File No. _____

SUPREME COURT OF CANADA

(ON APPEAL FROM A JUDGMENT OF THE COURT OF APPEAL OF QUÉBEC)

BETWEEN:

MOHAWK COUNCIL OF KANESATAKE

APPLICANT
(Appellant)

- and -

LOUIS-VICTOR SYLVESTRE
GORDON EDWARDS
1648-4404 QUÉBEC INC.
JEAN DEMERS
PAUL BOISSONNAULT
MARC CHÉNIER

RESPONDENTS
(Respondents)

APPLICATION FOR LEAVE TO APPEAL

(Article 40(1) of the *Supreme Court Act* and Rule 25 of the *Rules of the Supreme Court of Canada*)

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APPLICANT'S FACTUM

PART I – ISSUES OF PUBLIC IMPORTANCE AND STATEMENT OF FACTS

A. ISSUES OF PUBLIC IMPORTANCE

1. This case is about whether *Indian Act* bands have the same rights as other litigants when a party executes judgment against them. The Court of Appeal decided that because a large part of the property owned by *Indian Act* bands is (presumptively) exempt from seizure pursuant to s. 89, execution proceedings against them do not need to be documented in any meaningful way.

2. This case is also about whether prescription periods—which are a matter of public order[1]—apply equally to all litigants, or whether the fact that a judgment debtor has property exempt from seizure constitutes "special circumstances" that authorize the courts to extend the rights of judgment creditors indefinitely and decades beyond the normal ten-year period of prescription under the *Civil Code of Québec* (CCQ).

3. If the Court of Appeal's decision were to stand, there would be one punitive system for executing judgment against *Indian Act* bands, as well as possibly other parties with property exempt from seizure, and another system allowing for the normal extinguishment of unsatisfied judgment debts owed by anyone else. The exceptional regime would apply to an *Indian Act* band and potentially to others whose creditor believed their only significant assets were exempt from seizure, such as an individual whose only income was workers' compensation or a foreign embassy. In those cases, the creditor would not have to provide the debtor with any explanation of the execution measures being taken against it and the debtor would have no right to use the methods for contesting a seizure that are open to other participants in the justice system. This new system of execution for *Indian Act* bands ignores the provisions of the CCQ in order to create a system to the advantage of creditors.

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1 *Doré v. Verdun (City)*, [1997] 2 SCR 862, para. 27.

4. The Court of Appeal's decision was not based on any facts particular to the Applicant's situation: the only factor driving the Court's determination seems to be the existence at law of the exemption from seizure for on-reserve property. The approach adopted by the Court of Appeal therefore affects the rights of the hundreds of *Indian Act*-bands in Canada.

5. In addition to creating a separate system of execution against *Indian Act* bands, the decision of the Court of Appeal means that the prescription of judgment claims against *Indian Act* bands can be interrupted by execution proceedings that are fundamentally flawed, since bands no longer have access to the procedural mechanisms that allow debtors to protect themselves from invalid or illegal execution proceedings.

6. The judgment of the Court of Appeal raises the specter of claims against an *Indian Act* band that survive for decades, since now creditors could restart time running on their claims through the simple service of a writ or notice of execution, without having to take any concrete steps to pursue the matter. This is of particular concern for *Indian Act* bands in financial difficulty, since they cannot declare bankruptcy and therefore have no way to obtain a judicial settlement with their creditors and thereby wipe the slate clean.[2]

7. The decision places *Indian Act* bands in an enforced state of helplessness vis-à-vis unrelenting creditors whose claims the band cannot afford to fully pay. It threatens to lock bands into a vicious downward spiral, since the longer the claim goes unpaid, growing at a court-ordered interest rate, the less likely it is to ever be paid in full, and the worse the financial situation of the band becomes.

8. The judgment turns this Court's jurisprudence on its head: where this Court held that ordinary rules of prescription apply to bar actions by *Indian Act* bands against the Crown,[3] the court below now effectively creates special rules of prescription to the benefit of creditors who sue *Indian Act* bands.

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2 Colin Brousson and Emelie Kozak, "First Nations and Insolvency in Canada: A Shifting Landscape," (2014) 3 J.I.I.C. 189-217, pp. 196-197. [Brousson and Kozak]

3 *Wewaykum Indian Band v. Canada*, 2002 SCC 79, para. 121.

9. Finally, this case is about the notice to which a debtor is entitled when a creditor's execution proceeding is unsuccessful. The Court of Appeal held that prescription of a claim may be interrupted even where a party could not know that an unsuccessful seizure has been attempted against it. The judgment under appeal is therefore not some arcane question of civil procedure but a significant departure from the principle of fair notice that is foundational to the Canadian justice system and the rule of law.

10. The judgment of the Court of Appeal endorses the possibility of seizures that are purely intellectual exercises that bailiffs can perform from the comfort of their offices, a possibility that was rejected by this Court more than 80 years ago.[4] Such an approach is ripe for abuse by creditors and leaves all participants in the justice system unclear as to what has taken place and what effect it may have had on their rights.

11. The Applicant is seeking leave to appeal both to resolve this matter for itself but also to ensure that the Court of Appeal's judgment, and the new procedural mechanism that it opens for creditors of *Indian Act* bands, cannot be invoked against other bands in Canada.

B. Statement of Facts

12. The Applicant is a "band council" within the meaning of the *Indian Act* and is the public government for the Mohawks of Kanesatake, an "Indian band" within the meaning of that *Act*. It delivers public services such as education, housing, social assistance, and land management within the Kanesatake Mohawk interim land base.[5] It also represents the Mohawks of Kanesatake for the purpose of defending and advancing their Indigenous rights. Its funding is composed entirely of public funds received from government and with respect to which it has significant financial reporting and accounting obligations.[6]

13. In October 2004, the Respondents, a lawyer and a group of former expert witnesses, obtained two default judgments against the Applicant for professional fees charged in the context of

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4 *Brook v. Booker*, 41 SCR 331. [Brook]
5 *Kanesatake Interim Land Base Governance Act*, SC 2001, c 8.
6 Trial judgment, para. 9, **Application for Leave to Appeal (hereinafter "A.L.A."), p. 6.**

a legal challenge to the authorization of a mining project in the territory of the Mohawks of Kanesatake.[7]

14. At the time that the judgments were rendered, the Applicant was experiencing severe financial difficulties and had been placed into third-party management by the federal government. In 2005, the third-party manager sent a notice to all the creditors of the Applicant, offering to pay them 25% of their claims as full and final settlement.[8] This was the only option open to the Applicant, since an *Indian Act* band council is not considered eligible to file for protection under the *Bankruptcy and Insolvency Act*.[9]

15. The Respondents refused this offer.[10] They then, between 2005 and 2007, attempted multiple seizures against the Applicant's property, some of which were successful, but which did not reduce the overall amount owed by the Applicant.[11]

16. In November 2016, the Respondents attempted to garnish the property of the Applicant held at its on-reserve bank account and refunds owed by the Canada Revenue Agency and the Agence du Revenu du Québec.[12] All three of these attempted garnishments were subsequently annulled: the Applicant's bank account on reserve was exempt from seizure pursuant to s. 89 of the *Indian Act*, while the refunds were exempt from seizure under statue[13] and the common law rule that the Crown is immune from garnishment proceedings.[14]

17. Around the same time as the unsuccessful garnishments, the bailiff delivered a copy of the corresponding notice of execution to the offices of the Applicant, as required any time a notice of execution has been filed in the court record.[15] However, despite having been given

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7 Court of Appeal judgment, paras. 2-3, **A.L.A., p. 27.**
8 Trial judgment, paras. 9-10, **A.L.A., pp. 6-7**; Court of Appeal judgment, para. 4, **A.L.A., p. 27.** *First Nations Financial Transparency Act*, SC 2013, c 7.
9 *Bankruptcy and Insolvency Act*, RSC 1985, c B-3. Brousson and Kozak, *supra* note 2.
10 Trial judgment, para. 10, **A.L.A., p. 7**; Court of Appeal judgment, para. 4, **A.L.A., p. 27.**
11 Trial judgment, para. 11, **A.L.A., p. 7**; Court of Appeal judgment, para. 5, **A.L.A., p. 27.**
12 Trial judgment, para. 13, **A.L.A., p. 7-8**; Court of Appeal judgment, paras. 7-10, **A.L.A., p. 27-28.**
13 *Tax Administration Act*, CQLR c A-6.002, s 33.
14 *Mitchell v. Peguis Indian Band*, [1990] 2 SCR 85, p. 116. [Mitchell]
15 *Code of Civil Procedure*, CQLR c C-25.01, art. 681. [CCP]

instructions to rely on the same notice of execution to seize the Applicant's movable property, the bailiff made no attempt to do so nor did he indicate, whether orally or by the production of minutes of seizure or any other document, that he was doing anything other than leaving a copy of the notice of execution with the Applicant.[16]

18. At the hearing of this case at first instance, the bailiff confirmed that he had not prepared or served the Applicant with any minutes that would attest to a seizure having been attempted or carried out because he assumed that its property was exempt from seizure.[17] The bailiff also acknowledged that the Chambre des huissiers prepares a model proceeding, known as a "procès-verbal de carence" or a "*nulla bona*" to be completed in such circumstances[18] but that he had neither completed nor served the Applicant with any such document.[19]

19. If the amounts claimed by the Respondents are still valid, with court-ordered interest they would today be worth almost $2 million. The Applicant's revenues for the year ending March 31, 2020, were only $13 million,[20] all of which is composed of public funds provided by government for the delivery of public services to the Mohawks of Kanesatake. It is impossible for the Applicant to pay the claims and continue to function as the public government of Kanesatake.

C. The Judgments Below

20. In February 2020, the Applicant filed an application for declaratory judgment with the Superior Court of Québec, seeking a declaration that the Respondents' claims are prescribed, on the grounds that they had taken no legal proceedings in the previous ten years that would interrupt prescription of those claims. The Applicant also sought alternative relief in case the

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16 Court of Appeal judgment, para. 26, **A.L.A., p. 30.**

17 Excerpts from trial transcripts, p. 170, **A.L.A., p. 72**; Court of Appeal judgment, paras. 11, 26, **A.L.A., p. 28, 30.**

18 Chambre des huissiers, Model procès-verbal de carence, Exhibit P-30, **A.L.A., p. 65ff.** [P-30]

19 Excerpts from trial transcripts, p. 169, **A.L.A., p. 71.**

20 Financial Statements of the Mohawks Council of Kanesatake for year ending March 31, 2020, Exhibit P-23 (excerpt), p. 2, **A.L.A., p. 63.**

court determined that a seizure of its movable property had been carried out or attempted in November 2016.

21. The trial took place in May 2022. Until the hearing, six years after the bailiff's visit, the Applicant had received no indication that it had been subject to an attempted seizure of its movable property—still less that this undocumented unsuccessful seizure had given renewed legal life to onerous claims that it believed were prescribed.

22. On September 7, 2022, the Superior Court rendered judgment dismissing the Applicant's application. The trial judge decided that no property was seized in November 2016 and that, for this reason:

    a. the bailiff was not required to prepare any document to record what had taken place;[21]

    b. there was nothing the Applicant could have done to contest the bailiff's actions;[22] and,

    c. the Applicant's alternative relief seeking an opportunity to contest the attempted seizure was therefore denied.[23]

23. Despite these conclusions, the judge ruled that "the situation should be assimilated to an unsuccessful seizure"[24] and, as a result, prescription of the Respondents' claims had been interrupted on November 23, 2016.

24. The Applicant appealed to the Court of Appeal of Québec. On December 20, 2023, the Court of Appeal dismissed the appeal. The Court of Appeal found that the Applicant had no right to notice of what had taken place and suffered no harm from the lack of documentation,[25] despite the fact that, as a result of this "unsuccessful seizure", crippling debts that are now 20 years old receive renewed legal life.

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21 Trial judgment, paras. 62, 73, **A.L.A., p. 18-19, 20.**
22 *Ibid.*, para. 66, **A.L.A., p. 19.**
23 *Ibid.*, para. 73, **A.L.A., p. 20.**
24 *Ibid.*, para. 70, **A.L.A., p. 19.**
25 Court of Appeal judgment, para. 31, **A.L.A., p. 31.**

25. Key for the Court of Appeal was the fact that the Applicant's on-reserve property is exempt from seizure. It affirmed that "[i]n the specific context of the *Indian Act*, it would have apparently been moot for the bailiff" to prepare a document attesting to the fact that he had attempted a seizure.[26] For the Court, it is the "special circumstances"[27] of the *Indian Act* exemption that justify the bailiff's decision to not record his actions[28] and allow a court to find an "unsuccessful seizure" where no seizure was in fact attempted.[29]

PART II – QUESTIONS IN ISSUE

26. The questions in issue in this appeal are as follows:

a. Does the fact that an *Indian Act* band's property may be exempt from seizure pursuant to law mean that bands are owed fewer procedural protections in execution proceedings than other persons and in particular, are denied the right to contest those proceedings?

b. Does a creditor's attempt to execute on a judgment need to be documented if the creditor intends to rely on the attempt to argue that they have interrupted prescription of their claim?

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26 *Ibid*.
27 *Ibid*, para. 33, **A.L.A., p. 32.**
28 *Ibid*, para. 26, **A.L.A., p. 30.**
29 *Ibid*, paras. 31-33, **A.L.A., p. 31-32.**

PART III – STATEMENT OF ARGUMENT

A. Execution of Judgments and the Rules of Prescription

27. Under article 2924 of the CCQ, a right resulting from a judgment is prescribed at the end of ten years, if the right is not exercised. Article 2892 provides that "[t]he filing of a judicial application before the expiry of the prescriptive period constitutes a civil interruption" of prescription, while article 2894 adds that "[i]nterruption does not occur if the demand is dismissed, or if the proceedings are discontinued or perempted."

28. Under the *Code of Civil Procedure* (CCP), debtors may oppose, and seek to have annulled, execution proceedings taken against them by filing an opposition to the proceeding; their grounds may include that the property is exempt from seizure, that the debt is extinguished, or that there is an irregularity in the seizure resulting in serious prejudice.[30] The ten years to exercise a judgment under article 2924 CCQ can therefore be interrupted by the creditor's execution proceedings, as required by article 2892 CCQ, but the debtor's successful opposition can negate the effects of the creditor's proceedings, pursuant to article 2894 CCQ.[31]

29. According to this Court, limitations or prescription is a matter of substantive (rather than procedural) law, which vests a right in the defendant.[32] Statutes of limitations are statutes of repose, whose first rationale is certainty: there should come a time when a party "should be secure in his reasonable expectation that he will not be held to account for ancient obligations."[33] Under article 2924 of the CCQ, therefore, if no proceedings to execute judgment have been successful, at the end of a decade, a judgment debtor has a right to conduct its affairs secure in the expectation that his obligations to the creditor are too ancient to be enforceable.

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30 CCP, *supra* note 15, art. 735.

31 *Investissements Pliska inc. c. Guy & Gilbert, s.e.n.c. en liquidation*, 2005 QCCA 603. [Pliska]

32 *Tolofson v. Jensen; Lucas (Litigation Guardian of) v. Gagnon*, [1994] 3 SCR 1022, p. 1071.

33 *M.(K.) v. M.(H.)*, [1992] 3 SCR 6, p. 29.

30. Finally, there is an important distinction between the notice of execution, on the one hand, and minutes of seizure, on the other. The notice of execution is the document that starts execution proceedings in a file—there is only one, and it includes all creditors and all the various instructions they have given.[34] It is notified to a debtor as soon as it is filed and regardless of whether a specific execution measure is being taken.[35] In contrast, minutes of seizure are the vehicle for recording seizures: they inform the parties and the courts of the actions that have been taken under the notice of execution, for which creditors, and respecting which property.[36]

B. *Indian Act* Bands Must be Treated Equally at Law

(i) The Law Previously: Debtor's Rights and the Importance of Notice

31. Prior to its decision in this case, the Court of Appeal had established a logically consistent approach to determining when and how proceedings in execution could interrupt prescription. Under this approach, a seizure is treated like any other judicial application. This means that a seizure, whether successful or unsuccessful, can interrupt prescription if it is not annulled. If, however, the seizure is annulled, it does not interrupt prescription.[37] This approach is a simple and direct application of the CCQ's rules on prescription, consistent with the Court of Appeal jurisprudence that the rules must be read as a coherent whole and that in particular, articles 2892 and 2894 CCQ must be read and applied together.[38]

32. When adopting this approach, the Court of Appeal emphasized two things: first, that even unsuccessful seizures are documented in some way, for example through the production and

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34 CCP, *supra* note 15, art. 681-682.
35 *Ibid*, art. 681 para. 3.
36 *Ibid*., art. 705, 707.
37 Pliska, *supra* note 31, paras. 22-31. See also *Bard c. Appel*, 2017 QCCA 1150. [Bard]
38 *Sudaco, S.p.A. c. Connexions commerciales internationales CT inc.*, 2012 QCCA 2254, para. 38.

notification (service) of minutes of a *nulla bona*;[39] and second, that debtors have a right to contest a seizure and apply for its annulment, even where that seizure is unsuccessful.[40]

33. Until its judgment against the Applicant, the Court of Appeal had consistently protected the rights of judgment debtors to notice by emphasizing the importance of form and procedure in execution proceedings. Seizures that were tainted by even minor errors would be quashed by the Court of Appeal[41] while the Superior Court held the judgment debtor's right to notice is a matter of public order.[42] In at least two appellate cases, seizures were quashed specifically where a writ of seizure was served but no minutes of seizure were prepared.[43]

(ii) The Law Now: A Special Regime for *Indian Act* Bands That Rejects the Protections Available to Other Debtors

34. The policy reason for the Court of Appeal's previous insistence on notice to judgment debtors seems clear: if debtors did not enjoy the right to annul even unsuccessful seizures, they would be helpless to prevent a creditor from buying time and artificially extending the prescription period for its judgment by regularly attempting to seize property that the creditor knows is exempt from seizure. This is exactly what the Respondents did when attempting to obtain garnishments in 2016, which the Applicant successfully annulled. What the Applicant could not do in this case was to annul a seizure that the bailiff abandoned before taking any moveable property, yet the Court of Appeal held this was enough to interrupt prescription and make the Respondents' claim enforceable for another decade.

35. The Court of Appeal's judgment creates a new type of execution proceeding that appears unbounded by the rules of the CPC or the CCQ, one that applies at least to band councils, perhaps to all registered Indians with property on reserve, and potentially to any judgment

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39 *Pliska*, *supra* note 31, para. 31; *Tariff of fees of court bailiffs*, CQLR c H-4.1, r 13.1 (version in effect at time of the facts at issue), art. 33(b). [Tariff of fees]

40 *Pliska*, *supra* note 31, para. 29.

41 *G.T. c. M.A.*, 2005 CanLII 32969 (QC CS), para. 17; *Poitras c. Banque Canadienne nationale*, [1981] J.Q. no 109 (QC CA), paras. 13-14 [Poitras]; *Latulippe c. Besner*, 1983 CanLII 2749 (QC CA), paras. 12-13. [Latulippe]

42 *Fort Garry Trust Company c. Roberts Sprinkler Ltd.*, [1981] J.Q. No. 97 (QC CS), para. 66.

43 *Poitras*, *supra* note 41; *Latulippe*, *supra* note 41.

debtor with property is exempt from seizure. According to the judgment on appeal, an attempted seizure of a band council is a judicial application that interrupts prescription like any other except, it seems, that notice is not mandatory, in which case the judicial application can neither be contested nor dismissed.

36. The Court of Appeal confirmed that the Applicant had, by filing an opposition and obtaining a judgment annulling the Respondents' attempted garnishments, ensured that these garnishments did not interrupt prescription.[44] While these attempted garnishments were judicial applications within the meaning of article 2892 CCQ, any interruptive effect they could have had on prescription was retroactively cancelled when they were annulled, the whole in accordance with article 2894 CCQ.

37. Nevertheless, the Court of Appeal held that the Respondents had interrupted prescription of their claim in November 2016 so that their claims are valid for at least another ten years. This is because the Court of Appeal held that the Respondents had carried out an unsuccessful seizure of the Applicant's movable property, even though no document had been created to evidence this fact and the Applicant had been provided with no notice of the supposed seizure of its property.[45]

38. Implicit in the Court of Appeal's judgment is the conclusion is that the bailiff's visit to the Applicant's office constituted a judicial application within the meaning of article 2892 CCQ because the CCQ provides no other way for a creditor's actions to interrupt prescription of its personal rights as against a debtor.[46]

39. Despite concluding that the bailiff's visit constitutes a "judicial application", the Court of Appeal also expressly held that "the appellant could not oppose the seizure since the bailiff never proceeded to seize any of the assets that were exempt from seizure."[47] In other words, this was a judicial application that could not be opposed and could not be dismissed. In

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44 Court of Appeal judgment, para. 25, **A.L.A., p. 30.**
45 *Ibid*, para. 31, **A.L.A., p. 31.**
46 Bard, *supra* note 37, 2017 QCCA 1150.
47 Court of Appeal judgment, para. 32, **A.L.A., p. 31-32.**

adopting this approach, the Court gives article 2892 of the CCQ its full effect in favour of the Respondents as judgment creditors while excluding any possibility for the Applicant as judgment debtor to use article 2894 CCQ to protect itself from invalid execution proceedings.

40. Why did the court below depart from its rule that the CCQ's provisions on prescription must be read as a whole? The only reason alluded to is "the specific context of the *Indian Act*,"[48] namely, that the debtor is a band council whose property may be exempt from seizure pursuant to s. 89 of the *Indian Act*.

41. As a result of the Court of Appeal's decision, a band council's creditors have a much easier time: if they wish to interrupt prescription of their claim, they can simply instruct the bailiff or sheriff to serve a writ or notice of execution on the council. They need do nothing more and, more particularly, the creditors need not attempt to actually seize anything or serve and file any minutes documenting their failure to find property to be seized (a *nulla bona*). On the Court of Appeal's reasoning, the creditors' uncompleted proceeding becomes an unsuccessful seizure that interrupts prescription even though the band council is left without right or remedy to oppose the proceedings.

42. The Court of Appeal's creation of a type of judicial application that cannot be contested or annulled is contrary to the CCQ. It moves the Court away from the rational and well-reasoned approach to deciding issues of prescription that it has upheld since 2005 towards a system with no discernable structure and that is driven not by legal rules but by perceived equities. Such systems are ripe for abuse.

43. The Court of Appeal's creation of a type of judicial application that cannot be contested is also contrary to the very nature of a judicial application. As the CCP makes clear in its guiding principles,[49] and as the Court of Appeal has found on multiple occasions, the *sine*

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48 *Ibid*, para. 31, **A.L.A., p. 31.**
49 CCP, *supra* note 15, art. 17.

qua non of a judicial application is that it puts an issue before a court to be decided after hearing from either party.[50]

44. The Court of Appeal gave no reason for setting aside its principled approach other than the application of the *Indian Act* exemption from seizure to some of the Applicant's property.

45. The exemption from seizure established by the *Indian Act* is quite limited: it applies only to the on-reserve property of a registered Indian or a band.[51] In general this means that the property's physical location must be on the reserve for the exemption to apply.[52] The exemption does not create a golden throne from which Indigenous groups reap unseemly profit, as the social conditions on many reserves attest.

46. This Court has previously emphasized the foundational nature of the exemptions from taxation and seizure contained in the *Indian Act*, characterizing them as "part of a legislative 'package' which bears the impress of an obligation to native peoples which the Crown has recognized at least since the signing of the Royal Proclamation of 1763."[53] These provisions signify that the Crown "is honour-bound to shield Indians from any efforts by non-natives

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50 *Mayrand c. Serge Morency et Associés inc.*, 2010 QCCA 1190, para. 21; *Thibeault c. Québec (Sous-ministre du Revenu)*, 2009 QCCA 1786, para. 7; *Société canadienne des postes c. Rippeur*, 2013 QCCA 1893, para. 39; *Flanagan c. Périard*, 2007 QCCS 4584, para. 36; aff'd. *Flanagan c. Périard*, 2008 QCCA 614.

51 "Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band": *Indian Act*, RSC 1985, c I-5, s 89 (emphasis added).

52 *McDiarmid Lumber Ltd. v. God's Lake First Nation*, 2006 SCC 58, para. 19, though note that in certain limited circumstances a "paramount location" test may be applied for chattels or movable property (*Kingsclear First Nation v. J.E. Brooks & Associates Ltd.*, 1991 CanLII 4002 (NB CA)) and a "connecting factors" test may be applied to determine the location of intangible personal property (*Bastien Estate v. Canada*, 2011 SCC 38).

53 Mitchell, *supra* note 14, p. 131.

to dispossess Indians of the property they hold *qua* Indians, i.e. their land base and chattels on that land base."[54]

47. The Court of Appeal's decision to create an exceptional execution regime for *Indian Act* bands turns the jurisprudence of this Court on its head: the fact that *Indian Ac*t bands are protected from the seizure of the moveable property they hold on reserve is held out as the reason that unsuccessful and undocumented attempts to seize that same property should be treated as judicial applications that interrupt the normal prescription of judgments obtained against them, in contradiction of a long-standing commitment by the Crown. The decision must be corrected for the sake of *Indian Act* bands throughout Québec and across Canada.

(iii) The Implications for Other Parties with Property Exempt from Seizure

48. Section 89 of the *Indian Act* protects the on-reserve property of individual registered Indians from seizure, as well as a band's property. Obviously, if this protection constitutes "special circumstances" that authorize the courts to extend the rights of judgment creditors against band councils like the Applicant it will also apply to band members who live, work, or do business on reserve.

49. But it is not only bands and registered Indians who enjoy exemptions from seizure. Most governments enjoy full or partial exemptions: the Crown in right of either Canada or a province is exempt from seizure both by statute and at common law.[55] Foreign governments and international organizations are immune under treaties imported into domestic law by statute.[56] Article 916 CCQ prohibits parties from seizing not only the property of the State (i.e., the Crown), but also the "property of legal persons established in the public interest that

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54 *Ibid.*

55 *Crown Liability and Proceedings Act*, RSC 1985, c C-50, s 29; CCP, *supra* note 15, s 80; *Québec (Procureur général) c. 9148-5847 Québec inc.*, 2012 QCCA 1362, para. 76.

56 *State Immunity Act*, RSC 1985, c S-18, s 3; *Foreign Missions and International Organizations Act*, SC 1991, c 41, s 3.

is appropriated to public utility," a rule that protects the immoveable property of municipalities and that receives a large and liberal interpretation.[57]

50. For individuals, the benefits paid under most government income security programs are exempt from seizure, including provincial programs such as workers' compensation or social assistance,[58] federal programs such as employment insurance or old age security,[59] as well as federal and provincial public pension plans.[60] Every individual also enjoys protection from the seizure of part of their employment income and from the seizure of moveable property in their principal residence that they need for daily life, up to a fixed market value.[61]

51. The Court of Appeal's judgment leaves open two possibilities, neither of which is acceptable. The first is that every exemption from seizure constitutes special circumstances that will allow undocumented and unsuccessful seizures, such as those of the Respondents, to extend the enforceability of judgment debts indefinitely and past the normal prescription period. Foreign embassies as well as mothers on social assistance could face judgments debts that last for decades, without being able to challenge them. The second possibility is that the Court of Appeal meant for this special regime to apply only to *Indian Act* bands and registered Indians, making them the victims of prohibited discrimination, uniquely disadvantaged under the rules of civil procedure.

C. Execution Must be Documented to Affect a Person's Rights

52. All parties to execution proceedings have a right to be notified of measures taken that may affect their rights, notice being a foundational principle of the rule of law. The Court of

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57 *Douglas Consultants inc. c. Unigertec inc.*, 2021 QCCA 384, para. 18.

58 *Act respecting industrial accidents and occupational diseases*, CQLR c A-3.001, s 144; *Act respecting the Ministère de l'Emploi et de la Solidarité sociale and the Commission des partenaires du marché du travail*, CQLR c M-15.001, s 5.1.

59 *Employment Insurance Act*, SC 1996, c 23, s 42; *Old Age Security Act*, RSC 1985, c O-9, s 36.

60 *Canada Pension Plan*, RSC 1985, c C-8, s 65; *Act respecting the Québec Pension Plan*, CQLR c R-9, s 145.

61 CCP, *supra* note 15, art. 694, 698.

Appeal has established a new approach, which would allow creditors to conduct seizures that are undocumented, but which nonetheless have a profound effect on the debtor's rights.

53. The Court of Appeal found that the CCP "does not specifically require that the bailiff record minutes stating that a seizure was unsuccessful owing to the absence of seizeable assets."[62] It acknowledged that the bailiff had not prepared minutes of an unsuccessful seizure or a *nulla bona*,[63] but nonetheless found that there was no prejudice to the Applicant from this lack of notice.[64]

(i) Notice is a Central to the Adversarial System

54. The principle of notice is enshrined as the first "Guiding Principle of Procedure" in the *Code of Civil Procedure*. Article 17 prohibits a court from "rul[ing] on an application … which affects the rights of a party unless the party has been heard or duly called," and requires that court "uphold the adversarial principle and see that it is adhered to until the judgment and during execution of the judgment."[65]

55. The judgment of the Court of Appeal would do away with this central tenet of our legal system in any situation where the creditor or their bailiff believed that the debtor's property was exempt from seizure. In such circumstances, the bailiff would not be required to notify the debtor that they had attempted a seizure, and the debtor would be unaware that the creditor had allegedly interrupted prescription of their claim.

(ii) Notice is Key to the System for Contesting Forced Execution Measures

56. Article 735 CCP provides that "[a] person may oppose the seizure … of property and ask for the annulment in whole or in part of the seizure" on grounds including that "(1) the property is exempt from seizure; (2) the debt is extinguished; … (4) the proceedings are affected by

62 Court of Appeal judgment, para. 29, **A.L.A., p. 31.**
63 *Ibid*, para. 26, **A.L.A., p. 30.**
64 *Ibid*, para. 31, **A.L.A., p. 31.**
65 CCP, *supra* note 15, art. 17.

an irregularity resulting in serious prejudice." The right to form an opposition must be exercised "within 15 days of the notice of the minutes of seizure."[66]

57. The model notice of execution established by the Minister of Justice, which every creditor must use, reaffirms the text of the CCP, advising the debtor that "you may oppose the execution measures taken against you within 15 days after notification of the minutes of seizure, the notice of sale or the seizure in the hands of a third person, in accordance with articles 735 and 736 CCP."[67]

58. As the provisions of the CCP and the Minister's model notice of execution make clear, the right to contest an attempted execution measure opens upon the notification of the minutes of seizure. By eliminating any requirement to produce minutes in a situation where property is exempt from seizure, the Court of Appeal has also eliminated any recourse the debtor may have had to oppose the execution measures taken against it, even for reasons that are totally unrelated to their property's alleged immunity from seizure.

59. The Court of Appeal has gone so far as to decide that it is only at the instruction of the creditor that a bailiff will prepare minutes of a *nulla bona* to evidence the actions they have taken.[68] This is contrary to both the duties of good faith and cooperation incumbent upon all the parties to the execution proceedings,[69] as well as the bailiff's duty of impartiality to those same parties.[70]

(iii) A Model for Appropriate Notice Was Available

60. The governing authority for bailiffs produces a draft form that is designed to meet exactly the need identified in this situation. The model "Procès-Verbal de Carence" (the equivalent of minutes of a *nulla bona*) produced by the Chambre des huissiers clearly states that it is to

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66 *Ibid*, art. 736.

67 *Model pleadings and other documents established by the Minister of Justice pursuant to articles 136, 146, 235, 271, 393, 546 and 681 of the Code of Civil Procedure*, CQLR, c C-25.01, r 2, Annex 8.

68 Judgment of the Court of Appeal, para. 31, **A.L.A., p. 31.**

69 CCP, *supra* note 15, art. 683.

70 *Ibid*, art. 685.

be completed when a bailiff cannot find any property belonging to the debtor that can legally be seized.[71] The model also affirms that, once it is completed, it should be notified to the debtor.

61. There is also a solid legal foundation for the *nulla bona* process, as demonstrated by its inclusion in the regulation setting out the fees charged by bailiffs when they conduct seizures of movable property.[72]

62. Despite having a clear model before it that would provide the appropriate notice to the debtor, the Court of Appeal instead opted to create execution proceedings that do not require notice and that do not produce any reliable document trail that would assist the parties, and the courts, in understanding what happened at a given moment in time. This approach is bound to create confusion, misunderstanding, and injustice.

(iv) Seizures Cannot be Purely Intellectual Exercises

63. The Court of Appeal's judgment revives a procedural trick that this Court attempted to address as long ago as 1941: the seizure as a purely intellectual exercise.[73] As this Court insisted in that case, execution proceedings must have tangible results that can be seen and understood by all. Just as no one can, in good conscience, assert that bailiffs could carry out a seizure without getting up from their office chair,[74] it makes no sense to assert that the bailiff can effect a seizure by simply thinking about it; to find otherwise would be "to establish a most dangerous precedent."[75] However, this is the approach that the Court of Appeal has accepted in this file. The rights of all debtors in execution proceedings are put at risk when execution proceedings become so separated from reality.

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71 P-30, *supra* note 18, **A.L.A., p. 65ff.**
72 Tariff of fees, *supra* note 39, art. 33(b).
73 Brook, *supra* note 4, p. 335.
74 *Ibid*, p. 335.
75 *Ibid*, p. 336.

D. Conclusion

64. The judgment of the Court of Appeal creates a special execution regime that applies only to *Indian Act* bands and does away with notice as an essential component to execution proceedings. The judgment will have significant consequences for *Indian Act* bands and will undermine the fairness and transparency of execution proceedings for all participants in the justice system. The Applicant requests that this Honourable Court grant it leave to appeal so that these errors can be corrected and the proper balance restored.

PART IV – SUBMISSIONS CONCERNING COSTS

65. The Applicant is an *Indian Act* band of limited financial means attempting to resolve a legacy financial burden that has complicated its financial affairs for two decades. It does not seek costs on this motion for leave and asks that no costs be awarded against it in the event that its application is dismissed.

PART V – ORDER SOUGHT

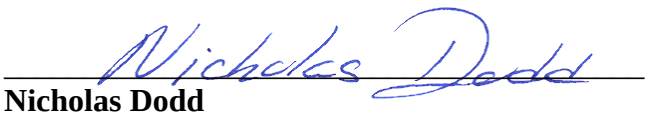
66. For the foregoing reasons, may it please the Court to:

GRANT the present application for leave to appeal;

AUTHORIZE the Mohawk Council of Kanesatake to file an appeal of the judgment rendered by the Québec Court of Appeal in *Mohawk Council of Kanesatake v. Sylvestre*, 2023 QCCA 1603 (QCCA file No. 500-09-700122-229);

THE WHOLE without costs.

Montréal, February 19, 2024



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PART VI –TABLE OF AUTHORITIES

Legislation **Paragraph(s)**

Legislation ***(cont'd)*** **Paragraph(s)**

Jurisprudence

Jurisprudence ***(cont'd)*** **Paragraph(s)**

Jurisprudence ***(cont'd)*** **Paragraph(s)**

Doctrine
