SCC File No. 38795

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

B E T W E E N:

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:

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. The central issue in this appeal directly affects Tseshaht's claim of unextinguished Aboriginal title. This Court's determination of the principles and methodology related to equitable compensation as a remedy for breaches of fiduciary duties, including the honour of the Crown will affect the measure of compensation for unjustified infringements of Aboriginal title lands, particularly respecting alienations of such land to third parties.

2. Tseshaht submits that the jurisprudence in the Aboriginal title context supports the Appellants' position that equitable compensation requires more than a bare expropriation valuation.

3. Where possible, the Court should strive to maintain jurisprudential consistency across related areas of Aboriginal law. That is possible in this appeal.

PART II – POINTS IN ISSUE

4. The central issue in this appeal relates to compensation for harms caused by Canada's fiduciary breaches in a manner that accords with both equitable and constitutional principles, including reconciliation and the honour of the Crown.

PART III – LEGAL ARGUMENT

(i) Overview

5. Tseshaht supports the Appellants' position that equitable compensation requires more than a bare expropriation valuation. A valuation of the flooded reserve land based on bare expropriation does not correctly apply the law for two reasons:

i. it ignores the *sui generis* Crown-Indigenous fiduciary relationship, which stems from the Aboriginal interest in land being a pre-existing legal right not created by any Crown act or statute; and

b. it is disproportional, privileging rather than reconciling federal power over federal duty and giving no consideration to the fact that the abolished *sui generis* interest was an interest that was meant to inhere in present and future generations.

6. The honour of the Crown requires that the Crown negotiate with the Indigenous group to determine a value that *both sides* would have considered fair. Unilateral expropriation does not achieve that fair result. The honour of the Crown must be applied to ensure adequate compensation for Indigenous peoples in these and other disputes.

7. Under the approach taken by the courts below, Indigenous groups would receive the same value for their wrongfully taken lands as any settler would have received through a process of expropriation. The lower courts failed to have due regard to the jurisprudence regarding the Crown's fiduciary duties with respect to Aboriginal lands.

(ii) The *sui generis* Crown-Indigenous fiduciary relationship

8. Tseshaht submits that the consideration of fiduciary duty in the context of justifying infringement of Aboriginal title is consistent with and relevant to how equitable compensation should operate in this appeal. In part, this is because the jurisprudence related to the taking of reserve land arose from the law's recognition of the *sui generis* Crown-Indigenous fiduciary relationship.

9. The Appellants rightfully draw the link between equity and reconciliation.[1] The Appellants emphasize that reconciliation is achieved when equitable redress occurs that meaningfully addresses breaches of the *sui generis* Crown-Indigenous fiduciary relationship. Equitable compensation must be consistent with constitutional principles such as the honour of the Crown that uphold and govern the Crown-Indigenous relationship.

10. In *Guerin*, this Court determined that a fiduciary duty on the part of the Crown was triggered by the voluntary surrender of reserve land that was otherwise generally inalienable. In such circumstances, "the Crown is under an obligation to deal with the land on the Indians'

[1] Appellants' Factum, paras. 80 and 88.

behalf when the interest is surrendered."[2] Justice Dickson set out the legal foundation underpinning the Crown's *sui generis* obligations in relation to Aboriginal interests in land as follows (emphasis added):

> The principle that a change in sovereignty over a particular territory does not in general affect the presumptive title of the inhabitants was approved by the Privy Council in *Amodu Tijani v. Southern Nigeria (Secretary)*, [1921] 2 A.C. 399. That principle supports the assumption implicit in *Calder* that Indian title is an independent legal right which, although recognized by the Royal Proclamation of 1763, nonetheless predates it. […]
>
> The "political trust" cases concerned essentially the distribution of public funds or other property held by the government. In each case the party claiming to be beneficiary under a trust depended entirely on statute, ordinance or treaty as the basis for its claim to an interest in the funds in question. The situation of the Indians is entirely different. Their interest in their lands is a pre-existing legal right not created by Royal Proclamation, by s. 18(1) of the *Indian Act*, or by any other executive order or legislative provision. It does not matter, in my opinion, that the present case is concerned with the interest of an Indian Band in a reserve rather than with unrecognized aboriginal title in traditional tribal lands. The Indian interest in the land is the same in both cases: see *Attorney-General for Quebec v. Attorney-General for Canada,* [1921] 1 *A.C.* 401, at pp. 410-11 (the *Star Chrome* case).[3]

11. *Guerin* confirms that the Aboriginal interest in land, whether it be reserve land or unceded Aboriginal title land, is an independent, pre-existing legal right. It is not created by Crown action. Because the nature of the Aboriginal interest in land is inalienable, except upon surrender to the Crown, fiduciary obligations attach to Crown action in relation to that interest.[4]

12. The Appellants' submissions draw on jurisprudence related to the taking of reserve land,[5] noting that the Crown must always seek to reconcile competing interests in a public taking.[6]

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[2] *Guerin v. The Queen,* [1984] 2 SCR 335, at 382 [*Guerin*].

[3] *Guerin*, at 378-379. Justice Wilson, writing on behalf of Ritchie and McIntyre JJ., concurred that it would "fly in the face of the clear wording of [s. 18(1) of the *Indian Act*] to treat that interest as terminable at will by the Crown without recourse by the Band": *Guerin,* at 352.

[4] *Guerin*, at 376.

[5] Appellant's' Factum, paras. 89, 91, 112, 118, 119 and 123.

This Court clarified in *Osoyoos* and *Wewaykum* that although the fiduciary duty rose in *Guerin* in the context of a surrender, a fiduciary duty can arise equally in the context of an expropriation of reserve land.[7] In *Wewaykum*, in the context of reserve creation, where the Crown sought to create reserves for bands out of Crown lands to which those bands held no specific Aboriginal or treaty rights, this Court held that a fiduciary duty still arose, albeit a more limited one.[8]

(iii) *Tsilhqot'in*: Obligation of Proportionality

13. The Appellants refer to *Tsilhqot'in* in support of the point that any remedy must take into account the Indigenous perspective on what was lost.[9] Tseshaht submits there is more in the analysis provided by *Tsilhqot'in* that is relevant to this appeal.

14. In *Tsilhqot'in*, this Court affirmed that after Aboriginal title is established, the Crown nonetheless holds the underlying title to the land. The Aboriginal interest "burdens" the Crown's underlying title, which gives rise to a fiduciary duty on the part of the Crown.[10]

15. In the context of this fiduciary duty, this Court considered the *Sparrow* justification test in light of the law pertaining to the honour of the Crown.

a. In *Sparrow*, in the context of a conflict between a criminal charge under the *Fisheries Act* and an Aboriginal right to fish, this Court held that the Crown has a general responsibility to act in a fiduciary capacity with respect to Aboriginal peoples.[11] The Court also held that, although section 35(1) rights are not subject to section 1 of the *Charter*, the Crown may nevertheless infringe upon those rights without consent of the rights-holders so long as sufficient justification is provided.[12] The Crown's

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[6] Appellants' Factum, para. 91; *Osoyoos Indian Band v. Oliver (Town),* 2001 SCC 85, [2001] 3 SCR 746 at para. 52 [*Osoyoos*].
[7] *Wewaykum Indian Band v. Canada*, 2002 SCC 79, at para. 98 [*Wewaykum*], following *Osoyoos*.
[8] *Wewaykum*, at para. 96.
[9] Appellant's' Factum, para. 93.
[10] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, at para. 69 [*Tsilhqot'in*].
[11] *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at 1108 [*Sparrow*].
[12] *Sparrow*, at 1108-1109.

fiduciary relationship nevertheless imports "some restraint on the exercise of sovereign power".[13]

b. What is required, per *Sparrow*, is a balancing or reconciliation between the exercise of the Crown's sovereign power and the Crown's fiduciary duty (emphasis added):

> In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights. Such scrutiny is in keeping with the liberal interpretive principle enunciated in *Nowegijick*, *supra*, and the concept of holding the Crown to a high standard of honourable dealing with respect to the aboriginal peoples of Canada as suggested by *Guerin v. The Queen*, *supra*.[14]

c. In *Haida*, this Court extended the *Sparrow* justification analysis to the context of asserted, yet unproven, Aboriginal rights. The Crown's fiduciary duty was described in *Haida* as a duty that is grounded in the honour of the Crown and arises where the Crown has assumed discretionary control over specific Aboriginal interests.[15] Unproven Aboriginal rights are insufficiently specific to give rise to a fiduciary duty. Nevertheless, the honour of the Crown requires that these rights be determined, recognized and respected.[16]

d. Following *Haida*, the honour of the Crown has developed in the jurisprudence as the overarching concept governing Crown conduct with respect to Aboriginal interests, whether asserted but unproven, in existing treaties[17] or when implementing constitutional law. The duty to consult is the procedural safeguard that is intended to strike a balance between Crown sovereignty and prior Aboriginal occupation, pending the negotiated reconciliation of those competing interests.[18]

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[13] *Sparrow*, at 1109.
[14] *Sparrow*, at 1109.
[15] *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73, at para. 18 [*Haida*].
[16] *Haida*, at para. 25.
[17] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388 [*Mikisew Cree*]
[18] *Haida*, at para. 27.

16. In *Tsilhqot'in*, this Court held that the Crown's fiduciary duty is balanced against the Crown's "right to encroach on Aboriginal title if the government can justify this in the broader public interest under s. 35 of the *Constitution Act, 1982*".[19] Government incursions not consented to by the title-holding group must be undertaken in accordance with the Crown's procedural duty to consult and must also be justified on the basis of a compelling and substantial public interest. This restatement of the justification test in *Tsilhqot'in* ultimately requires balancing the public interest against the Aboriginal interest.[20]

17. But how is that balance achieved? According to *Tsilhqot'in* the Crown's fiduciary duty over Aboriginal title lands means that government must act in a way that respects that Aboriginal title is a group-interest that inheres in present and future generations. Infringements "cannot be justified if they would substantially deprive future generations of the benefit of the land".[21]

18. Given the enduring interest Indigenous peoples have in Aboriginal title land[22] and the interest all Canadians have in reconciliation, only the most compelling and substantial public need can justify the Crown's unilateral abolishment of an Indigenous people's constitutionally-protected title in the land – one that that people are bound to hold for future generations – and the Crown's using that land or giving it to another people in the name of the "public interest". Thus, federal power is reconciled with federal duty. If the proportionality required by *Tsilhqot'in* is not met, then federal power is privileged over federal duty. That does not comport with reconciliation and is a breach of fiduciary duty. Equitable compensation should then be available for that taking, as has been suggested before in the Aboriginal title jurisprudence.[23]

(iv) Application of Proportionality

19. The Federal Court summarized the presumptions relevant to the assessment of equitable compensation as follows: (1) the plaintiff is entitled to have compensation assessed as if he would have made the most favourable use of property; (2) there is an element of deterrence in an equitable remedy; (3) it is presumed that the fiduciary would have carried out its duties lawfully;

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[19] *Tsilhqot'in*, at para. 71.
[20] *Tsilhqot'in*, at paras. 77 and 85-88.
[21] *Tsilhqot'in*, at para. 86.
[22] *Tsilhqot'in*, at para. 86.
[23] *Delgamuukw v. British Columbia,* [1997] 3 SCR 1010 at para. 169 [*Delgamuukw*].

and (4) if there has been a breach of the duty to fully disclose material facts to the beneficiary, the trustee cannot argue that the decision would have been the same even if the facts were disclosed (meaning the defendant must prove the plaintiff would have proceeded with the transaction despite non-disclosure).[24]

20. In the assessment of the first presumption (the most favourable use to which the Appellants' lands could have been put), the courts below cited *Guerin* for its guidance in taking into account "realistic contingencies".[25] The courts below agreed that one realistic contingency requiring consideration in the present case is whether Canada would have initiated negotiations with the Appellants for a voluntary surrender of the land.[26]

21. The Federal Court distinguished *Guerin* on the basis that, in the present case, Canada would have proceeded to have the land flooded with or without consent of the beneficiary.[27] Nevertheless, given the project was a *fait accompli*, the Federal Court (upheld by both majority and dissent of the Federal Court of Appeal) found Canada "should have" advised the Appellants of its intention with respect to their lands "to see if a surrender of the Reserve foreshore could be agreed upon" (emphasis added), prior to taking steps to flood the land without their consent.[28] After all, the sacred agreement between the parties, Treaty 3, provided that Reserve lands could be sold or leased by the Crown, with the consent of the band.[29]

22. Such a finding implicitly recognizes that only the most compelling and substantial public purpose can justify the Crown's unilateral abolishment of the Appellants' use and benefit of their lands forever. An act that substantially deprives the present and future generations of an Indigenous group of its use and benefit of the land unjustifiably would constitute a breach of fiduciary duty. Proportionality thus favours a Crown action which seeks to balance the public interest with the loss of an enduring Indigenous interest, to avoid a seizure of land that would be

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[24] *Tsilhqot'in.*, at paras. 239 and 247.
[25] *Southwind v. Canada,* 2017 FC 906, at para. 286 [*Southwind* (FC)]; *Southwind v. Canada*, 2019 FCA 171, at paras. 82 (dissent) and 104 (majority) [*Southwind* (FCA)].
[26] *Southwind* (FC), at paras. 295 and 322; *Southwind* (FCA), at para. 83 (dissent) and 104 (majority).
[27] *Southwind* (FC), at paras. 292-293.
[28] *Southwind* (FC), at para. 322; *Southwind* (FCA), at paras. 83-84 (dissent) and 104 (majority).
[29] *Southwind* (FC), at para. 323.

exploitative or heavy-handed. Proportionality requires the Crown action in favour of the public interest be reconciled with the best interests of the beneficiary. One way to achieve this is to compensate the beneficiary based on the most favourable use of the property. Thus, Canada, acting honourably and as a fiduciary, was required at the very least to pursue a negotiated surrender, given that a negotiated resolution would likely have been less detrimental to the Appellants than an outright expropriation.[30]

23. The Federal Court (upheld by the majority of the Federal Court of Appeal) rejected the option of a negotiated surrender in assessing the value of the lands on the basis that, because Canada "had the legal right to appropriate the land" with or without the Appellants' consent and was determined to proceed, the Appellants had little leverage "to strike a better deal".[31] The "fair and reasonable price" for the Appellants' land was the lowest price Canada was legally obligated to pay given the fact, "[a]ll other things being equal, Canada could unilaterally take the land".[32] Anything more was simply "optimistic speculation".

24. In effect, the courts below determined that because of the Crown's unilateral authority to appropriate the lands of its Indigenous beneficiaries without their consent, the first presumption of equitable compensation is effectively inapplicable.[33] The Appellants were not entitled to have compensation assessed as if the most favourable use of property would have been made because they had no leverage in light of the Crown's legal right to simply appropriate the land.

25. But this entirely misses the point of proportionality and ignores the *sui generis* Crown-Indigenous relationship. Moreover, the analysis of the courts below erroneously reduced the Indigenous interest of future generations to the benefit of the land as "opportunistic speculations".

26. Once the magnitude of the Indigenous interest in the land is properly appreciated, not just for those alive at the time of the Crown action but also for those yet to be born in the future, proportionality requires more than simplistically equating that Indigenous interest in land to any

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[30] *Southwind* (FCA), at para. 84 (dissent).
[31] *Southwind* (FC), at paras. 295 and 318.
[32] *Southwind* (FC), at para. 383.
[33] *Southwind* (FC), at paras. 288-294.

non-Indigenous land-owner's interest subject to Canada's sovereign power of expropriation. Equitable compensation based on the principle of proportionality is not speculation but a constitutional requirement.

27. Valuation of the historic loss as an expropriation, rather than a negotiated surrender of reserve land intended to benefit future generations, cannot be proportional given the significance of reserve lands to Indigenous peoples and the need for the public interest to be of such an overriding nature that the honour of the Crown is not disregarded.

28. Assessing the historic loss on the basis of a negotiated surrender is more consistent with upholding the honour of the Crown than a unilateral expropriation. Equitable compensation must reflect the balancing and reconciliation required in the jurisprudence and inherent in both the Crown's specific fiduciary duties in the circumstances of this case and the overarching honour of the Crown at stake in all its dealings with Aboriginal lands.

(v) Conclusion

29. The valuation of the Appellants' loss at the fair market value of the land based entirely on Canada's sovereign powers of expropriation without any balancing of its fiduciary obligations and honourable standards constitutes a palpable and overriding error in the application of the principles of equitable compensation. The valuation of the historic loss ought to have been made, in the very least, as if it were a negotiated surrender.

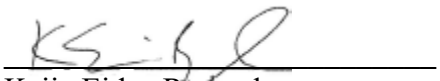
30. In setting out the principles that must guide equitable compensation for harms caused by Canada's breaches, the Appellants' position maintains consistency across not only the jurisprudence respecting loss of reserve land but also respecting the unjustified infringement of Aboriginal title. As such, it should be preferred as it strikes a balance that achieves reconciliation and holds the Crown to a high standard of honourable dealing.

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

SIGNED BY:

Christopher Devlin

John W. Gailus



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Tseshaht First Nation

PART VI – TABLE OF AUTHORITIES

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STATUTES

Constitution Act, 1982, s. 35

Loi constitutionelle, 1982, s. 35