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**

*(Style of Cause continued on next page)*

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# FACTUM OF THE INTERVENER TREATY LAND ENTITLEMENT COMMITTEE OF MANITOBA INC

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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## Table of Contents

I. OVERVIEW AND FACTS....1
II. ISSUES....2
III. ARGUMENT....2
IV. COSTS....10
V. ORDER SOUGHT....10
VI. TABLE OF AUTHORITIES....11

## I. OVERVIEW AND FACTS

1. The question on which the Treaty Land Entitlement Committee Inc. (TLEC) has intervened is the one raised by the Appellants at para 67 of their factum: "…how principles of equitable compensation, together with legal principles applicable to the Crown-Indigenous relationship, should be applied…".

2. The Appellants link the issue of proper compensation to the breach of a fiduciary duty depriving the Appellant of the use and benefit of their reserve lands. However, the analysis which follows identifies guiding principles relating to the assessment of compensation applicable not only to the case at bar, but more generally to all Crown breaches of Aboriginal or treaty rights.

3. The unique place that Aboriginal and treaty rights fit within our constitutional structure, when coupled with the honour of the Crown and the principle of reconciliation, call for the adoption of additional[1] guiding principles that should be considered when assessing compensation due for the breach of Aboriginal and treaty rights.

4. The proposed additional guiding principles would assist in reducing both the financial and emotional costs associated with complex, uncertain, and time consuming litigation. The proposed additional guiding principles are that:

a. The assessment of compensation for the breach of Aboriginal and treaty rights should not depend on whether the claim sounds in common law or in equity. Compensation should be based on equitable principles and should be consistent across causes of action;

b. Compensation for the breach of any Aboriginal and treaty rights must not only serve as a meaningful and effective deterrent to any future breach, (a principle already existing in respect of equitable compensation generally), but the compensation award should also be enhanced on the grounds that this will further the goal of reconciliation;

c. In the Aboriginal law context, the "value" of the loss of use of land must not only reflect traditional economic losses, but must also include an element to compensate for "cultural losses";[2] and

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[1] In addition to the guiding principles already articulated by the courts relating to the assessment of equitable compensation. See *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534 at 556 [*Canson*] where the principles are summarized.

[2] *Southwind v. Canada*, 2017 FC 906 (hereinafter the "Trial Reasons") at paras 444 and 508-512, the trial

d. Whenever past losses are identified, they should be brought forward with compounding interest without regard to spending or consumption patterns of the band.[3]

## II. ISSUES

5. With respect to the Appellant's questions on appeal, the Intervener TLEC takes the position that the unique place that Aboriginal and treaty rights fit within our constitutional structure, when coupled with the honour of the Crown and the principle of reconciliation, call for the adoption of additional[4] guiding principles to be considered when assessing compensation due for the breach of Aboriginal and treaty rights.

## III. ARGUMENT

### *A. Introduction: The unique nature of Aboriginal and treaty rights.*

6. This Court observed in *Reference re Secession of Quebec*:

> …. The "promise" of s. 35, as it was termed in *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (S.C.C.), at p. 1083, recognized not only the ancient occupation of land by aboriginal peoples, but their contribution to the building of Canada, and the special commitments made to them by successive governments. The protection of these rights, so recently and arduously achieved, whether looked at in their own right or as part of the larger concern with minorities, reflects an important underlying constitutional value.[5]

7. It is a constitutional imperative that the rights recognized and affirmed by section 35 of the *Constitution Act*, 1982 be honoured.[6]

8. Given the unique nature of Aboriginal and treaty rights, and their special place within our constitutional structure, it is appropriate for the Court to identify common guiding principles that both clarify and simplify the assessment of compensation where there has been a breach of Aboriginal and treaty rights by the Crown. Such guiding principles would build upon the current

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judge identified some of the aspects of what this intervener would call "Culture loss". They were: loss of livelihood on and off reserve, overall damage to the aesthetic of the lakeshore, travel and water hazards, negative effects on hunting and fishing, damage to docks, destruction of gardens and rice fields, difficulty in transportation between and among community members, and causing uncertainty and anxiety.

[3] This principle, while important, is not at issue in this appeal. It was in fact, adopted by the trial judge at para 491-493, and was not raised as an issue before the Federal Court of Appeal in *Southwind v. Canada*, 2019 FCA 171 at paras 35-45.

[4] In addition to the guiding principles already articulated by the courts relating to the assessment of equitable compensation. See *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534 at 556 [*Canson*] where the principles are summarized.

[5] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para 82.

[6] *R. v. Powley*, 2003 SCC 43, [2003] 2 S.C.R. 207 at para 38.

guiding principles developed for the assessment of equitable compensation, would be consistent with the honour of the Crown, would deter future breaches, and would facilitate reconciliation.

### *B. Guiding Principle 1: Harmonization of compensation for Aboriginal and treaty rights breaches regardless of the nature of the cause of action: To be based on equitable principles.*

9. The assessment of compensation for interference with Aboriginal and treaty rights should not depend on whether the Aboriginal claim sounds in common law or in equity.

10. Common compensation principles ought to apply in all cases where the compensation relates to the breach of Aboriginal or treaty rights. These principles should be built upon the existing guiding principles already developed for the assessment of equitable compensation.

11. In *Wewaykum*, this Court commented upon the "flood of fiduciary claims".[7] The unspoken reality is that the remedial advantages[8] that equitable compensation is believed to have over common law damages, encourages litigants to frame their claims as fiduciary breaches instead of simply treaty or Aboriginal rights breaches. The consequence of the foregoing is the potential, in some cases, for "an overworking of the fiduciary concept."[9]

12. However, often overlooked is that the law does not require one to resort to fiduciary or equitable claims in order for compensation awards for the breach of common law causes of action to be calculated using guiding principles developed in equity. In *M. (K.) v. M. (H.)*, LaForest, for the majority, referring back to his comments in the 1991 *Canson* case, observed that:

> 106 Recently, I have had occasion to consider the relationship between equitable and common law remedies, and in particular compensation for breach of fiduciary obligation; see *Canson Enterprises Ltd. v. Boughton & Co.*, *supra*. In equity there is no capacity to award damages, but the remedy of compensation has evolved. The distinction between damages and compensation is often slight, and as I noted in *Canson*, the courts have tended to merge the principles of law and equity when necessary to achieve a just remedy. There I was speaking of the relationship between remedies for tortious misstatement and breach of fiduciary duty, but the underlying principles are equally applicable in this case. Of particular relevance are my

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[7] *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. at para 82.

[8] Examples of possible benefits include claims to disgorgement (constructive trust/account of profits), the availability of compound interest against the Crown, the use of hindsight, the availability of compensation for lost opportunities instead of simply putting one back in the position as if the obligation had been performed (contract) or putting one back in the position they would have been had the breach not occurred (tort), and a common sense view of causation without concerns over foreseeability or remoteness.

[9] Jeff Berryman, "Equitable compensation for Breach by Fact Based Fiduciaries: Tentative thoughts on clarifying remedial goals", (1999) 37(1) Alberta Law Review 95. An opinion likely shared by Justice Binnie in *Wewaykum*. In the case of bar, like many other Aboriginal claims, there was no such overworking. There was clearly a fiduciary duty breached.

comments beginning at p. 581, and particularly the following passages at pp. 581 and 586-587 respectively:

> The truth is that barring different policy considerations underlying one action or the other, I see no reason why the same basic claim, whether framed in terms of a common law action or an equitable remedy, should give rise to different levels of redress.
>
> . . . . .
>
> Only when there are different policy objectives should equity engage in its well-known flexibility to achieve a different and fairer result. The foundation of the obligation sought to be enforced ... is "the trust or confidence reposed by one and accepted by the other or the assumption to act for the one by that other." That being so, it would be odd if a different result followed depending solely on the manner in which one framed an identical claim. What is required is a measure of rationalization.[10]

13. In 2007, Laskin, J.A. for the Ontario Court of Appeal in *Whitefish*, explained that equitable compensation was warranted (in that case for a fiduciary breach) because such an award "…best furthers the objectives of enforcement and deterrence. It signals the emphasis the court places on the Crown's ongoing obligation to honour its fiduciary duty and the need to deter future breaches."[11]

14. This Court similarly spoke to the issue of the importance of honouring constitutional promises to Aboriginal peoples when, in *MMF*, it identified that the honour of the Crown gives rise to the obligation to diligently and purposefully fulfil historic promises that are part of our constitutional fabric.[12]

15. This intervener thus argues that the classification of the cause of action should not dictate the measure of compensation where a Crown breaches Aboriginal or treaty rights.

16. Whether the claim sounds in breach of fiduciary duty (as this case did), or whether it sounds in breach of treaty, or trespass over reserve lands, the policy considerations at play are fundamentally the same in each instance. Each instance engages the honour of the Crown, the principle of reconciliation, and the constitutional imperative of respecting constitutionally entrenched rights. A deterrent effect is needed for each, and compensation built upon equitable principles is the appropriate measure regardless of the cause of action.[13]

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[10] *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6 at para 106 (underlining added for emphasis), citing *Canson*, [1991] 3 S.C.R. 534 at para 106.
[11] *Whitefish Lake Band of Indians v. Canada (Attorney General)*, 2007 ONCA 744 at para 57.
[12] *Manitoba Metis Federation Inc. v. Canada*, [2013] 1 S.C.R. 623 at paras 78-79 [*MMF*].
[13] In putting forward this position we are not advocating for the merger of equity and common law. We are

17. The point is that regardless of the nature of the cause of action, where Aboriginal or treaty rights are infringed, the party in breach has undermined a valuable fiduciary relationship, rights enshrined within our constitutional structure are ignored, and the goal of reconciliation is made ever more difficult. In all such cases, compensation based on enhanced equitable type guiding principles is necessary.

### *C. Guiding Principle 2: The quantification of compensation for the breach of Aboriginal or treaty rights must both deter future breaches and facilitate reconciliation.*

18. The problematic result in the case at bar is that the lower court award encourages the Crown to ignore, or even actively breach, the Aboriginal and treaty rights of Aboriginal peoples and at a price that amounts to a license fee. This is little more than importing the concept of "efficient breach" into the analysis of Crown-Indigenous relations. This is wrong.

19. Whatever its proper role might be in respect of ordinary commercial disputes,[14] the theory of "efficient breach" has no role to play in assessing compensation for breach of Aboriginal or treaty rights. To do so would be to eviscerate this Court's ruling that for reconciliation to be attained, Aboriginal and treaty rights must be diligently and purposefully fulfilled.[15]

20. Compensation calculated on the basis of expropriation value effectively permits the Crown to "buy injustice". This intervener says that such an outcome is antithetical to this Court's ruling that it is a constitutional imperative that the rights recognized and affirmed by section 35 of the *Constitution Act,* 1982 be honoured.[16]

21. This Court has identified that the honour of the Crown, a constitutional principle,[17] requires diligent and purposeful fulfilment of Aboriginal and treaty rights.[18] It has also identified that the fundamental objective of the modern law of Aboriginal rights is "reconciliation".[19]

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positing that proper redress requires compensation for Aboriginal and treaty rights breaches to be guided by the principles that govern equitable compensation in order for them to be adequate.

[14] See for example the discussion of efficient breach by this Court in *Bank of America v. Mutual Trust Co.* [2002] 2 S.C.R. 601 at paras 30-31. Note as well the majority's refusal to adopt efficient breach in *Waterman v. IBM Canada* [2013] 3 S.C.R. 985 at paras 76 and 92, where to do so would lead to an award that failed to incentivize socially desirable conduct.

[15] *MMF*, 2013 SCC 14, [2013] 1 S.C.R. 623 at paras 75-83.

[16] *R. v. Powley*, 2003 SCC 43, [2003] 2 S.C.R. 207 at para 38.

[17] *Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 S.C.R. 103 at para 42; *Mikisew Cree First Nation v. Canada (Governor General in Council)*, [2018] S.C.R. 756 at para 24.

[18] *MMF*, 2013 SCC 14, [2013] 1 S.C.R. 623 at para 75.

[19] *Mikisew Cree First Nation v. Canada (Governor General in Council)*, [2018] S.C.R. 756 at para 1.

22. Moreover, treaties are not ordinary commercial contracts.[20] The entrenchment of Aboriginal and treaty rights within our constitutional structure, and the foundational nature of the treaties as part of the building blocks of Confederation highlights the importance of honouring them and helps identify the appropriate level of compensation for their breach.

23. Fulfilling and respecting Aboriginal and treaty rights is critically important to our Nation. In this regard, some analogy can be made to the promises made to the Francophone minority in 1982.[21] Both are part of the foundation on which Canada's constitutional structure rests.

24. Like the promise of French language instruction in section 23 of the *Charter*,[22] Aboriginal and treaty rights protect rights of a collective, and seek to maintain the culture[23] of a people. Like the promises in section 23 of the *Charter*, Aboriginal and treaty rights are not subject to the notwithstanding clause (*Charter* section 33).[24]

25. Unlike many of the freedoms enshrined in the *Charter* that operate as checks on state power (such as sections 2, and 7-11), but like section 23 rights that require the Crown to diligently take positive steps,[25] so too must the Crown engage in positive action in order to "diligently" and "purposefully" fulfil Aboriginal and treaty rights promises.[26]

26. The collective, constitutional, and foundational nature of Aboriginal and treaty rights, and the positive state action on which they depend, also makes them vulnerable (like *Charter* section 23 rights) to State action and inaction.[27] This vulnerability speaks to the appropriateness of ensuring that awards for breach of Aboriginal or treaty rights, like fiduciary breaches, contain an element of deterrence.

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[20] *Restoule v. Canada (Attorney General)*, 2020 ONSC 3932 (CanLII) and the cases cited therein at paras 149-151.
[21] See *Canadian Charter of Rights and Freedoms*, ss. 16-19 & 23, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*].
[22] See most recently the discussion of the positive nature of section 23 rights and the steps the state must take to ensure that those rights are secured in *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13 [*CSFCB*].
[23] We will return to the importance of cultural aspects of Aboriginal and treaty rights in Part III.D below.
[24] *Charter*, *supra* note 21, ss 25 (non-derogation clause), 33; *CSFCB*, 2020 SCC 13 at paras 148, 189-190.
[25] *CSFCB*, 2020 SCC 13 at paras 189-190.
[26] *MMF*, 2013 SCC 14, [2013] 1 S.C.R. 623 at para 75.
[27] *CSFCB*, 2020 SCC 13 at paras 16, 142.

27. But beyond the need to deter future breach, the quantum of an award in respect of Aboriginal or treaty rights breaches, should promote reconciliation.

28. The part of an award that addresses reconciliation would focus not on the First Nations' losses, would not be in the nature of punitive damages aimed at an "evil wrongdoer", nor for the purposes of deterring future breaches. This additional element would seek to promote reconciliation, and would be in an amount that would help repair the relationship which the Crown damaged, whether by neglect or ineptitude, when it failed to diligently and purposefully fulfil the rights at issue.

***D. Guiding Principle 3: "Loss of Culture" as a distinct head of loss.***

29. This intervener puts forward that the "value" of the loss of use of land for an Aboriginal collective must not only reflect traditional economic losses, but must also include an element to compensate for "cultural losses," or loss of cultural attachment to land. The recognition of "cultural loss" as a distinct head of damage would further facilitate reconciliation.

30. While courts in Canada have mooted whether there exists a claim to "cultural loss",[28] there is no definitive recognition of such a claim in its own right, not even with respect to aboriginal lands.

31. This Court has recognized that Aboriginal lands, be they reserve lands or traditional lands, are not fungible commodities. In *Osoyoos Indian Band v. Oliver (Town)*, this Court identified that:

> [45] ….reserve land does not fit neatly within the traditional rationale that underlies the process of compulsory takings in exchange for compensation in the amount of the market value of the land plus expenses. The assumption that the person from whom the land is taken can use the compensation received to purchase replacement property fails to take into account in this context the effect of reducing the size of the reserve and the potential failure to acquire reserve privileges with respect to any off-reserve land that may thereafter be acquired.
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> 46 Third, it is clear that an aboriginal interest in land is more than just a fungible commodity. The aboriginal interest in land will generally have an important cultural component that reflects the relationship between an aboriginal community and the land and the inherent and unique value in the land itself which is enjoyed by the community.[29]

32. As this Court is aware, cultural attachment to land is a significant part of the Aboriginal reality and is at the heart of section 35. It is in fact the integral parts of a First Nation's distinctive

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[28] See for example *Gottfriedson v. Canada*, 2019 FC 462 at paras 20-24.
[29] *Osoyoos Indian Band v. Oliver (Town)* [2001] 3 S.C.R 746 at paras 45-46 (underlining for emphasis).

culture that form the basis for the articulation of what existing Aboriginal rights are recognized and affirmed by section 35.

33. Recognizing a claim to "loss of culture", or "loss of cultural attachment to land", as a distinct head of loss would be consistent with this Court's jurisprudence , and is consistent with the respect for such cultural rights that section 35 recognizes, affirms, and seeks to protect.

34. Last year, the High Court of Australia accepted that "loss of culture" is its own head of damage and that a mere *solatium* award for injured feelings did not capture the nature of the loss.[30]

35. The law of remedies would do a disservice to the goal of reconciliation if an infringement of the very integral cultural practices and traditions that are recognized as rights, and constitutionally protected under section 35, failed to give rise to an actionable head of loss where they are infringed.

36. In this case, by valuing the reserve land that would have been taken by an easement at a market value of $1.29 per acre,[31] the trial judge ignored the Aboriginal perspective as to value, which would include loss of culture. While the trial judge attempted to take into account some intangible elements that arguably reflect the unique attachment that Aboriginal people have to their land,[32] there was insufficient consideration of the First Nations' cultural loss as a distinct head of damage.

37. Moreover, while the trial judge referred to such losses as not being calculable,[33] this is not necessarily the case. Economic models, not dealt with at trial, do exist to assist the court in quantifying loss of First Nations' cultural attachment to land.[34] If the matter were remitted back to a hearing, the parties could more fully lead evidence on the subject of how to properly quantify that cultural loss.

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[30] *Northern Territory v Griffiths*, [2019] HCA 7 (High Court of Australia).
[31] Trial Reasons, *supra* note 2 at para 383.
[32] The trial judge identified some of the aspects of what this intervener would call "Culture loss" at paras 373-375, 444 and 508-512 (AR Vol 1 Tab 1 at 153 and 172-174). They were: loss of livelihood on and off reserve; overall damage to the aesthetic of the lakeshore; travel and water hazards; negative effects on hunting and fishing; damage to docks , destruction of gardens and rice fields. Difficulty in transportation between and among community members; and causing uncertainty and anxiety.
[33] Trial Reasons, *supra* note 2 at para 444.
[34] Robin Gregory et al, "Compensating Indigenous Social and Cultural Losses: a community-based multiple-attribute approach" (2020) 25(4):4 Ecology and Society.

38. In any event, and as the trial judge effectively noted, it has never been the case that a difficulty in quantifying a genuine compensable loss relieves the wrongdoer of liability.[35]

39. This case thus presents an opportune time for this Court to rule that Aboriginal "loss of culture" is a distinct head of damage, and is compensable in its own right.

### *E. Guiding Principle 4: The availability of compound interest on all losses when bringing forward historic losses.*

40. Although the trial judge's decision to permit compounding of interest on the whole of the past loss[36] was not appealed, the identification of guiding principles, more generally, is at issue. The intervener TLEC submits that bringing forward historic losses on the basis of compound interest is an important guiding principle.

41. The argument against allowing for interest to be compounded on all past losses (which was rejected by the trial judge[37]) is to the effect that the band and its members would have consumed some or all of the payments, with the result that those funds would not have in fact been invested and would not have earned compound interest.[38] At trial, this theory was countered by the expert evidence that there is a lost opportunity in consumption that is at least equal to the investment interest lost.[39] In the end, the trial judge allowed compound interest at band trust rates on all of the past amount, regardless of what was consumed.

42. The very fact that the matter was even an issue mandates in favour of guidance from this Court. At the core of the argument is the objectionable postulate that poor people, who must spend (consume) the money they receive in order to survive instead of investing it, are deserving of lesser compensation than the rich, who not needing the money right away, would invest it.

43. Even if it is true that poor people invest less of their money than the rich, the objectionable theory fails to realize that money spent on people's needs (consumption) does have a value.

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[35] Trial Reasons, *supra* note 2 at para 374. See also *Williams v Stephenson*, (1903) 33 SCR 323; *Easter Power Ltd. v. Ontario Electricity Financial Corp.*, 2010 ONCA 467.
[36] Trial Reasons, *supra* note 2 at paras 500-501.
[37] Trial Reasons, *supra* note 2 at para 495.
[38] Trial Reasons, *supra* note 2 at para 492.
[39] Trial Reasons, *supra* note 2 at paras 491, 493.

44. Moreover, the theory that consumption has no value is morally bankrupt, culturally insensitive, an affront to reconciliation, and fails to address the goal of deterrence. As Chairman Slade of the Specific Claims Tribunal aptly observed:

> 155 The Claimant did not receive the annuities. The money was retained by government agents. The Respondent [Canada] seeks to parse the loss into components of consumption and investment for the purpose of calculating the loss. 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.[40]

45. However, in the absence of a Supreme Court decision refuting it, the theory that consumption patterns can be used to limit the awarding of compound interest continues to be raised. It should not be. The objectionable consumption theory has no place in Canadian law.

## IV. COSTS

46. TLEC seeks no costs in the intervention. It asks that none be awarded against it.

## V. ORDER SOUGHT

47. TLEC takes no position on the ultimate disposition of the appeal.

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

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[40] *Beardy's and Okemasis Band No. 96 and Canada*, 2016 SCTC 15 at para 155.

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|---|---|
| *Bank of America v. Mutual Trust Co.*, [2002] 2 S.C.R. 601 | 19 |
| *Beardy's and Okemasis Band No. 96 and Canada (Minister of Indian Affairs and Northern Development), Re*, 2016 SCTC 15 | 44 |
| *Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 S.C.R. 103 | 21 |
| *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534 | 3, 5, 12 |
| *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia* 2020 SCC 13 | 24, 25, 26 |
| *Easter Power Ltd. v. Ontario Electricity Financial Corp.*, 2010 ONCA 467 | 38 |
| *Gottfriedson v. Canada*, 2019 FC 462 | 30 |
| *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6 | 12 |
| *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, [2013] 1 S.C.R. 623 | 14, 19, 21, 25 |
| *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, [2018] S.C.R. 756 | 21 |
| *Northern Territory v Griffiths*, [2019] HCA 7 (High Court of Australia) | 34 |
| *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 S.C.R 746 | 31 |
| *R. v. Powley*, 2003 SCC 43, [2003] 2 S.C.R. 207 | 7, 20 |
| *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 | 6 |
| *Restoule v. Canada (Attorney General)*, 2020 ONSC 3932 | 22 |
| *Southwind v. Canada*, 2017 FC 906 | 4c., 36, 37, 38, 40, 41 |
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| *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R.245 | 11 |
| *Whitefish Lake Band of Indians v. Canada (Attorney General)*, 2007 ONCA 744 | 13 |
| *Williams v Stephenson*, (1903) 33 SCR 323 | 38 |

| **LEGISLATION** | | **PARAS** |
|---|---|---|
| *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, ss 7-11, 16-19, 23, 25, 33, 35 | *Loi constitutionnelle de 1982*, constituent l'annexe B de la *Loi de 1982 sur le Canada* (R-U), 1982, c 11, art 7-11, 16-19, 23, 25, 33, 35 | 7, 20, 23, 24, 25, 26, 32, 33, 35 |

| **SECONDARY SOURCES** | **PARA** |
|---|---|
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