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:

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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PART I – OVERVIEW

1. Manitoba Keewatinowi Okimakanak Inc ("MKO") is an organization representing twenty-six First Nations and their communities throughout Northern Manitoba. The MKO First Nations entered into Treaties No. 4, No. 5, No. 6 and No. 10, respectively. They are among the most hydro-affected communities in Canada and have entered eleven settlement, compensation and implementation agreements regarding water diversion, water-power storage and hydroelectric developments. MKO and its member First Nations and communities are therefore very interested in how this Honourable Court develops the law of equitable remedies and equitable compensation in this appeal. MKO is also interested in how the matters in this appeal might be applied in future to compensate First Nations and attempt to reconcile other continuing breaches and unlawful takings and uses of Treaty-promised reserve lands for other public purposes, such as railway rights of way, roads, transmission lines, gas pipelines, utility corridors, and the like.

2. MKO submits that the Canadian law of equitable remedies and compensation is not in line with international law. To bring Canada's law in line with these international approaches, MKO submits that Canadian courts must apply the principle of *restitutio in integrum* from the perspective of the party that was harmed: the Indigenous people who lost their lands. From this perspective, restitution means the return of the land, the removal of any interferences with its use and enjoyment, and the restoration of its benefits. Only when restitution is not possible should compensation be the primary form of redress. Such compensation must reflect the value of the land and its benefits *from the Indigenous party's perspective*. It must also account for the various ways the land, the Indigenous party, and the relationship between them were harmed.

3. Compensation must account for: (a) economic losses; (b) non-economic cultural losses already suffered and yet to be experienced by future generations deprived of their connection to ancestral lands; (c) the indignity occasioned by the non-consensual taking of lands and; (d) the mental distress and anxiety suffered from losing their place in the world. In the Canadian context, there should also be compensation for the effects of unilateral and unlawful breaches of solemn and sacred Treaty promises. As MKO develops below, such an approach is consistent with long-established principles of international law as well as approaches to remedies and compensation in New Zealand and Australia for Indigenous peoples who have had their lands taken.

PART II – POSITION ON THE APPELLANT'S ISSUES

4. Canada's law of equitable remedies and compensation for lands taken from Indigenous peoples needs to be brought into line with the principle of *restitutio in integrum*, as (1) understood at international law and as (2) practiced in other similar Commonwealth jurisdictions. From this perspective, restitution means the return of the land, the removal of any interferences with its use and enjoyment, and the restoration of its benefits. Only when restitution is not possible should compensation be the primary form of redress, and it must reflect the value of the land and its benefits *from the Indigenous party's perspective*.

PART III – STATEMENT OF ARGUMENT

1. Canada's approach is not consistent with international law

5. In its submissions Canada states that it is committed to the *United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP"). At paragraph 94 Canada states that Article 28 of UNDRIP – the right to restitution for "lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent"[1] – is already reflected in Canada's law of equitable compensation. Yet the approach of the courts below and Canada's approach in this case falls well short of the principle of *restitutio in integrum* at the heart of this right.

a. Give the land and its benefits back

6. Article 28 of UNDRIP is an expression of long-recognized principle of *restitutio in integrum* at international law. This means that a "state responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed".[2] The state "must, so far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have

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[1] UNGA, *United Nations Declaration on the Rights of Indigenous Peoples*, UN Doc No A/RES/61/295 (2 October 2007)

[2] ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supp No 10, UN Doc. A/56/10, Article 35.

existed if that act had not been committed."[3] Restitution is the preferred method of accomplishing that, with compensation only where restitution is not possible.[4]

7. In 1989 this principle was recognized by the International Labour Organization in its *Indigenous and Tribal Peoples Convention.*[5] Article 16 of the Convention recognized that, first and foremost, taken lands should be returned. If that is not possible, then compensation in land and money must be paid so as to fully replace or restore what was lost and will be lost in the future. In 1996 this was echoed by the UN Committee on the Elimination of Racial Discrimination. The Committee called upon states to not just protect Indigenous rights in their ancestral lands, but also to return lands taken: "Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation."[6]

8. This is the animating principle behind Article 28 of UNDRIP and its rights to restitution and redress. The UN High Commissioner on Human Rights has stated in its manual about UNDRIP: "restitution of lands and territories is to be the primary means of redress…[o]nly when restitution is not possible should other forms of redress and compensation be explored."[7]

b. Give the benefits in the land back

9. International law requires states to effectively return all the land and all interests and rights in the land to the harmed Indigenous party, including by purchasing or expropriating third party interests and changing laws where necessary.

10. For instance, the Inter-American Court of Human Rights has interpreted the *American Convention on Human Rights*,[8] which Canada has signed and ratified, to require states to remove legal barriers to the ownership and the full use and enjoyment of lands by Indigenous peoples. In *Yakye Axa Indigenous Community v Paraguay* the Court ordered Paraguay to establish a fund to

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[3] *Chorzów Factory (Merits) (Germany v. Poland)* (1928), PCIJ (Ser A) No 17, p. 47.
[4] ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supp No 10, UN Doc. A/56/10, Articles 35 and 36.
[5] ILO, *Indigenous and Tribal Peoples Convention*, No C169 (27 June 1989).
[6] UNCERD, *General Recommendation 23*, 51st Sess, UN Doc A/52/18.
[7] UNHCHR, *The United Nations Declaration on the Rights of Indigenous Peoples: A Manual for National Human Rights Institutions*, UN Doc HR/PUB/13/2 (August 2013). See pp 27, 33 and 35.
[8] OAS, *American Convention on Human Rights*, TS No 36 (1969).

"purchase the land from private owners or to pay fair compensation to them in the case of expropriation, as appropriate."[9] According to the Court, expropriation of non-Indigenous interests may be necessary and proportional in attaining the legitimate objective of restoring the Yakye Axa their traditional lands.[10] In *Sawhoyamaxa Indigenous Community v Paraguay*, the Court ordered Paraguay to amend their legislation and take any necessary administrative action to guarantee Sawhoyamaxa ownership rights and full use and enjoyment of their traditional lands.[11] Similar to *Yakye Axa*, the Court ordered the state to consider purchasing private interests in those lands to allow their return to their original inhabitants.[12] It also ordered "on equitable grounds" for Paraguay to establish a community development fund to address the damage to the community from having been displaced.[13] In *Kalina and Lokono v Suriname* the Court ordered Suriname to "review the land titles, transfer rights and short- and long-term leases granted to non-indigenous persons, and determine the modifications that are required" and to "review the terms of the mining activities authorized" inside their ancestral lands.[14] It also ordered Suriname to rehabilitate and remediate areas that had been affected by bauxite mining and to not allow any further mining activities in the area.[15]

11. Giving all the rights and interests in the land back includes sharing benefits made by third party users of the land with the Indigenous party. Article 15(2) of the *Indigenous and Tribal Peoples Convention* recognized that where development activities interfered with the use and enjoyment of traditional lands, "[t]he peoples concerned shall wherever possible participate in the benefits of such activities".[16] The UN Committee on the Elimination of Racial Discrimination has

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[9] *Case of the Yakye Axa Indigenous Community v Paraguay* (2005), IACTHR (Ser C) No 125 at para 217.
[10] *Ibid* paras 144-154.
[11] *Case of the Sawhoyamaxa Indigenous Community v Paraguay* (2006), IACTHR (Ser C) No 146 at para 210.
[12] *Ibid* para 212.
[13] *Ibid* paras 223-224.
[14] *Case of the Kalina and Lokono Peoples v Suriname* (2015), IACTHR (Ser C) No 309 at para 274.
[15] *Ibid* para 290.
[16] ILO, *Indigenous and Tribal Peoples Convention*, No 169 (27 June 1989).

also recommended that when major exploitation activities are planned in Indigenous territories, "the equitable sharing of benefits to be derived from such exploitation be ensured."[17]

12. In the *Saramaka People v Suriname* case the Inter-American Court ordered that beyond restoring land to the Saramaka People, the *American Convention* and the principles of restitution required that Suriname share the benefits from projects on their lands:

> The concept of benefit-sharing, which can be found in various international instruments regarding indigenous and tribal peoples' rights, can be said to be inherent to the right of compensation recognized under Article 21(2) of the [American] Convention… In the present context, the right to obtain "just compensation" pursuant to Article 21(2) of the Convention translates into a right of the members of the Saramaka people to reasonably share in the benefits made as a result of a restriction or deprivation of their right to the use and enjoyment of their traditional lands and of those natural resources necessary for their survival.… In this context, pursuant to Article 21(2) of the Convention, benefit sharing may be understood as a form of reasonable equitable compensation resulting from the exploitation of traditionally owned lands and of those natural resources necessary for the survival of the Saramaka people. [Emphasis added.][18]

13. This approach to benefit sharing was recently confirmed by the Court in *Kalina and Lokono People*[19] and has been adopted by other international human rights bodies. In the *Endorois* case the African Commission on Human and Peoples' Rights ordered Kenya not only to recognize the ownership rights of the Endorois in a state game reserve and to return their ancestral land, but also to "pay royalties to the Endorois from existing economic activities and ensure that they benefit from employment opportunities within the Reserve."[20] This requirement for benefit sharing should animate any interpretation of the redress and restitution requirements in Article 28 of UNDRIP. It should also animate the interpretation and development of Canadian law of equity.

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[17] UNCERD, *Concluding Observations, Ecuador*, UN Doc No CERD/C/62/CO/2 (2 June 2003) at para 16.
[18] *Case of the Saramaka People v Suriname* (2007), IACTHR (Ser C) No 172 at paras 138-140
[19] *Case of the Kalina and Lokono Peoples v Suriname* (2015), IACTHR (Ser C) No 309 at paras 201 and 305(d).
[20] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, (2010), African Commission on Human and Peoples' Rights, Doc No 276/2003 at p. 80, para 1(d).

c. Compensate for what was lost from the perspective of the people who lost it

14. International law also recognizes that compensating Indigenous peoples for the loss of their ancestral lands must adequately reflect the value of what was lost *to the people who lost it*. It must compensate not just for economic losses or values, but also for non-pecuniary, non-economic, cultural losses to present and future generations, and for the offence and indignity of being removed from their ancestral lands without their consent.

15. The Inter-American Court in *Saramaka* awarded compensation for non-pecuniary losses, recognizing the cultural disruption and spiritual dislocation caused by interference with their use and enjoyment of their ancestral lands:

> [M]embers of the Saramaka people maintain a strong spiritual relationship with the ancestral territory they have traditionally used and occupied. Land is more than merely a source of subsistence for them; it is also a necessary source for the continuation of the life and cultural identity of the Saramaka people. The lands and resources of the Saramaka people are part of their social, ancestral, and spiritual essence. In this territory, the Saramaka people hunt, fish, and farm, and they gather water, plants for medicinal purposes, oils, minerals, and wood. Their sacred sites are scattered throughout the territory, while at the same time the territory itself has a sacred value to them.[21]

16. The Court took a similar approach in *Yakye Axa*, awarding substantial non-pecuniary damages for "denial of the enjoyment or exercise of their territorial rights" because as a result the Yakye Axa "are at risk of losing or suffering irreparable damage to their cultural identity and life and to the cultural heritage to be passed on to future generations."[22] In *Moiwana Village v Suriname* the Court awarded moral damages of $10,000 for each member of a displaced N'djuka community for violations of their mental and moral integrity, including disruption of their customs, traditions, and spiritual practices: "[s]ince a N'djuka community's relationship to its traditional land is of vital spiritual, cultural and material importance, their forced displacement has devastated them emotionally, spiritually, culturally, and economically."[23] The Court awarded a further $3,000 for "material harms" suffered by these people, including the losses of their homes and other

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[21] *Case of the Saramaka People v Suriname* (2007), IACTHR (Ser C) No 172 at para 82.
[22] *Case of the Yakye Axa Indigenous Community v Paraguay* (2005), IACTHR (Ser C) No 125 at para 217.
[23] *Case of Moiwana Community v Suriname* (2005), IACTHR (Ser C) No 124 at paras 194-196.

economic losses.[24] Notably, the Court understood that the non-economic, moral harms from being forcibly displaced from their ancestral lands were much greater than the economic losses.

2. Canada's approach is not consistent with other common law jurisdictions

17. The above remedial principles for the unlawful and wrongful taking of Indigenous lands is being applied in other common law jurisdictions. In New Zealand, this principle can be seen at work in decisions of the Waitangi Tribunal requiring the return of lands to Maori. In 1987 an amendment to the *Treaty of Waitangi Act* gave the Waitangi Tribunal the power to order ancestral lands to be returned to Maori, even where they had been sold to private parties.[25] Such lands now carry a memorial on title alerting would-be owners that they may be ordered to be returned to Maori, in which case the Crown must pay fair compensation to the owner.[26]

18. This has not been a hollow promise. For instance, the Tribunal made findings that the Crown breached its fiduciary duties when it compulsorily expropriated lands from Maori at Mangakino for a hydroelectric scheme, and that paying market value was not sufficient compensation for such takings:

> As most of the land in Wairarapa ki Tararua was farmland or bush, its value for compensati on purposes turned on its potential for agriculture. No regard was paid to the spiritual or em otional value of the land to its owners; nor to the role that the land played in cultural practic es such as hunting and gathering…nor to whether the land had inherent and unique potentia l for other purposes (such as the hydroelectric potential of land at Mangakino…) ; nor to w hether the right to develop any such unique potential properly belonged to Maori. We think all these factors should have been taken into account in assessing fair compensation for Māori land. [Emphasis added.][27]

19. In 2020 the Tribunal determined that the Mangakino lands and improvements should be returned to the tribe, despite the fact that they are now the site of a major hydroelectric facility and were valued at in excess of $600 million.[28] This was based on the Tribunal's earlier finding that the taking was a breach of the Crown's duties and that the Maori owners had not been otherwise

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[24] *Ibid* at para 186.
[25] Treaty of Waitangi Act 1975 Public Act No 114 (New Zealand), ss 8A-H.
[26] *Ibid*. See also State-Owned Enterprises Act 1986 Public Act No 124 (New Zealand), ss 27A-C.
[27] Waitangi Tribunal, *Wairarapa Ki Tararua Report* (Wai 863, 2010), pp 796 and 1058-1059.
[28] Waitangi Tribunal, *Determinations of the Tribunal Preliminary to Interim Recommendations*, (Wai 863, 24 March 2020) at paras 1(b), 22-23, 118, 175-183 [Book of Authorities, Tab 1].

adequately compensated for the hydroelectric potential of the land and other values.[29] The best way to restore the tribe was to return the land itself, along with the hydro project located on it.[30]

20. The principle that compensation must not be limited to market values or economic losses is also being applied in Australia. This type of compensation is variously described as "non-pecuniary damages", "non-economic losses", "solatium" or "cultural losses". Regardless of how they are described, their purpose is to attribute value to the loss of Indigenous lands beyond what the "market value" ascribes to them, and to compensate Indigenous peoples for the full range of losses that *they* suffer when deprived of those lands. Market value is a settler concept that reflects setter priorities and preferences. It is manifestly unfair to have those preferences be the primary way of quantifying the loss suffered by Indigenous peoples when their land is taken.

21. This approach to non-economic or cultural losses has been elaborated in Australia determining just compensation for takings of native title lands. In 2002 a Discussion Paper authored by Paul Burke was released by the Native Title Research Unit of the Australian Institute for Aboriginal and Torres Strait Islander Studies, titled "How can judges calculate native title compensation?" ("The Burke Report"). The Burke Report articulated principles for calculating non-economic loss, which must include compensation for (1) "the insult associated with the loss of important rights without consent"; (2) "disruption to social and cultural practices" and; (3) "mental distress associated with the loss of homelands".[31] It recommended an approach which quantified appropriate loss or "solatium" damages for the most affected individual and then multiplied these across the native title group. In cases of maximum, large scale disturbance, the Burke Report proposed as an example $40,000 for individuals, as a combination of compensation for insult, disruption of social and cultural practices, and mental distress. This was then multiplied across the number of rights-holding individuals, with some gradation reflecting the different rights held. Added to this was compensation for future generations.[32]

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[29] *Ibid*. at para 118
[30] *Ibid*. at paras 184-215.
[31] P Burke, "How can judges calculate native title compensation?" (2002, Native Title Research Unit of the Australian Institute for Aboriginal and Torres Strait Islander Studies), pp 5-9, 11-15, 17-19, and in particular 24-29.
[32] Ibid at pp 41-51.

22. This type of approach to compensation has recently been applied by the Australian courts. In the recent *Northern Territory of Australia v Griffiths* case, the principles from the Burke Report were directly referenced by the Full Federal Court to validate on appeal an award for non-economic losses in the case of a native title expropriation. The trial judge had awarded solatium compensation of $1.3 million to native title holders for takings affecting 127 hectares of non-exclusive native title lands.[33] This was several times more than the market value of those lands, which was separately factored into the compensation award. The trial judge set out the elements that were considered in the determining the award, including "the special value of the land to the native title holding community, above market value, and the need for an award to have a correlation with other awards for non-pecuniary losses where substantial amounts are awarded for injury to the feelings and reputation experienced of an individual…"[34] The Full Federal Court upheld this award on appeal, relying on the Inter-American Court cases cited above and their awards non-pecuniary compensation for the loss of Indigenous lands, as well as the Burke Report and its principles for calculating non-economic losses.[35] On ultimate appeal the High Court of Australia upheld this approach, confirming that compensation for what it called "cultural losses" could form a substantial part of compensation for takings of native title lands.[36] These cultural losses amounted to *four times* the market value of the land. Moreover, the High Court confirmed that these losses should be measured into the future, because the cultural loss would be "permanent and intergenerational".[37] One of the concurring judges thought that likely the amount of compensation for these types of losses should be much higher.[38]

23. Just as this Honourable Court has determined that Aboriginal and Treaty rights are not frozen and evolve over time, MKO submits that the principles of equitable compensation should evolve to reflect international law and approaches in other jurisdictions with respect to the recognition of Indigenous rights, the restitution for breaches of Indigenous rights and the losses

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[33] *Griffiths v Northern Territory of Australia (No 3)* [2016] FCA 900 (Federal Court of Australia) at para 383
[34] *Ibid* at para 368.
[35] *Northern Territory of Australia v Griffiths* [2017] FCAFC 106 (Full Court of the Federal Court of Australia) at paras 397-408.
[36] *Northern Territory of Australia v Griffiths* [2019] HCA 7 (High Court of Australia) at paras 196-208 and 235-237.
[37] *Ibid* at para 229-231.
[38] *Ibid* at paras 304-317 and 326-328.

arising from such breaches. The principle of *restitutio in integrum* at international law requires the return of the land and restoration of its benefits first. Where that is not possible, compensation should take into account the value of the land to the people who lost, taking into the types of factors set out in the Inter-American Court cases, the Waitangi Tribunal decisions and by the Australian courts. Respectfully, the award by the trial court of compensation for a flowage easement and "non-calculable losses" is not equivalent to or consistent with these principles or approaches.

24. This appeal is an important opportunity for this Honourable Court to advance the law and principles of equitable compensation to further "reconciliation with Indigenous peoples" and to ensure performance of Canada's duties and obligations to First Nations. In the Canadian context, compensation should vindicate First Nations for the Crown's ongoing breaches of its fiduciary, statutory and constitutional duties owed to them. More fully adopting the principle of *restitutio in integrum* at international law would help to achieve these ends and promote reconciliation. Doing so will ensure there are robust remedies for (1) the continuing failures of Canada to exercise its discretion and fiduciary duties to protect the interests of First Nations to the fullest extent possible; (2) Canada's failures to discharge its statutory duties and obligations to apply and enforce the *Indian Act* to protect Treaty-promised reserve lands; and (3) the breach of Canada's mandatory constitutional obligations to prevent the unlawful and unjustifiable infringement of Aboriginal and Treaty rights.

PART IV – SUBMISSIONS ON COSTS

25. MKO seeks no costs and asks that no costs be awarded against it.

PART V – ORDER SOUGHT

26. MKO takes no position on whether, on the facts, the appeal should be granted or not.

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

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Manitoba Keewatinowi Okimakanak Inc

Kevin Hille

PART VI – TABLE OF AUTHORITIES

Para.

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