

FEDERAL COURT OF APPEAL		D E P O S I T
COUR D'APPEL FÉDÉRALE		
F I L E D	February 27, 2023 le 27 février, 2023 Ginette Lischenski	
VANCOUVER, BC	1	

Court File No. A-62-23**FEDERAL COURT OF APPEAL**

BETWEEN:

SALT RIVER FIRST NATION #195

**Appellant/
Proposed Intervener**

CHIEF SHANE GOTTFRIEDSON, on behalf of the TK'EMLUPS TE
SECWÉPEMC INDIAN BAND and the TK'EMLUPS TE SECWÉPEMC INDIAN
BAND, and CHIEF GARRY FESCHUK, on behalf of the SECHELT INDIAN
BAND and the SECHELT INDIAN BAND

**Respondents/
Plaintiffs**

AND:

HIS MAJESTY THE KING IN RIGHT OF CANADA
as represented by THE ATTORNEY GENERAL OF CANADA

**Respondent/
Defendant****NOTICE OF APPEAL****TO THE RESPONDENTS:**

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellant. The relief claimed by the appellant appears below.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellant. The appellant requests that this appeal be heard at Vancouver, British Columbia.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341A prescribed by the *Federal*

Courts Rules and serve it on the appellant's solicitor, or, if the appellant is self-represented, on the appellant, WITHIN 10 DAYS after being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341B prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

February 27, 2023

Issued by: _____
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Counsel for Respondent / Defendant,
His Majesty the King in Right of Canada

APPEAL

THE APPELLANT APPEALS to the Federal Court of Appeal from the order of Madam Justice Ann Marie McDonald (the “**Motions Judge**”) dated February 17, 2023 denying the Appellant’s motion for leave to intervene and be added as a class member in the proceedings in Federal Court File No. T-1542-12.

THE APPELLANT ASKS this Honourable Court to:

1. Allow the appeal and set aside the February 17, 2023 order of the Motions Judge;
2. Grant leave for the Appellant to intervene and join as a class member in Federal Court File No. T-1542-12;
3. In the alternative, remit this matter to the Federal Court to conduct a hearing to determine, in accordance with the principles and standards set forth by this Honourable Court, whether the Appellant should be granted leave to intervene and allowed to join as a class member in Federal Court File No. T-1542-12; and
4. Such further or other relief as this Honourable Court deems just.

THE GROUNDS OF APPEAL are as follows:

1. The Motions Judge erred in law in dismissing the Appellant’s motion by:
 - (a) Failing to identify and apply the correct legal standards for determining whether a putative class member who missed a deadline to opt-in or submit a claim should nonetheless be allowed to join the class, which require the court to: (i) consider whether sufficient notice was received by the Appellant and any other reasons for the Appellant missing the deadline, and (ii) balance the harm or hardship to the Appellant if deprived of the class action remedy against the prejudice to those who joined the class on time;
 - (b) Failing to consider the compelling public interests of justice and reconciliation that favor not applying a strict opt-in deadline and allowing additional Bands to join the class and have the opportunity to remedy some of the devastating effects of the residential school system;
 - (c) Failing to consider that Rules 334.17(1)(f) and 334.21 of the *Federal Courts Rules* only provide for opt-out classes, and that opt-in classes are fundamentally inconsistent with the access to justice policy underlying class proceeding rules; and
 - (d) Failing to consider that because the Aboriginal rights on which the class action and settlement are based are communal in nature and not held by the Bands, their leadership or individual members, but rather by the

members as a collective, class action procedures should be flexible and recognize the difficulty of providing effective notice to a collective body.

2. The Motions Judge made a palpable and overriding error of fact by:
 - (a) Failing to consider the affidavits before the court establishing that the Appellant had not received sufficient or any notice of the class action proceeding and opt-in requirement and deadline; and
 - (b) Finding that Class counsel had communicated the opt-in deadlines to all Bands that were potential class members, without any evidence before the court supporting any such finding at all or with respect to the Appellant.
3. The Motions Judge erred in law and failed to observe a principle of procedural fairness and natural justice by incorrectly deciding the Appellants' motion pursuant to Rule 369 of the *Federal Courts Rules*, when no such request had been made by the moving party, and by failing to hold an oral hearing at which the Appellants (and other parties) were allowed to make meaningful submissions on these important issues.
4. The Motions Judge erred with respect to the test for intervention, including, but not limited to, the Appellants' genuine interest in the class action proceedings and settlement as a potential class member.
5. Such further and other grounds as counsel may advise and this Honourable Court permit.

Date: February 27, 2023



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