SCC 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, HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, HER MAJESTY THE QUEEN IN RIGHT OF MANITOBA

Respondents

- and -

ASSEMBLY OF MANITOBA CHIEFS, TSESHAHT FIRST NATION, ATTORNEY GENERAL OF SASKATCHEWAN, MANITOBA KEEWATINOWI OKIMAKANAK INC., TREATY LAND ENTITLEMENT COMMITTEE OF MANITOBA INC., ANISHINABEK NATION, WAUZHUSHK ONIGUM NATION, BIG GRASSY FIRST NATION, ONIGAMING FIRST NATION, NAOTKAMEGWANNING FIRST NATION AND NIISAACHEWAN FIRST NATION, COALITION OF THE UNION OF BRITISH COLUMBIA INDIAN CHIEFS, PENTICTON INDIAN BAND AND WILLIAMS LAKE FIRST NATION, FEDERATION OF SOVEREIGN INDIGENOUS NATIONS, ATIKAMEKSHENENG ANISHINAWBEK FIRST NATION, KWANTLEN FIRST NATION, ASSEMBLY OF FIRST NATIONS, ASSEMBLY OF FIRST NATIONS QUEBEC-LABRADOR, GRAND COUNCIL TRATY #3, MOHAWK COUNCIL OF KANAWA:KE, ELSIPOGTOG FIRST NATION, CHEMAWAWIN CREE NATION, AND WEST MOBERLY FIRST NATIONS

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I. OVERVIEW OF POSITION AND STATEMENT OF FACTS

1. The Attorney General of Saskatchewan (hereinafter "Saskatchewan") intervenes in this appeal by virtue of the Order of Brown, J. dated October 22, 2020.

2. Saskatchewan has intervened in this appeal to address a single issue – the current status of the flooded land. It is Saskatchewan's position that an understanding of the current status of the flooded land is required to properly determine the amount of equitable compensation that the Lac Seul First Nation (hereinafter "LSFN") is entitled to on account of Canada's breach of fiduciary duty.

3. If the LSFN is entitled to get the land back, the compensation must be determined on a backwards-looking basis only. Compensation will relate only to past losses. However, if the LSFN are not getting the land back, then the compensation must be determined on a backwards and forward-looking basis and compensation will relate to past and future losses. Accordingly, the first step in assessing compensation must be to determine what happens to the land.

4. In this case, the trial judge recognized an easement which authorized the flooding of a portion of the LSFN's reserve, as part of his award of equitable compensation. He determined the damages on a backwards and forward-looking basis. Both the majority and the dissenting judge in the Court of Appeal agreed with this approach.

5. It is Saskatchewan's position that this was the correct approach and that recognition of an easement over the flooded land goes hand in hand with the award of equitable compensation. The LSFN can't get compensation for the wrongful taking of their land and, at the same time, deny that the land has actually been taken.

6. Saskatchewan intervenes in this appeal because of its involvement in a similar case. The issues in *Peter Ballantyne Cree Nation v Canada, Saskatchewan and SaskPower (No. 2)*[1]

[1] 2019 SKQB 334, [2019] SJ No 533; an appeal of this decision will be heard by the Saskatchewan Court of Appeal on December 1, 2020.

(hereinafter the "PBCN case") also concern the historic flooding of part of an Indian reserve caused by a dam built downstream from the reserve, without a surrender or an expropriation of the flooded land. As in this case, Canada arguably breached its fiduciary duties to the Cree Nation when it consented to the dam being built in 1939. However, unlike in this case, the Cree Nation's claim against Canada for breach of fiduciary duties has been barred by Saskatchewan's limitations legislation. The Cree Nation's claim against SaskPower (as the operator of the dam) and Saskatchewan (as the licensor of the project) for trespassing on the flooded lands has, nevertheless, been permitted to proceed because under Saskatchewan law trespassing is considered to be a continuing tort. The current status of the flooded land is potentially a very significant issue in the PBCN case.

7. Saskatchewan accepts the Statement of Facts set out in paras 5 to 12 of the Factum of the Attorney General of Canada.

II. STATEMENT OF ISSUES

8. The issues raised by this appeal concern the principles to be applied to determine the equitable compensation that the LSFN is entitled to on account of the breach of fiduciary duty by Canada which resulted in flooding of a part of its reserve. Saskatchewan submits that consideration of the current status of the flooded land is critical to determining this compensation. Saskatchewan's submissions will be limited to this issue.

III. ARGUMENT

A. Introduction

9. In this case, the LSFN sought a declaration that their legal interest in the flooded lands had not been encumbered. The trial judge refused to make this declaration. Instead, he held as follows:

> 529. The equitable damages awarded in this case are intended to return the LSFN to the position it would have been in but for the breach. This involves a $30M payment by Canada. The result of this payment is that Canada retroactively obtains a flowage easement up to 1,172 meters, while the flooded shoreline remains part of the reserve.[2]

10. On appeal, the LSFN initially contested the trial judge's decision that an easement existed, but abandoned this argument during the hearing.[3]

11. In their factum in this Court, the LSFN does not directly challenge the trial judge's decision that a flooding easement arose on the facts of this case. However, the LSFN suggest on two occasions that the ongoing flooding of their land is "unlawful". For example, at para 73(b) they say that "the Lands have never been lawfully taken and are still part of the Reserve, and the unlawful use of the Lands will continue indefinitely."[4]

12. It is Saskatchewan's position that the ongoing use of these lands by the operator of the dam is not unlawful. The matter cannot be looked at solely from the perspective of the LSFN. The operator's use of the lands is lawful, and has always been lawful, because it was authorized by Canada.

13. Saskatchewan submits that the trial judge dealt with this issue appropriately and made no legal error in recognizing the existence of an easement. When all of the equities are considered, it was necessary for him to do so.

14. Recognition of the existence of an easement in this case was simply part and parcel of the determination of the equitable compensation payable to the LSFN. Recognition of an easement and the payment of compensation are two sides of the same coin.

15. The LSFN and Canada have chosen not to address this issue directly in their factums.

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[2] Trial Judgment at para 529.
[3] Court of Appeal Judgment at para 42, per Gleason JA.
[4] Appellants' Factum at paras 73(b) and 95.

16. This leaves the operator of the dam in an untenable position. The LSFN seeks an award of compensation for Canada's breach of fiduciary duty. This breach led to construction of the dam and results in its operation to this very day. However, the submissions of the LSFN cast doubt on the operator's ability to continue to operate the dam into the future.

17. This is not an issue that can or should be left hanging. The interests of more than the LSFN and Canada are at stake. Equity requires that the interests of the operator of the dam must also be considered. These interests impact on the amount of compensation that the LSFN is entitled to.

B. Equitable Remedies and the Crown

18. There is no dispute that the remedies for breach of fiduciary duty are restorative. The Court's goal should be to return the beneficiary to the position that he or she would have been in but for the fiduciary's breach, with the full benefit of hindsight and without limitations that exist with respect to calculating damages in tort law and contract law.[5]

19. Where the breach relates to land, this is usually achieved by an order returning the land to the beneficiary by, for example, an order imposing a constructive trust. The Court will also order an accounting and require the fiduciary to disgorge any profits earned from the land.

20. These are backwards-looking remedies. There is no need for the remedies to be forward-looking because the property is returned to the beneficiary and future profits from the land will accrue to the beneficiary.

21. However, the return of the land is not always possible. The fiduciary may have disposed of the land to innocent third parties. In these cases, the courts require equitable compensation to be paid in lieu of the return of the land. As noted by Jeffrey Berryman in his textbook, *The Law of Equitable Remedies*, equitable compensation is a substitute for the land.[6] Once the lands have been

[5] See *Canson Enterprises Ltd. v Boughton & Co.*, [1991] 3 SCR 534 at 546 – 547.
[6] Jeffrey Berryman, *The Law of Equitable Remedies*, 2nd ed (Irwin Law Inc., 2013) at 484.

alienated to an innocent third party, the beneficiary has only an *in personam* remedy against the fiduciary. There is no *in rem* remedy.

22. Furthermore, the Crown is no ordinary fiduciary. As stated by Binnie, J. in *Wewaykum Indian Band v Canada*, the Crown wears many hats and represents many interests some of which cannot help but be conflicting.[7] For example, an ordinary fiduciary does not have the power to expropriate the property of his beneficiary for public purposes.

23. In *Osoyoos Indian Band v Oliver (Town)*, this Court held that a fiduciary duty does not arise when the Crown is considering the expropriation of reserve lands for a public purpose.[8] At that stage, the Crown acts in the public interest. A fiduciary duty only arises once the decision to expropriate has been made.

24. Furthermore, in the case of Treaty No. 3, the relevant treaty in this case, there is an express acknowledgment that reserve land may be appropriated for public works in the future (and that "due compensation" will be paid).[9]

25. Accordingly, the breach of fiduciary duty in this case was not the taking of the land for public purposes. The breach was not being upfront with the LSFN about the taking and not properly and promptly paying for the land.

26. In cases where the Crown has alienated reserve land to an innocent third party in violation of its fiduciary duties, the land cannot be returned. The rights that the third party has acquired in

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[7] 2002 SCC 79, [2002] 4 SCR 245; see also *Guerin v the Queen*, [1984] 2 SCR 335 at 385; *Fairford First Nation v Canada (Attorney General)*, [1999] 2 FC 48, [1999] 2 CNLR 60; *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 at paras 37 - 54, [2011] 2 SCR 261; and *Williams Lake Indian Band v Canada (Indian Affairs and Northern Development)*, 2018 SCC 4, at para 55 per Wagner J and at paras 163 - 165, per Brown J, [2018] 1 SCR 83.
[8] 2001 SCC 85 at para 53, [2001] 3 SCR 746.
[9] 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 Woods with Adhesions (Queen's Printer and Controller of Stationery, 1966).

the land through its good faith dealings with the Crown must be respected and the remedy of the First Nation is confined to equitable compensation.[10]

27. Saskatchewan submits that the same result should occur where the Crown has devoted the land to a public purpose. In these cases, as well, the First Nation is not entitled to get the land back and the appropriate remedy is equitable compensation.

28. These propositions are borne out by a review of the relevant case law. For example, the leading case on the wrongful alienation of reserve land is *Guerin v the Queen*.[11] In that case, the Crown breached its fiduciary duties to the First Nation by leasing out surrendered reserve land to a golf club on terms that were unfavourable and had not been approved by the First Nation. The remedy was equitable compensation but the golf club's lease remained intact.

29. Similarly, in *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, the Crown breached its fiduciary duty to a First Nation by giving away the mineral rights under surrendered reserve land and by not rectifying the situation when it had an opportunity to do so.[12] Again, the remedy was equitable compensation. The mineral rights remained with the veterans who had acquired them under the *Veterans Lands Act*. Once the mineral rights passed out of the hands of the Department of Indian Affairs by an arms-length transaction, the First Nation's proprietary interest in the mineral rights was "converted" or "crystallized" into a monetary claim only.[13]

30. In contrast, in *Semiahmoo v Canada*, the Crown breached its fiduciary duty to a First Nation by obtaining a surrender of reserve land ostensibly to expand a customs facility, but then

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[10] *Snell's Equity*, 33rd ed, (Sweet & Maxwell, 2015), at 63 – 64 and 788. See also *Chippewas of Sarnia Band v Canada (Attorney General)*, [2000] OJ No 4804 at paras 258 and 264, [2001] 1 CNLR 56 (CA), which recognized the interests of bona fide purchasers for value without notice in unsurrendered reserve lands.

[11] *Supra* note 7.

[12] [1995] 4 SCR 344.

[13] *Ibid* at para 111, per McLachlin J (as she then was).

allowed the land to lie vacant and unused for 40 years.[14] In that case, the appropriate remedy was the return of the land to the First Nation.

31. In this case, the land has clearly been devoted to a public purpose. It is flooded in connection with the operation of a number of hydro-electric dams that provide electricity to people in Manitoba. The LSFN acknowledges in its factum that the lands are being used for public purposes.

32. Also, third parties have acquired rights to the land. While the operator of the dam may not have a disposition under the *Indian Act*, the fact is that the dam has been operating for over 90 years. In crafting an appropriate equitable remedy, the Court must take into account the rights of the dam operator.

33. Accordingly, in this case, the equitable compensation to be awarded to the LSFN must be backwards and forward-looking. The land cannot be returned. The compensation must take into account both the past and the future losses that will be suffered by the LSFN.

34. The recognition of an easement in favor of the operator of the dam is appropriate.[15] As indicated by the trial judge, an easement represents the least intrusive way of impacting the LSFN's interest in its reserve land and thereby satisfies the "minimal impairment" rule.[16] The land will remain part of the reserve. The dam operator has the right to continue to flood the land -- to use the land for water storage purposes – but for no other purposes. The LSFN retains exclusive possession of the land *vis a vis* all others and can use the land for purposes that are not inconsistent with the flooding. Also, the LSFN retains ownership of the mineral rights underlying the flooded land.

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[14] [1998] 1 FC 3, [1998] 1 CNLR 250.

[15] In this case, the trial judge recognized that Canada had an easement over the flooded land, but it should have been the operator of the dam who got the easement. A landowner cannot have an easement over land that he or she owns. See *Gale on Easements*, 17th ed (Sweet and Maxwell, 2002) at 20 – 21 and *Morelli v Burkhart* (1981), 27 BCLR 298, 18 RPR 311 (BC Sup Ct).

[16] See *Osoyoos, supra* note 8 at para 52.

C. Related Issues

35. There are two related issues that Saskatchewan also wishes to address.

36. First, both Canada and the LSFN appear to assume that the only way that a third party can obtain long-term rights to use reserve land is by way of a surrender or an expropriation under the *Indian Act*.[17] Saskatchewan submits that this assumption is wrong.

37. In *Opetscheshat Indian Band v Canada*, this Court recognized that a permit could be granted by the Minister of Indian Affairs under s. 28(2) of the *Indian Act* which creates an easement over reserve land.[18] In that case, the easement was for a power line and the easement was to remain in place for as long as BC Hydro required the power line.

38. A similar conclusion, and one that is more directly on point, was reached by the Saskatchewan Court of Appeal in *Peter Ballantyne Cree Nation v Canada, Saskatchewan and SaskPower (No. 1)*.[19] In that case, the Court of Appeal recognized that the Superintendent General of Indian Affairs could issue a permit under s. 34 of the 1927 *Indian Act* (the precursor of s. 28(2)) which authorized the long term flooding of reserve land. [20]

39. Furthermore, as determined by Konkin J. of the Saskatchewan Court of Queen's Bench in *Peter Ballantyne Cree Nation v Canada, Saskatchewan and SaskPower (No. 2)*, the right to use reserve land may arise pursuant to equitable principles like proprietary estoppel.[21]

40. Second, at para 80 of its Factum, Canada suggests that the Federal Courts have no jurisdiction to recognize third party rights in reserve lands. The implication of this assertion is that the trial judge did not have jurisdiction to recognize a flooding easement in this case and that such

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[17] RSC 1985, c I-5, s 35 (expropriation) and s 37 (surrender).
[18] [1997] 2 SCR 119.
[19] 2016 SKCA 124, [2017] 1 WWR 685.
[20] RSC 1927, c 98.
[21] *Supra* note 1.

rights could only be bestowed by the Governor-in-Council or the Minister acting under the *Indian Act*.

41. With respect, this submission is wrong in law and leaves the dam's operator in an untenable position. The Federal Court directed that the LSFN be compensated on the basis that an easement is in place. Canada now says that there is no easement and the matter is left to the discretion of the Governor-in-Council or the Minister. What happens if the Governor-in-Council or the Minister refuse to grant the easement? Or require the operator of the dam to compensate the LSFN again as a condition of granting the easement?

42. Saskatchewan submits that the Federal Court's equitable jurisdiction allows it to recognize third party rights in reserve lands where the equities of the case require this to be done.[22] This Court's decision in *Cowper-Smith v Morgan* clearly acknowledges that equitable remedies can include the creation of interests in land.[23] In this case, that is the only fair and just result.

43. The LSFN is entitled to equitable compensation for Canada's breach of fiduciary duty by giving away part of its reserve. This compensation is both backwards-looking and forward-looking. But the flip-side of this coin is recognition of the rights in the land that were obtained by the innocent third party, in this case, the operator of the dam.

44. The LSFN cannot have it both ways. They cannot get compensation based on the wrongful taking of reserve land and then deny that the land has actually been taken. That would be inequitable.

IV. COSTS

45. Saskatchewan does not seek costs and submits that it should not be liable for the costs of either the Appellants, the Respondent or any of the other Interveners.

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[22] *Federal Courts Act*, RSC 1985, c F-7, s 3.
[23] 2017 SCC 61 at para 17, [2017] 2 SCR 754.

V. DISPOSITION OF THE LEGAL ISSUES

46. Saskatchewan takes no position with respect to the ultimate disposition of the appeal.

47. Saskatchewan intends to present oral argument at the hearing of the appeal, as per the Order of Brown, J. dated October 22, 2020.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the City of Regina, in the Province of Saskatchewan, this 17th day of November, 2020.

P. Mitch McAdam, Q.C.

For Macrina Badger

VII. TABLE OF AUTHORITIES

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