Court File No. 38795

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

ROGER SOUTHWIND, FOR HIMSELF, AND ON BEHALF OF THE MEMBERS OF THE LAC SEUL BAND OF INDIANS AND LAC SEUL FIRST NATION

Appellants

AND:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO and HER MAJESTY THE QUEEN IN RIGHT OF MANITOBA

Respondents

APPELLANTS' FACTUM
(ROGER SOUTHWIND, FOR HIMSELF, AND ON BEHALF OF THE MEMBERS OF THE LAC SEUL BAND OF INDIANS AND LAC SEUL FIRST NATION, APPELLANTS)
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I - OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. Canada breached its fiduciary duties to Lac Seul First Nation ("LSFN") by unlawfully bringing about the flooding of over 11,000 acres of LSFN's reserve lands for a hydroelectric project in 1929, knowing it would bring hardship and disaster to LSFN, and without providing any reasonable compensation or replacement land. The flooding has had devastating effects on LSFN, depriving them of the ability to use and benefit from a key part of their reserve forever. The Courts below confirmed Canada's breaches, but in assessing compensation lost sight of the nature of those breaches and their effects on LSFN. In doing so, they erred in law.

2. The law of equity identifies certain relationships of social importance, preserves them and ensures accountability. Canada has acknowledged that no relationship is more important than the one between Canada and Indigenous peoples and that reconciliation is an imperative. When the Crown-Indigenous relationship has been compromised by breaches of fiduciary duty that have unlawfully benefitted Canada and third parties for nearly a century, the law's response must be to meaningfully restore the Indigenous group rather than condone wrongdoing.

3. Far from holding Canada accountable and restoring what LSFN lost, the Courts below sought to restore Canada to the position it would have been in had it not breached its duties to LSFN. By compensating LSFN based on a hypothetical expropriation, rather than on what actually happened, the Courts shifted the focus from restoring what LSFN lost to retroactively regularizing Canada's unlawful actions.

4. The central issue before this Court is how to compensate for harms caused by Canada's breaches in a manner that accords with both equitable and constitutional principles, including reconciliation and the honour of the Crown. To achieve a just result, wrongs must be acknowledged and addressed, taking into account the Indigenous perspective on what was lost. Neither equity nor reconciliation is served by notionally rewriting history, as attempted by the Courts below.

B. Facts

1. Lac Seul First Nation

5. LSFN brought this action to seek redress for the unlawful flooding of 11,304 acres of their only reserve (the "Lands") as part of the construction of the Ear Falls Storage Dam (the

"Dam") for the Lac Seul Storage Project (the "Project").[1] The Dam caused the waters of Lac Seul to rise ten feet. The Lands are still part of the reserve, and will remain flooded for eternity, though the flooding was never legally authorized.[2]

6. LSFN's members are Anishinaabe people and have always been lake dwellers, travelling by water, keeping their homes and gardens near the water, cultivating wild rice in the water, fishing in the water and hunting near the water.[3] In the late 19th and early 20th centuries, LSFN's livelihood depended on their lands, waters, and the resources they used in the rich and productive riparian zones, through hunting, trapping, fishing, gathering berries, harvesting wild rice and growing produce and hay.[4] LSFN's harvesters are the keepers and protectors of their lands.[5] Their stewardship of their lands includes the concept of *Gaa-ondaadiziyuing Akiing* ("Our Livelihood From the Land"),[6] through which they follow a practice of reciprocity and equity to "circulate [their] knowledge of Land that makes its total value much more than the sum of its individual parts."[7]

7. LSFN's territory extends from the Trout Lake region in northwest Ontario, southeast through the Lac Seul region and easterly and northerly from Lac Seul towards Lake St. Joseph.[8] Their sole reserve, Lac Seul Indian Reserve No. 28 ("Reserve"), is located on the southeastern

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[1] Federal Court Reasons ("**Trial Reasons**") at paras 1-2, 5-7, 116-118, Appellants' Record ("**AR**"), Vol I, Tab 1 at 4-6, 37-38; Federal Court of Appeal Reasons ("**FCA Reasons**") at para 6, AR Vol I, Tab 2 at 196.
[2] Trial Reasons at paras 2, 6, 296-298, 359, 528-529, AR Vol I, Tab 1 at 4, 6, 105-106, 126, 180.
[3] Transcript - Chief Bull, Appellants' Record before the Federal Court of Appeal ("**FCA AR**"), Part B, Vol II, Tab 20 at 170, ll 3-15; *A History of the Lac Seul Storage Project, Flooding on the Lac Seul Indian Reserve No. 28, and Related Compensation to the Lac Seul Band, 1873 to 1943* ("**Baldwin Report**"), Exh 7971, FCA AR, Part C, Vol CCXXXIX at 155; *Loss of Use of Lands and Resources by Lac Seul First Nation as a Result of Flooding of Lac Seul ca. 1929* ("**Reimer Reply Report**"), Exh 7982, FCA AR, Part C, Vol CCXL at 216-217.
[4] Trial Reasons at para 112; Reimer Reply Report, Exh 7982, FCA AR, Part C, Vol CCXL at 78-82, 86, 89.
[5] *Pizaaniziwin 'Living a Life in Balance and Moderation': The Economy of the Obishikokaang (Lac Seul) Anishinaabeg* ("**Pizaaniziwin Report**"), Exh 7790, FCA AR, Part C, Vol CCXXXIII at 174.
[6] Reimer Reply Report, Exh 7982, FCA AR, Part C, Vol CCXL at 97.
[7] Pizaaniziwin Report, Exh 7790, FCA AR, Part C, Vol CCXXXIII at 174.
[8] Reimer Reply Report, Exh 7982, FCA AR, Part C, Vol CCXL at 67-68, 78.

shores of Lac Seul in northwestern Ontario.[9] LSFN have about 2700 members, one-third of whom live on the Reserve in three LSFN communities.[10]

2. Treaty 3 and LSFN's Reserve

8. LSFN's Reserve was created under Treaty 3, which Canada and representatives of the "Saulteaux Tribe of the Ojibbeway Indians at the Northwest Angle on the Lake of the Woods" signed on October 3, 1873 ("Treaty 3").[11] LSFN adhered to Treaty 3 at Lac Seul on June 9, 1874.[12]

9. Treaty 3 required Canada to create reserves "selected and set aside where it shall be deemed most convenient and advantageous for each band or bands of Indians."[13] Federal government officials met with LSFN in 1875 to select reserve lands. LSFN chose Lac Seul as the site of their Reserve because of the resources along the shoreline of Lac Seul and the social, cultural and spiritual importance of that area to LSFN.[14] The Reserve was surveyed in 1883 and set aside for LSFN's use and benefit.[15]

3. The Ear Falls Storage Dam and the Lac Seul Storage Project

10. In the early 20th century, Canada wanted to provide more power to Winnipeg, which was an important economic centre and key to western expansion.[16] By 1911, Canada had identified Lac Seul, which flows into the English River in Ontario, which in turn flows into the Winnipeg River in Manitoba, as having the necessary water storage potential for hydroelectric power.[17] Canada was making plans for LSFN's Lands to be flooded more than ten years before the Dam was completed at Lower Ear Falls. The record shows that Canada understood at an early stage the harms the flooding would cause to LSFN, but pursued the Project without addressing any of those harms. Canada failed to consult LSFN or respond to LSFN's questions about the proposed

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[9] Baldwin Report, Exh 7971, FCA AR, Part C, Vol CCXXXIX at 112-115; Exh 7038, FCA AR, Part C, Vol CXVI at 174, para 8; Exh 7969, FCA AR, Part C, Vol CCXXXIX at 88.
[10] Trial Reasons at para 4, AR Vol I, Tab 1 at 5.
[11] Treaty No. 3 Between Her Majesty the Queen and the Saulteaux Tribe of the Ojibbeway Indians at the Northwest Angle on the Lake of the Wood with Adhesions dated 03/10/1873 ("Treaty 3"), Exh 135, FCA AR, Part C, Vol XXXI at 343.
[12] Trial Reasons at para 104, AR Vol I, Tab 1 at 33.
[13] Trial Reasons at para 220, AR Vol I, Tab 1 at 80-81.
[14] Reimer Reply Report, Exh 7982, FCA AR, Part C, Vol CCXL at 86.
[15] Trial Reasons at paras 105-106, AR Vol I, Tab 1 at 33-34.
[16] Baldwin Report, Exh 7971, FCA AR, Part C, Vol CCXXXIX at 152-153.
[17] Trial Reasons at paras 116-121, AR Vol I, Tab 1 at 37-39.

flooding in a forthright manner or at all.[18] Canada proceeded without regard for the law or its sacred trust-based relationship with LSFN.

11. In 1911, Canada established the Dominion Water Power Branch ("Dominion Power") within the Department of the Interior. The Department of Indian Affairs ("Indian Affairs") was also under the authority of the Department of the Interior at this time.[19]

12. Dominion Power prepared a report in 1915 entitled "Report on the Winnipeg River Power and Storage Investigations" ("1915 Report"). The 1915 Report noted that Lac Seul, being "the largest lake in the basin", had the potential to be a suitable storage reservoir with a contemplated ten foot flooding limit.[20] According to the 1915 Report, a ten foot increase in Lac Seul could increase the power potential on the English River by 233 percent.[21]

13. Also in 1915, Dominion Power provided instructions to the Manitoba Hydrographic Survey to conduct further field work at Lac Seul. LSFN Chief John Akewance found out about the survey and wrote to Indian Agent R.S. McKenzie ("McKenzie") on July 30, 1915, explaining the damage that would result if the water in Lac Seul were raised. When McKenzie made enquiries, he was told by the Assistant Deputy and Secretary of Indian Affairs J.D. McLean ("McLean") that "there is no present intention to raise the waters of Lac Seul."[22]

14. Manitoba Hydrographic Survey published a report on March 1, 1916 entitled "Report on the Storage Possibilities of Lac Seul" ("1916 Report"). The 1916 Report specifically contemplated flooding on the Reserve, including the flooding of "a considerable amount of hay land", bushland and Chief Akewance's shed.[23] As a result of the 1916 Report, Canada formally recommended a reservation to Ontario "of all rights to the elevation 1170 and the reservation of flowage rights from 1170 to 1175 on the lake…"[24] Canada still did not inform or consult with LSFN about using the Lands for hydroelectric purposes.[25]

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[18] Trial Reasons at paras 308-311, 315-317, AR Vol I, Tab 1 at 108-110, 112.
[19] Trial Reasons at paras 121, 218(xiv), AR Vol I, Tab 1 at 39, 78.
[20] Trial Reasons at para 123, AR Vol I, Tab 1 at 39.
[21] Trial Reasons at para 124, AR Vol I, Tab 1 at 40.
[22] Trial Reasons at paras 125-127, AR Vol I, Tab 1 at 40-41.
[23] Trial Reasons at para 128, AR Vol I, Tab 1 at 41.
[24] Trial Reasons at para 130, AR Vol I, Tab 1 at 42.
[25] Trial Reasons at paras 136, 306, AR Vol I, Tab 1 at 44, 108.

15. In 1919, Indian Affairs advised Dominion Power that the usual procedure for attaining on-reserve flooding rights was through a surrender under the *Indian Act*.[26] Canada did not obtain a surrender nor did it expropriate the Lands, but continued to urge Ontario to reserve flooding rights.[27]

16. In 1922, Canada, Ontario and Manitoba signed a tripartite agreement about regulating the English and Winnipeg Rivers and water storage in Lac Seul. The agreement did not address LSFN's interests and Canada did not inform LSFN prior to signing that agreement.[28]

17. In January 1924, LSFN Chief Paul Thomas met with Indian Agent Frank Edwards ("Edwards") to express LSFN's concerns about the effects of possible flooding of the Reserve, including the destruction of hay fields, gardens, houses, timber, burial grounds and thousands of muskrats.[29] In his report to Indian Affairs, Edwards said he had "assured the Chief our Department would look into the matter, and protect their interests as far as possible."[30]

18. The Chief's concerns were relayed to the Secretary of Indian Affairs and the Director of Dominion Power.[31] On February 15, 1924, J. B. Challies of Dominion Power wrote to the Indian Affairs Secretary noting that "[n]othing definite has as yet been arranged… but whenever the subject does arise for definite action the matter will be taken up fully with your Department."[32] Nevertheless, plans for the Project progressed.[33] Indian Affairs sent a similar reassurance to Edwards in January 1928 after the publication of a news story about the Project.[34]

19. On February 28, 1928, Canada, Ontario and Manitoba entered into the Lac Seul Storage Agreement ("LSSA"), this time setting out that Ontario would construct, own and operate the Dam, and the Lake of the Woods Control Board would have full power and authority to regulate

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[26] Trial Reasons at para 132, AR Vol I, Tab 1 at 42-43.
[27] Trial Reasons at paras 6, 132-133, 298, AR Vol I, Tab 1 at 6, 42-43, 106.
[28] Trial Reasons at paras 135-136, 310, AR Vol I, Tab 1 at 44, 109.
[29] Exh 7039, FCA AR, Part C, Vol CXVI at 261.
[30] Trial Reasons at para 137, AR Vol I, Tab 1 at 45.
[31] Trial Reasons at para 137, AR Vol I, Tab 1 at 45.
[32] Trial Reasons at para 138, AR Vol I, Tab 1 at 45.
[33] Trial Reasons at para 139, AR Vol I, Tab 1 at 45.
[34] Trial Reasons at paras 144, 309, AR Vol I, Tab 1 at 46, 109.

and control the outflow of Lac Seul by means of the Dam.[35] Canada agreed to pay Ontario's carrying costs until it could develop power sites on the English River and the parties agreed Canada's expenses would be reimbursed by Manitoba power interests.[36]

20. Provincial and federal legislation came into effect on June 30, 1928, giving effect to the LSSA.[37] Canada left LSFN in the dark respecting the LSSA and the legislation despite concerns being repeatedly raised by and on behalf of LSFN, including a mere month before the LSSA was signed.[38] The LSSA provided no protection for LSFN's interests, nor did it address the impacts to LSFN and their Lands.[39]

21. In April 1928, Ontario contacted the Hudson's Bay Company ("HBC"), the Anglican Church and others to advise about the agreement to construct a dam and raise water levels, and that their land interests could be affected by the construction and operation of the Dam.[40] LSFN was not similarly advised.[41]

22. On May 29, 1928, the Ontario Surveyor-General wrote to Indian Affairs to advise that the LSSA would result in Lac Seul being raised about 12 feet above normal levels.[42] Indian Affairs noted in response that the Indian Agent had warned "the raising of waters of Lac Seul will occasion very considerable damage to Lac Seul reserve, not only to timber but also to hay lands, rice fields, houses and gardens."[43] In the summer of 1928, H. J. Bury ("Bury"), Supervisor of Indian Timber Lands for Canada, appraised the prospective damage to LSFN from the flooding of its Reserve at $120,200: (a) $8,000 for loss of 8,000 acres at $1 an acre; (b) $15,000 for loss of timber; (c) $8,000 for loss of hay crops; (d) $15,000 for loss of rice crops; (e) $15,000 for hunting and trapping loss; (f) $10,000 for fishing loss; and (g) $49,200 as compensation for 82

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[35] Agreement made this 28th day of February, A.D. 1928 between: the Government of the Dominion of Canada, the Government of the Province of Ontario, and the Government of the Province of Manitoba at ss 2, 18 ("*LSSA*"), Exh 1517, FCA AR, Part C, Vol LI at 302, 307.
[36] *LSSA* at ss 7, 8, 9 and 20, Exh 1517, FCA AR, Part C, Vol LI at 303-304, 307.
[37] Exh 1739, FCA AR, Part C, Vol LIII at 8; Exh 1771, FCA AR, Part C, Vol LIII at 72; Exh 1778, FCA AR, Part C, Vol LIII at 93; Exh 1779, FCA AR, Part C, Vol LIII at 94.
[38] Trial Reasons at para 144-145, 309-310, 315, AR Vol I, Tab 1 at 46-47,109, 112.
[39] *LSSA*, Exh 1517, FCA AR, Part C, Vol LI at 298.
[40] Trial Reasons at para 150, AR Vol I, Tab 1 at 50.
[41] Trial Reasons at para 312, AR Vol I, Tab 1 at 110; FCA Reasons at paras 85-86, AR Vol I, Tab 2 at 225-226.
[42] Trial Reasons at para 151, AR Vol I, Tab 1 at 51.
[43] Exh 1721, FCA AR, Part C, Vol LII at 319.

houses and gardens.[44] Bury also confirmed that 53 graves on the Reserve would be flooded, and emphasized the gravity of the situation and the bleak impacts of the flooding.[45] Edwards advised Bury that after the flooding, there would be no more moose, deer, rabbits, fur-bearing animals, fish, ducks or rice and questioned how LSFN would feed themselves.[46]

23. Indian Affairs officials made an all or nothing proposal to LSFN in 1928 that they relocate the Reserve away from the planned flood zone, but LSFN refused given the importance of the Lands to LSFN and their belief that Canada would protect their interests.[47]

24. The first workers arrived at the Ear Falls site to begin construction of the Dam on July 19, 1928.[48] Although the Dam required approval under the *Navigable Waters Protection Act* ("*NWPA*") before construction began, the *NWPA* application was submitted only ten days before workers arrived. On July 27, 1928, Indian Affairs advised that they did not want to obstruct the approval, and suggested a clause requiring "fair and just compensation" for damage to the Reserve.[49] Construction continued although no such compensation was paid, and no *NWPA* authorization was ever issued.[50]

25. Meanwhile, on the same date, Archdeacon Lofthouse of the Anglican Diocese of Keewatin, wrote to Ontario to report that 53 graves would be flooded, others would be washed out when there is a south wind, and that LSFN might have to completely remove the remains.[51]

26. In an internal memo to the Indian Affairs Deputy Minister dated May 14, 1929, Bury stated that "[t]he reserve is ruined for any purpose which it was set aside by treaty for the Indians."[52] In a second internal memo dated two days later, Bury stated:

> There are 688 Indians on the reserve, who are helpless to avert this calamity, and who view the future with utter dismay, but I feel that the

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[44] Trial Reasons at para 153, AR Vol I, Tab 1 at 51-52.
[45] Trial Reasons at paras 154, 156, AR Vol I, Tab 1 at 52-53.
[46] Exh 1934, FCA AR, Part C, Vol LIII at 325.
[47] Exh 2173, FCA AR, Part C, Vol LV at 313; Reimer Reply Report, Exh 7982, FCA AR, Part C, Vol CCXL at 86.
[48] Trial Reasons at para 159, AR Vol I, Tab 1 at 54.
[49] Trial Reasons at para 160, AR Vol I, Tab 1 at 54-55; Exh 1827, FCA AR, Part C, Vol LIII at 171.
[50] Trial Reasons at paras 159-162, AR Vol I, Tab 1 at 54-55.
[51] Baldwin Report, Exh 7971, FCA AR, Part C, Vol CCXXXIX at 166.
[52] Exh 2169, FCA AR, Part C, Vol LV at 304.

> associated governments concerned, will not permit these Indians to be deprived of their livelihood, robbed of their natural resources, and driven out of their home, without not only allowing them generous monetary compensation, but also make provision, during the period of years in which they will have to re-adjust themselves to new and strange conditions, for exclusive trapping rights for them in a district remote from civilisation.[53]

27. On May 17, 1929, the Deputy Superintendent General of Indian Affairs wrote to his superior that "[t]he situation is certainly serious; and hardship and disaster appear to face these poor Indians unless some arrangement is made at once, providing for reasonable compensation and the allocation of suitable hunting and fishing grounds elsewhere."[54] He also characterized Bury's estimated damages as "conservative", called Ontario's treatment of the matter indifferent, and warned that "the matter has now reached the stage where some serious consideration should be given to the problem and the question of compensation decided, in order that the distress and anxiety of the Indians on this Reserve may be relieved to the greatest possible extent."[55]

4. Flooding of the Reserve

28. The Dam was completed by June 1929. Although Canada had taken no steps to protect LSFN's interests or ensure the flooding of the Lands was authorized, the Ear Falls Generating Station began generating power on February 15, 1930.[56]

29. In total, 11,304 acres of LSFN's Reserve were flooded, rendering nearly one-fifth of the Reserve unusable.[57] The damage to LSFN's Lands and LSFN's ability to use them started in the first year of the Dam's operation. Timber was flooded with rising waters starting in 1930, even though the plan had been to clear unharvested timber prior to flooding.[58] In 1931, the water level was over a foot higher than the year before.[59] The Project reached a standstill when Ontario

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[53] Exh 2173, FCA AR, Part C, Vol LV at 313.
[54] Exh 2176, FCA AR, Part C, Vol LV at 319.
[55] Exh 2176, FCA AR, Part C, Vol LV at 320.
[56] Trial Reasons at para 162, AR Vol I, Tab 1 at 55.
[57] FCA Reasons at para 6, AR Vol I, Tab 2 at 196.
[58] Trial Reasons at paras 163-166, AR Vol I, Tab 1 at 55-57.
[59] Trial Reasons at para 166, AR Vol I, Tab 1 at 57.

refused to raise water levels further until timber was cleared.[60] Ontario and Canada came up with a plan to hire workers to clear the timber under the Depression-era *Relief Act* ("Relief Project").[61]

30. On July 20, 1933, Bury and Edwards met with LSFN Chief William Tuckooshequan, six band councillors and approximately 40 band members. They informed LSFN about the Relief Project and assured them the water would not be raised further "for several years to come."[62] They also informed LSFN that they would receive compensation for damages and that replacement houses would be built. The Chief informed Bury and Edwards of graves that would be "washed away" and Bury asked him to make a list of the affected graves.[63]

31. The Relief Project was a failure, with only a portion of the timber cleared on the Reserve. Although Canada spent over $800,000 to clear some timber, LSFN received no dues for any of the timber and LSFN members were ineligible to be hired for the relief work because they were not recognized as citizens.[64] Had all the timber been cleared from the Reserve foreshore, and LSFN had received timber dues, LSFN would have received $34,917.33.[65]

32. Despite assurances from Bury and Edwards, the water continued to rise in 1934.[66] Bury and G.G. McEwen ("McEwen") of the Dominion Water Power and Hydrometric Bureau inspected houses on the Reserve in November 1934. McEwen identified at least 22 houses that would need to be rebuilt while Edwards identified 29 houses.[67] On February 19, 1936, Edwards reported that twenty new houses had been completed and seven had yet to be started.[68]

33. Between 1935 and 1939, damage to LSFN continued, including the partial flooding of their graveyard, flooding of hay land, erosion of banks, the loss of wild rice and poor muskrat hunting, and timber was not cleared on the foreshore as promised.[69] Indian Affairs was well

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[60] Trial Reasons at paras 168-169, AR Vol I, Tab 1 at 57.
[61] Trial Reasons at paras 170-173, AR Vol I, Tab 1 at 57-59.
[62] Exh 3226, FCA AR, Part C, Vol LXVI at 293.
[63] Trial Reasons at para 183, AR Vol I, Tab 1 at 62.
[64] Trial Reasons at para 185-186, AR Vol I, Tab 1 at 63.
[65] Trial Reasons at para 218(xxi, xxii), AR Vol I, Tab 1 at 79.
[66] Trial Reasons at para 188, AR Vol I, Tab 1 at 64.
[67] Trial Reasons at para 189, AR Vol I, Tab 1 at 64-65; Exh 3867, FCA AR, Part C, Vol LXXIV at 150-151.
[68] Trial Reasons at para 190, AR Vol I, Tab 1 at 65.
[69] Trial Reasons at para 191, AR Vol I, Tab 1 at 65.

aware of the situation on the ground, reporting concerns about these impacts.[70] In January 1935, Edwards noted that "…there was no wild rice in the Lac Seul watershed last fall, and if the water is again raised, it will probebly [sic] kill it all off and there will be none in future."[71]

34. On March 16, 1937, Bury wrote to the Indian Affairs Director of the Lands and Timber Branch about Canada's "serious breach of faith" in relation to Indian Affairs' promises to LSFN for flooding compensation and noted:

> I consider that these Indians have been very shabbily treated. Their reserve lands, timber, houses, gardens, rice beds, musk-rat swamps have been flooded now for some years, and we still procrastinate. If it had been a white settlement, no person would have dared to flood the property, without paying compensation before flooding took place.[72]

35. On March 18, 1937, Bury wrote to the Deputy Minister and advised that the Reserve, which had been chosen for "its game, fish and timber resources" was "utterly ruined for any purpose for which it was originally intended."[73] In April 1937, an Indian Affairs delegation advised the Ontario Minister of Lands and Forests that LSFN had suffered both personal and property damage and were in a plight, facing real hardships.[74]

36. In August 1937, Bury again urged that LSFN be compensated given that other claims had already been paid or discharged.[75] The Indian Affairs Deputy Minister was later advised that LSFN were "in a sadly impoverished condition" with their Treaty 3 hunting and trapping rights curtailed and their livelihoods lost.[76] Nevertheless, Canada continued to leave LSFN without compensation for the serious effects that LSFN had already experienced for years, despite promises they would be "fully protected".[77]

37. In 1943, Canada, Manitoba and Ontario agreed to $50,263 in compensation for LSFN (after deductions of $5000 for a timber claim and $17,286 for "excess acres").[78] The figure

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[70] Baldwin Report, Exh 7971, FCA AR, Part C, Vol CCXXXIX at 228-236.
[71] Exh 3790, FCA AR, Part C, Vol LXXIV at 29.
[72] Exh 4243, Lac Seul Reserve, FCA AR, Part C, Vol LXXVI at 343 [emphasis in original].
[73] Exh 4246, FCA AR, Part C, Vol LXXVII at 32.
[74] Exh 4281, FCA AR, Part C, Vol LXXVII at 150.
[75] Trial Reasons at para 192, AR Vol I, Tab 1 at 65-66.
[76] Exh 4445, FCA AR, Part C, Vol LXXVIII at 223.
[77] Trial Reasons at paras 192, 194, 207-208, AR Vol I, Tab 1 at 65-66, 67, 72.
[78] Trial Reasons at paras 111, 206-208, 218 (vi, vii, xxvi, xxvii, and xxviii), AR Vol I, Tab 1 at 36, 72, 77-80.

agreed to did not accord with Bury's 1928 and 1929 valuations, where he called for a payment of $120,200 plus an additional provision to help LSFN readjust,[79] or W.R. White's 1941 report (Indian Affairs Surveys and Engineering Branch) that projected LSFN's ongoing losses, including from rice harvesting and muskrat trapping, at approximately $248,000 plus additional losses caused by erosion.[80] LSFN was not informed about or involved in the 1943 negotiations, and the Governor-in-Council did not oversee the negotiation of the payment.[81] In 1949, LSFN knew that a certain amount of compensation was paid, without any specifics.[82]

38. The harms that Bury had anticipated came to pass. The flooding destroyed wild rice fields that LSFN relied on for food and income, gardens that LSFN relied on for food and haylands for LSFN's livestock; permanently inundated shoreline habitat and impacted LSFN's ability to hunt and trap; impacted LSFN's fishery; damaged one-quarter to one-third of LSFN's homes as well as camp sites and shoreline infrastructure; and flooded and exposed graves and human remains.[83] One of LSFN's communities, Kejick Bay, became an island due to the flooding and, before a causeway was built, people had to use ice roads to travel between communities in the winter. People drowned because fluctuating water levels made it dangerous to cross the ice.[84]

39. In contrast to the harms caused to LSFN, the Project that Canada had advocated for was a success, with Canada and the provinces of Manitoba and Ontario ("Provinces") reaping its benefits.[85] After the Dam was completed, four more generating stations were developed in Ontario on the English River, and there are currently six on the Winnipeg River in Manitoba

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[79] Exh 1913, FCA AR, Part C, Vol LIII at 294; Exh 2173, FCA AR, Part C, Vol LV at 313.
[80] Exh 4875, FCA AR, Part C, Vol LXXXI at 170.
[81] Trial Reasons at para 208, AR Vol I, Tab 1 at 72; Baldwin Report, Exh 7971, FCA AR, Part C, Vol CCXXXIX at 256-267.
[82] Trial Reasons at para 209, AR Vol I, Tab 1 at 72-73.
[83] Trial Reasons at paras 191-192, 209, 218(xix, xxi, xxiii), AR, Vol I, Tab 1 at 65-66, 72-73, 78-79; Exh 3790, FCA AR, Part C, Vol LXXIV at 29; Exh 4445, FCA AR, Part C, Vol LXXVIII at 223; Exh 4875, FCA AR, Part C, Vol LXXXI at 171-172; Exh 5705, FCA AR, Part C, Vol XC at 80; Baldwin Report, Exh 7971, FCA AR, Part C, Vol CCXXXIX at 272; Reimer Reply Report, Exh 7982, FCA AR, Part C, Vol CCXL at 201, 228-229, 282-283, 285; Transcripts - Dr. Reimer, FCA AR, Part B, Vol XV, Tab 45 at 37, ll 14-20 and 127, l 17 to 128, l 20 and FCA AR, Part B, Vol XIV, Tab 44 at 222, ll 14-20 and 337, l 24 to 340, l 20.
[84] Transcript - Mr. Gordon, FCA AR, Part B, Vol II, Tab 20 at 213 l 1 to 214 l 9.
[85] Trial Reasons at para 551, AR Vol I, Tab 1 at 186-187.

relying on storage at Lac Seul.[86] LSFN members did not benefit from the electricity generated by the Project, and their Reserve was not serviced with electricity until the early 1980s.[87]

5. Lac Seul's Claim for Redress

40. In 1991, LSFN filed this civil action in the Federal Court. The action was tried before the Honourable Mr. Justice Zinn in a fifty-four day trial starting in September 2016. LSFN sought equitable compensation, punitive damages and a declaration that their equitable interests in the Lands had not been encumbered or extinguished.[88]

41. At trial, LSFN proposed four different methods for valuing compensation. Each model provided a proxy for measuring the value of LSFN's interest in the Lands that was lost due to the flooding: (a) hydroelectric revenues; (b) loss of revenues from traditional activities; (c) lease model; and (d) utility corridor model.[89] These reflected the loss of the Lands and the use to which the Lands were put as flooded lands.

42. LSFN also adduced evidence of Canada's arrangements with other First Nations respecting contemporaneous hydroelectric projects. These included agreements negotiated between Stoney Indian Band and Calgary Power between 1911 and 1915 with respect to hydroelectric power on the Bow River.[90] Compensation for one of the projects — the Kananaskis Falls project ("Kananaskis Project") — included a higher price per acre for reserve land based on flooding purposes. McLean, who corresponded with the Indian Agent for LSFN about flooding concerns, had previously been involved with the Kananaskis Project, noting that the considerable

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[86] Trial Reasons at paras 2-3, AR Vol I, Tab 1 at 4-5.
[87] Baldwin Report, Exh 7971, FCA AR, Part C, Vol CCXXXIX at 154.
[88] FCA Reasons at para 10, AR Vol I, Tab 2 at 197 (per Gleason JA).
[89] *Benefits from Hydroelectric Developments Associated with the Lac Seul Conservation Dam and First Nation Participation in Energy Projects*, Exh 7807, FCA AR, Part C, Vol CCXXXIV at 87; *Expert Report of P.M. (Patt) Larcombe, Symbion Consultants on behalf of the Plaintiff, Lac Seul First Nation*, Exh 7769, FCA AR, Part C, Vol CCXXXII at 1 (the Appellants did not pursue this approach at trial); *A Method for Determining Economic Compensation and its Application to the Losses Experienced by LSFN as a consequence of the flooding of 14,891 acres of its reserve lands and traditional territories in 1929*, Exh 7944, FCA AR, Part C, Vol CCXXXVIII at 100; see also Exh 7947, FCA AR, Part C, Vol CCXXXVIII at 150.
[90] Trial Reasons at paras 335-346, AR Vol I, Tab 1 at 118-122; *Water Power Development on the Bow River and the Stoney Indian Reserves 142, 143 and 144*, Exh 8165, FCA AR, Part C, Vol CCXLVI at 238-244.

value of the Stoney Band's reserve lands "consists in their usefulness in connection with the development of the power at Kananaskis Falls."[91]

C. Procedural History

1. Federal Court

43. The Trial Judge's findings from the historical record included the following:

(a) The *Indian Act* required consent of the Governor-in-Council to appropriate the Reserve for a public work, and that consent was never obtained.

(b) LSFN never surrendered the flooded Lands.

(c) Prior to construction and operation of the Dam, LSFN and Indian Affairs officials expressed concern about the losses the Project would cause LSFN.

(d) LSFN were assured by Canada as early as 1924 that it would "protect their interests as far as possible".

(e) One quarter to one third of LSFN's houses had to be moved or replaced due to the flooding, and this was not done until 1935 after they had already been affected.

(f) Only a very small portion of timber was removed from the foreshore, although Canada and the Provinces recognized that it should be removed prior to flooding, which would have resulted in LSFN receiving timber dues of $34,917.33.

(g) At about the same time as the Project, Canada and the Stoney Band in Alberta negotiated agreements with power authorities that wished to build power projects at sites wholly or partially on reserve lands, providing the Band with ongoing revenue streams from power plants.[92]

44. Justice Zinn acknowledged that, as a result of the Project, the Lands were "to be swallowed up and unavailable to the band for eternity."[93]

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[91] Trial Reasons at para 341, AR Vol I, Tab 1 at 119-120.
[92] Trial Reasons at para 218 (x, xi, xii, xv, xvi, xix, xxi, xxii, xxiii, xxiv, xxx, xxxi), AR Vol I, Tab 1 at 77-80.
[93] Trial Reasons at para 359, AR Vol I, Tab 1 at 126.

45. He further held that Canada, as a fiduciary, had the following duties to LSFN due to the creation of the Reserve: (a) a duty of loyalty and good faith to LSFN in the discharge of its mandate as trustee of the Reserve lands; (b) a duty to provide full disclosure and to consult with LSFN; (c) a duty to act with ordinary prudence with a view to LSFN's best interests; and (d) a duty to protect and preserve LSFN's proprietary interest in the Reserve from exploitation.[94] Justice Zinn also found that "it is arguable that the content of Canada's fiduciary duties expanded when it committed to the LSFN that when it came to the flooding of its Reserve that Canada would protect its interests 'to the fullest possible extent.'"[95]

46. Justice Zinn set out the "guiding principles of equitable compensation", relying on case law and Specific Claims Tribunal decisions,[96] and summarized six "key points":

> 1. The goal of equitable compensation is to restore what the plaintiff has lost due to the breach;
>
> 2. What the plaintiff lost is an opportunity that was not realized because of the breach;
>
> 3. The plaintiff's loss arising from the breach is to be assessed with the advantage of hindsight and is not to be assessed based on what may have been known at the date of breach or have been reasonably foreseeable;
>
> 4. The losses are to be determined based on a common sense view of causation, which is to say that the lost opportunity must have been caused by the breach;
>
> 5. The Court must assume that the plaintiff would have made the most favourable use of the trust property – the plaintiff's best opportunity – and the loss must be assessed accordingly; and
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> 6. When considering what would have happened had the defendant not breached its duty to the plaintiff, the Court must assume that the

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[94] Trial Reasons at para 226, AR Vol I, Tab 1 at 83.
[95] Trial Reasons at para 227, AR Vol I, Tab 1 at 84.
[96] Trial Reasons at paras 232-284, AR Vol I, Tab 1 at 85-102; *Canson Enterprises Ltd v Boughton & Co*, 1991 CanLII 52 (SCC), [1991] 3 SCR 534 [*Canson* cited to SCR, all references to McLachlin J. unless otherwise noted]; *Hodgkinson v Simms*, [1994] 3 SCR 377 [*Hodgkinson*]; *Brickenden v London Loan Savings Co et al*, [1934] 3 DLR 465 (PC); *Guerin v Canada*, [1982] 2 FC 385, Book of Authorities **("BA")**, Tab 1 [*Guerin FC*]; *Nocton v Lord Ashburton*, [1914] AC 932, BA, Tab 3 [*Nocton*]; *Whitefish Lake Band of Indians v Canada (Attorney General)*, 2007 ONCA 744 [*Whitefish*]; *Beardy's & Okemasis Band #96 and #97*, 2016 SCTC 15 [*Beardy's*]; *Huu-Ay-Aht First Nations v Her Majesty the Queen in Right of Canada*, 2016 SCTC 14 [*Huu-Ay-Aht*].

> defendant would have carried out its duties vis-à-vis the plaintiff, in a lawful manner.[97]

47. Justice Zinn referred to two further equitable presumptions not listed above: (1) it is presumed that there is an element of deterrence in an equitable remedy; and (2) if there has been a breach of a duty to disclose material facts to a beneficiary, the trustee cannot argue the decision would have been the same even if the facts were disclosed.[98]

48. Justice Zinn concluded that the beneficiary is entitled to recover the sum that it ought to have received at the time but for the breach, as well as the foregone opportunity to use that trust property or the funds it ought to have received in the most advantageous manner.[99] He also found that "…when assessing equitable compensation a court must consider a hypothetical scenario and ask: "What likely would have happened if the Crown had not breached its duty, but had carried out its fiduciary duties lawfully."[100]

49. Prior to considering Canada's specific duties to LSFN in 1929 and whether they were breached, Zinn J. stated "it is essential in my view, that we first determine what options were available in 1929 to the taking of the Reserve land through flooding."[101] He found that the Lands would have been flooded no matter what in 1929.[102] Concluding the flooding of the Lands was inevitable, Zinn J. hypothesized that, had Canada acted legally, it would have appropriated the land "either with the consent of the LSFN or without it."[103]

50. Justice Zinn found that Canada breached all four duties identified above and took no legal steps under Treaty 3 or the *Indian Act* to obtain a surrender of the Lands from LSFN or to expropriate them if consent could not be obtained, noting that this was "inexplicable" and contrary to the manner in which Canada dealt with other bands in similar circumstances.[104]

51. He also found that, despite Canada knowing that the Project was a "fait accompli", Canada had little or no communication with LSFN either in the years leading up to, or following,

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[97] Trial Reasons at para 285, AR Vol I, Tab 1 at 102.
[98] Trial Reasons at para 239, AR Vol I, Tab 1 at 86-87.
[99] Trial Reasons at para 244, AR Vol I, Tab 1 at 88.
[100] Trial Reasons at para 290, AR Vol I, Tab 1 at 104.
[101] Trial Reasons at para 286, AR Vol I, Tab 1 at 102-103.
[102] Trial Reasons at paras 292-294, AR Vol I, Tab 1 at 104-105.
[103] Trial Reasons at para 295, AR Vol I, Tab 1 at 105.
[104] Trial Reasons at paras 296-298, AR Vol I, Tab 1 at 105-106.

the completion of the Dam.[105] He noted that, even when Canada and the Provinces agreed to compensation for LSFN, they did so without LSFN's knowledge or consent.[106]

52. Justice Zinn questioned what loss flowed from Canada's failure to fully disclose material facts to LSFN.[107] He found that if Canada had provided LSFN with timely and full disclosure, LSFN's claims for lost land use and avoidable losses would likely have been addressed before the Lands were flooded, but otherwise Canada's failure to provide full disclosure to LSFN was only a factor to consider in relation to whether punitive damages should be awarded.[108]

53. Justice Zinn set out Treaty 3 and *Indian Act* provisions about reserve land dispositions and then considered what would have occurred in 1929 if Canada had acted lawfully.[109] In this analysis, Zinn J. considered the evidence relied on by LSFN about agreements reached with other Indigenous groups and rejected the possibility that Canada would have negotiated a benefit-sharing agreement.[110] He did not address LSFN's lease model or utility corridor model. He found that Canada would have obtained a flowage easement through a surrender or expropriation and that the amount of compensation would have been the same either way.[111]

54. Justice Zinn accepted the opinion of Canada and Ontario's expert Duncan Bell that the average value of the flooded land on the Reserve was $1.29 an acre, based on a valuation of ten percent of the Lands as waterfront ($3.00 an acre) and 90 percent of the Lands as bush land ($1.10 an acre).[112] Based on this valuation, he found that LSFN ought to have received $14,582.16 in 1929 for a flowage easement on the Lands; $34,917.33 in 1929 for timber dues; and $1,750,000 in 2008 for community infrastructure.[113] He also found that the deductions for the excess acreage and the timber claim should not have been deducted.[114] Justice Zinn credited

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[105] Trial Reasons at paras 302-312, 315-316, AR Vol I, Tab 1 at 107-110, 112.
[106] Trial Reasons at paras 208, 317, AR Vol I, Tab 1 at 72, 112.
[107] Trial Reasons at para 318, AR Vol I, Tab 1 at 112-113.
[108] Trial Reasons at para 320, AR Vol I, Tab 1 at 113.
[109] Trial Reasons at paras 323-329, AR Vol I, Tab 1 at 114-116.
[110] Trial Reasons at paras 334-346, 350-357, AR Vol I, Tab 1 at 118-122, 124-126.
[111] Trial Reasons at paras 358-359, AR Vol I, Tab 1 at 126.
[112] Trial Reasons at paras 376, 380, AR Vol I, Tab 1 at 132, 135.
[113] Trial Reasons at paras 391-392, 443, AR Vol I, Tab 1 at 137-138, 152.
[114] Trial Reasons at paras 447-451, AR Vol I, Tab 1 at 154-155.

Canada a portion of the compensation paid in 1943 ($8,000 for lost land and $10,000 for timber losses).[115]

55. In determining how to bring forward the above amounts to today, Justice Zinn adopted the opinion of Ontario's experts Fred Lazar and Eliezner Prisman, which created a multiplier based on the historic Indian Trust Fund rates. He found that, absent contrary evidence, this was the "appropriate basis to bring a past loss forward to the present day for equitable compensation purposes."[116] The approach treated consumption in the same way it treats savings and investment.[117]

56. Applying the Indian Trust Fund rates, Zinn J. found that Canada owed $14,981,868.10 for a flowage easement, timber dues and infrastructure brought forward to today, and $1,133,997.70 should be credited to Canada for the compensation already paid, with a balance of $13,847,870.40 owed to LSFN.[118] He also found that there were losses that "are not susceptible of mathematical calculation", including, *inter alia*, the failure to remove timber; the fact that LSFN's communities became separated by water; docks and outbuildings were not replaced; LSFN's hay fields and hunting and trapping grounds were destroyed or impacted; and the failure to communicate with LSFN or act promptly despite its knowledge of the negative impacts of flooding on LSFN members.[119] He ordered a global award of $30 million.[120]

57. Finally, Zinn J. dismissed LSFN's claim for punitive damages because he found that the remedy "sufficiently meets the objectives of retribution, deterrence and denunciation."[121] He dismissed LSFN's claim for "a declaration that their legal interests in the flooded lands and the freeboard area has not been encumbered or extinguished" and instead concluded that Canada retroactively obtained a flowage easement.[122] Justice Zinn further dismissed Canada's defence of laches and Canada's third party claims against Ontario and Manitoba.[123]

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[115] Trial Reasons at para 452, AR Vol I, Tab 1 at 155.
[116] Trial Reasons at para 467, AR Vol I, Tab 1 at 160.
[117] Trial Reasons at para 500, AR Vol I, Tab 1 at 170.
[118] Trial Reasons at para 508, AR Vol I, Tab 1 at 172-173.
[119] Trial Reasons at para 512, AR Vol I, Tab 1 at 173-174.
[120] Trial Reasons at paras 509-511, AR Vol I, Tab 1 at 173.
[121] Trial Reasons at para 525, AR Vol I, Tab 1 at 179.
[122] Trial Reasons at paras 528-529, AR Vol I, Tab 1 at 180.
[123] Trial Reasons at paras 538, 539-552, AR Vol I, Tab 1 at 183-187.

2. Federal Court of Appeal

58. The majority (Nadon and Webb JJ.A.) of the Federal Court of Appeal ("FCA") dismissed LSFN's appeal.[124] In dissenting reasons, Gleason J.A. would have allowed the appeal, set aside the total award of compensation and remitted the assessment of equitable compensation to the Federal Court to determine whether the legal error she found changed the assessment.[125] The majority adopted the reasons of Gleason J.A. for two of the three issues on appeal.

59. The parties agreed on appeal that Canada owed LSFN a fiduciary duty based on the discretionary control it assumed over the Reserve and that Canada breached that duty by failing to meet the standard of care required of a fiduciary.[126] The parties also agreed that the Federal Court appropriately selected the remedy of equitable compensation.[127]

60. With respect to the Trial Judge's factual findings, the parties agreed on appeal that: (1) the Dam would have been built by the summer of 1929 and the Lands would have flooded thereafter; (2) the Dam was a public work; and (3) had Canada acted in compliance with its fiduciary duties, it could have obtained the right to flood the Lands either through a surrender with LSFN's consent or a taking for a public purpose with Governor-in-Council approval.[128]

61. The FCA addressed three asserted errors respecting the Trial Judge's assessment of compensation: that the Federal Court erred by: (1) not awarding compensation for failure to negotiate a revenue-sharing agreement; (2) assessing one-time compensation for LSFN's loss of the Lands by applying current rather than 1929 expropriation law; and (3) discounting the possibility of a negotiated surrender of LSFN's Lands and distinguishing the Kananaskis Project.

62. The FCA upheld the Trial Judge's decision not to award compensation for loss of a revenue-sharing agreement.[129] Gleason J.A. distinguished the loss suffered in this case from that in *Guerin*[130] because in this case Canada had the right to take the land for a public purpose.[131] In

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[124] FCA Reasons at para 141, AR Vol I, Tab 2 at 242.
[125] FCA Reasons at para 102, AR Vol I, Tab 2 at 231.
[126] FCA Reasons at paras 47-48, AR Vol I, Tab 2 at 212.
[127] FCA Reasons at para 49, AR Vol I, Tab 2 at 212-213.
[128] FCA Reasons at para 50, AR Vol I, Tab 2 at 213.
[129] FCA Reasons at paras 57, 105-107, AR Vol I, Tab 2 at 215, 232 (per Gleason JA, adopted by Nadon and Webb JJA).
[130] *Guerin FC* at para 173, BA, Tab 1.
[131] FCA Reasons at para 59, AR Vol I, Tab 2 at 216-217.

her view, the Trial Judge correctly identified the losses as "*both* the deprivation of an opportunity to negotiate a surrender of the flooded land in 1929 and the deprivation in 1929 of the funds that ought to have been paid had Canada taken and exercised the right to flood the reserve land."[132]

63. The FCA also found that the Trial Judge erred in using current expropriation law rather than 1929 expropriation law, but that this was not a basis to allow the appeal because it did not change the result.[133] Gleason J.A. found that 1929 expropriation law would not have required the Lands to be valued for flooding purposes so it was not an error to assess them at $1.29 an acre.[134]

64. All three Justices agreed that Zinn J. incorrectly found that Canada had no power to expropriate for the Kananaskis Project. However, the majority characterized the Trial Judge's error in distinguishing the Kananaskis Project from the Project in this case as a question of fact that did not go to the core of the outcome and was not a palpable and overriding error.[135]

65. Justice Nadon set out the facts respecting the Kananaskis Project in some detail.[136] He noted that Canada was not prepared to use its expropriation power for the Kananaskis Project, seeming to contrast this to LSFN's situation, even though Canada did not in fact expropriate LSFN's Lands or even indicate that it intended to.[137] He also noted the difference in the per-acre value of Stoney Band's lands for agricultural use ($5-$7/acre) compared to flooded lands for hydro power generation ($320-$360/acre, or $60-$90 with an annual rental payment).[138]

66. In dissent, Justice Gleason characterized Zinn J.'s error in distinguishing the Kananaskis Project as a question of law reviewable on a correctness standard.[139] She found that the Trial Judge erred in discounting the possibility that LSFN could have negotiated a surrender for more than what they would receive in an expropriation, noting that "[i]n these circumstances, as a fiduciary, Canada was arguably required to pursue a negotiated surrender before proceeding to expropriation as a negotiated resolution would probably have been less detrimental to the Lac

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[132] FCA Reasons at para 59, AR Vol I, Tab 2 at 216-217 [emphasis in original].
[133] FCA Reasons at paras 66, 108, AR Vol I, Tab 2 at 219, 233.
[134] FCA Reasons at paras 67-80, AR Vol I, Tab 2 at 223-224.
[135] FCA Reasons at paras 113-114, AR Vol I, Tab 2 at 234-235.
[136] FCA Reasons at paras 115-135, AR Vol I, Tab 2 at 235-240.
[137] FCA Reasons at para 139, AR Vol I, Tab 2 at 241.
[138] FCA Reasons at para 131, AR Vol I, Tab 2 at 238-239.
[139] FCA Reasons at paras 54, 92, AR Vol I, Tab 2 at 214-215, 228.

Seul First Nation."[140] She concluded that the matter must go back to trial so that the Federal Court can consider whether Canada might have agreed to a surrender price in excess of $1.29 and, alternatively, whether LSFN's lost opportunity to negotiate a surrender constituted a non-calculable loss for which LSFN must be compensated.[141]

PART II - POINTS IN ISSUE

67. The Courts below ("Courts") erred in law in their approach to the assessment of equitable compensation. The question before this Court is how principles of equitable compensation, together with legal principles applicable to the Crown-Indigenous relationship, should be applied to compensate LSFN for Canada knowingly and fundamentally breaching its fiduciary duty to LSFN by flooding the Lands, without adhering to *Indian Act* requirements, depriving LSFN of the Lands forever, and seriously and detrimentally affecting LSFN's way of life.

PART III - LEGAL ARGUMENT

A. Overview

68. The Courts correctly found that Canada breached its fiduciary duties to LSFN and that equitable compensation should be awarded.[142] However, the Courts erred in law in how they assessed equitable compensation for LSFN's loss of the use and benefit of their Lands. In the result, the Courts ordered compensation in relation to the Lands based on a loss valued at $14,582.16 in 1929, which was characterized as compensation for a flowage easement.[143]

69. The Courts improperly applied equitable principles and failed to compensate LSFN for what they actually lost. The flooding has deprived LSFN of the use and benefit of their Lands, as well as the protections they were entitled to under the *Indian Act*, for over 90 years and indefinitely into the future. Rather than compensating for those losses in light of the use to which the Lands have been put, the Courts re-wrote history and relied on a fictional expropriation scenario to improperly approach LSFN's losses as if they were one-time lost expropriation funds. To achieve an equitable outcome, advance the process of reconciliation and accord with the honour of the Crown, compensation must address LSFN's loss of its use and benefit of their

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[140] FCA Reasons at paras 84, 91, AR Vol I, Tab 2 at 225-228.
[141] FCA Reasons at paras 93-97, AR Vol I, Tab 2 at 229-230.
[142] FCA Reasons at paras 47-49, AR Vol I, Tab 2 at 212-213.
[143] Trial Reasons at para 443, AR Vol I, Tab 1 at 152.

Lands "for eternity,"[144] based upon what actually happened. By relying on a hypothetical expropriation and creating a flowage easement to attempt to undo Canada's breaches, the Courts failed to respond to the breaches and properly value LSFN's losses. This did not provide a deterrent remedy; it rewarded Canada and forgave its inexcusable conduct by retroactively filling in steps that Canada failed to take, premised on a worst-case scenario for LSFN.

70. The Courts' application of the principles did not result in a just or equitable result consistent with the imperative of reconciliation. The principles must be applied and, if necessary to fairly compensate LSFN, be adapted to address the unique facts before this Court. [145] The Appellants submit that the matter of compensation should be remitted to trial with this Court's directions on the correct approach.

B. Applicable Legal Principles

1. Standard of Review: Errors of law in analysis of equitable compensation

71. The Courts erred in law in their analysis of how to assess equitable compensation, and failed to adhere to the principles they identified as applicable to this case. A trial judge's assessment of damages or compensation may be interfered with on appeal where that assessment is "tainted by an error in principle, or is unreasonably high or low."[146] Delineation of the relevant equitable principles is reviewable on a correctness standard.[147] While a court's application of principles to facts is reviewable on a standard of palpable and overriding error, extricable errors of principle are legal errors assessed on a correctness standard.[148]

72. The errors in this case relate to the Courts' failure to correctly apply the legal principles they identified. An error in apprehending how the assessment of equitable compensation should be carried out relates to the "scope, effect or application of a rule of law which the courts apply

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[144] Trial Reasons at para 359, AR Vol I, Tab 1 at 126.
[145] *Pro Swing Inc v Elta Golf Inc*, 2006 SCC 52, [2006] 2 SCR 612 at 78-79, 85 (per McLachlin J dissenting but not on the principle that the common law evolves).
[146] *Whitefish* at para 28 (citing *Guerin v Canada*, 1984 CanLII 25 (SCC), [1984] 2 SCR 335 at 391 (per Dickson J) and 363 (per Wilson J affirming *Guerin FC*) [*Guerin SCC*]; *Woelk v Halvorson*, 1980 CanLII 17 (SCC), [1980] 2 SCR 430 at 435-436.
[147] FCA Reasons at paras 54-55, AR Vol I, Tab 2 at 214-215 (per Gleason JA); FCA Reasons at para 113, AR Vol I, Tab 2 at 234 (per Nadon JA); *Heritage Capital Corp v Equitable Trust Co*, 2016 SCC 19, [2016] 1 SCR 306 at para 24 [*Heritage Capital*].
[148] *Housen v Nikolaisen*, 2002 SCC 33 at paras 27, 36 [*Housen*]; *Heritage Capital* at paras 22, 24.

in determining the rights of parties"[149] and is an extricable question of principle or pure law reviewable on a correctness standard.[150] The Courts' errors are also palpable and overriding, going to the core of the outcome, and should not survive scrutiny under any standard of review.

73. The Courts fell into error in their interpretation and application of the legal principles in a number of respects, including:

(a) By framing the question for assessing equitable compensation as: "What likely would have happened if the Crown had not breached its duty, but had carried out its fiduciary duties lawfully"[151] rather than "what did LSFN lose due to the breach", the Courts fell into error and considered the legal issues in the wrong sequence– this departed from the requirement that equitable compensation must be determined following, and in response to, the determination of the duty, the breach and the loss, and led the Courts to compensate LSFN for an expropriation rather than for the breaches the Courts identified;

(b) By imposing a hypothetical expropriation to attempt to undo Canada's breaches, the Courts misconstrued LSFN's loss of the use and benefit of their Lands as a one-time loss of expropriation funds, even though the Lands have never been lawfully taken and are still part of the Reserve, and the unlawful use of the Lands will continue indefinitely – this departed from equitable principles requiring that the court properly and meaningfully comprehend and value the losses that resulted from the breaches with the goal of restoring to the plaintiff what was lost due to the breach;

(c) By choosing an expropriation scenario at an exceedingly low price per acre, the Courts favoured Canada, not LSFN, in the absence of evidence or reasons to support that approach – this was inconsistent with the equitable principle that the fiduciary should not benefit at the expense of the beneficiary and that the beneficiary is entitled to compensation based on the presumption of most advantageous use; and

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[149] *Canadian National Railway Co v Bell Telephone Co*, [1939] SCR 308 at 316.
[150] *Housen* at para 27.
[151] Trial Reasons at para 290, AR Vol I, Tab 1 at 104.

(d) By relying on a hypothetical expropriation, the Courts excused and affirmed Canada's unlawful and egregious conduct in allowing LSFN's Lands to be flooded for hydroelectric generation – this departed from the equitable principle that compensation is meant to effect deterrence and from the constitutional principle and imperative of reconciliation.

74. Due to these flaws in the legal analysis, the Courts erred in assessing compensation for a flowage easement in the amount of $14,582.16 in 1929.[152] Their approach was not grounded in common sense and did not result in an equitable result.

2. Fiduciary duties: Canada's breaches were 'inexplicable'

75. The Courts correctly found that Canada breached the fiduciary duties identified by the Trial Judge.[153] The standard of care that Canada must meet in the Crown-Indigenous relationship was recently affirmed in *Williams Lake* as "that of a man of ordinary prudence in managing his own affairs."[154] Canada failed to deal with LSFN's interests in their Reserve according to this standard when Canada allowed unauthorized and permanent flooding of LSFN's Lands. A prudent landowner, managing their own lands, would have taken steps to ensure the use was legally authorized and that any bargain was fair. As McLachlin J., as she then was, noted in *Blueberry River*, "[a] reasonable person does not inadvertently give away a potentially valuable asset…"[155] The *Indian Act* surrender and expropriation provisions set out procedures intended to prevent exploitation,[156] including requiring First Nation and Cabinet consent. By foregoing those procedures, Canada exposed LSFN to exploitation through Canada's own actions to advance the Project.[157] As Zinn J. found, Canada's breaches were "inexplicable".[158]

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[152] Trial Reasons at paras 391, 443, AR Vol I, Tab 1 at 137, 152.
[153] Trial Reasons at paras 296-297, AR Vol I, Tab 1 at 105-106.
[154] *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, [2018] 1 SCR 83 at para 46 [*Williams Lake*].
[155] *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development*), 1995 CanLII 50 (SCC), [1995] 4 SCR 344 at para 104 [*Blueberry River*].
[156] *Guerin SCC* at 383 (per Dickson J).
[157] Waters, Donovan W M, Gillen, Mark R & Smith, Lionel D. eds, "Waters' Law of Trusts in Canada", 4th ed (Toronto: Carswell, 2012), BA, Tab 11 at 968-971 [Waters]; *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245 at para 96 [*Wewaykum*]; *Osoyoos Indian Band v Oliver (Town)*, 2001 SCC 85, [2001] 3 SCR 746 at para 52 [*Osoyoos*].
[158] Trial Reasons at paras 296-298, AR Vol I, Tab 1 at 105-106.

76. This is not a situation where Canada did a poor job in trying to fulfil its fiduciary duties, or did not realize that the First Nation's interests would be adversely affected. Canada's representatives knew that the flooding would cause hardship and disaster for LSFN, depriving them of their livelihoods, robbing them of some of the most valuable areas of their Reserve (the shorelines) and the natural resources there, driving them out of their homes, and ruining the Reserve for the purpose for which it was set aside. Although Canada repeatedly promised to protect LSFN's interests as far as possible, it did not fulfil its fiduciary obligations to any standard prior to permitting the flooding to "swallow up" the Lands and render one-fifth of the Reserve unusable forever for any purpose other than hydroelectric generation.

3. Principles of equity and reconciliation provide the correct foundation

77. Assessing compensation for Crown breaches of fiduciary duty is challenging.[159] This case is also distinct from other cases dealing with equitable compensation, in that:

(a) the fiduciary relationship in question is one of specific constitutional, legal and social importance;

(b) the flooding of the Lands was unlawful and allows others to profit from the Lands, without mandatory legal requirements having been met;

(c) the breaches in question were egregious and involved a failure to carry out fiduciary duties at even a bare minimum level, despite prior knowledge of the serious harms to LSFN;

(d) the use of the Lands was for a public purpose that Canada itself actively promoted and benefitted from;

(e) Canada's fiduciary obligations and fiduciary relationship with LSFN still exist in relation to the Lands, and the breach is ongoing;

(f) the principles of the honour of the Crown and reconciliation are implicated; and

(g) the time period of the loss is lengthy, and is anticipated to be "for eternity".

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[159] *Guerin SCC* at 356 (per Wilson J concurring); Trial Reasons at paras 229, 374, AR Vol I, Tab 1 at 84, 131-132; Rotman, Leonard I. "Understanding Fiduciary Duties and Relationship Fiduciarity", (2017) 62:4 McGill LJ 975, BA, Tab 10 at 1032 [Rotman, "Understanding Fiduciary Duties"].

78. Despite the uniqueness of this case, first principles of equity and Aboriginal law provide the path to meaningful compensation. The proper approach requires the Court to "look to the policy behind compensation for breach of fiduciary duty and determine what remedies will best further that policy".[160] Equitable principles are not frozen and must respond to the case before the court.[161] In the present case, this includes alignment with the policy objectives underlying Crown-Indigenous fiduciary relationships, including the imperative of reconciliation and the requirement that the Crown act honourably in all its dealings with First Nations.[162]

79. The law of equity provides the Court with the flexibility to tailor an approach that meaningfully restores LSFN and achieves what is just and fair in the circumstances.[163] An equitable remedy must be tailored to the specific case, address the nature of the obligation and the breach,[164] and restore to the beneficiary what was lost due to the breach.[165] To do so, courts have the latitude to "fashion appropriate relief out of the full gamut of available remedies."[166] Aboriginal law principles also allow for flexibility and a focus on substance over form.[167]

80. Both equitable and Aboriginal law principles address wrongs that undermine valuable relationships, and provide the means to chart a positive way forward in the Crown-Indigenous relationship. A remedy that is equitable will advance reconciliation by ascribing value to the relationship at stake, meaningfully addressing breaches and deterring wrongdoing.[168] A remedy that is consistent with reconciliation will satisfy the purposes of equity by providing redress for what was lost as a result of a breach of a trust-based relationship. When a remedy provides meaningful redress for the Indigenous plaintiff, principles of equity and fairness are achieved and reconciliation is advanced.

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[160] *Canson* at 544-545; *Whitefish* at para 51, citing *Hodgkinson* and *Cadbury Schweppes Inc v FBI Foods Ltd*, 1999 CanLII 705 (SCC), [1999] 1 SCR 142 at para 26 [*Cadbury*].
[161] *Canson* (per La Forest J for the majority) at 580, 588-589.
[162] *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14, [2013] 1 SCR 623 at para 70 [*Manitoba Metis*].
[163] *Canson* at 546-547.
[164] *Canson* at 543; *Hodgkinson* at 413 (per La Forest J).
[165] *Soulos v Korkontzilas*, 1997 CanLII 346 (SCC), [1997] 2 SCR 217 at para 34; *Kerr v Baranow*, 2011 SCC 10, [2011] 1 SCR 269 at para 71 [*Kerr*]; *Cadbury* at para 61.
[166] *Kerr* at para 71; *Cadbury* at para 61.
[167] *Lax Kw'alaams Indian Band v Canada (Attorney General)*, 2011 SCC 56, [2011] 3 SCR 535 at para 45.
[168] *Whitefish* at para 57.

81. The primary purpose of an equitable remedy is to advance the foundational purpose of the fiduciary concept: "maintaining the integrity of socially and economically valuable, or necessary, relationships of high trust and confidence that facilitate and flow from human interdependency."[169] As this Court has found, equity is concerned not only to compensate the Plaintiff but to enforce the trust that is at its core.[170] To achieve this purpose, remedies must be deterrent so as to remove any incentive for a fiduciary to breach its duties.[171] A court must take into account the implications of the remedy to particular relationships of social value and whether a remedy will sufficiently deter the abusive behaviour in question.[172]

4. Equitable compensation principles aim to restore what was lost to the beneficiary

82. Equitable compensation is a monetary remedy that is available as a substitute when restitution *in specie* and an account is inappropriate or impossible.[173] The remedy aims to put a beneficiary in the position it would be in absent the fiduciary's actionable breach,[174] with the ideal of "restoring… that which was lost through the breach."[175] Compensation must be materially related to the fiduciary's acts in relation to the interest they undertook to protect.[176]

83. Equitable compensation is retrospective.[177] While the losses that may be remedied are those which, on a common sense view of causation, were caused by the breach, foreseeability of the loss is not a concern in assessing compensation, and should not be brought "into the fiduciary

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[169] Rotman, Leonard I. "Fiduciary Law" (Toronto: Thomas Canada Limited, 2005), BA, Tab 9 at 635-636; [Rotman, "Fiduciary Law"]; *Beardy's* at para 83.
[170] *Canson* at 543.
[171] *Nocton,* BA, Tab 3 at 963; Rotman, "Fiduciary Law", BA, Tab 9 at 695, 709,711.
[172] *Canson* at 547; *Hodgkinson* at 452-453.
[173] *Canson* at 547-548, 556; Oosterhoff, Albert H, Chambers, Robert & McInnes, Mitchell. "Oosterhoff on Trusts", (9th ed) (Toronto: Thomas Reuters, 2019), BA, Tab 8 at 1013, 1016 [Oosterhoff].
[174] *Semiahmoo Indian Band v Canada*, [1998] 1 FC 3, [1997] FCJ No 842, BA, Tab 5 at para 115 [*Semiahmoo*]; *Hodgkinson* at 440; *Guerin SCC* at 360 citing *Re Dawson; Union Fidelity Trustee Co v Perpetual Trustee Co* (1966) 84 WN Pt1 NSW 399, BA, Tab 4 at 404-406 [*Re Dawson*].
[175] *Canson* at 547-548, 556; see also *Whitefish* at para 40; *Hodgkinson* at 440; *Guerin SCC* at 361*; Blueberry River* at para 103.
[176] *Canson* at 551, citing Davidson, Ian E. ″The Equitable Remedy of Compensation″ (1982), 13 Melbourne U L Rev 349 at 354; *Canson* at 551-552; *Whitefish* at para 58; Rotman, "Fiduciary Law", BA, Tab 9 at 639; *Semiahmoo,* BA, Tab 5 at para 58.
[177] *Canson* at 556.

analysis by the back door."[178] The value of a loss is based "on the equitable approach of looking at what actually happened to values in later years."[179]

84. The basis for equitable compensation is the restoration of the actual value of the loss flowing from the breach. An equitable remedy should return to the *cestui que trust* compensation "for what the object would be worth."[180] In determining what the object is worth, it must be presumed that the beneficiary would have made the most advantageous or profitable use of the property in question.[181]

85. In addition, since the fiduciary relationship has "trust, not self-interest, at its core", the balance must favour the wronged party.[182] Where a trustee holds a beneficiary's property over time, evidentiary difficulties in relation to valuing the lost property will be resolved against a defendant who wrongfully created the difficulties.[183] The beneficiary's loss in those circumstances "will be taken as the highest amount it could be, consistently with the evidence before the court."[184] Accordingly, in the face of uncertainty, a court should not select the approach most advantageous to the fiduciary and least advantageous to the beneficiary.

86. In describing what has been lost as the result of a fiduciary breach, some courts have referred to a plaintiff's "lost opportunity."[185] However, this is not the only way to understand losses flowing from breaches of fiduciary duty. If the property (or interest) that is the subject of the fiduciary duty cannot be returned *in specie*, compensation can be payable in the amount of the actual value of what was lost, based on its highest price while the trustee held the property.[186]

87. This Court held in *Guerin* that a fiduciary's obligation to restore the beneficiary's assets "is a continuing one and ordinarily, if the assets are for some reason not restored *in specie*, it will

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[178] *Blueberry River* at para 103; see also *Canson* at 551-553, 556 (citing *Guerin FC*); *Dhillon v Jaffer*, 2016 BCCA 119 at paras 22-26; *Huu-Ay-Aht* at paras 193-194 and 319.
[179] *Canson* at 550-551, 554-555 (citing *Guerin SCC*); *Guerin SCC* at 362.
[180] *Canson* at 562.
[181] *Guerin SCC* at 362 (per Wilson J); *Canson* at 545-546; *Whitefish* at paras 60, 102; *Semiahmoo*, BA, Tab 5 at para 112; see also *Beardy's* at paras 102, 151.
[182] *Canson* at 543.
[183] Waters, BA, Tab 11 at 1282, 1288-1289.
[184] Waters, BA, Tab 11 at 1289.
[185] *Canson* at 556; *Whitefish* at para 52; *Guerin SCC* at 362 (per Wilson J).
[186] *McNeil v Fultz*, (1906) 38 SCR 198 at 205 [*McNeil*]; *MacDonald v Hauer*, 1976 CanLII 959 (SK CA) at paras 59-68; Waters, BA, Tab 11 at 1289; Oosterhoff, BA, Tab 8 at 1018.

fall for quantification at the date when recoupment is to be effected, and not before."[187] Compensation must be quantified at the time the asset is recouped "by reference to the value of the assets at the date of restoration and not at the date of deprivation."[188] As such, compensation is assessed with the full benefit of hindsight,[189] at the time of trial,[190] with the beneficiary getting the benefit of any increase in value since the date of deprivation.[191]

5. Equitable principles and Aboriginal law principles must be aligned

88. Equitable remedies must be informed by, and tailored to, the nature of the particular fiduciary relationship at issue. In *Canson*, McLachlin J., as she then was, noted that different approaches to damages may need to be taken for different fiduciary relationships.[192] Remedies for breaches of fiduciary duty by Canada, and in particular for breaches in relation to Indigenous peoples' lands, must be responsive to the *sui generis* Crown-Indigenous fiduciary relationship. This relationship is of overarching importance in this country.[193]

89. A correct approach to equitable compensation must uphold the constitutional principles and legal values governing the Crown-Indigenous relationship, the unique nature of the relationship in question and the context in which they exist, including that:

(a) the Crown's relationship with Indigenous peoples is founded on the underlying constitutional principles of reconciliation and the requirement that the Crown act honourably in all its dealings with First Nations,[194] which deepen and characterize the Crown's obligations, and should buttress and strengthen the relationship;

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[187] *Guerin SCC* at 361, citing *Re Dawson*; *Canson* at 550.
[188] *Guerin SCC* at 361, citing *Re Dawson* at 406 [emphasis added in *Guerin*].
[189] *Canson* at 556.
[190] *Whitefish* at paras 49, 81.
[191] *Guerin SCC* at 362.
[192] *Canson* at 546-547.
[193] *Guerin SCC* at 385; *Whitefish* at para 57; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550 at para 24; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388 at para 1 [*Mikisew Cree*].
[194] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 (CanLII), [2004] 3 SCR 511 at para 17; *Mikisew Cree* at para 1; *Manitoba Metis* at para 70; Canada's Residential Schools: Reconciliation, The Final Report of the Truth and Reconciliation Commission of Canada, vol 6 (Montreal: Truth and Reconciliation Commission of Canada, 2015) at 3.

(b) the Crown's obligations to Indigenous peoples are affirmed in international law, including the call for redress in the *United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP");[195]

(c) since reserves are inalienable except to the Crown, the Crown has a distinct fiduciary relationship with Indigenous peoples and trust-like fiduciary obligations to exercise discretionary control over reserves for First Nations' benefit, grounded in the requirement that the Crown protect Indigenous peoples' pre-existing interests in their lands from exploitation by others;[196] and

(d) the Crown made solemn promises in Treaty 3, including setting aside reserves that the *Indian Act* was intended to protect from exploitation.[197]

90. Breaches of Canada's fiduciary duties to First Nations must be strenuously deterred, particularly given the power imbalance between them in respect of reserves.[198]

91. In addition, there are a number of ways in which this fiduciary relationship is unlike any other, and specifically distinguishable from a fiduciary relationship between private individuals. First, even though Canada has an obligation to act in a First Nation's best interests, it has the power to take a First Nation's property (reserve lands) for public purposes with Cabinet approval. This unusual power does not diminish the fiduciary duty.[199] The Crown must always seek to reconcile any competing interests in a public taking scenario and ensure the First Nation is not subjected to an exploitative bargain.[200]

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[195] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/61/295 (endorsed by Canada 12 November 2010) at art 28 [*UNDRIP*].
[196] *Guerin SCC* at 349, 379, 383-384, 386-387, 392; *Opetchesaht Indian Band v Canada*, 1997 CanLII 344 (SCC), [1997] 2 SCR 119 at paras 82-87 [*Opetchesaht*].
[197] *Jim Shot Both Sides v Canada,* 2019 FC 789 at para 369, *citing Restoule v Canada (Attorney General),* 2018 ONSC 7701 at paras 3, 528 [*Restoule*]; *R v Badger*, [1996] 1 SCR 771 at para 41; *Treaty 3*, Exh 135, FCA AR, Part C, Vol XXXI at 343; *Indian Act*, 1927, ss 48, 51, Exh 1307, FCA AR, Part C, Vol L at 16-18.
[198] *Guerin* SCC at 349 (per Wilson J) and 384 (per Dickson J); *LAC Minerals Ltd v International Corona Resources Ltd*, 1989 CanLII 34 (SCC), [1989] 2 SCR 574 at 662-663.
[199] *Wewaykum* at 96-97.
[200] *Osoyoos* at para 52; *Semiahmoo*, BA, Tab 5 at paras 45-46.

92. Second, unlike other trust relationships,[201] no matter how egregious the Crown's breaches of fiduciary duties owed to First Nations, the Court cannot remove the Crown as a fiduciary. The Crown-Indigenous relationship always remains, so McLachlin J.'s comment in *Canson* (albeit applying to another relationship) is particularly apt: "… the high duty assumed and the difficulty of detecting such breaches makes it fair and practical to adopt a measure of compensation calculated to ensure that fiduciaries are kept 'up to their duty'".[202]

93. Arguably the most important factor for properly apprehending the losses in this case is the special relationship between Indigenous peoples and their lands.[203] That relationship is founded in pre-contact occupation of the lands, and is connected to Indigenous laws, practices, cultures, traditions and the fact that Indigenous Nations have relied on and stewarded their lands since time immemorial.[204] Reserves are not fungible or replaceable.[205] The remedy in this case must take into account, not erase, the Indigenous perspective on what was lost.[206]

C. The Courts erred in their application of equitable compensation principles

1. Performing the analysis in the wrong order leads to the wrong result

94. The assessment of fiduciary duty, breach, loss and remedy must be carried out in sequence.[207] A court must first frame the wrongdoing and consider the standards to which the fiduciary should be held to ensure that the remedy will properly respond to the duties, breaches and losses that have been suffered.[208] In this case, the Trial Judge failed to do so. Instead, Zinn J. concluded, before analysing Canada's duties, how they were breached, and what losses arose,

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[201] Waters, BA, Tab 11 at 895-903.
[202] *Canson* at 552-553.
[203] *Osoyoos* at paras 45-46, 54; *UNDRIP* at arts 10, 25, 26, 27, 28, 29, 32.
[204] *Guerin SCC* at 379; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 120 [*Delgamuukw*]; *Calder et al v Attorney-General of British Columbia*, [1973] SCR 313 at 375 (per Hall J) and 328 (per Judson J); *R v Van der Peet*, [1996] 2 SCR 507 at paras 33-43 [*Van der Peet*].
[205] *Osoyoos* at paras 45-46.
[206] *Van der Peet* at para 50; *R v NTC Smokehouse Ltd*, [1996] 2 SCR 672 at para 44; *Tsilhqot'in Nation v BC*, 2014 SCC 44 at para 54; *Restoule* at para 169; *Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 at para 31 [*Uashaunnuat*].
[207] *Williams Lake* at para 48; *Doig River First Nation and Blueberry River First Nations v Her Majesty the Queen in Right of Canada*, 2018 SCTC 5 (CanLII) at 169-171, 182.
[208] Bray, Samuel L. "Fiduciary Remedies" in Evan J Criddle, Paul B Miller, & Robert H Sitkoff, eds, *The Oxford Handbook of Fiduciary Law* (New York: Oxford University Press, 2019), BA, Tab 7 at 12.

that there were only two ways Canada could have proceeded lawfully and that it would have appropriated the Lands.[209] The Courts relied on that conclusion as the only way to characterize LSFN's losses, and fell into error by identifying LSFN's principal loss as a missed payment for a fictional expropriation and not the loss of the use and benefit of their Lands. In doing so, the Courts remedied Canada's failure to expropriate rather than the breaches that they found Canada had committed.

2. A hypothetical expropriation is the wrong paradigm and does not produce a fair result

95. By applying a hypothetical expropriation, the Courts' approach was to go back in time and assess compensation by regularizing Canada's unlawful conduct in 1929. The Courts purported to remedy the situation with a fictional *post facto* flowage easement that was never legally obtained, even though the use of LSFN's Lands continues and remains unlawful to this day. This approach put Canada back in the position it might have been in absent the breach; it did not restore LSFN's losses.

96. This approach was incorrect, as it shifted the analysis away from restoring what LSFN lost to fictionally and retroactively fixing what Canada did wrong. It also ignores the use to which Canada continues to put LSFN's Lands, which remain part of the Reserve.

97. The Courts' error is apparent in the Trial Judge's statement that: "the beneficiary is entitled to recover (1) the sum that it ought to have received at the time but for the breach, and (2) the foregone opportunity to use that trust property or the funds it ought to have received in the most advantageous manner."[210] By turning back the clock and hypothesizing about what funds LSFN would have received if Canada had expropriated the Lands in 1929,[211] the Courts failed to maintain the link between Canada's breaches and LSFN's losses. As a result, the Courts' assessment of compensation failed to address the losses actually suffered by LSFN: the use and benefit of their Lands forever.

98. This case is distinguishable from *Guerin*, which called for a different approach. In *Guerin,* a hypothetical was needed to consider what alternate uses Musqueam could have put their lands to, had the lands not been leased to the golf club. This allowed the courts to estimate

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[209] Trial Reasons at paras 290-295, AR Vol I, Tab 1 at 104-105.
[210] Trial Reasons at para 244, AR Vol I, Tab 1 at 88.
[211] Trial Reasons at para 457, AR Vol I, Tab 1 at 156.

the difference in value between the lease that the Crown granted and a more advantageous use to which the lands could have been put, had there been no lease. Since the actual use of the lands was not the most advantageous to Musqueam and did not reflect the value of what was lost,[212] the courts had to use hypotheticals to determine the most advantageous use. In the present case, the Courts did not use hypotheticals to determine most advantageous use, but to consider how Canada could have conducted itself differently.

99. Using an expropriation hypothetical also resulted in the Courts treating LSFN's losses as if they were a one-time loss in 1929. This is not the case. LSFN continues to be denied their ability to use and benefit from their Lands to this day, even though they remain part of the Reserve and Canada continues to owe fiduciary duties to LSFN in relation to the Lands.

100. The Courts implicitly understood what LSFN lost but did not seek to restore LSFN. The Trial Judge attempted to regularize LSFN's deprivation through a flowage easement, rather than compensate for the actual loss. The unfairness of the compensation for LSFN's complete loss of the use and benefit of their Lands ($14,582.16 in 1929) is apparent when compared against what Canada expended for third parties to remove timber from the Lac Seul foreshore through the Relief Project prior to the flooding ($800,000 in 1933).

3. A hypothetical expropriation ignores Canada's duties

101. By assessing compensation based on Canada's failure to expropriate, the Courts did not respond to the breaches of duty that had been found. Canada did not have a duty to expropriate, there was no breach of such a duty, and a hypothetical based on that erroneous conception of the breach should not be the basis for compensation.

102. By treating Canada's fiduciary duties as irrelevant, the Courts failed to hold Canada to account. Although there were lawful ways for Canada to allow the Lands to be used for public purposes, Canada could not "do whatever it wants with reserve lands".[213] Crafting compensation based on Canada doing whatever it wanted ignored what Canada was required to do in the circumstances, as LSFN's fiduciary.

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[212] *Guerin SCC* at 362.
[213] Trial Reasons at para 221, AR Vol I, Tab 1 at 81.

103. If Canada had expropriated the Lands or negotiated a surrender, it would have been required to ensure that LSFN's interests were harmed as little as possible.[214] Canada would have had to balance the different interests it served and determine whether expropriation was in the public interest.[215] As this Court has noted in relation to both surrenders and expropriations, a central purpose of the *Indian Act* is the protection of reserve lands for future generations. Alienation of reserve lands by any means requires strict regulation and public scrutiny, including providing for community consent on surrender, and Cabinet consent for expropriation.[216]

104. Although Canada had the power to take the Lands for a public purpose, the exercise of this power would have particularly grave and permanent effects on LSFN: the loss of their use of one fifth of their Reserve forever, desecration of their graves and the loss of livelihoods. Canada was well aware of these effects on LSFN, referring to the situation as a "calamity" that LSFN was "helpless to avert" and that caused LSFN members to view their futures with "utter dismay."[217] In these circumstances, Cabinet would have had to seriously consider whether to take the Lands without LSFN's consent. As the FCA noted, in a similar context, Canada was not prepared to expropriate the Stoney Band's reserve for the generation of hydroelectricity.[218]

105. In assuming that Cabinet would have consented to an expropriation or surrender based on a bare land valuation of the Lands in 1929, the Courts ignored Canada's obligation to protect against an improvident bargain.[219] Fiduciaries are held to stricter standards than the "morals of the marketplace."[220] Even where there is a public purpose, the Crown is held to a strict standard to scrutinize proposed transactions and withhold consent to exploitative bargains.[221] As a result, Cabinet would have had to consider whether a bare land valuation would have been appropriate.

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[214] *Osoyoos* at para 52.
[215] *Semiahmoo,* BA, Tab 5 at paras 45-46; *Indian Act*, 1927, ss 48, 51, Exh 1307, FCA AR, Part C, Vol L, Exh 1307 at 16-18.
[216] *Opetchesaht* at paras 85-86.
[217] Trial Reasons at para 156, AR Vol I, Tab 1 at 52-53.
[218] FCA Reasons at para 91, AR Vol I, Tab 2 at 228 (per Gleason JA); FCA Reasons at para 139, AR Vol I, Tab 2 at 241 (per Nadon JA).
[219] Waters, BA, Tab 11 at 968-971; *Osoyoos* at paras 52 and 54; *Semiahmoo*, BA, Tab 5 at para 36.
[220] Rotman, "Understanding Fiduciary Duties", BA, Tab 10 at 1025-1026 (citing *Meinhard v Salmon*, (1928), 164 NE 545, 249 NY 458).
[221] *Semiahmoo,* BA, Tab 5 at para 45, a case where the surrender was based on market value of the lands.

As Bury urged in vain, LSFN should not be "deprived of their livelihood, robbed of their natural resources, and driven out of their home, without … allowing them generous monetary compensation…."[222] The fact that the Stoney Band received a per acre valuation based on the use of their reserve for flooding was also something Cabinet would have had to consider in deciding what price should be paid for a taking of LSFN's Lands. Compensation for LSFN should not be assessed based on a worst case scenario for LSFN or on an assumption that Canada would have paid the lowest price.

106. All of these considerations indicate the inappropriateness of using hypotheticals to assess compensation in this case, given the number of unknowns in relation to what Canada may or may not have done or Cabinet assented to. It is impossible to know with any degree of reliability what would have happened had Canada faithfully fulfilled its obligations.

107. The hypothetical expropriation approach is an affront not only to principles of Aboriginal law, but also to expropriation law, which provides important public policy reasons for rejecting *de facto* expropriations by government.[223]

108. Equity is not achieved in this case by assessing compensation based on a hypothetical expropriation at the lowest cost. Doing so merely imposes a Crown-centred perspective that perpetuates historical injustice. The use of the Courts' expropriation hypothetical created an absurd result: Canada was found to have given itself a flowage easement over Lands it holds the legal title to as a fiduciary for LSFN.[224]

4. Canada's breaches were not inevitable

109. The proposition that the flooding was 'inevitable' does not diminish the duties owed by Canada, the effects of the breaches or LSFN's losses. Canada's breaches were not inevitable. Canada knew that *Indian Act* processes needed to be followed and that the flooding would ruin the Reserve irreparably and have devastating effects on LSFN.

110. Whether or not the flooding was bound to happen does not break the causal link between Canada's breaches and LSFN's losses. The record shows that Canada caused the situation of

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[222] Trial Reasons at para 156, AR Vol I, Tab 1 at 52-53 [emphasis added].
[223] *Costello and Dickhoff v City of Calgary* 1983 CanLII 137 (SCC), [1983] 1 SCR 14 at 20-21; *Calgary (City) v Costello*, 1997 ABCA 281 at paras 24, 27.
[224] Trial Reasons at para 528-529, AR Vol I, Tab 1 at 180.

inevitability. Canada stood to benefit from the Project, by providing power to open up Winnipeg as a western economic centre, took multiple steps to make it a reality and then completely ignored legal requirements to lawfully authorize the use of the Lands before the flooding occurred. Flooding became inevitable because Canada, in pursuit of its own goals, made commitments to the Provinces in the LSSA, without properly taking into account or protecting LSFN's interests and fulfilling its fiduciary duties to LSFN. In the LSSA, Canada was focused on protecting the Provinces' and its own interests, not LSFN's.

5. The Courts restored Canada, without regard to LSFN's perspective

111. The Courts' rewriting of history was carried out from an exclusively Crown-centred perspective, without consideration of what was required for Canada to act honourably and with no reflection of LSFN's Indigenous perspective or what is required to advance reconciliation. The importance of Canada's role in relation to protecting the Lands cannot be overlooked. Reserve lands cannot be unilaterally added to or replaced.[225]

112. From LSFN's perspective, restoration requires acknowledgment of the unique nature of their losses. LSFN's relationship with their Lands must be understood in light of their cultural importance, and the inherent and unique value of reserve lands to the community.[226] LSFN had a vital cultural connection to the Lands and Canada was required to protect the Reserve that was set aside for LSFN's benefit pursuant to Treaty 3. LSFN selected their Reserve because of its economic, cultural, social and spiritual importance. The riparian area was of particular importance to LSFN – it was where they hunted, trapped, fished and cultivated wild rice, built their homes and grew their gardens.

113. These Lands should not have been taken from LSFN without *Indian Act* processes being followed, which included the need to obtain LSFN consent in a surrender context and Cabinet consent in both surrender and expropriation scenarios.

114. Canada's failures to undertake a bare minimum surrender or expropriation process are not merely technical oversights. Canada failed to follow the law that it had established itself for the

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[225] *Osoyoos* at para 54; *Restoule* at para 169.
[226] *Osoyoos* at para 46; *Uashaunnuat* at paras 31, 35; *Delgamuukw* at para 112; *R v Marshall; R v Bernard*, 2005 SCC 43 (CanLII), [2005] 2 SCR 220 at paras 129-130 (per LeBel J concurring).

taking of reserve lands so as to prevent exploitation. In so doing, Canada deprived LSFN of the protection of the rule of law and thwarted the principles underlying those provisions.

115. The Courts' approach was inconsistent with the principle that the fiduciary must restore the beneficiary on a basis most favourable to the beneficiary.[227] Instead, they rewrote history to the fiduciary's benefit by restoring Canada to the position it might have been in had it not breached its obligations to LSFN. The re-write purported to undo Canada's actions without repairing the harms that LSFN suffered. This approach was fundamentally in error because, contrary to the primary goal of equitable compensation, it focused on restoring Canada to where it would have been absent its breaches, not on restoring to LSFN what they have lost.

6. The Courts' approach does not deter Canada's behaviour

116. Restoring Canada with a *de facto* expropriation was antithetical to the principle that equitable compensation must deter breaches of fiduciary duties. Instead of rejecting Canada's egregious behaviour, the Courts effectively condoned and excused Canada's wrongdoing, which was contrary to its most solemn obligations as well as its repeated promises and assurances to LSFN.

117. Despite LSFN's numerous requests for information about the proposed flooding, Canada chose to leave LSFN in the dark and make false assurances that there were no immediate plans to flood the Lands. Prior to the flooding, Canada's representatives were well aware of how devastating the impacts of the flooding would be on LSFN, referring to the "hardship and disaster" and "distress and anxiety" that LSFN faced.[228] Despite that, Canada did not deal with those impacts or help LSFN to do so. Even in 1929, federal representatives recognized that Canada had committed a serious breach of faith and had treated LSFN "shabbily" and that, had LSFN been a white settlement, the property would never have been flooded before compensation was paid.[229] Canada treated LSFN more poorly than it had treated other First Nations in similar circumstances[230] and LSFN was given less consideration than the HBC and other landholders.[231]

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[227] *Whitefish* at para 102.
[228] Trial Reasons at paras 155-157, AR Vol I, Tab 1 at 51-53.
[229] Trial Reasons at para 194, AR Vol I, Tab 1 at 67.
[230] Trial Reasons at paras 296-298, AR Vol I, Tab 1 at 105-106.
[231] FCA Reasons at paras 85-86, AR Vol I, Tab 2 at 225-226

118. The manner in which the Courts relied on the finding of inevitability in the analysis of equitable compensation creates perverse incentives by permitting Canada to avoid its fiduciary and statutory obligations by making commitments to third parties. Canada should not be relieved of having to compensate for losses that can be construed as 'inevitable' as a result of its own conduct and promises to others. This would not advance reconciliation, which requires an honest reckoning of past wrongs, or accord with the honour of the Crown.[232]

119. Canada's actions unlawfully deprived LSFN of their ability to use and benefit from Lands on which they have relied since time immemorial. The Lands set aside for LSFN as part of the Crown's solemn Treaty promises were chosen because they were economically, socially, culturally and spiritually important, and were part of a bargain whereby LSFN was asked to surrender all of their other lands. Canada acknowledged that the flooding ruined the Reserve for the purposes for which Canada had set it aside for LSFN. Canada's failure to keep its promises, meet its fiduciary obligations and comply with the *Indian Act* was unconscionable, and equity does not countenance unconscionable behavior in a fiduciary.[233]

D. Equitable compensation must be based on the use of the Lands for flooding

120. As a matter of common sense, policy and first principles, equitable compensation to remedy LSFN's losses must be based on what Canada actually did with the Lands – allowed them to be flooded for hydroelectric generation. This was the "inevitable" use to which the Lands were put because of Canada's own conduct. Basing compensation on that use is the only way to achieve a fair and equitable result for LSFN.

121. This approach appropriately links compensation for LSFN's losses to the intended outcome of Canada's self-motivated behaviour and its egregious conduct in failing to take any steps to protect LSFN's interests in their Lands, breaking promises and leaving LSFN in the dark in relation to the Project, ignoring the protections to which LSFN was entitled under the *Indian Act*, and promoting and causing the Lands to be unlawfully exploited to LSFN's serious detriment and others' benefit.

122. It is not necessary or appropriate to consider a hypothetical surrender or expropriation to assess equitable compensation in this case. The reality is that there was no legal taking of the

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[232] *Mikisew Cree* at paras 1, 4.
[233] *Guerin SCC* at 388-389 (per Dickson J)w.

Lands, yet Canada has deprived LSFN of the use and benefit of their Lands for nearly 90 years to date. Canada has an ongoing fiduciary obligation to LSFN in relation to the Lands. The third party use of the Lands that Canada has allowed cannot be undone. Justice and common sense require that compensation for LSFN be based on the value of the Lands for their use in generating power and for nation-building.

123. Equity requires the Court to presume the most advantageous use of the deprived asset, and compensation can be assessed at the highest value of the asset during the period it has been wrongfully used.[234] An equitable approach in this case does not require the Court to try to divine what might have happened in 1929. The use of the Lands for flooding purposes as part of a hydroelectric project can be presumed to be their most profitable use. Canada and others contemplated this use long before the Lands were flooded, without any regard to LSFN's interest in those Lands or Canada's fiduciary obligations to protect that interest. In *Wallersteiner v Moir (No 2)*, Lord Denning noted that it can be presumed that a wrongdoer would have made the most beneficial use of a wrongfully deprived asset from a beneficiary.[235] While the asset in that case was money, the presumption is equally applicable to the use of the Lands in this case. The Crown's use of lands for a public purpose will not always be the most advantageous, but on the facts of this case the presumption is appropriate, particularly to avoid favouring the fiduciary at the expense of the beneficiary.

124. The presumption of most advantageous use applies even if the beneficiary would not have put the assets to that use.[236] LSFN does not need to show that they would have agreed to the flooding of their Lands for the presumption of most advantageous use to apply.

125. Applying a presumption of most advantageous use to assess compensation based on the use of the Lands for flooding purposes ensures that the balance favours LSFN, the wronged party. Canada's complete failure to live up to its obligations to protect LSFN's interest in the Lands so that others could benefit and profit must be viewed with disapprobation. Assessing compensation based on the actual use of the Lands for flooding purposes achieves the goals of accountability and deterrence in the inexplicable circumstances of this case.

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[234] *Guerin SCC* at 338, 362 (per Wilson J); *Canson* at 545-546; *McNeil* at 205.
[235] *Wallersteiner v Moir (No 2)*, [1975] QB 373 (CA), BA, Tab 6 at 388.
[236] Rotman, "Fiduciary Law", BA, Tab 9 at 734, citing *Maguire v Makaronis* (1997), 71 ALJR 781 (Australia HC), BA, Tab 2 at 791.

126. Assessing compensation based on the use of the Lands for flooding purposes also ensures that LSFN is compensated for their losses in a way that is consistent with Canada and LSFN's fiduciary relationship, and the genuine reckoning required by principles of reconciliation, the honour of the Crown and UNDRIP's call for redress. Rather than assuming the lowest valuation of the Lands, it acknowledges that Canada knew the higher economic value of the Lands when it decided to forego its fiduciary obligations and flout *Indian Act* requirements to press forward with the flooding of the Lands for the benefit of others.

127. Since the assessment of compensation based on the use of the Lands for flooding purposes gives rise to complex quantification issues that are best addressed at the trial level, the question of compensation should be remitted to the Trial Court for determination based on the evidence adduced below or additional evidence, as the Trial Judge deems appropriate.[237]

E. Conclusion

128. Instead of restoring what was lost, the approach taken by the Courts leaves LSFN today with a new and different wrong: a *de facto* and *post facto* expropriation achieved unlawfully, without LSFN's interests being protected for over 90 years and indefinitely into the future, and with other parties benefiting all the while. The Appellants submit this approach to compensation was fundamentally in error and must be overturned.

129. It is respectfully submitted that history should not be rewritten to erase the serious wrongs done to LSFN. Equity should instead ensure that the losses that LSFN has suffered as a result of Canada's breaches are addressed meaningfully and responsively. Reconciliation similarly requires reckoning with the past, not erasing it.[238] This case presents an opportunity to apply principles of equitable compensation to achieve a just result that addresses the need for reconciliation and accords with the honour of the Crown. The Courts failed to properly apply those principles and, as a result, did not provide appropriate compensation. By failing to compensate LSFN for what they have lost forever, the Courts gravely missed the mark, and undermined, rather than upheld, the Crown-Indigenous fiduciary relationship.

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[237] *Semiahmoo,* BA, Tab 5 at para 110, where a similar approach was taken.
[238] United Nations General Assembly, *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence* (A/67/368, 13 September 2012) at para 67.

PART IV - SUBMISSIONS CONCERNING COSTS

130. The Appellants seek their costs in the appeal and throughout.

PART V - ORDER SOUGHT

131. The Appellants submit that, given the foregoing errors of law, the award of equitable compensation must be remitted to the Trial Court for reassessment with the benefit of this Court's reasons and directions.

PART VI - SUBMISSIONS ON IMPACT OF CONFIDENTIALITY ORDER

132. fAt trial, certain documents were sealed subject to a confidentiality order made September 9, 2016. The Appellants do not reference any of the confidential documents in this Factum. The Appellants do not anticipate referring to any documents subject to the order in oral argument.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Vancouver, in the Province of British Columbia, the 17th day of August, 2020.

Rosanne Kyle	Elin Sigurdson	Kendra Shupe

PART VII - TABLE OF AUTHORITIES

Paragraph

Cases