Federal Court  Cour fédérale

Date: 20221104

Docket: T-361-20

Citation No: 2022 FC 1505

Ottawa, Ontario, November 4, 2022

PRESENT: Associate Judge Benoit M. Duchesne

BETWEEN:

WINDSUN ENERGY CORP.

Plaintiff
(Responding Party)

and

CAT LAKE FIRST NATIONS, also known as PESHEWESAHEKNIK NETUM ANESHENAPEK, as represented by the Chief and Councillors

and

MARCEL GAGNON, as Recipient Appointed Advisor for Cat Lake First Nation

Defendants
(Moving Parties)

AND BETWEEN:

CAT LAKE FIRST NATIONS, also known as PESHEWESAHEKNIK NETUM ANESHENAPEK, as represented by the Chief and Councillors

Plaintiff by Counterclaim
(Respondent by cross-motion)

and

WINDSUN ENERGY CORP., GERALD PAULIN, PATRICIA MAGISKAN, RAIN DANCER NORTH INC., DAVID MORGAN, DC AVIATION CANADA AND CELTIC AIR SERVICES LIMITED

Defendants by Counterclaim
(Moving Parties, in part, by cross-motion)

REASONS AND ORDER

[1] The Defendant Cat Lake First Nation, also known as Peshewesaheknik Netum Aneshenapek (the "CLFN") brings this motion to strike the Plaintiff Windsun Energy Corp.'s ("Windsun") Statement of Claim pursuant to Rule 221 of the *Federal Courts Rules*, SOR/98-106 (the "Rules") on the basis that this Court does not have jurisdiction to determine the dispute between the parties.

[2] The Plaintiff Windsun responds by seeking the dismissal of the CLFN motion and brings its own cross-motion. Windsun's cross-motion is for an Order striking the CLFN Counterclaim on the basis that this Court does not have the jurisdiction to determine the claims advanced by the CLFN.

[3] For the reasons that follow, both motions are granted. The Statement of Claim and the Counterclaim are both struck without leave to amend as neither disclose a reasonable cause of action that is within the jurisdiction of this Court.

I. The Pleadings and The Claims

A. The Statement of Claim

[4] The following is a summary of the allegations contained in Windsun's Statement of Claim. Windsun claims against the CLFN as follows:

a) The sum of $1,280,000.00 representing a consulting fee of 10% for new monies brought into CLFN;
b) Harmonized Sales Tax (HST) in the amount of $166,400.00 due and payable on the consulting fee claimed;

c) interest at the rate of 2% per month on the aforementioned consulting fee and HST remaining unpaid from month to month, presently owing in the amount of $332,739.47 from February 21, 2019 until the date of the claim, said interest will continue to be calculated at the end of each month until the account is fully paid;

d) general damages in the amount of $1,800,000.00 for breach of loss of opportunity, loss of reputation, and embarrassment caused through misrepresentations concerning Windsun's performance by the members of the band council and some administrators of the CLFN; and,

e) in the alternative to its claims above, compensation from the CFLN on a *quantum meruit* basis for the professional consulting services provided during the period of November 16, 2017 until February 26, 2019, in such amount as the Court deems fair and reasonable.

[5] Windsun alleges that it entered into a contract for consulting services (the "Contract") with the CLFN on November 16, 2017, after the CLFN Chief and Council adopted Band Council Resolution No. 1700-38 authorizing the Contract. Windsun pleads that the CLFN had agreed through the Contract that Windsun would receive a consulting fee equal to 10% of *"*all new monies brought into the CLFN*"* during the term of the Contract ending on April 15, 2019.

[6] Windsun pleads that in June 2018, it was directed by the CLFN Chief and Council to focus specifically on a community housing mould problem that was seriously affecting the health of Band members. This direction would have added the specific project to the other projects it had been tasked to work on. No projects to be completed by Windsun are described in the Contract beyond a single sentence assistance task which reads, "Windsun will remain to assist with the new subdivision, 7 plex and two duplexes until completed". Windsun alleges that Indigenous Services Canada ("ISC") approved $199,976 in funding for the CLFN's use in a

Comprehensive Household Inspection Project, and that that funding was a result of its efforts. The CLFN paid Windsun the sum of $19,997.60 on December 17, 2018. Windsun alleges that the December 17, 2018 payment was a payment of the 10% fee it and the CLFN had agreed upon through the Contract.

[7] Windsun further pleads that through or as a result of its work and performance of the Contract, ISC agreed to provide emergency housing funds requirements to the CLFN. These funds, intended to be used as emergency funds to address long standing housing and mould issues, are alleged to be new money brought into the CLFN as contemplated by the Contract and should result in payments to Windsun.

[8] Windsun pleads that the CLFN declared a state of emergency on January 16, 2019, due to its on-reserve housing conditions. On February 19, 2019, the CLFN entered into both a Memorandum of Understanding with ISC and an Interim Framework Agreement with ISC, pursuant to which the CLFN was awarded and obtained $12,800,000 in funding, presumably to address the housing conditions on-reserve. There is no explicit allegation set out in the Windsun pleading that the $12,800,000 ISC funding awarded to the CLFN was the result of work completed by Windsun in connection with or pursuant to the Contract.

[9] Finally, Windsun pleads that the CLFN improperly terminated the Contract.

B. The Statement of Defence and Counterclaim

[10] The CLFN delivered a 161 paragraph Statement of Defence and Counterclaim that repeats various allegations throughout its text with minor or internally inconsistent variations. It pleaded at the outset pursuant to Rule 208 of the *Rules* that it was not attorning to the jurisdiction of this Court by the delivery of its pleading as the substance of Windsun's claims was based on contract law, and that contract law is not a "law of Canada" or included in a body of existing federal law. It further pleaded that this Court does not have jurisdiction to hear this proceeding, but that the Ontario Superior Court of Justice sitting in Kenora, Ontario, does.

[11] Although the CLFN Statement of Defence need not be considered to dispose of the motion and cross-motion to strike, some of the allegations contained within it merit being mentioned because they are incorporated by reference and pleaded afresh in the Counterclaim.

[12] The CLFN denies Windsun's allegations and seeks damages, an accounting and the disgorgement of profits from Windsun and other defendants to its Counterclaim.

[13] The CLFN pleads that the then CLFN Chief Ernie Wesley hired Patricia Magiskan as an advisor in late fall 2017 or January 2018. Shortly after, Ms. Magiskan, purportedly through or jointly with her company Raindancer North Inc., hired Gerald Paulin as an advisor. Despite acknowledging having dealt with Mr. Paulin personally, the CLFN pleads that Mr. Paulin requested that payments payable to him by the CLFN should be paid to the Plaintiff Windsun rather than to him personally. The pleading does not allege any material facts as to why the CLFN would be required to pay monies to Mr. Paulin personally or to Windsun, particularly

when it is alleged that Mr. Paulin had been hired as an advisor by Raindancer North Inc. rather than by the CLFN.

[14] The CLFN pleads that Mr. Paulin signed a "Contract for Consulting Services" dated November 16, 2017. Notwithstanding that a contract for consulting services was entered into, the CLFN pleads that its then Chief Wesley was neither authorized to sign the contract document alone, nor to approve the specific terms that were set out in the contract although the Chief and Council had been authorized to enter into a consulting services contract with Mr. Paulin. The CLFN says that no mention was ever made to the Council that Mr. Paulin was to receive "10% of all new monies brought into Cat Lake during the term" of the agreement.

[15] The CLFN pleads that the $12,800,000 in funding announced in February 2019 had been applied for by the CLFN prior to the Contract and, accordingly, does not constitute "new money" within the meaning of the Contract. Further, the CLFN pleads that federal and provincial monies provided to it for housing matters are provided annually and cannot be considered as "new money" within the meaning of the Contract.

[16] The CLFN also pleads conspiracy in defence to the claims advanced against it. It pleads that Mr. Paulin, along with Ms. Magiskan, Raindancer, David Morgan, DC Aviation and Celtic Air conspired to benefit financially from the receipt of funds from the CLFN without providing any corresponding benefit to the CLFN. The alleged conspiracy is pleaded as consisting of a course of conduct by which Windsun and the named co-conspirators made representations to the CLFN that they were supplying labour and materials to a seven-plex/duplex construction project

on-reserve to the CLFN's benefit when in reality they were conspiring to direct the funds to themselves for their own personal gain of monies and materials.

[17] The CLFN's counterclaim advances claims against Windsun and Mr. Paulin for:

a) General and Special Damages in the amount of $4,000,000.00;

b) an accounting of all profits received by the Defendants by Counterclaim;

c) monetary compensation in the amount of $4,000,000.00;

d) disgorgement of all profits received by the Defendants by Counterclaim; and

e) equitable compensation in an amount to be determined by the Court.

[18] The Counterclaim pleads that Windsun and/or Mr. Paulin were unjustly enriched as a result of their having received payments from Ms. Magiskan. The monies used by Ms. Magiskan to make these payments are alleged to have been misappropriated by her from the CLFN.

[19] Windsun, Mr. Paulin and Ms. Magiskan are alleged to have been unjustly enriched by the CLFN paying monies to unidentified non-parties on Windsun's, Mr. Paulin's, Ms. Magiskan's, or Raindancer's directions without the CLFN following its normal due diligence Band Office financial process. How these payments to third parties results in Windsun, Mr. Paulin and Ms. Magiskan or Raindancer's unjust enrichment is not pleaded.

[20] More generally, the CLFN pleads that Windsun and/or Mr. Paulin received monies from the CLFN without any juristic reason for their enrichment because the CLFN "received little or no value for the monies paid", this in part echo of the conspiracy claim raised in defence.

[21] The CLFN reiterates the conspiracy claims it had advanced in its defence, but additionally alleges that Windsun, Mr. Paulin, Ms. Magiskan, Raindancer, Mr. Morgan, DC Aviation and Celtic Air conspired and acted in concert, by agreement or common design, to misappropriate funds from the CLFN because the CLFN received no benefit from them corresponding to the amounts they were paid by the CLFN.

[22] The Counterclaim advances claims against Ms. Magiskan and, Raindancer North Inc. in the same $4,000,000 amounts as sought from Windsun and Mr. Paulin, and in the nearly the same wording. The material facts pleaded in support of the claims advanced against Ms. Magiskan and, Raindancer North Inc. are substantively the same allegations of unjust enrichment, negligence and conspiracy as had been pleaded against Windsun and Mr. Paulin.

[23] Substantively similar claims for $4,000,000 are advanced by the CLFN in its Counterclaim as against the Defendants by Counterclaim David Morgan, DC Aviation and Celtic Air Services Limited. The material facts pleaded in support of the claims against Mr. Morgan, DC Aviation and Celtic Air Services Limited are substantively the same as those alleged in connection with the claims advanced against Ms. Magiskan and Raindancer North Inc.

[24] Windsun has not delivered a Reply and Defence to the Counterclaim.

[25] None of the Defendants by Counterclaim have served or filed a Statement of Defence to the Counterclaim despite appearing to having been properly served with the Statement of Defence and Counterclaim.

II. The Parties' Positions on the Motions

A. The CLFN's Motion

[26] The CLFN pleads that:

1. The Statement of Claim contains no claim, monetary or otherwise, against the Crown or pursuant to the *Crown Liability and Proceedings Act*.

2. Contractual disputes, such as the one alleged by the Plaintiff, are not subject matter assigned to Parliament under the *Federal Courts Act.*

3. The Statement of Claim fails to identify any actual, existing, and applicable federal law which assigns jurisdiction to the Federal Court; and,

4. The law of contracts, such as that between the parties named in this action, is not among law which has had its administration conferred upon the Federal Court via the *Federal Courts Act*, or any other applicable federal statutes

[27] Windsun's response to the attack upon its Statement of Claim is that the Federal Court has jurisdiction to hear and determine the claims advanced because:

1. The Plaintiff is a federally incorporated corporation;

2. The Defendant is a "Federal First Nation" within the meaning of the *Indian Act*, R.S.C 1985, c I-5 and subsection 91(24) of the *Constitution Act, 1867*, 30 & 31 Vict. C 3, and operates under the *Indian Act* and its regulations, including the *Indian Band Council Borrowing Regulations,* CRC, c 949; *Indian Band Council Procedure Regulations,* CRC, c 950, *Indian Band Election Regulations,* CRC, c 952*; Indian Band Revenue Moneys Order, SOR/90-297; Indian Bands Council Elections Order, SOR/97-138; Indian Bands Revenue Moneys Regulations, CRC, c 953*;

3. The consulting contract at the heart of the litigation was created and signed on-reserve lands;

4. The services at the heart of the litigation were services to secure funding from the Government of Canada for the purposes of constructing new housing on the CLFN reserve lands, ostensibly in connection with or pursuant to paragraph 64(1)(j) of the *Indian Act*; and,

5. The Plaintiff's claims are within the inherent or Federal statutory and common law jurisdiction of the Federal Court.

[28] Windsun also argues that this Court has inherent concurrent jurisdiction with the Ontario Superior Court of Justice with regard to the subject matter of the litigation. As the jurisdiction is concurrent, Windsun argues that it can choose whether it wishes to litigate the matter in this Court or in the Ontario Superior Court of Justice.

B. Windsun's Cross-Motion

[29] Windsun seeks to have the CLFN's Counterclaim struck on the basis that it does not disclose a reasonable cause of action that is within jurisdiction of this Court pursuant to section 17 of the *Federal Courts Act* (the *"Act"*), and therefore can be struck pursuant to Rule 221(1)(a) of the *Rules*. Windsun's position is that the Counterclaim is improper because it brings an additional five (5) parties into the proceeding "on a wide range of provincial legal issues", and that it is more appropriate for such provincial law claims to be dealt with in the Ontario Superior Court of Justice where there are already proceedings pending between the parties.

[30] The CLFN's argument on the cross-motion is that its set-off claims are properly asserted and can be considered by the Federal Court.

III. Issues

[31] The motions before the Court require the resolution of a single issue: whether the claims set out in the Statement of Claim and the Counterclaim disclose causes of action that are within the jurisdiction of this Court.

A. The Rule and the *Federal Courts Act*

[32] Rule 221 of the Rules reads as follows :

Motion to strike	**Requête en radiation**
221 (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it	**221 (1)** À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas :
(a) discloses no reasonable cause of action or defence, as the case may be,	**a)** qu'il ne révèle aucune cause d'action ou de défense valable;
(b) is immaterial or redundant,	**b)** qu'il n'est pas pertinent ou qu'il est redondant;
(c) is scandalous, frivolous or vexatious,	**c)** qu'il est scandaleux, frivole ou vexatoire;
(d) may prejudice or delay the fair trial of the action,	**d)** qu'il risque de nuire à l'instruction équitable de l'action ou de la retarder;
(e) constitutes a departure from a previous pleading, or	**e)** qu'il diverge d'un acte de procédure antérieur;
(f) is otherwise an abuse of the process of the Court,	**f)** qu'il constitue autrement un abus de procédure.
and may order the action be dismissed or judgment entered accordingly.	Elle peut aussi ordonner que l'action soit rejetée ou qu'un jugement soit enregistré en conséquence.
Evidence	**Preuve**
(2) No evidence shall be heard on a motion for an order under paragraph (1)(a).	**(2)** Aucune preuve n'est admissible dans le cadre d'une requête invoquant le motif visé à l'alinéa (1)a).

[33] Neither of the parties allege that the claims advanced in the Statement of Claim or the Counterclaim should be struck because they fail to set out a reasonable cause of action from a technical pleading perspective or with respect to any ground identified in Rule 221(1)(b) through (f). The substance of the arguments before the Court is limited to whether or not this Court has the jurisdiction necessary to hear the dispute between the parties. Succinctly put, if this Court

does not have jurisdiction over the claims set out in the pleadings, then there is no reasonable cause of action pleaded and the pleading should be struck.

[34] Sections 17, 23 and 26 of the *Act* grant this Court statutory jurisdiction over claims and actions as follows:

Relief against the Crown	**Réparation contre la Couronne**
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.
Cases	**Motifs**
(2) Without restricting the generality of subsection (1), the Federal Court has concurrent original jurisdiction, except as otherwise provided, in all cases in which	**(2)** Elle a notamment compétence concurrente en première instance, sauf disposition contraire, dans les cas de demande motivés par :
(a) the land, goods or money of any person is in the possession of the Crown;	**a)** la possession par la Couronne de terres, biens ou sommes d'argent appartenant à autrui;
(b) the claim arises out of a contract entered into by or on behalf of the Crown;	**b)** un contrat conclu par ou pour la Couronne;
(c) there is a claim against the Crown for injurious affection; or	**c)** un trouble de jouissance dont la Couronne se rend coupable;
(d) the claim is for damages under the *Crown Liability and Proceedings Act.*	**d)** une demande en dommages-intérêts formée au titre de la Loi sur la responsabilité civile de l'État et le contentieux administratif.
Crown and subject: consent to jurisdiction	**Conventions écrites attributives de compétence**

(3) The Federal Court has exclusive original jurisdiction to hear and determine the following matters:

(a) the amount to be paid if the Crown and any person have agreed in writing that the Crown or that person shall pay an amount to be determined by the Federal Court, the Federal Court — Trial Division or the Exchequer Court of Canada; and

(b) any question of law, fact or mixed law and fact that the Crown and any person have agreed in writing shall be determined by the Federal Court, the Federal Court — Trial Division or the Exchequer Court of Canada.

(3) Elle a compétence exclusive, en première instance, pour les questions suivantes :

a) le paiement d'une somme dont le montant est à déterminer, aux termes d'une convention écrite à laquelle la Couronne est partie, par la Cour fédérale — ou l'ancienne Cour de l'Échiquier du Canada — ou par la Section de première instance de la Cour fédérale;

b) toute question de droit, de fait ou mixte à trancher, aux termes d'une convention écrite à laquelle la Couronne est partie, par la Cour fédérale — ou l'ancienne Cour de l'Échiquier du Canada — ou par la Section de première instance de la Cour fédérale.

Conflicting claims against Crown

(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.

Demandes contradictoires contre la Couronne

(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.

Relief in favour of Crown or against officer

(5) The Federal Court has concurrent original jurisdiction

(a) in proceedings of a civil nature in which the Crown or the Attorney General of Canada claims relief; and

Actions en réparation

(5) Elle a compétence concurrente, en première instance, dans les actions en réparation intentées :

a) au civil par la Couronne ou le procureur général du Canada;

(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.

Federal Court has no jurisdiction

(6) If an Act of Parliament confers jurisdiction in respect of a matter on a court constituted or established by or under a law of a province, the Federal Court has no jurisdiction to entertain any proceeding in respect of the same matter unless the Act expressly confers that jurisdiction on that court.

Incompétence de la Cour fédérale

(6) Elle n'a pas compétence dans les cas où une loi fédérale donne compétence à un tribunal constitué ou maintenu sous le régime d'une loi provinciale sans prévoir expressément la compétence de la Cour fédérale.

Bills of exchange and promissory notes — aeronautics and interprovincial works and undertakings

23 Except to the extent that jurisdiction has been otherwise specially assigned, the Federal Court has concurrent original jurisdiction, between subject and subject as well as otherwise, in all cases in which a claim for relief is made or a remedy is sought under an Act of Parliament or otherwise in relation to any matter coming within any of the following classes of subjects:

Lettres de change et billets à ordre — Aéronautique et ouvrages interprovinciaux

23 Sauf attribution spéciale de cette compétence par ailleurs, la Cour fédérale a compétence concurrente, en première instance, dans tous les cas — opposant notamment des administrés — de demande de réparation ou d'autre recours exercé sous le régime d'une loi fédérale ou d'une autre règle de droit en matière :

(a) bills of exchange and promissory notes, where the Crown is a party to the proceedings;

a) de lettres de change et billets à ordre lorsque la Couronne est partie aux procédures;

(b) aeronautics; and

b) d'aéronautique;

(c) works and undertakings connecting a province with

c) d'ouvrages reliant une province à une autre ou

any other province or extending beyond the limits of a province**.**	s'étendant au-delà des limites d'une province.
General original jurisdiction **26** The Federal Court has original jurisdiction in respect of any matter, not allocated specifically to the Federal Court of Appeal, in respect of which jurisdiction has been conferred by an Act of Parliament on the Federal Court of Appeal, the Federal Court, the Federal Court of Canada or the Exchequer Court of Canada.	**Tribunal de droit commun** **26** La Cour fédérale a compétence, en première instance, pour toute question ressortissant aux termes d'une loi fédérale à la Cour d'appel fédérale, à la Cour fédérale, à la Cour fédérale du Canada ou à la Cour de l'Échiquier du Canada, à l'exception des questions expressément réservées à la Cour d'appel fédérale.

B. The Applicable Tests

[35] The test applicable on a motion to strike for want of jurisdiction is the same as the test applicable on a motion to strike a pleading on the basis that it discloses no reasonable cause of action: the lack of jurisdiction must be plain and obvious to justify striking out a pleading at this preliminary stage of the proceeding (*Hodgson v. Ermineskin Indian Band No. 942*, 2000 CanLII 15066 at para. 10). The applicable test and the underlying principles applicable such a motion are that (*Theriault v. the Queen*, 2022 FC 722, at para. 14):

> A. To strike a claim on the basis it discloses no reasonable cause of action, it must be plain and obvious that the claim discloses no reasonable cause of action or has no reasonable prospect of success (*Hunt v Carey Canada Inc*, [1990] 2 SCR 959 at para 36 [*Hunt*]; *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 17);
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> B. All facts plead must be accepted unless patently ridiculous or incapable of proof: *Hunt* at paras 33 and 34; *Edell v Canada*, 2010 FCA 26 at para 5; *Operation Dismantle v The Queen* (1985), 18 DLR (4th) 481 (SCC) at 486-487 and 490-491 [*Operation Dismantle*]);
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> C. The statement of claim is to be read generously and in a manner that accommodates drafting deficiencies (*Operation Dismantle* at para 14; (*Hunt v. Carey Can Inc.* [1990] 2 S.C.R. 959, at page 980; *Condon v. Canada*, 2015 FCA 159 (CanLII), at paras. 11 to 13 and 21).
>
> D. To disclose a cause of action the pleading must (1) allege facts capable of giving rise

> to the action; (2) disclose the nature of the action; and (3) indicate the relief sought – the statement of claim is to contain a concise statement of the material facts to be relied upon but not the evidence by which the facts are to be proved (*Oleynik v Canada (Attorney General)*, 2014 FC 896 at para 5; Rule 174 of the Rules);
>
> E. What constitutes a material fact is to be determined by the cause of action and the relief sought. The pleading must disclose to the defendant the who, when, where, how and what, that give rise to the claimed liability – a narrative of what happened and when will rarely suffice and neither the court nor opposing parties are to be left to speculate as to how the facts support various causes of action *(Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227 at para 19; *Simon v Canada*, 2011 FCA 6 at para 18).

[36] In determining whether it is plain and obvious that there is lack of jurisdiction, the Court must apply the well known test for Federal Court jurisdiction as set out in *ITO International Terminal Operators Ltd. v. Miida Electronics Inc*., 1986 CanLII 91 (SCC), [1986] 1 S.C.R. 752 at 766, and reaffirmed in *Windsor (City) v. Canadian Transit Co.*, 2016 SCC 54 ("*Windsor*"), at para. 34 (the "ITO-Windsor Test"). Pursuant to the ITO-Windsor Test this Court's jurisdiction will not be engaged unless:

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

[37] The ITO-Windsor Test can be applied only after the determination of the essential nature or character of the claim advanced. In doing so, the Court must take a realistic appreciation of the practical result sought by the claimant and look beyond the words used, the facts alleged and the remedy sought to ensure that the Statement of Claim is not a disguised attempt to reach before this Court a result otherwise unreachable before it (*Windsor*¸ at paras. 25 and 26)

C. Affidavit Evidence on these Motions

[38] The parties are entitled to lead affidavit evidence on a motion to strike based on the want of jurisdiction (*Hodgson v. Ermineskin Indian Band No. 942*, 2000 CanLII 15066 (FC), at para. 9; affirmed, 2000 CanLII 16686 (FCA).

[39] The CLFN's motion record contains the affidavit evidence of Wendy Rabideau, copies of the pleadings in this matter and copies of Orders and directions issued by this Court. It also includes documentary evidence consisting of pleadings and correspondence between legal counsel pertaining to parallel proceedings between the parties commenced before the Ontario Superior Court of Justice sitting in Thunder Bay, in court file numbers CV-20-315 and CV-21-61.

[40] Windsun's responding motion record contains the affidavit evidence of Gerald Paulin and six (6) exhibits. The exhibits include the Windsun corporate profile (Exhibit A), a certificate of compliance (Exhibit B), CLFN Band Council Resolution 1700-38 (Exhibit C), the Contract (Exhibit D), a February 9, 2019, letter from the CLFN to the Minister of Indigenous Affairs (Exhibit E), and the February 20, 2019, termination letter delivered to the CLFN by Windsun (Exhibit F).

[41] Neither Mr. Paulin, Ms. Magiskan, Rain Dancer North Inc., Mr, Morgan, DC Aviation Canada nor Celtic Air Services Limited have filed any materials in connection with the motions before the Court. They have not participated in the argument of these motions.

IV. Jurisdictional Analysis

A. The Essential Nature or Character of the Claims

I) Windsun's Claims in the Statement of Claim

[42] The parties to the dispute as framed in the Statement of Claim are Windsun, a business corporation incorporated pursuant to the *Canada Business Corporations Act*, RSC 1985, c C-44, as the Plaintiff, and the CLFN, a "band" within the meaning of the *Indian Act*, RSC 1985, c I-5, as the Defendant.

[43] Windsun advances three (3) separate claims through its Statement of Claim. Two claims are against the CLFN as a band within the meaning of the *Indian Act*, whereas one claim is against various councillors and administrators of the CLFN.

[44] The first claim is framed as a breach of contract claim. Windsun seeks the payment of a sum of money it says is payable to it as commission in connection with the Contract. To the extent that the CLFN has not paid those commissions to Windsun, then the claim is framed as a breach of contract claim against the CLFN as a contracting and breaching party.

[45] The second claim is for $1,800,000 for breach of loss of opportunity, loss of reputation, and embarrassment caused through misrepresentations by the members of Band Council and some CLFN administrators concerning Windsun's performance. The Statement of Claim is unclear as to whether the claim is for damages arising from misrepresentations, damages based on the unlawful means tort, or some other cause of action that may give rise to damages of the nature sought. Regardless, the tortfeasors identified in the prayer for relief are not parties to the action and there is no allegation of vicarious liability or similar cause of action that could make a

Band liable for the actions of Band Councillors or other Band employees individually. As a result, the Statement of Claim does not disclose a reasonable cause of action with respect to the named parties and will be struck for the failure to disclosure a reasonable cause of action without regard to the jurisdictional issue.

[46] The third claim pleaded in the prayer for relief as an alternative claim is a claim for compensation from the Defendant on a *quantum meruit* basis for the professional consulting services provided during the period of November 16, 2017, to February 26, 2019, in such amount as the Court deems fair and reasonable. A claim for *quantum meruit* is a common law claim for compensation for benefits conferred under an agreement which, while apparently binding, was rendered ineffective for a reason recognized at common law (*Kerr v. Baranow*, 2011 SCC 10 (CanLII), [2011] 1 SCR 2692011 SCC 10 at para. 74).

[47] Reading the Windsun Statement of Claim generously and appreciating the result sought, Windsun's claims is for an award of a contractually determined commission equal to 10% of the $12,800,000 in funding the CLFN was awarded by ISC because the $12,800,000 in funding was "brought in to Cat Lake during the term" of the Contract. If the Contract fails, then the same amount of money sought to be recovered is sought to be recovered on the basis of *quantum meruit*. On the whole, Windsun seeks money from its contracting party, the CLFN.

II. The CLFN's Counterclaim

[48] The Counterclaim advances claims framed in unjust enrichment, negligence and conspiracy against Windsun, other individuals and the private corporations they either operate or

work for. The claims of unjust enrichment have their source in equity and equitable relief while the claim of conspiracy is a claim in tort, as is a claim of negligence.

[49] As with the Statement of Claim, the result sought through the Counterclaim is an award of damages alleged to be payable as result of Windsun's breaches of contract, its tortious conduct, both alone and in conspiracy with others.

B. ITO-Windsor Test Part I: Statutory grant of jurisdiction

I. Windsun's Claims

[50] The first part of ITO-Windsor test requires that a statute grant the Federal Court jurisdiction over the dispute. As determined above, Windsun's claims are breach of contract and *quantum meruit* claims against the CLFN and the CLFN's claims are claims in equity, tort and negligence against Windsun and persons related to it.

[51] Claims framed as a breach of contract and in tort may fall within the grant of jurisdiction to this Court as prescribed by section 17 of the *Act* provided the Crown is a party to the litigation. That is not the case here. The Crown is not a party to the litigation. No claim is advanced by either party that involves the Crown at all. There is no allegation that the dispute between the parties is connected to a contract, equitable remedy or tort claim involving land, goods or money that is in possession of the Crown, arises out of a contract entered into by or on behalf of the Crown, or is pursuant to the *Crown Liability and Proceedings Act*. There is no allegation that the Crown is under any obligation toward any of the parties to the litigation.

[52] It follows that this Court's contract and tort claim jurisdiction pursuant to section 17 of the *Act* is not engaged. Similarly, there is no allegation or argument that this Court's jurisdiction pursuant to sections 23 or 26 of the *Act* is engaged either. As there is no statutory grant of jurisdiction for this Court to hear and decide Windsun's claims in the *Act*, any grant of jurisdiction it must be found elsewhere.

[53] Windsun argues that there is a statutory grant of jurisdiction for this Court to hear the breach of contract dispute between the parties because the laws, regulations and Band Council resolutions at issue were created by past Governments of Canada, the federal Parliament, and the CLFN. Windsun also argues that this Court has jurisdiction over the dispute because Windsun is federally incorporated, the CLFN is a "band" within the meaning of the *Indian Act* and entered into the Contract through its grant of powers pursuant to the *Indian Act* and related regulations. Windsun also argues that this litigation concerns paragraphs 64(1)(g), (j) and (k) of the *Indian Act* and the expenditure of capital monies of the CLFN for the construction of permanent improvements, houses for band members, and the expenditure of capital monies generally.

[54] Windsun's argument, reduced to its central theme, is that this Court has the jurisdiction to hear and determine any matter that is regulated in any manner, regardless of how tangentially, by a statute or regulation enacted by the federal Parliament. Windsun's argument conflates the third part of the ITO-Windsor Test that requires that the law on which the case is based must be a "law of Canada" with the first part of the ITO-Windsor Test that is concerned with a statutory grant of jurisdiction to adjudicate a dispute. Legislative jurisdiction by Parliament does not necessarily lead to a grant of adjudicative jurisdiction for the Federal Court.

[55] A corporate litigant's constituting statute is seldom relevant to the question of this Court's jurisdiction to hear a dispute involving it. The *Canada Business Corporation Act* does not provide this Court with any jurisdiction, be it exclusive or concurrent, with respect to litigation involving corporations incorporated pursuant to its provisions. The statutory definitions contained at subsection 2(1) of the *Canada Business Corporation Act* reflect that references to a "court" in the statute are references to the superior courts in each of the provinces and not to this Court at all.

[56] The *Indian Act* provides a statutory grant of jurisdiction to this Court with respect to trespass on reserves (sections 30 and 31) and in estate matters (section 47), but there is no grant of jurisdiction with respect to contractual disputes involving a Band and a corporation where litigation is used to obtain a remedy such as compensation or other relief which are primarily designed to right private rather than public wrongs.

[57] Paragraphs 64(1)(g), (j) and (k) of the *Indian Act* are not pleaded in the Statement of Claim despite having been raised in argument as being the basis for this Court's jurisdiction. Windsun admitted during the hearing of these motions that section 64 of the *Indian Act* contemplates ministerial authorization and direction for the expenditure of a band's capital monies with the consent of the concerned Band Council, none of which is at issue in the Statement of Claim or in the claims advanced. Windsun's argument based on section 64 of the *Indian Act* must accordingly be rejected as being ill-founded and unsupported by the allegations made in the Statement of Claim.

[58] This Court might have had the jurisdiction to entertain an Application for Judicial Review of the CLFN's decisions to terminate the Contract pursuant to section 18.1 of the *Act* if the CLFN had been acting as a federal board, commission or other tribunal throughout the events alleged. Even then, however, if the CLFN was exercising its power to contract for private commercial purposes that may lead to a benefit to the Band rather than exercising any delegated statutory authority in the public law sphere, the CLFN would might not have been acting as a federal board, commission or tribunal (*Cyr v. Batchewana First Nation of Ojibways*, 2022 FCA 90, at paras 22 to 24; *Des Roches v. Wasauksing First Nation*, 2014 FC 1126, at paras. 50 to 62; *Maloney v. Council of the Shubenacadie Band of Indians*, 2014 FC 129). If it had pursued an Application for Judicial Review, Windsun would have been generally precluded from seeking and being awarded damages in connection with the same (*Canada (A.G.) v. Telezone Inc.*, 2010 SCC 62). I had asked the parties prior to the hearing of these motions to consider the *Des Roches* and *Maloney* decisions during their oral submissions given the often misunderstood source of this Court's jurisdiction with respect to Band Council action. Neither party spent much time on these cases as their submissions focussed on section 17 of the *Act* and the ITO-Windsor Test.

[59] Although the CLFN might have been exercising powers pursuant to the *Indian Act* when Band Council Resolution No. 1700-38 (the "BCR") was adopted, the text of the BCR suggests otherwise. Exhibit C to Mr. Paulin's affidavit establishes that there was no reference made to or reliance upon the *Indian Act* or to any of its related regulations when the CLFN adopted the BCR to enter into the Contract with Windsun. The BCR rather reflects that the CLFN was at all times acting in accordance with its maintenance of its sovereignty, self-determination, and inherent jurisdiction throughout its homelands.

[60] Windsun also argues that its claims must be within the jurisdiction of this Court because the subject matter of this litigation deals with services provided by a federal corporation to a "Federal First Nation" to secure new and additional Government of Canada grants of monies from the Minister of Indigenous Affairs for purposes of constructing new housing on CLFN reserve lands to deal with emergency on-reserve housing issues. With respect, reading beyond the words used in the Statement of Claim and focusing on the essential nature of the claims advanced and the result sought as is required it is clear that whatever public benefit may have resulted from the Contract is not at issue in the Statement of Claim. This litigation does not concern services provided to the CLFN on-reserve for the public good. It concerns compensation for breach of contract and for that compensation's equivalent based on *quantum meruit* if the contract is held to fail as a contract.

[61] Finally, Windsun pleads that this Court has the inherent jurisdiction to determine the claims advanced by Windsun. This argument must be rejected. It is unnecessary to comment on this Court's inherent jurisdiction to control its processes in these reasons. It is necessary, however, to recall that in *Windsor*, at paragraph 33, the Supreme Court of Canada wrote as follows with respect to this Court's inherent jurisdiction to hear and determine claims:

> [33] The Federal Court, by contrast, has only the jurisdiction it has been *conferred* by statute. It is a statutory court, created under the constitutional authority of s. 101, without inherent jurisdiction. While the Federal Court plays a critical role in our judicial system, its jurisdiction is not constitutionally protected in the same way as that of a s. 96 court. It can act only within the constitutional boundaries of s. 101 and the confines of its statutory powers. As this Court noted in *Roberts v. Canada*, 1989 CanLII 122 (SCC), [1989] 1 S.C.R. 322, at p. 331, "[b]ecause the Federal Court is without any inherent jurisdiction such as that existing in provincial superior courts, the language of the [*Federal Court Act*] is completely determinative of the scope of the Court's jurisdiction."

[62] It follows that Windsun does not satisfy the first part of the ITO-Windsor Test as there is no statutory grant of jurisdiction for this Court to hear and determine its claims against the CLFN. Considering that the first part of the ITO-Windsor test is not met, there is no need to consider whether Windsun meets the second and third parts of the ITO-Windsor test.

[63] I find that it is plain and obvious that Windsun's Statement of Claim discloses no reasonable cause of action that is within the jurisdiction of this Court. Windsun's Statement of Claim will be struck without leave to amend. This proceeding will accordingly be dismissed.

II. The CLFN's Counterclaim

[64] At the hearing of these motions, the CLFN conceded that there is no Federal Court jurisdiction over the claims advanced in its Counterclaim if I found that there was no jurisdiction for this Court to hear and determine Windsun's claims as set out in its Statement of Claim.

[65] Quite independently of the CLFN admission, I find that the CLFN Counterclaim falls beyond any statutory grant of jurisdiction to this Court for substantively the same reasons are set out above with respect to the Windsun claims. The claims in unjust enrichment, conspiracy and negligence against private parties without any Crown involvement as are pleaded in the Counterclaim are not captured by the *Act* or any other grant of jurisdiction to this Court.

[66] Considering my conclusions above and this admission by the CLFN, and considering that it is plain and obvious that the CLFN claims as contained in its Counterclaim are not within the jurisdiction of this Court, the CLFN Counterclaim will be struck without leave to amend on the

basis that it fails to disclose a reasonable cause of action that is within the jurisdiction of this Court.

V. Costs

[67] Both parties have requested their costs of these motions. Given that these motions have put an end to this proceeding, the costs of the proceeding are also at issue. The parties are encouraged to discuss and agree on the costs of these motions and of this proceeding. A consent order for costs may be entertained if the parties reach an agreement and contemplate an Order as to costs as part of their agreement.

[68] If the parties cannot agree on costs then they can serve and file costs submissions in accordance with the following timetable and parameters: a) the CLFN shall deliver its costs submissions not exceeding five (5) pages, excluding schedules or appendices, within 15 days of these Reasons and Order; b) Windsun shall deliver its costs submissions not exceeding five (5) pages, excluding schedules or appendices, within 15 days of its receipt of the CFLN's costs submissions; and c), the CLFN shall delivery its reply submissions or no more than 3 pages, excluding schedules and appendices, if any, within 5 days of its receipt of Windsun's responding submissions.

THIS COURT ORDERS that:

1. The Defendant and Moving Party Cat Lake First Nation's motion to strike is granted.
2. Windsun Energy Corp.'s Statement of Claim be and is hereby struck without leave to amend, and this proceeding is dismissed.
3. The Plaintiff and Cross-Moving Party Windsun Energy Corp.'s motion to strike is granted.

4. The Defendant and Cross-Responding Party Cat Lake First Nation's Counterclaim be and is hereby struck without leave to amend and dismissed.

5. Cost shall be determined following receipt of the parties' submissions on costs.

"Benoit M. Duchesne"
Associate Judge