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

-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

Interveners

FACTUM OF FEDERATION OF SOVEREIGN INDIGENOUS NATIONS
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada)*

COUNSEL FOR THE INTERVENOR, FEDERATION OF SOVEREIGN INDIGENOUS NATIONS:

Ron S. Maurice
Steven W. Carey
MAURICE LAW BARRISTERS & SOLICITORS
300, 602 – 12th Ave SW
Calgary, AB T2R 1J3
Tel: 403.266.1201
Fax: 403.266.2701
Email: rmaurice@mauricelaw.com

OTTAWA AGENT FOR THE INTERVENER:

Marie-France Major
SUPREME ADVOCACY LLP
100 – 340 Gilmour Street
Ottawa, ON K2P 0R3
Tel: 613.695.8855 Ext: 102
Fax: 613.695.8580
Email: mfmajor@supremeadvocacy.ca

COUNSEL FOR THE APPELLANTS:

Rosanne Kyle
Elin Sigurdson
Elisa Penn
MANDELL PINDER LLP
422, 1080 Mainland Street
Vancouver, BC V6B 2T4
Tel: 604.681.4146
Fax: 604.681.0959
Email: rosanne@mandellpinder.com

OTTAWA AGENT FOR THE APPELLANTS:

Marie-France Major
SUPREME ADVOCACY LLP
100 - 340 Gilmour Street
Ottawa, ON K2P 0R3
Tel: 613.695.8855 Ext: 102
Fax: 613.695.8580
Email: mfmajor@supremeadvocacy.ca

COUNSEL FOR THE RESPONDENT, HER MAJESTY THE QUEEN IN RIGHT OF CANADA:

Christopher M. Rupar
Dayna Anderson
Michael Roach
ATTORNEY GENERAL OF CANADA
Department of Justice Canada, Civil Litigation Section
500, 50 O'Connor Street
Ottawa, ON K1A 0H8
Tel: 613.967.6290
Fax: 613.954.1920
Email: christopher.rupar@justice.gc.ca

OTTAWA AGENT FOR THE RESPONDENT, HER MAJESTY THE QUEEN IN RIGHT OF CANADA:

Robert J. Frater Q.C.
ATTORNEY GENERAL OF CANADA
Department of Justice Canada, Civil Litigation Section
500, 50 O'Connor Street
Ottawa, ON K1P 6L2
Tel: 613.670.6289
Fax: 613.954.1920
Email: robert.frater@justice.gc.ca

COUNSEL FOT THE RESPONDENT, HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO:

Leonard F. Marsello
Dona Salmon

OTTAWA AGENT FOR THE RESPONDENT, HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO:

MINISTRY OF THE ATTORNEY GENERAL
720 Bay Street, 8th Floor
Toronto, ON M7A 2S9
Tel: 416.326.4939
Fax: 416.326.4181
Email: leonard.marsello@ontario.ca

Nadia Effendi
BORDEN LADNER GERVAIS LLP
World Exchange Plaza
100 Queen Street, suite 1300
Ottawa, ON K1P 1J9
Tel: 613.787.3562
Fax: 613.230.8842
Email: neffendi@blg.com

COUNSEL FOR THE RESPONDENT, HER MAJESTY THE QUEEN IN RIGHT OF MANITOBA:

Kristen Wright
MANITOBA JUSTICE
405 Broadway, Suite 730
Winnipeg, MB R3C 3L6
Tel: 204.945.2843
Fax: 204.948.2826
Email: Kirsten.wright@gov.mb.ca

OTTAWA AGENT FOR THE RESPONDENT, HER MAJESTY THE QUEEN IN RIGHT OF MANITOBA:

D. Lynne Watt
GOWLING WLG (CANADA) LLP
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3
Tel: 613.786.8695
Fax: 613.788.3509
Email: lynne.watt@gowlingwlg.com

COUNSEL FOR THE INTERVENER, ASSEMBLY OF MANITOBA CHIEFS:

Carly Fox
FOX FRASER LLP
#1630 - 1800 4 Street SW
Calgary, Ab T2S 2S5
Tel: 403.910.5392
Fax: 403.407.7795
Email: cfox@foxfraserlaw.com

OTTAWA AGENT FOR THE INTERVENER, ASSEMBLY OF MANITOBA CHIEFS:

Bijon Roy
CHAMP AND ASSOCIATES
43 Florence Street
Ottawa, ON K2P 0W6
Tel: 613.232.2680
Fax: 613.232.2680
Email: broy@champlaw.ca

COUNSEL FOR THE INTERVENER, TSESHAHT FIRST NATION:

Christopher G. Devlin
DEVLIN GAILUS WATSON
201 - 736 Broughton Street
Victoria, BC V8W 1E1
Tel: 250.361.9469
Fax: 250.361.9429
Email: christopher@dglaw.ca

OTTAWA AGENT FOR THE INTERVENER, TSESHAHT FIRST NATION:

Eugene Meehan, Q.C.
SUPREME ADVOCACY LLP
100-340 Gilmour Street
Ottawa, ON K2P 0R3
Tel: 613.695.8855 Ext. 101
Fax: 613.695.8580
Email: emeehan@supremeadvocacy.ca

COUNSEL FOR THE INTERVENER, ATTORNEY GENERAL OF SASKATCHEWAN:

OTTAWA AGENT FOR THE INTERVENER, ATTORNEY GENERAL OF SASKATCHEWAN:

P. Mitch McAdam, Q.C.
ATTORNEY GENERAL FOR SASKATCHEWAN
Aboriginal Law Branch
820 - 1874 Scarth St
Regina, SK S3P 3B3
Tel: 306.787.7846
Fax: 306.787.9111
Email: mitch.mcadam@gov.sk.ca

COUNSEL FOR THE INTERVENER, MANITOBA KEEWATINOWI OKIMANAK INC.:

Kate Kempton
Kevin Hille
OLTHUIS, KLEER, TOWNSHEND LLP
250 University Ave, 8th floor
Toronto, ON M5H 3E5
Tel: 416.981.9374
Fax: 416.981.9350
Email: kkempton@oktlaw.com

COUNSEL FOR THE INTERVENER, TREATY LAND ENTITLEMENT COMMITTEE OF MANITOBA INC.:

Harley I. Schachter
DUBOFF EDWARDS HAIGHT & SCHACHTER
1900 - 155 Carlton Street
Winnipeg, MB R3C 3H8
Tel: 204.942.3361
Fax: 204.942.3362
Email: schachter@dehslaw.com

COUNSEL FOR THE INTERVENER, ANISHINABEK NATION:

Cynthia Westaway
Geneviève Boulay
K.R. Virginia Lomax
WESTAWAY LAW GROUP
230-55 Murray Street
Ottawa, ON K1N 5M3
Tel: 613.722.6339
Fax: 613.722.9097

D. Lynne Watt
GOWLING WLG (CANADA) LLP
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3
Tel: 613.786.8695
Fax: 613.788.3509
Email: lynne.watt@gowlingwlg.com

OTTAWA AGENT FOR THE INTERVENER, KEEWATINOWI OKIMANAK INC.:

Marie-France Major
SUPREME ADVOCACY LLP
100 - 340 Gilmour Street
Ottawa, ON K2P 0R3
Tel: 613.695.8855 Ext: 102
Fax: 613.695.8580
Email: mfmajor@supremeadvocacy.ca

OTTAWA AGENT FOR THE INTERVENER, TREATY LAND ENTITLEMENT COMMITTEE OF MANITOBA INC.:

Geneviève Boulay
WESTAWAY LAW GROUP
230-55 Murray Street
Ottawa, ON K1N 5M3
Tel: 613.722.9097
Fax: 613.722.9097
Email: genevieve@westawaylaw.ca

OTTAWA AGENT FOR THE INTERVENER, ANISHINABEK NATION:

Esther De Vos
WESTAWAY LAW GROUP
230-55 Murray Street
Ottawa, ON K1N 5M3
Tel: 613.722.3042
Fax: 613.722.9097
Email: esther@westawaylaw.ca

Email: cynthia@westawaylaw.ca

COUNSEL FOR THE INTERVENER, WAUZHUSHK ONIGUM NATION:

David G. Leitch
DAVID GARTH LEITCH PROFESSIONAL CORPORATION
23 Edith Drive
Toronto, ON M4R 1Y9
Tel: 416.573.8947
Email: dgl@dgleitch.ca

OTTAWA AGENT FOR THE INTERVENER, WAUZHUSHK ONIGUM NATION:

Christopher Rootham
NELLIGAN O'BRIEN PAYNE LLP
300-50 O'Connor Street
Ottawa, ON K1P 6L2
Tel: 613.231.8311
Fax: 613.788.3667
Email: Christopher.rootham@nelliganlaw.ca

COUNSEL FOR THE INTERVENERS, BIG GRASSY FIRST NATION, ONIGAMING FIRST NATION, NAOTKAMEGWANNING FIRST NATION AND NIISAACHEWAN FIRST NATION:

Eamon P. Murphy
WOODWARD & COMPANY
200-1022 Government St.
Victoria, BC V8W 1X7
Tel: 250.383.2356
Fax: 250.380.6560
Email: eamon@woodwardandcompany.com

OTTAWA AGENT FOR THE INTERVENERS, BIG GRASSY FIRST NATION, ONIGAMING FIRST NATION, NAOTKAMEGWANNING FIRST NATION AND NIISAACHEWAN FIRST NATION:

Michael J. Sobkin
331 Somerset Street West
Ottawa, ON K2P 0J8
Tel: 613.282.1712
Fax: 613.288.2896
Email: msobkin@sympatico.ca

COUNSEL FOR THE INTERVENERS, COALITION OF THE UNION OF BRITISH COLUMBIA INDIAN CHIEFS, PENTICTON INDIAN BAND AND WILLIAMS LAKE FIRST NATION:

Brenda Gaertner
Peter Millerd
Erica Stahl
MANDELL PINDER LLP
422 1080 Mainland Street
Vancouver, BC V6B 2T4
Tel: 604.681.4146
Fax: 604.681.0959
Email: brenda@mandellpinder.com

OTTAWA AGENT FOR THE INTERVENERS, COALITION OF THE UNION OF BRITISH COLUMBIA INDIAN CHIEFS, PENTICTON INDIAN BAND AND WILLIAMS LAKE FIRST NATION:

Marie-France Major
SUPREME ADVOCACY LLP
100 - 340 Gilmour Street
Ottawa, ON K2P 0R3
Tel: 613.695.8855 Ext: 102
Fax: 613.695.8580
Email: mfmajor@supremeadvocacy.ca

COUNSEL FOR THE INTERVENER, ATIKAMEKSHENG ANISHNAWBEK FIRST NATION:

OTTAWA AGENT FOR THE INTERVENER, ATKIAMEKSHENG ANISHNAWBEK FIRST NATION:

Ron S. Maurice
Steven W. Carey
MAURICE LAW BARRISTERS & SOLICITORS
300, 602 – 12th Ave SW
Calgary, AB T2R 1J3
Tel: 403.266.1201
Fax: 403.266.2701
Email: rmaurice@mauricelaw.com

COUNSEL FOR THE INTERVENER, KWANTLEN FIRST NATION:

Tim Dickson
Robin A. Dean
Naomi Moses
JFK LAW CORPORATION
340-1122 Mainland Street
Vancouver, BC V6B 5L1
Tel: 604.687.0549
Fax: 607.687.2696
Email: tdickson@jfklaw.ca

COUNSEL FOR THE INTERVENER, ASSEMBLY OF FIRST NATIONS:

Stuart Wuttke
ASSEMBLY OF FIRST NATIONS
55 Metcalfe Street, Suite 1600
Ottawa, ON K1P 6L5
Tel: 613.241.6789 Ext. 228
Fax: 613.241.5808
Email: swuttke@afn.ca

COUNSEL FOR THE INTERVENER, ASSEMBLY OF FIRST NATIONS QUEBEC-LABRADOR:

David Schulze
DIONNE SCHULZE SENC
502-507, Place d'Armes
Montréal, QB H2Y 2W8
Tel: 514.842.0748
Fax: 514.842.9983
Email: dschulze@dionneschulze.ca

Marie-France Major
SUPREME ADVOCACY LLP
100 - 340 Gilmour Street
Ottawa, ON K2P 0R3
Tel: 613.695.8855 Ext: 102
Fax: 613.695.8580
Email: mfmajor@supremeadvocacy.ca

OTTAWA AGENT FOR THE INTERVENER, KWANTLEN FIRST NATION:

Guy Régimbald
GOWLING WLG (CANADA) LLP
2600-160 Elgin Street
Ottawa, ON K1P 1C3
Tel: 613.786.0197
Fax: 613.563.9869
Email: guy.regimbald@gowlingwlg.com

OTTAWA AGENT FOR THE INTERVENER, ASSEMBLY OF FIRST NATIONS:

Moira Dillon
SUPREME LAW GROUP
900 - 275 Slater Street
Ottawa, ON K1P 5H9
Tel: 613.691.1224
Fax: 613.691.1338
Email: mdillon@supremelawgroup.ca

OTTAWA AGENT FOR THE INTERVENER, ASSEMBLY OF FIRST NATIONS QUEBEC-LABRADOR:

David P. Taylor
CONWAY BAXTER WILSON LLP
400 - 411 Roosevelt Avenue
Ottawa, ON K2A 3X9
Tel: 613.691.0368
Fax: 613.688.0271
Email: dtaylor@conway.pro

COUNSEL FOR THE INTERVENER, GRAND COUNCIL TREATY #3:

Bruce McIvor
FIRST PEOPLES LAW
502-55 East Cordova Street
Vancouver, BC V6A 0A5
Tel: 604.685.4240
Fax: 604.283.9349
Email: bmcivor@firstpeopleslaw.com

OTTAWA AGENT FOR THE INTERVENER, GRAND COUNCIL TREATY #3:

Colleen Bauman
GOLDBLATT PARTNERS LLP
500-30 Metcalfe St.
Ottawa, ON K1P 5L4
Tel: 613.482.2463
Fax: 613-235-3041
Email: cbauman@goldblattpartners.com

COUNSEL FOR THE INTERVENER, MOHAWK COUNCIL OF KAHNAWÀ:KE:

Francis Walsh
Stacey Douglas
MOHAWK COUNCIL OF KAHNAWÀ:KE
P.O. Box 720
Mohawk Territory of Kahnawà:ke, QB J0L 1B0
Tel: 450.632.7500
Fax: 450.638.3663
Email: Francis.Walsh@mck.ca

OTTAWA AGENT FOR THE INTERVENER, MOHAWK COUNCIL OF KAHNAWÀ:KE:

Maxine Vincelette
POWER LAW
1103-130 Albert Street
Ottawa, ON K1P 5G4
Tel: 613.702.5560
Fax: 613.702.5560
Email: mvincelette@powerlaw.ca

COUNSEL FOR THE INTERVENER, ELSIPOGTOG FIRST NATION:

Donald E. Worme, Q.C.
Alisa R. Lombard
Aubrey D. Charette
Mark Ebert
SEMAGANIS WORME LOMBARD
300 - 203 Packham Avenue
Saskatoon, SK S7N 4K5
Tel: 306.664.7175
Fax: 306.664.7176
Email: dworme@swllegal.ca

COUNSEL FOR THE INTERVENER, CHEMAWAWIN CREE NATION:

Catherine J. Boies Parker
Mark Underhill
John Trueman
ARVAY FINLAY LLP
816 - 1175 Douglas Street
Victoria, BC V8W 2E1

OTTAWA AGENT FOR THE INTERVENER, CHEMAWAWIN CREE NATION:

Jeffrey W. Beedell
GOWLING WLG (CANADA) LLP
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3
Tel: 613.786.0171

Tel: 250.380.2788 Ext. 5
Fax: 888-575-3281
Email: cboiesparker@arvayfinlay.ca

COUNSEL FOR THE INTERVENER, WEST MOBERLY FIRST NATIONS:

Reidar M. Mogerman, Q.C.
Naomi Kovak
Chya Mogerman
CAMP FIORANTE MATTHEWS MOGERMAN
400-856 Homer Street
Vancouver, BC V6B 2W5
Tel: 604.689.7555
Fax: 604.689.7554
Email: rmogerman@cfmlawyers.ca

Fax: 613.788.3587
Email: jeff.beedell@gowlingwlg.com

OTTAWA AGENT FOR THE INTERVENER, WEST MOBERLY FIRST NATIONS:

Michael J. Sobkin
331 Somerset Street West
Ottawa, ON K2P 0J8
Tel: 613.282.1712
Fax: 613.288.2896
Email: msobkin@sympatico.ca

TABLE OF CONTENTS

PART I – OVERVIEW

1. The Federation of Sovereign Indigenous Nations ("FSIN") is a body that represents 74 First Nations in Saskatchewan. Most of the FSIN member Nations are still in the process of advancing and resolving specific claims, including analogous claims involving the unlawful flooding of reserve lands. The guiding principles and tests enunciated by this Court will have a major bearing on the resolution of those claims.

PART II – QUESTIONS IN ISSUE

2. The question on appeal is: how should principles of equitable compensation, together with legal principles applicable to the Crown-Indigenous relationship, be applied to determine compensation owed to Indigenous groups where the Crown has breached its fiduciary duty, and in particular where it has permitted the unlawful use of reserve lands for a public purpose?

3. Once a breach is characterized as an equitable breach, the trier of fact must assess compensation in light of the principles of equitable compensation. The objective of equitable compensation is to restore the injured party to the position it would have been but for the unlawful conduct of the fiduciary. We submit that where reserve land has been taken without surrender or lawful expropriation (as in the present case), compensation should be assessed to include (i) the current replacement value of the land; and (ii) the present value of the lost opportunity or loss of use of the land from the date of taking to the date of trial.

4. Foreseeability and remoteness do not apply to the assessment, and the injured party is entitled to equity's presumption that it would have used the land (and any derivative income for its use) in the most advantageous manner possible.

5. In order to meet the underlying policy objectives of deterrence and enforcement of the Crown's fiduciary duties to First Nations, the FSIN submits that the assessment of equitable compensation should be completed through an objective, two-part test:

A. Step 1: Assessing Damages for Replacement Value and Loss of Use

1) Using the assistance of appraisal experts, the trier of fact must apply an objective test to determine the highest and best use of reserve land taken unlawfully;

2) The trier of fact must then determine the current replacement value of the unlawfully converted or withheld asset based on its highest and best use;

3) To determine the value of the lost opportunity to earn income from beneficial use of the asset, the trier of fact must assess the income earning potential of the unlawfully converted or withheld asset over the claim period (from the date of taking to the date of judgment), with the full benefit of hindsight;

a. If the land in question was in fact put to its highest and best use during the claim period, then actual data regarding foregone income or market rents is a reliable and objective method of assessing the lost income;

b. If the asset in question was *not* in fact put to its highest and best use during the claim period, then the trier of fact must consider objective factors that would influence the income generating capacity of the asset assuming it was put to its highest and best use, with due regard to realistic contingencies where found to apply. Subjective factors, such as whether the party wronged would likely have used the asset for its highest and best use are irrelevant, as foreseeability and remoteness do not apply.

B. Step 2: Present Valuing Compensation for Loss of Use

1) The trier of fact must assess the present value of historical or nominal losses by applying an appropriate interest rate or investment rate for foregone income, compounded from the date of the unlawful taking to the date of judgment.

PART III – ARGUMENT

6. Although the objective test advanced by FSIN is intended to apply to all unlawfully converted or withheld assets (eg. lands, timber, royalties, or monies) and losses arising from a breach of the Crown's fiduciary obligations, FSIN will hereinafter refer to the unlawfully converted or withheld asset as "reserve lands" for the purposes of these submissions.

A. Step 1: Assessing Damages for Replacement Value and Loss of Use

7. The jurisprudence is clear that where a breach of treaty or fiduciary duty has been established (as in the instant case), the party wronged is entitled to restitution *in specie,* but where that is unavailable, "equity awards compensation in place of restitution *in specie*".[1] It is rare that there will be a case where the Crown has breached its fiduciary duties to an Indigenous group and restoration *in specie* will be an available equitable remedy. It is consequently imperative to clarify how equitable damages in lieu are assessed.

8. As stated above, equitable compensation requires assessing damages for i) the replacement value of the asset; and ii) the value of the lost opportunity or income from use of the asset. Professor Waddams provides an apt summary of guiding principles to assess compensation where a wronged party has been unlawfully deprived of their property:

> Many kinds of legal wrongs cause a loss of property to the plaintiff. … Classified as legal wrongs, these instances seem to have little in common.... *However, from the point of view of compensation, they all raise a single issue: how to provide in money a substitute for property that the plaintiff does not have but would have had but for the defendant's wrong.*
>
> It is common in such cases that the plaintiff complains not only of the loss of property but also of the loss of its use. Had the wrong not been done, the plaintiff would have had, at the time of the complaint, not only capital wealth represented by the property, but an accretion to wealth represented by profitable use of the property. … if instant reparation could be made for the plaintiff's loss, and a perfect substitute instantly acquired, there would never be a claim for loss of use. But reparation for legal wrongs is never made instantly, and substitutes are rarely perfect. *Consequently, compensation may be usefully regarded as containing two elements: a substitute for loss of use of the value of the property and a substitute for the loss of the opportunity to use it*.[2]

9. Therefore, the first step in assessing equitable compensation is to determine the "highest and best use" of the unlawfully taken reserve land. "Highest and best use" is an objective standard of assessment used by qualified appraisers, and defined by Professor Eric Todd in *The Law of Expropriation and Compensation* in Canada as follows:

> … the legal concept of "highest and best use" is an economic one, i.e. "the use that would bring about the highest economic value on the open market." It is that use of land which may

---

[1] *Canson Enterprises Ltd. v Boughton & Company,* [1991] 3 SCR 534, at para 69 [*Canson*].
[2] S.M. Waddams, *Law of Damages*, 3rd ed (Toronto: Canada Law Book Inc, 1997) at 1.10 and 1.20. Emphasis added. [Book of Authorities, ("BOA"), Tab 2].

> reasonably be expected to produce the greatest net return to the land over a given period of time.[3]

10. Once the highest and best use is established, expert appraisers provide evidence as to what it would cost to replace the unlawfully taken reserve lands in a hypothetical market based on a willing-seller and willing-buyer. It is irrelevant that the owner of the land is an Indian Band or that the Crown is purchaser; fair market value is based on the qualities of the land itself.

11. The next step requires the trier of fact to determine losses based on the income generating capacity of the land over the claim period. This determination requires the trier of fact to apply the presumption of most advantageous use (or simply highest and best use) to determine the *lost opportunity*. The basis for applying the presumption of highest and best use arises in *Guerin v The Queen* ("*Guerin*") wherein this Honourable Court emphasized a critical distinction between damages at common law and equitable compensation, stating that: "In contract it would have been necessary for the Band to prove that it would have developed the land [for residential uses]; *in equity a presumption is made to that effect*."[4]

12. If the asset in question was in fact put to its highest and best use during the claim period, then actual data is a reliable and objective method of assessing lost income. In this scenario, the trier of fact can use a backward-looking analysis, taking into account verifiable asset-specific data to assess the value of the injured party's lost opportunity.

13. Alternatively, if the asset in question was *not* in fact put to its highest and best use during the claim period (like the land in *Guerin*), then the trier of fact may be required to look forward and consider factors that would influence the income generating capacity of the land assuming it was put to its highest and best use, with due regard to realistic contingencies where found to apply. As Justice Slade held in *Beardy's*, "realistic contingencies" are "contingencies that affect the potential

---

[3] Todd, Eric C. E., *The Law of Expropriation and Compensation in Canada*, 2nd ed. (Carswell: Scarborough, 1992) at 135 (footnotes omitted), [BOA, Tab 1].
[4] *Guerin v The Queen*, [1984] 2 SCR 335 at para 52 [*Guerin*].

for realization of compensation based on the full application of factors governing the assessment of equitable compensation, in particular the presumption of most advantageous use (*Guerin*)."[5]

14. The governing principle is that compensation should be based on an objective assessment of how a "reasonable person" would have used the land having reasonable access to capital, markets, and equipment. Other realistic contingencies include objective characteristics of land such as soil quality, hydrology, or market conditions.

15. Subjective factors, such as whether the party wronged would likely have used the asset for its highest and best use are irrelevant, as foreseeability and remoteness do not figure into this assessment. To replace the objective "reasonable person" with the subjective "First Nation without adequate financial resources or ability to secure financing" adds caveats that are speculative, prejudicial, and contrary to the presumption of highest and best use. To accord with equity's presumption, the assessment of "highest and best use" or "reasonable and probable use" must focus exclusively on the *asset* that was taken from the beneficiary by the fiduciary – not on the capacity, intention, or aspirations of the injured party.

16. This approach to assessing realistic contingencies is discussed in *Canson,* where McLachlin J. (as she then was) held: "Foreseeability is not a concern in assessing compensation, but it is essential that the losses made good are only those which, on a common sense view of causation, were caused by the breach."[6] Having established that the highest and best use of the reserve lands was for hydroelectric development, the trier of fact should attempt to estimate the reasonable and probable losses suffered by the wronged party in each year of the claim period in order to value the lost opportunity, expressed as lost annual income.[7]

17. FSIN submits that it is highly unlikely that the Lac Seul Band could have been an "owner-operator" of the Lac Seul Hydroelectric Project, but the Appellant should be entitled to

---

[5] *Southwind v Canada*, 2017 FC 906 at para 280 [*Southwind FC*], citing *Beardy's & Okemasis Band #96 and #97 v Her Majesty the Queen in Right of Canada,* 2016 SCTC 15 at para 12 [*Beardy's*].
[6] *Canson, supra* note 1 at para 84.
[7] *Southwind FC*, *supra* note 5 at para 292.

compensation based on its lost opportunity to lease the lands to the developer based on a fair market rent with regard to the highest and best use of the lands. Instead, Zinn J. held:

> As described above, the willing surrender of the Reserve land was but one option. If the price could not be agreed upon, I have found that Canada would have used its expropriation powers under the Treaty to "take" the land by flooding it, albeit with proper compensation having to be paid to the band.[8]

18. Justice Zinn's interpretation is incorrect as it fails to objectively apply the principles of equitable compensation, particularly the presumption of highest and best use. Canada is not entitled to the presumption that it would have acted lawfully and taken the reserve lands via expropriation – the simple fact is that Canada acted unlawfully and in breach of its fiduciary duty. Such a finding completely obviates the need to assess equitable compensation with regard to highest and best use. As explained by Expert Norris Wilson:

> …land appraisal based on the highest and best use of land cannot be considered in the case of an expropriation, because in the case of expropriation, you ignore any increase or decrease in value that is attributable to the project or the imminence of expropriation or the expropriation itself.[9]

19. Justice Zinn's interpretation presents a more serious challenge to the interpretation of principles of equitable compensation in the instant case. By presuming that Canada would have acted under lawful authority, Zinn J. actually departs from the entire basis for an award of equitable compensation. If Canada had acted under lawful expropriation authority, *then the Appellants would not be entitled to compensation based on the hydroelectric scheme.* Zinn J.'s interpretation fundamentally changes the nature of the breach, notwithstanding his finding that there were fiduciary obligations to the Lac Seul Band that the Crown breached.

B. Step 2: Present Valuing Damages

20. Having determined the historic nominal losses in each year of the claim period, the trier of fact must determine the present value of the loss as of the date of judgment. The first consideration in this step of the test is what portion of historic nominal losses must be present valued, and whether simple or compound interest should apply.

---

[8] *Ibid*, at para 497.
[9] *Ibid*, at para 378.

21. In *Bank of America Canada v Mutual Trust Co.*[10] this Honourable Court recognized that compound interest is a measure of opportunity cost (or loss of use) and it is a preferred method of dealing with the effects of time on money. It was further held that compound interest is considered to be compensatory when calculating common law damages and has long been a discretionary option in equity.[11] In *Beardy's,* the Specific Claims Tribunal upheld the rationale of this Honourable Court in *Bank of America*, and confirmed that the application of compound interest in equitable compensation is the standard.[12]

22. In *Beardy's*, Canada argued that a portion of the nominal historic losses should not be present valued at all, in order to reflect the possible "consumption" of the unlawfully withheld monies by the band (had the monies not been withheld). The Tribunal rejected this argument and held that treating consumption as a "realistic contingency" would result in a portion of the loss having no compensable value, denying the First Nation an equitable remedy.[13]

23. Accounting for "realistic contingencies" is not equivalent to accounting for consumption. Rather, the principle of "realistic contingencies" requires that the analysis to determine the historic value of the unlawfully converted or withheld reserve lands must be *reasonable*. Insofar as present valuing of historic nominal losses is concerned, consumption is irrelevant to this exercise. It is not for Canada nor the Courts to parse the loss of an Indigenous group into components of consumption and investment for the purposes of calculating the loss.[14] As per the Specific Claims Tribunal in *Beardy's:* "This would eliminate the deterrent value of equitable compensation on the premise that the loss could not be brought to present value as the risk to a fiduciary, if tempted to breach, would be lessened if able to prove that the beneficiary would have used up the money if it had not been misappropriated."[15]

24. As noted at trial by Zinn J., "the analysis of equitable compensation in cases such as this need not, and should not, be complicated, time consuming, or expensive."[16] Engaging in a wholly

---

[10] *Bank of America Canada v Mutual Trust Co.*, 2002 SCC 43 [*Bank of America*].
[11] *Ibid*, at paras 36–38 and para 41.
[12] *Beardy's, supra* note 5 at para 113.
[13] *Ibid*, at para 155.
[14] *Ibid*, at para 154.
[15] *Ibid*, at para 154.
[16] *Southwind FC*, *supra* note 5 at para 465.

speculative analysis regarding how Indigenous groups may have consumed money that the group never actually received is complicated, time consuming, and expensive – all of which pose significant access to justice issues for First Nations.

25. To present value the historic nominal losses, the trier of fact must determine what interest rate or investment index should be applied. The starting point for this analysis is *Fales v Canada Permanent Trust Co. ("Fales")*[17] cited in *Blueberry River Indian Band v Canada (Department of Indian Affairs & Northern Development)*, wherein McLachlin J. stated:

> The matter comes down to this. The duty on the Crown as fiduciary was "that of a man of ordinary prudence in managing his own affairs": *Fales v. Canada Permanent Trust Co.*, [1977] 2 S.C.R. 302, at p. 315.[18]

26. All possible methods to present value historic nominal loss must be guided by the principle of ordinary prudence. FSIN submits that using "ordinary prudence" as the guiding principle for present valuation gives expression to equity's presumptions and acts as a deterrent to the Crown's unlawful exploitation of reserve lands and a breach of its fiduciary duties.

27. At trial, Zinn J. adopted the view of the Lazar-Prisman expert model and concluded that a multiplier based on the historic Indian Trust Fund Rates was the appropriate index to present value the historic nominal losses. FSIN submits that Indian Trust Fund Rates may only be appropriate when the unlawfully converted or withheld asset was Indian monies that necessarily would be managed as Indian trust funds.

28. In *Ermineskin Indian Band & Nation v Canada* ("*Ermineskin*"),[19] the band brought an action for breach of fiduciary duty against the Crown for failing to invest royalties from oil and gas reserves found beneath the surface of the two reserves. It was acknowledged by the Crown that a trustee at common law has a duty to invest monies in a reasonable and prudent manner. This Honourable

---

[17] *Fales v Canada Permanent Trust Co.,* [1977] 2 SCR 302 at para 34 [*Fales*].
[18] *Blueberry River Indian Band v Canada (Department of Indian Affairs & Northern Development)*, [1995] 4 SCR 344 at para 104, McLachlin J. citing *Fales* at para 32. [Emphasis added.]
[19] *Ermineskin Indian Band & Nation v Canada,* 2006 FCA 415 at para 122.

Court found that the Crown had no fiduciary duty to invest because the Crown was obligated to pay the prescribed rate of interest under the *Indian Act* for Indian monies.[20]

29. *Ermineskin* is distinguishable on its facts because there is no such obligation in a case involving a breach of fiduciary duty and unlawful taking of reserve lands. In *Ermineskin*, the funds in issue were deposited in the Indian Trust Account. In the instant case, the Appellants never received the income for their lost opportunity. The effect is that compensation for loss of use in the instant case is not "Indian monies," and is therefore not subject to the limitations on investment prescribed by the *Indian Act*. In this context, the nominal losses should be brought forward by applying an objective standard, specifically, the mean or average returns of prudent investors (i.e. pension plans, major endowments, or trusts).

30. Indeed, the Federal Court of Appeal's analysis in *Ermineskin* supports FSIN's position that, but for the *Indian Act*, the Crown would have a duty to invest monies as a prudent person would in managing their own affairs….

> If a situation is such that a fiduciary is in a position similar to that of a trustee, even though the situation cannot necessarily be categorized as a "common law trust", I do not see why the common law duties of a trustee cannot be applied to that fiduciary if that is what the particular situation warrants. In this case the bands have placed particular emphasis on a trustee's duty to invest their royalties- the trust corpus. In my opinion if the situation is such that the Crown is in the position of a fiduciary, although not strictly speaking a trustee at common law, and holds funds on behalf of the bands, it is not improper to ascribe to the Crown a duty to invest those funds in the manner of a common law trustee, subject to any legislation limiting its ability to do so.
> …
> In *Fales v. Canada Permanent Trust Co*. (1976), [1977] 2 S.C.R. 302 (S.C.C.), at 315 (*Fales*), Dickson J. identified that "the standard of care and diligence required of a trustee in administering a trust is that of a man of ordinary prudence in managing his own affairs." A primary responsibility of the prudent trustee is the duty to invest. As the Trial Judge recognized, "...a trustee owes a positive duty to invest the corpus — or, put another way, to make it productive — when the corpus is a wasting asset, such as money. The trust corpus may not lie fallow. This is the duty to invest".[21]

31. In *Siemens v Bawolin*,[22] the Saskatchewan Court of Appeal held that benchmark investments are appropriate to be used as a proxy to assess equitable compensation. A "benchmark" return is

---

[20] *Ermineksin Indian Band & Nation v Canada*, 2009 SCC 9 at paras 195 – 197.
[21] *Ibid*, at paras 73 and 195 – 197.
[22] *Siemens v Bawolin*, 2002 SKCA 84 [*Siemens*].

essentially an average of stocks and bonds on the selected index. In this sense, the use of a balanced portfolio best reflects a "realistic contingency" because it is reasonable and results in a proportional award of compensation. The present valuation of monies through the use of an objective benchmark portfolio is an appropriate and reasonable remedy on the facts of this case because it breathes life into the concept of the presumption of most advantageous and profitable use in a tempered and reasonable way.

32. In this context, FSIN submits that Justice Zinn erred in accepting Mr. Prisman's contention that the most realistic vehicle for determining return on money is the annual Indian Trust Account rates set by Canada.[23] Mr. Prisman argued that the band would not invest its moneys "when they have a risk-free vehicle, the Indian Trust Account that does not suffer from default risk".[24] This perspective is flawed for several reasons, the first of which is that the principles of equity do not allow for speculation about what a wronged First Nation may have done with money *it never received.* Second, Indian Trust Account rates, based on Canada bond rates, generate notoriously poor returns; as of 2019, the return on Indian Trust Account rates is not enough to cover the cost of inflation (currently 1.95%) – this can hardly be described as "risk-free".

33. A "benchmark" return is essentially an average of stocks and bonds on the selected index (e.g. the S&P 500, Dow Jones, Nasdaq, or TSE). This is not about "cherry-picking" stocks to achieve the most advantageous or profitable return. As noted by Zinn J. this is not about speculating as to whether the Appellant would have bought stocks in Google or in Nortel.[25] It is about what risk a prudent fiduciary would accept in managing the funds of a beneficiary. Indeed, a benchmark return amplifies the importance of diversification and prudent risk management.

34. By present-valuing historic nominal losses using a benchmark portfolio model, the assessment of compensation will include the equitable principles of deterrence and enforcement which lies at the heart of the Crown's fiduciary relationship with First Nations. As per *Beardy's,* "deterrence as an objective of compensation is served by a remedy that leaves the Claimant whole and the Crown fully accountable for the consequence of the breach."[26]

---

[23] *Southwind FC*, *supra* note 5 at para 498.
[24] *Ibid*, at para 498.
[25] *Ibid*, at para 499.
[26] *Beardy's*, *supra* note 5 at para 133.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of November, 2020.

Counsel for the Intervener:
Ron S. Maurice / Steven W. Carey
MAURICE LAW BARRISTERS & SOLICITORS

PART VI – LIST OF AUTHORITIES

Cases	**Paragraph Referred to**
Bank of America Canada v Mutual Trust Co., 2002 SCC 43.	21
Beardy's & Okemasis Band #96 and #97 v Her Majesty the Queen in Right of Canada, 2016 SCTC 15.	13, 21 - 23, 34
Blueberry River Indian Band v Canada (Department of Indian Affairs & Northern Development), [1995] 4 SCR 344 [*Apsassin*].	25
Canson Enterprises Ltd. v Boughton & Company, [1991] 3 SCR 534.	7, 16
Ermineksin Indian Band & Nation v Canada, 2009 SCC 9.	28, 29,
Ermineskin Indian Band & Nation v Canada, 2006 FCA 415.	28, 30
Fales v Canada Permanent Trust Co. (1976), [1977] 2 SCR 302.	25, 30
Guerin v The Queen, [1984] 2 SCR 335.	11, 13
Siemens v Bawolin, 2002 SKCA 84.	31,
Southwind v Canada, 2017 FC 906.	13, 16 - 19, 24, 27, 32, 33
Legislation and Rules	
Indian Act, RSC 1985, c I-5.	28 - 30
Loi sur les Indiens, L.R.C. (1985), ch. I-5	28 - 30
Secondary Sources	
Eric C. E. Todd, *The Law of Expropriation and Compensation in Canada*, 2nd ed. (Carswell: Scarborough, 1992) at 135.	9
S.M. Waddams, *Law of Damages*, 3rd ed (Toronto: Canada Law Book Inc, 1997) at 1.10 and 1.20.	8