewin demanded the officer in charge of the Indian Register and the Band Lists maintained by DIAND (the Registrar) refrain from adding names to Kehewin's Band Membership list, stating:

> Kehewin Citizenship Law is valid under Treaty and under Traditional Law. The Minister cannot disallow Kehewin Law under the new amendments to the Indian Act as our law was in place prior to its introduction. Consequently, you are improperly acting in your administrative capacity. Your power and the Minister's power is circumscribed by the rule of law.

[21] All of Kehewin's protests, including those against the Plaintiffs' membership, were rejected by DIAND. While Kehewin was aware of its right to appeal the results of their protests to the Alberta Court of Queen's Bench, Kehewin chose not to exercise that right.

[22] Kehewin also failed to file an action or application to challenge the constitutionality of Bill C-31. Kehewin simply ignored Bill C-31.

[23] Christina Dumais, William Dumais and Joseph Dumais were all restored to Kehewin Band membership as Acquired Rights Individuals from the date of their reinstatement to registered Indian status. The remaining Plaintiffs were immediately reinstated to registered Indian status under subsection 6(2) of the *Indian Act*. After Kehewin failed to take control of its membership lists by June 28, 1987, the remaining Plaintiffs also became Acquired Rights Individuals with a right to Kehewin Band membership pursuant to subsection 11(2) of the *Indian Act*. As explained below, the Plaintiffs' dates of reinstatement to Kehewin Band membership were confirmed by this Court on December 31, 2012.

[24] Kehewin refused to recognize any Acquired Rights Individuals as Kehewin Band members. Kehewin's adoption and application of their *Kehewin Law #1* made it impossible for individuals reinstated to registered Indian status or Kehewin Band membership under Bill C-31 to qualify for Kehewin Band membership.

[25] Moreover, during his examination for discovery, Kehewin's representative, Chief Eric Gadwa, confirmed Kehewin would not consider applications from Acquired Rights Individuals for Kehewin Band membership because they were considered ineligible.

[26] Kehewin was provided with copies of the DIAND membership lists, which included the Plaintiffs. Kehewin chose instead to use a version that excluded "Bill C-31 Members" as confirmed by Chief Gadwa:

> Q: So, and I just want to be sure that I am completely understanding this, Chief Gadwa. So if a person was reinstated under Bill C-31 but one of their parents was not a treaty Indian, it wouldn't matter how well they knew the Cree language, it wouldn't matter how many people they were related to in the Kehewin community, it wouldn't matter if they had a very full knowledge of the Cree culture, and the Kehewin culture, they still couldn't be members under Kehewin's law, is that right?
>
> A: Right

[27] The evidence is clear that Kehewin maintained its objection to the recognition of Bill C-31 Members as members of the Kehewin Band and refused to provide membership benefits to Bill C-31 Members. In particular, Kehewin opposed payments of per capita distributions and treaty payments to Bill C-31 Members. Kehewin refused to consider applications for housing from them, refused to provide them with post-secondary education funding and failed to make them aware of alternate sources of funding, refused to allow them the right to vote, refused to provide them Christmas benefits, and refused to offer them employment opportunities.

[28] Canada made some supplementary funding available to bands after the implementation of Bill C-31 to assist the bands in accommodating the return of Bill C-31 Members. The available supplementary funding included funding for housing and post-secondary education. Kehewin refused to access the funding because it did not want to have to accept Bill C-31 Members.

B. *Statement of Claim and Particulars*

[29] On March 3, 2000, the underlying action was commenced by way of Statement of Claim by three named plaintiffs: Doreen Dumais, William Dumais and Phyllis Dumais as the Administrator of the Estate of Joseph Dumais. The Statement of Claim was amended numerous times over the years.

[30] In summary, the Plaintiffs claim Canada owed a fiduciary duty to the Plaintiffs, arising from the Plaintiffs' status as Aboriginal persons, to ensure the provision of monies and other benefits properly payable or accruing to the benefit of the Plaintiffs as a result of their status as Kehewin Band members or Indian status or both, "as the Kehewin Band membership list is under the control of Canada pursuant to section 9 of the Indian Act." The Plaintiffs claim Kehewin owed a similar fiduciary duty to them.

[31] The Plaintiffs claim the Defendants refused them, or failed to ensure that they received, the monies or other benefits of Kehewin Band membership or Indian status or both. Kehewin Band members received a range of benefits: (1) the benefit of Kehewin capital fund expenditures and per capita distributions; (2) housing benefits and related services; (3) Christmas benefits; (4) funding for children's school expenses and daycare costs; (5) tax exemptions; (6) on-reserve health services and supplementary benefits; (7) funding and courses for employment, career training and economic development; (8) funding for educational upgrading and post-secondary education benefits; (9) the right to vote and participate in local government; (10) occasional monetary and other supports; and (11) the intangible benefits of Kehewin Band membership.

[32] The Plaintiffs claim Kehewin's actions towards them constitute discrimination under subsection 15(1) of the *Charter* on the grounds of sex, Aboriginality-residence, Aboriginality-status and family status. The Plaintiffs allege Kehewin refused them monies and benefits because of their mother's Indian status or reinstatement under Bill C-31 or their own reinstatement under Bill C-31.

[33] The Plaintiffs further claim the Defendants have been unjustly enriched as a result of their failure to ensure that the Plaintiffs receive the monies or other benefits owed to them.

[34] The Plaintiffs seek a declaration that the Defendants violated the Plaintiffs' rights under ss. 15(1) of the *Charter* and damages under section 24 of the *Charter* and/or restitution equal to the amount of monies and/or benefits lost, with interest. They also seek a declaration that the Defendants breached their fiduciary duties to the Plaintiffs and damages and/or restitution for breach of fiduciary duty and/or unjust enrichment, with interest.

[35] The Plaintiffs later amended their pleading to seek punitive damages to address Kehewin's high-handed and malicious treatment of them as Bill C-31 Members and to address Kehewin's ongoing disregard for the laws of Canada and orders of this Court.

C. *Default by Kehewin*

[36] The action moved forward by fits and bounds for almost a decade. Throughout this period, Kehewin engaged in a deliberate and systematic pattern of delay, using all possible means to frustrate the Plaintiffs' efforts to conduct an orderly and complete discovery. In particular,

Kehewin: (1) failed to attend scheduled dates for examination for discovery; (2) sent an uninformed or unprepared witness for discovery; (3) did not comply with a deadline for filing affidavits of documents; (4) delayed in providing answers to undertakings and ultimately failed to provide answers to numerous undertakings; (5) failed to respond to its own counsel's request for instructions; (6) changed counsel just before a Court-imposed deadline, further delaying progress on the file; and (7) delayed in paying Court-ordered costs.

[37] Kehewin snubbed its nose at deadlines fixed by the Court, as was noted in an Order dated December 12, 2007:

> When viewed in isolation, the various transgressions of the Kehewin Defendants over the past three years in complying with their discovery obligations appear benign. However, in the past year, a pattern of willful indifference and/or resistance to deadlines and orders of this Court on the part of the Kehewin Defendants has emerged. As a result of the Kehewin Defendants' lackadaisical approach to the litigation, the Plaintiffs have been wholly frustrated in conducting an orderly and meaningful examination for discovery. More concerning, the Kehewin Defendants effectively flouted the Order issued on July 27, 2007 by producing a representative who was unprepared and had no knowledge of the central issues in the litigation.

[38] The Plaintiffs moved on three separate occasions to strike Kehewin's pleadings based on Kehewin's lack of compliance with and respect for the Court's process. The first two motions were dismissed in order to afford Kehewin the opportunity to remedy its default and comply with its discovery obligations. In the face of Kehewin's continued defiance, the Plaintiffs' third application to strike Kehewin's Statement of Defence was granted by Order dated November 6, 2009.

D. *Motion for Partial Relief*

[39] Upon the Kehewin's Statement of Defence being struck, the Plaintiffs moved for partial relief against Kehewin, seeking the following declarations. First, that the Plaintiffs were entitled to band membership. Second, that the Plaintiffs be reinstated to the Kehewin Band membership with retroactive effect. Third, that their names be restored to all versions of the Kehewin Band's membership lists, including membership lists consulted for the purposes of voting and membership benefits.

[40] By Judgment dated December 31, 2012, Mr. Justice Michael Manson granted the relief requested. No appeal was taken from the Judgment.

E. *Present Motion for Default Judgment*

[41] The present motion is the second phase of the default proceedings in this action. The Plaintiffs seek an assessment of damages resulting from Kehewin's discrimination and associated denial of all tangible and intangible benefits of band membership to the Plaintiffs.

[42] Rule 184 of the *Rules* provides that allegations that are not admitted in a pleading are deemed to be denied. As a result, the Plaintiffs' allegations which are set out in their Statement of Claim, as amended, remain allegations, without evidence of their truth or correctness, absent the filing of an affidavit: *Chase Manhattan Corp v 3133559 Canada Inc*, 2001 FCT 895.

[43] The Plaintiffs filed fourteen affidavits and almost 3,000 pages of evidence in support of their motion. The affiants were not cross-examined on their affidavits and their evidence stands unchallenged.

[44] The motion was initially brought in writing pursuant to Rule 369 of the *Rules*. Given the volume of material filed and the number and complexity of issues raised by the Plaintiffs, the motion was set down for an oral hearing. After hearing from counsel for the Plaintiffs and Canada on the assessment of damages, the matter was adjourned to allow the Plaintiffs to make further written submissions regarding limitation periods and costs. Plaintiffs' counsel was also directed to submit a draft judgment to give effect to the reasons given orally at the hearing confirming Kehewin's liability and quantifying the Plaintiffs' damages, including *Charter* damages.

[45] After reviewing the Plaintiffs' further submissions, it became apparent that the matter of this Court's jurisdiction to grant the relief claimed by the Plaintiffs had never been addressed. The Plaintiffs and Canada were directed to serve and file further written submissions, on notice to Kehewin, regarding this Court's jurisdiction to grant damages, including damages pursuant to s. 24 of the *Charter*, and other equitable relief against Kehewin. While Canada initially took no position on the matter, at the Court's request, it agreed to provide written representations on the applicable law.

[46] At the Plaintiffs' request, a second hearing was held to hear submissions of counsel for the parties, including Kehewin, which were confined to the issue of the Court's jurisdiction.

## III. Jurisdiction

### A. *Jurisdiction of the Federal Court*

[47] The applicable test to establish this Court's jurisdiction is set out by the Supreme Court of Canada in *ITO-Int'l Terminal Operators v Miida Electronics*, [1986] 1 SCR 752 (SCC) [*ITO*] at 766:

> 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.
>
> 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 (U.K.), c. 3.

#### (1) Whether there is a statutory grant of jurisdiction by the federal Parliament

[48] It is common ground that, as a statutory court, the Federal Court is without inherent jurisdiction. The role of this Court is constitutionally limited to administering federal law: *Windsor (City) v Canada Transit Co*, 2016 SCC 54 at para 34 [*Windsor*]. In *Windsor*, the Supreme Court of Canada concluded that the *ITO* test "is designed to ensure the Federal Court does not overstep this limited role" (see also *Ordon Estate v Grail*, [1998] 3 SCR 437 at 474; see also *Côté c R*, 2016 FC 296 at para 7 [*Côté*]).

[49] The Plaintiffs concede there is no specific federal legislation that grants jurisdiction to the Federal Court to adjudicate upon the existence or extent of any liability owed by an Indian band

to its members in respect of membership benefits. However, they submit that a statutory grant of jurisdiction can be found under subsection 17(4) or paragraph 17(5)(b) of the *Federal Courts Act*, RSC 1985, c F-7 [FCA], or both, to deal with the *Charter* cause of action and associated relief in the default judgment application against Kehewin.

[50] In material part, section 17 provides:

| | |
|---|---|
| 17 (1) Except as otherwise provided in this Act or any other Act of Parliament, the Federal Court has concurrent original jurisdiction in all cases in which relief is claimed against the Crown. | 17 (1) Sauf disposition contraire de la présente loi ou de toute autre loi fédérale, la Cour fédérale a compétence concurrente, en première instance, dans les cas de demande de réparation 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. |
| (5) The Federal Court has concurrent original jurisdiction | (5) Elle a compétence concurrente, en première instance, dans les actions en réparation intentées: |
| […] | […] |
| (b) in proceedings in which relief is sought against any person for anything done or omitted to be done in the performance of the duties of that person as an officer, servant or agent of the Crown. | b) contre un fonctionnaire, préposé ou mandataire de la Couronne pour des faits — actes ou omissions — survenus dans le cadre de ses fonctions. |

[51] Kehewin submits this Court does not have the requisite jurisdiction to grant the relief claimed by the Plaintiffs under either provision of the FCA, regardless of the fact its Statement of Defence was struck.

[52] Canada, for its part, views ss. 17(4) of the FCA as the only possible source of the requisite federal statutory grant of jurisdiction in this action.

[53] The provisions of s. 17 of FCA relied upon by the Plaintiffs and the arguments of the parties are analyzed below. As explained below, the Plaintiffs have failed to satisfy the first branch of the *ITO* test.

(a) *Subsection 17(4) of the Federal Courts Act*

[54] The parties all rely on the decision of the Supreme Court of Canada in Roberts v Canada, [1989] 1 SCR 322 [Roberts], also reported as *Wewayakum Indian Band v Canada*, as the starting point for the interpretation of ss. 17(4) of the FCA. The issue in Roberts was whether the Federal Court of Canada (as it then was) had jurisdiction to hear the trespass action brought by the respondent Indian band against the appellant Indian band.

[55] The Supreme Court of Canada noted at p. 331 of *Roberts* that because the Federal Court was without any inherent jurisdiction such as that existing in provincial superior courts, the language of the *Federal Court Act*, RSC 1970 (2nd Supp), c 10 [*Federal Court Act*] was "completely determinative of the scope of the Court's jurisdiction."

[56] The Supreme Court of Canada held that paragraph 17(3)(c) of the *Federal Court Act* (now subsection 17(4) of the FCA) provided jurisdiction to the Federal Court over all claims where: (i) there is a proceeding; (ii) the proceeding is to determine a dispute; (iii) the Crown is or may be under an obligation; and (iv) that obligation is in respect of which there are or may be competing claims. The Court concluded that para. 17(3)(c) conferred the necessary jurisdiction over the claim of the respondent Indian band given that the proceeding involved a dispute that needed to be determined between the two bands and there were conflicting claims to an obligation owed by the federal Crown. A key factor was that each band claimed that the Crown, which held the underlying title to the land, owed to it alone the obligation to hold the land for its exclusive use and occupancy.

[57] Subsequent to *Roberts*, this Court and the Federal Court of Appeal considered the jurisdiction of the Federal Court in claims by individuals against First Nations, with Canada named as a co-defendant. These cases all turn on the first branch of the *ITO* test.

[58] In *Stoney Band v Stoney Band Council*, [1996] FCJ No 1113, 118 FTR 258 (FC) [*Stoney Band*], Mr. Justice Darrel Heald was dealing with an action brought by individuals on behalf of their band alleging that the band chief and council and Canada had breached their fiduciary and trust obligations in relation to logging operations on reserve. The plaintiff band members claimed that as a result of the breaches, they had suffered pecuniary loss and damages. Justice Heald held that ss. 17(4) of the FCA did not apply to the facts before the Court. In his analysis on this issue, Justice Heald found it significant that *Roberts*, which applied ss. 17(4)'s predecessor legislative provision, was decided at a time where the Federal Court had exclusive original jurisdiction over

the Crown. He dismissed the argument that because jurisdiction over a band council in a judicial review had been established in other cases, that jurisdiction could also apply in the action before the Court.

[59] Another case considering this Court's jurisdiction under ss. 17(4) of the FCA is *Hodgson v Ermineskin Indian Band No 942*, [2000] FCJ No 313, 180 FTR 285 (FC) [*Hodgson (FC)*]. In that case, Madam Justice Barbara Reed dismissed an appeal from a decision of Prothonotary John Hargrave denying the motion of the Ermineskin Indian Band No. 942 and the Ermineskin Band Council to strike out certain of the plaintiffs' claims against them. The plaintiffs' allegations in *Hodgson FC* are strikingly similar to those made by the Plaintiffs in the present case.

[60] The plaintiffs claimed the Crown and the Ermineskin defendants breached their fiduciary duties to all the plaintiffs by allowing deletion of their names from the Ermineskin Band Membership List or failing to add the names of those born after 1944 to the List. The plaintiffs claimed these breaches deprived them of the benefits of membership in the band. The plaintiffs sought declarations that they were members of the band and that they were entitled to receive benefits available to members of the band. They also claimed an accounting of all benefits they would be entitled to since 1944.

[61] The Ermineskin defendants moved to strike certain paragraphs of the statement of claim and portions of the prayer for relief on the basis that the Federal Court lacked jurisdiction over a claim for damages or equitable relief against them and that they had no fiduciary duty towards non-members. They also sought to clarify that the claim for monetary relief arising by way of

declarations of entitlement in the nature of benefits and for damages, interest and costs would be the responsibility of the Crown. Prothonotary Hargrave dismissed the motion to strike, finding that ss. 17(4) does not require a positive allegation in the statement of claim of a competing claim, but only that there may be competing claims flowing from the facts pleaded. On appeal, Justice Reed was not persuaded that it was plain and obvious that the Court was without jurisdiction to hear the claims that the Ermineskin defendants sought to have struck out. She concluded that the dispute over continuing authority (or potential fiduciary responsibility) over membership in the band gave rise to potentially conflicting obligations.

[62] The decision of Justice Reed was upheld by the Federal Court of Appeal in *Hodgson v Ermineskin Indian Band No 942*, [2000] FCJ No 2042, 102 ACWS (3d) 2, 193 FTR 158 (FCA) [*Hodgson (FCA)*], leave to SCC ref d [2001] SCCA No 67, 276 NR 193. While doing so, Mr. Justice Marshall Rothstein, speaking for the Court, expressed some reservations about the Federal Court's jurisdiction as follows:

> [5] While we are by no means confident that this Court has jurisdiction over the Plaintiffs' claims against the Ermineskin Defendants under section 17 of the *Federal Court Act*, we are not prepared to say that the Court's lack of jurisdiction is plain and obvious and beyond doubt. This is a case involving claims against an Indian band and band council as well as the Crown. While the Court clearly has jurisdiction in respect of judicial reviews of decisions of Indian band councils, jurisdiction in the case of actions against bands is far less clear. Insofar as the breach of fiduciary duty claim is concerned, the Band's argument that it has no fiduciary duty to non-members, while seemingly obvious at first blush, rests upon the Plaintiffs never having been members or being entitled to membership. It is not plain and obvious that, if the Plaintiffs or their ancestors were wrongly deleted or not added as members, there may not be some fiduciary duty owed to them.

[63] Similar doubts about the scope of this Court's jurisdiction under ss. 17(4) were raised in *Charlie v Vuntut Gwitchin First Nation*, 2002 FCT 344 [*Charlie*]. The plaintiff in that case was a disabled Aboriginal person who alleged he had been discriminated against by the Vuntut Gwitchin First Nation [Vuntut Gwitchin] and Canada, who had denied him any part in or information about a substantial settlement reached between the two parties. The agreement provided settlement funds to Vuntut Gwitchin from which they could supplement low incomes and fund education. The plaintiff alleged that Vuntut Gwitchin owed him various fiduciary duties and ought not to be permitted to retain that portion of the settlement benefits which should rightfully belong to him. He sought damages as well as remedies pursuant to s. 24 of the *Charter* for a breach of the equality rights guaranteed by s. 15.

[64] The Vuntut Gwitchin brought a motion to strike out the plaintiff's pleading for want of jurisdiction. Prothonotary Hargrave dismissed the motion based on the following reasoning:

> [25] From the pleadings the Crown clearly says, relying upon the 29 May 1993 final agreement, between the First Nation and the Crown, that it owes duties only to the Vuntut Gwitchin First Nation. The Vuntut Gwitchin Defendants say that any legal duties owed by the Crown are to the Defendant, Vuntut Gwitchin First Nation, and not to the Plaintiff. In effect all of the Defendants say that the Plaintiff should look to the Vuntut Gwitchin Defendants, for the Crown owes you nothing: anything the Crown does owe or any duty the Crown owes is to Vuntut Gwitchin First Nation. Yet the Plaintiff says, in his Further Amended Statement of Claim, that he is owed a fiduciary duty by the Crown including recompense for extinguishing his rights in a way which does not provide any consideration or benefit to him. This leads to the submission, and indeed this is also found in the prayer for relief, that the Plaintiff seeks damages from all of the Defendants [...]
>
> [26] All of this is perhaps a tenuous case, however, without extending section 17(4) of the *Federal Court Act* any further than has already been the case, it is an outside possibility. The case for Mr. Charlie, as against the Crown, is a difficult one, but I am unable to say that it is plainly, obviously and beyond doubt a

> claim which cannot succeed […] The Plaintiff s claim should not be terminated at this point but, on the pleadings, information and argument, which have been presented to me, the claim should be allowed to proceed on the basis of jurisdiction under section 17(4) of the *Federal Court Act.*

[65] The above cases were all decisions on motions to strike for lack of jurisdiction and do not involve a final determination on jurisdiction following a trial. While not binding on me, they are instructive.

[66] I take from these cases that the nature of the proceeding generally contemplated by ss. 17(4) is an interpleader. As stated by Madam Justice Bertha Wilson at paragraph 21 of *Roberts*: "at first blush it is hard to envisage other situations other than interpleader in which the requirements of s. 17(3)(c) will be met."

[67] Mr. Justice Marc Nadon, speaking on behalf the Federal Court of Appeal in *ING Bank NV v Canpotex Shipping Services Limited*, 2017 FCA 47, explained that the purpose of interpleader relief is to prevent a multiplicity of suits and to avoid double vexation against a person. Justice Nadon cited with approval the words of Mr. Justice Chong of the Singapore High Court in *Precious Shipping Public Company Ltd v OW Bunker Far East (Singapore) Pte Ltd*, [2015] SGHC 187 setting out his understanding of interpleader:

> [59] In other words, interpleader proceedings exist to assist applicants who want to discharge their legal obligations (to pay a debt, deliver up property etc.) but do not know *to whom* they should do so. […]
>
> [60] The applicant in an interpleader summons is caught between the devil and the deep blue sea — if he discharges his obligation to one claimant, he exposes himself to suit from the other. In such a situation, the relief of interpleader comes to his aid by compelling

> the real claimants to present their cases in order that the court can determine which one of the competing claimants has the legal entitlement to call on the enforcement of the applicant's admitted liability. The applicant, having disclaimed any interest in the subject matter of the dispute, "drops out" and is released from the proceedings (see *De La Rue* at 173). In other words, the object of an interpleader is the determination of the *incidence of liability*; *ie*, it serves to identify the person to whom the applicant is liable. It follows from this that interpleader relief is not available where the applicant is separately liable to both claimants (see *Farr v. Ward* [1837] 150 ER 1000) because there is no controversy in such a case: there are two obligations both of which the applicant is legally bound to discharge. [Emphasis in original.]

[68] The Plaintiffs submit that there are "competing claims" in the proceeding relating to the responsibilities to the Kehewin Band membership. On the one hand, Kehewin claims to control the membership list. On the other hand, the Crown claims it controls the membership list pursuant to section 11 of the *Indian Act*. I disagree.

[69] Prothonotary Hargrave was faced with a similar argument in *Shade v The Queen*, 2001 FCT 1067 [*Shade*], also reported as *Blood Band v Canada*. The proceedings involved, in broad terms, claims by various plaintiffs to riparian rights and to lands in southern Alberta. Relief was sought against both the federal Crown and the Province of Alberta. Prothonotary Hargrave concluded that the Court clearly was without a statutory grant of jurisdiction to hear the plaintiffs' claim against the Province of Alberta in the absence of a common obligation and rival claimants:

> [24] The position of the Plaintiffs is that the federal Crown is or may be under an obligation to them and that the Plaintiffs and Alberta have conflicting claims to the lands and resources both in Treaty 7 territory and on the Blood Indian Reserve, being the subject matter of the riparian action. Here the Plaintiffs rely upon *Roberts v. Canada* [1989] 1 S.C.R. 322, […]
>
> [25] The difficulty I have with applying *Roberts* to the present situation is that there are no conflicting claims raised anywhere in

> the pleadings in this proceeding. Certainly the federal Crown may be under an obligation, or indeed many obligations, but the only claim relying upon such obligations is that which has been advanced by the Plaintiffs. As I say, there is no obligation owed to two or more rival claimants. Certainly there are obligations, for example as between Canada and the Plaintiffs and perhaps between Alberta and the Plaintiffs, but there is no common obligation, as there was in *Roberts*, in order to provide the underpinning for the application of the section relying upon Mr. Justice Hugessen's analysis.
>
> [26] To extend section 17(4) of the *Federal Court Act* to grant jurisdiction in a situation in which there are not two conflicting claims would be to distort the purpose of section 17(4) far beyond an interpleader type of situation and indeed, far beyond that envisioned by any reasonable extension of the Supreme Court of Canada approach in *Roberts*. [Emphasis added.]

[70] I fully agree with and adopt Prothonotary Hargrave's reasoning. What is operative is not whether the Plaintiffs have claims against Canada and Kehewin relating to the membership list, but whether the Plaintiffs and Kehewin have claims against Canada that are irreconcilable. In the present case, there is no allegation, let alone any evidence, that the Crown owes any obligation to Kehewin, or vice versa, that is in conflict with any obligation that may be owed by either Defendant to the Plaintiffs. To the extent any obligation may be owed by the Defendants to the Plaintiffs, they are concurrent, not conflicting.

[71] I recognize that in construing s. 17, a fair and liberal interpretation is mandated by the Supreme Court of Canada's decision in *Canada (Human Rights Commission) v Canadian Liberty Net*, 1998 CanLII 818 (SCC), [1998] 1 SCR 626 [*Canadian Liberty Net*] at paragraph 34. It remains that the statutory language cannot be stretched beyond its ordinary meaning, far beyond that envisioned by any reasonable extension of the Supreme Court of Canada's approach in *Roberts*.

[72] In *Roberts*, the Supreme Court of Canada carefully interpreted "conflicting claims" as circumstances in which two parties each have a claim against Canada for the same property. In such a case, the nature of the conflict is apparent because Canada cannot deliver the same property to both parties at the same time. The obligation can only be owed to one. In other words, it is the claims as against Canada by other parties which must be in conflict to fulfill the requirements of ss. 17(4).

[73] A plaintiff's obligation on a motion for default judgment is to prove its entitlement to the requested judgment as a matter of fact and law. Subsection 17(4) expressly states and has been consistently interpreted as requiring a dispute in which the Crown is or may be under an obligation and in which there are or may be conflicting claims. I find that the evidence adduced by the Plaintiffs not only fails to prove but indeed disproves this basic allegation.

[74] Canada denies in its pleadings the existence of any fiduciary obligations in the circumstances of this case, or, alternatively, that any such fiduciary obligations were not fulfilled. However, it does not allege it could not fulfill its fiduciary obligations to the Plaintiffs because said obligations were owed to the Band as opposed to the Plaintiffs or the fulfillment of its duties to one party would preclude Canada's ability to fulfill its duty to the other. While Kehewin takes a different legal position regarding the Plaintiffs' status as band members, this does not create a conflicting claim as against Canada.

[75] For the above reasons, I conclude that this Court does not have jurisdiction to entertain the Plaintiffs' action against Kehewin under ss. 17(4) of the FCA.

(b) *Paragraph 17(5)(b) of the Federal Courts Act*

[76] I now turn to the Plaintiffs' alternative submissions based on para. 17(5)(b) of the FCA, which grants concurrent jurisdiction to the Federal Court to entertain claims against persons in relation to the performance of their duties as an officer, servant or agent of the Crown.

[77] Band councils have been recognized as legal entities separate and distinct from their membership with the capacity to sue and be sued by courts at all levels. The Plaintiffs conceded from the start that a band council generally does not act as an agent of the Crown. The concession is appropriate given the weight of jurisprudence to that effect: *Stoney Band* at paras 10-12; *Bear v John Smith Indian Band*, [1983] 5 WWR 21, 148 DLR (3d) 403 (SKQB) [*Bear*] at para 14; *Lower Similkameen Indian Band v Allison*, [1996] FCJ No 1434 (TD) at paras 19-20; *Chadee v Norway House First Nation*, [1996] 10 WWR 335, 131 WAC 110 (MBCA) at paras 27-39; *Charlie* at paras 30-33; and *Little Chief v Siksika Nation*, 2003 FCT 708 at paras 16-18.

[78] In the *Bear* case, Mr. Justice Noble of the Saskatchewan Court of Queen's Bench examined the meaning of the word "servant" (which includes the word "agent") as it is used in section 3 of the *Crown Liability Act*, RSC 1970, c C-38 (now the *Crown Liability and Proceedings Act*, RSC 1985, c C-50). Justice Noble referred to the most widely accepted statement as to how to define circumstances under which a person or group of persons acts as a servant or agent of the Crown, which is summarized in the quotation by President Joseph Thorson of the Exchequer Court of Canada in *Union Packing Company Limited v The King*, [1946] Ex CR 49 [*Union Packing*], at para. 54:

> It is, I think, clear from these authorities that the question whether a body performing functions of a public nature is a servant or agent of the Crown or is a separate independent entity depends mainly upon whether it has discretionary powers of its own, which it can exercise independently, without consulting any representative of the Crown.

[79] The jurisprudence recognizes that there might possibly be certain circumstances in which band councils could be viewed as agents of the Crown: *Charlie* at 28-29; *Stoney Band* at para 10; *Bear* at para 11; and *Cooper v Tsartlip Indian Band* (1994), 88 FTR 21, 5 WDCP (2d) 617 at para 16.

[80] On the one hand, they may act from time to time as an agent of the Crown with respect to carrying out certain departmental directives, orders of the Minister and the regulations passed for the benefit of its members. On the other hand, the band councils do many acts which are done in the name of and which represent the collective will of the band members, all of which is directly related to the elective process provided for in the *Indian Act* whereby the band members elect its governing body.

[81] The element of control is key to a finding of agency.

[82] The Plaintiffs submit that the following facts establish an agency relationship. First, Kehewin never actually took over control of its band membership. Second, responsibility for the Band List remained with the Registrar pursuant to the *Indian Act*. Third, Canada delegated day-to-day administration of membership to Kehewin, and Canada's representative, Joseph Leask, described the delegation of administration of membership functions to bands as follows:

> A: The practice was to continue, even post Bill C-31, the practice was to continue to delegate to the bands the management of their membership, but I stress the word delegate. It wasn't passing the authority over under a membership code for them to assume control of it, but they were essentially performing departmental functions for which they got paid, by the way, I understand.
>
> Q: By the department or by the band?
>
> A: By the department. The bands would get a per capita […]

[83] The difficulty with the Plaintiffs' argument is that no facts have ever been advanced in their pleadings which could support a finding of agency, nor does the notice of motion seek a declaration or finding of agency. It is not open to the Plaintiffs on a motion for default judgment to now assert liability of Kehewin based on agency. The introduction of this new theory of liability at this late stage of the proceeding is problematic.

[84] In any event, the facts established by the Plaintiffs on this motion do not support a conclusion that Kehewin was under the control of Canada when it refused to provide benefits to the Plaintiffs.

[85] The Plaintiffs' pleading refers to s. 9 of the *Indian Act*, which describes the Registrar's obligation to maintain and update the Band List until such time as a band assumes control of its Band List. There is no suggestion in the pleadings or in the *Indian Act* that s. 9 creates any obligations by Kehewin towards Canada as an agent or otherwise. To the contrary, the evidence is clear that Kehewin acted independently in preparing its own membership list and in distributing monies and other benefits to the members of the Kehewin Band of its own choosing. While Canada

may have decided who was included in the Kehewin Band's membership list, Kehewin decided by itself to ignore the law and administer the benefits as it saw fit.

[86] Being substantially in agreement with paragraphs 36 to 44 of Kehewin's written representations, I conclude that the Plaintiffs have failed to demonstrate that their claim against Kehewin falls within the correct interpretation of para. 17(5)(b) of the FCA.

## IV. Court of Competent Jurisdiction under subsection 24(1) of the *Charter*

[87] I should also touch briefly on the submissions by the Plaintiffs that this Court has jurisdiction to provide a remedy under ss. 24(1) of the *Charter*. The Plaintiffs acknowledge that the Federal Court's ability to award damages under the *Charter* is contingent on a finding that the Court has jurisdiction over the person, jurisdiction over the subject matter, and jurisdiction to grant the remedy. Given my finding that the Plaintiffs' claims against Kehewin do not fall within the jurisdiction of this Court pursuant to ss. 17(4) or para. 17(5)(b), it follows that this Court is unable to grant a *Charter* remedy.

## V. Costs

[88] The Plaintiffs seek costs of the motion. Neither Canada nor Kehewin have requested costs. There is no doubt that had Kehewin promptly raised the issue of jurisdiction after being served with the Statement of Claim, much of the costs incurred by the Plaintiffs would have been avoided and precious time would have been saved. However, in light of the result, no costs will be awarded.

**ORDER IN T-449-00**

**THIS COURT ORDERS that**:

The motion for default judgment as against the Kehewin Band and Kehewin Band Council is dismissed, without costs.

"Roger R. Lafrenière"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-449-00 |
| **STYLE OF CAUSE:** | NEAL ROTHERHAM AS THE ADMINISTRATOR OF THE ESTATE OF DOREEN DUMAIS, VERA DUMAIS, LENA DUMAIS, LORNA-MARIE DUMAIS, NANCY YARMUCH, CHRISTOPHER DUMAIS, CECILE WILBERG, WILLIAM DUMAIS, CHRISTINA DUMAIS, AND PHYLLIS DUMAIS, AS THE ADMINISTRATOR OF THE ESTATE OF JOSEPH DUMAIS v HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT, THE KEHEWIN BAND, AND THE KEHEWIN BAND COUNCIL |
| **PLACE OF HEARING:** | EDMONTON, ALBERTA |
| **DATE OF HEARING:** | MARCH 19, 2019 |
| **ORDER AND REASONS:** | LAFRENIÈRE J. |
| **DATED:** | JANUARY 9, 2020 |

**APPEARANCES:**

| | |
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| Linda Fleury<br>Eve Coppinger | FOR THE DEFENDANT<br>HER MAJESTY THE QUEEN |
| Keltie Lambert | FOR THE DEFENDANTS<br>KEHEWIN BAND AND THE KEHEWIN BAND COUNCIL |

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