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, ATIKAMEKSHENG ANISHNAWBEK FIRST NATION, KWANTLEN FIRST NATION, ASSEMBLY OF FIRST NATIONS, ASSEMBLY OF FIRST NATIONS QUEBEC-LABRADOR, GRAND COUNCIL TREATY #3, MOHAWK COUNCIL OF KAHNAWÀ:KE, ELSIPOGTOG FIRST NATION, CHEMAWAWIN CREE NATION and WEST MOBERLY FIRST NATIONS

Interveners

FACTUM OF THE INTERVENERS
THE COALITION OF THE UNION OF BRITISH COLUMBIA INDIAN CHIEFS, THE PENTICTON INDIAN BAND, AND THE WILLIAMS LAKE FIRST NATION
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I - OVERVIEW AND STATEMENT OF FACTS

1. Lac Seul First Nation's ("**LSFN**") appeal raises issues regarding the proper approach to assessing equitable compensation owed by Canada for historical breaches of its fiduciary obligations effectively resulting in an unlawful alienation of reserve lands. While LSFN's case proceeded through the courts, most claims by Indigenous groups stemming from Canada's historical breaches of fiduciary duty in relation to reserve lands, proceed through Canada's specific claims resolution process. When the land cannot be returned, principles of equitable compensation inform both what is achievable for resolving specific claims at negotiations and the remedies available to the Specific Claims Tribunal.

2. The Interveners are a coalition of the Union of British Columbia Indian Chiefs, the Williams Lake First Nation, and the Penticton Indian Band ("**Coalition**"). The Interveners have a long history of seeking legal redress for historical breaches of the Crown's fiduciary duty by pursuing specific claims through the settlement processes available under Canada's Specific Claims Policy and adjudicative process available under the *Specific Claims Tribunal Act*.

3. Specific claims arise from broken promises and Canada's breaches of its fiduciary duty related to reserve lands within the larger context of Canada's history of systemic racism towards Indigenous peoples.[1] This Court has found this history to include paternalistic and oppressive legal regimes, Crown policies openly hostile toward Indigenous peoples, and a federal government that was frequently feckless when it came to protecting Indigenous land rights.[2] As the majority of this Court said of specific claims in *Williams Lake*, "A just resolution of these types of claims is essential to the process of reconciliation."[3]

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[1] *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 at para 2 [*Williams Lake*]; *R v Gladue*, [1999] 1 SCR 688 at paras 58-61
[2] See *Guerin v The Queen*, [1984] 2 SCR 335 at 347, 356 [*Guerin*]; *R v Sparrow*, [1990] 1 SCR 1075 at 1103-1104; *Wewaykum Indian Band v Canada,* 2002 SCC 79 at paras 14-24, 46, 50-51; *Williams Lake*, at paras 1-17, 90-101.
[3] *Williams Lake* at para 2.

PART II - POINTS IN ISSUE

4. The Coalition will address how principles of equitable compensation need to be flexible and evolve in order to apply to historical breaches of fiduciary duty in the Crown-Indigenous relationship and to properly respect Indigenous laws and perspectives.

PART III - LEGAL ARGUMENT

A. Equity and Reconciliation

5. To advance reconciliation, the equitable compensation for the unlawful taking of reserve land must be based on the lands' highest and best use from the time of the taking, informed by Indigenous laws and perspectives when available. Such an approach will promote fair and equitable outcomes and advance reconciliation and is consistent with existing law and policy.

6. Reconciliation is the fundamental objective of the law governing the relationship between the Crown and Indigenous peoples.[4] Canada has committed to reconciliation and taken steps to change the way it relates to Indigenous peoples, including by endorsing and promising to implement the *United Nations Declaration on the Rights of Indigenous Peoples* ("**UNDRIP**"), and adopting ten principles for a renewed relationship in which Indigenous peoples are respectfully treated as full partners in Confederation.[5]

7. Land is central to the identity, culture, and worldviews of Indigenous peoples. Wherever possible, Indigenous peoples' lands taken or damaged without their consent should be returned or restored with, at a minimum, appropriate compensation for loss of use of that land. Too often restitution *in specie*—i.e., restoring the lands to the Indigenous people—is not available. In these cases, redress must be provided through equitable compensation.[6] As a "second best" remedy, it is critical that equitable compensation result in just outcomes that promote reconciliation, including by being

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[4] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 1.
[5] Department of Justice Canada, 2018, "Principles respecting the Government of Canada's relationship with Indigenous peoples"
[6] *Canson Enterprises Ltd v Boughton & Co*, [1991] 3 SCR 534 at 547-548, 556 [*Canson*].

inclusive of Indigenous laws and perspectives, and that deter unlawful conduct by the fiduciary. Just outcomes must acknowledge the historical breach and the ongoing loss of the use and benefit of the land. To achieve deterrence, equitable presumptions must operate to ensure Canada does not benefit from its breach.

1. Canada's specific claims policies and legislation

8. The specific claims process was designed to promote reconciliation by establishing a legal and policy framework for the resolution of historical claims. While this Court is not bound by Canada's Specific Claims Policy or the compensation criteria in the *Specific Claims Tribunal Act* ("**SCTA**"), it is important that this Court is mindful of the compensation framework that Canada put into place to facilitate the resolution of historical claims.

9. Although the courts and the SCTA are alternative processes, both have emphasized the need for consistency between them in the adjudication of historical claims.[7] There is good reason for such consistency: both processes provide for adjudication of similar types of claims by superior court judges according to legal principles. Under both the SCTA and the Specific Claims Policy, compensation for established claims must be assessed "based on the principles of compensation applied by the courts." This appeal presents an important opportunity for the Court to offer guidance on how principles of equitable compensation apply to historical breaches of duty in relation to Indigenous lands in a manner that advances reconciliation.

10. Under Canada's Specific Claims Policy and the SCTA, a claim such as LSFN's, in which reserve lands have effectively been unlawfully alienated, would be assessed using a framework that provides for compensation for loss of use of the lands from the time of the unlawful taking to the present plus the current unimproved market value of those lands. This is distinct from situations in which there was a lawful taking but Canada failed to meet its fiduciary obligations (e.g., by failing to provide adequate compensation), where the SCTA and the Specific Claims Policy provide for

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[7] *Specific Claims Tribunal Act*, SC 2008, c. 22, Preamble; *Canada v Kitselas First Nation*, 2014 FCA 150 at para 34; *Popkum First Nation v Her Majesty the Queen in Right of Canada*, 2016 SCTC 12 at para 56.

compensation based on the present value of the compensation that the beneficiary should have received at the time of the taking.[8]

11. In contrast, the trial judge, on Canada's encouragement, erroneously assessed compensation for Canada's unlawful conduct by ignoring the 90 years of loss of use and enjoyment of LSFN's reserve lands and instead assessing compensation as though Canada acted lawfully in 1929. The trial judge's approach is wrong in law, inconsistent with Canada's Specific Claims Policy and the SCTA, and does not result in a fair and equitable outcome.

2. Equitable compensation must acknowledge the losses over time

12. Equitable compensation must acknowledge the wrong and the resulting losses over time. A first step of reconciliation is truth-telling about the past.[9] In this case, the basis of compensation should not be what the LSFN would have received for a flowage easement in 1929. Canada did not take an easement in 1929 and compensating on that basis in 2020 provides a remedy that most benefits Canada, denies LSFN's losses resulting from the unlawful action, and does not deter Canada's unlawful conduct.

13. International law provides helpful guidance. Reparative justice, an international doctrine that seeks to repair the relationship between a wrongdoer (usually a state) and the people they harmed, explicitly seeks accountability and redress for historical, state-sanctioned wrongs. *Restitutio in integrum* is considered the primary objective of reparative justice. Reparative justice recognizes that violations of individual or collective human rights, such as dispossession and displacement from traditional lands,[10] have long lasting effects with ripples felt by many persons and across generations.[11] Proper redress for past violations must include identifying the harm correctly, acknowledging

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[8] *Tsleil-Waututh Nation v. Her Majesty the Queen in Right of Canada*, 2016 TRPC 11.
[9] Truth and Reconciliation Commission, Canada's Residential Schools: Reconciliation, vol 6 at 7 [TRC Vol 6] [Book of Authorities ("BOA"), Tab 5].
[10] United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/61/295 (endorsed by Canada 12 November 2010) at arts 25-28 [UNDRIP] [BOA, Tab 6].
[11] United Nations General Assembly, *Report of the Special Rapporteur on the promotion of trust, justice, reparation, and guarantees of non-recurrence*, (A/69/518, 14 October 2014) at para 7 [BOA, Tab 7].

that it occurred, and taking appropriate action to repair the harm—usually through restitution or equitable compensation.[12] This assures the victims, and others, that the future can be better than the past and that the rule of law will apply.[13]

14. To be meaningful and just, equitable compensation must recognize what, in fact, has happened: what has the unlawful use of the land meant to the beneficiary, how has the confiscated land been used by the Crown or those permitted by the Crown in the past, present and future, and how can compensation assist in restoring the beneficiary today for the losses, including lost benefits. The answers to these questions must inform the assessment of compensation for unlawful alienation of reserve lands, including the determination of the highest and best use of the lands, in this case for hydroelectric purposes. Unless a party meets the evidentiary burden of establishing that actual use was not the highest and best use of the lands, the loss of use analysis should rely on actual use as the highest and best use. Using these factors to inform compensation will keep the compensation grounded in the lands and the loss suffered by the beneficiary.

3. Limitations of the "but for" test and the "lawful fiduciary presumption" in historical Crown-Indigenous fiduciary claims

15. The decisions of the lower courts in this case demonstrate that certain principles of equitable compensation must evolve if they are to help remedy historical breaches in a manner that promotes reconciliation.

16. The Federal Court approached the valuation of compensation for the land on the basis that LSFN should be put in the position it would have been in had Canada discharged its legal duties to LSFN in 1929. The Court applied the "but for" test and the presumption that Canada would have acted lawfully ("**lawful fiduciary presumption**") to conclude that, but for the breach Canada would have acted lawfully and taken a

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[12] International Commission of Jurists, *The Right to a Remedy and Reparation for Gross Human Rights Violations: A Practitioners' Guide*, (October 2018) at xii-xiv, 153-158, 172-173, 195-199 [BOA, Tab 3].

[13] United Nations General Assembly, *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence* (A/67/368, 13 September 2012) at para 67 [BOA, Tab 8].

flowage easement, and therefore the compensation should be the amount LSFN would have been paid in 1929 for the flowage easement brought forward to today.[14]

17. The trial judge fell into error by characterizing LSFN's loss as the loss of the payment for a flowage easement in 1929, rather than the loss of use and enjoyment of the land by LSFN since 1929 based on the highest and best use of that land. The trial judge's approach is wrong for at least three reasons.

18. First, this approach is inherently unreliable. In this appeal, as in many specific claims, the wrong and the remedy are separated by the passage of decades or centuries. The Crown breached its obligations to LSFN over 90 years ago. Many unresolved specific claims are older. These long timeframes create irresolvable uncertainties when applying the "but for" test. Using the "but for" test as the lens for assessing compensation in these historical breaches puts the trier of fact in the difficult position of selecting and weighing numerous possible "alternative histories" of what would have or should have unfolded as the foundation for compensation. Given the myriad possibilities over decades of time, this is a fraught and unreliable exercise that should not form the basis for the remedy.

19. Second, assessing compensation for breaches of fiduciary duty on the basis of what would have happened but for the breach and then applying the lawful fiduciary presumption undermines reconciliation. This approach allows the Crown to rely on the history of discriminatory and assimilationist practices, policies, and legislation that have caused immeasurable harm to Indigenous peoples in Canada. Courts must proceed cautiously when using the *Indian Act* and other colonial legislation or policy as the standard for lawful conduct of the Crown in a historical claim. In many cases using that lens will taint the assessment of equitable compensation and undermine reconciliation. Reconciliation will not result from a process of assessing equitable compensation that avoids looking at what actually happened and how the lands are actually used by the Crown or third parties and instead redirects the court to assess what might have happened under the discriminatory legal structures of the past.

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[14] *Southwind v Canada*, 2017 FC 906 at paras 235-239, 358-359, 371, 452, 457-458, 508-512; aff'd *Southwind v Canada*, 2019 FCA 171 at para 104 per Nadon JA.

20. Third, the trial judge wrongly assessed compensation on the basis that the flooding was inevitable, thereby limiting LSFN's losses. Where there is at least some causal connection between the breach and the loss, a fiduciary may not argue that the loss was inevitable.[15] There is clearly such a causal connection in this case, particularly given that Canada set the Lac Seul Storage Project into motion. In the circumstances, it was not open to Canada to argue that LSFN's loss of use and benefit of its lands was inevitable.

B. Equity Must be Informed by the Indigenous Perspective in order to Advance Reconciliation

21. The correct approach to the assessment of equitable compensation for breach of fiduciary duty in the Crown-Indigenous context is to assess equitable compensation through the lens of what is required to restore and make the claimant whole today. Wherever possible, the claimant's perspective and laws should inform the assessment of the nature and extent of the loss and the remedy.

22. As the Truth and Reconciliation Commission has said, "[Indigenous] legal traditions are important in their own right. They can also be applied towards reconciliation for Canada, particularly when considering apologies, restitution, and reconciliation."[16] "Indigenous legal traditions" or "Indigenous laws" refers to the diverse legal orders of Indigenous peoples, which were operating when the common law was imposed over what is now Canada. Canada was, and remains, a multi-juridical nation.[17] Fair and equitable compensation for Indigenous claimants cannot be assessed solely by reference to western legal perspectives. Recognition of Indigenous laws is necessary to move to a more inclusive approach to assessing equitable compensation—one that is owned and considered just by all.

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[15] *Plaza Fiberglass Manufacturing Ltd. v Cardinal Insurance Co.* [1994] OJ No 1023 (CA) at para. 28 (QL) [BOA, Tab 2]; *Island Realty Investments Ltd. v Douglas*, [1985] BCJ No 1118 (SC) at paras. 15-16 (QL) [BOA, Tab 1].
[16] TRC Vol 6 at 78 [BOA, Tab 5]
[17] TRC Vol 6 at 45-79 [BOA, Tab 5]; Lance Finch, "The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice" (Paper prepared for the Continuing Legal Education Society of British Columbia, November 2012) at para 1 [BOA, Tab 4].

23. Indigenous laws are a source of authority that inform the nature and content of the Indigenous interest in land. Indigenous peoples' interest in their lands is an independent, *sui generis* interest, which exists whether the lands in question are reserve lands or Aboriginal title lands.[18] The common law recognizes two sources of this interest: Indigenous peoples' pre-contact occupation of their territories, and the relationship between common law and pre-existing systems of Indigenous law.[19]

24. Given that the *sui generis* Indigenous interest in land arises in part from Indigenous laws, it follows that Indigenous laws may also inform the identification and delineation of harm to that interest, the nature of the loss caused by the harm, and the assessment of compensation and/or restitution for that loss. To understand the losses suffered by the claimant and the appropriate forms of redress for the losses, where possible the court must be informed by the Indigenous claimant's perspective and laws. Such an approach is consistent with existing law and advances reconciliation.

25. Recognition of Indigenous laws is a golden thread running through the common law.[20] This Court has confirmed the importance of the Indigenous perspective when adjudicating Indigenous rights (particularly land rights), and has long recognized that considering the Indigenous perspective includes a consideration of Indigenous laws.[21] If Indigenous laws are included on a respectful basis in the assessment of equitable compensation, the process will gain legitimacy and contribute to reconciliation.

26. UNDRIP, which Canada has endorsed and committed to implement, likewise calls for Indigenous laws to be recognized in fair and impartial processes to adjudicate Indigenous land rights and redress for their violation.[22] Given the centrality of Indigenous lands to Indigenous peoples' cultures and identities, it is critical that the

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[18] *Guerin* at 379, 382.
[19] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, at paras 114, 126 [*Delgamuukw*]; *R v Van der Peet*, [1996] 2 SCR 507, at para 40, 49-50 [*Van der Peet*]; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 14.
[20] *Van der Peet* at para 263
[21] *Delgamuukw* at paras 148, 157; *Van der Peet* at paras 40, 49-50.
[22] UNDRIP Arts 27, 28, 40 [BOA, Tab 6]

perspectives and laws of Indigenous claimants play a role in the assessment of equitable compensation for interference with the Indigenous interest in land.

C. The Correct Approach Must Result in Equitable Outcomes

27. The Crown-Indigenous fiduciary relationship is unique, as are the claims for redress which arise from the Crown's historical breaches of its fiduciary duty. As this Court noted in *Williams Lake*, "The application of these [equitable] doctrines requires a measure of flexibility and adaptation to map onto historical claims."[23]

28. The approach proposed by the Coalition is consistent with the principles of equitable compensation. Such an approach reflects the fundamental principle that "equity awards compensation in place of restitution *in specie*… with the ideal of restoring to the estate that which was lost through the breach."[24] It is also consistent with other principles of equitable compensation, including the principles that, in determining the value of trust property, it must be presumed that the beneficiary would have made the most advantageous or profitable use of the property in question;[25] the fiduciary must restore the beneficiary on a basis most favourable to the beneficiary;[26] and, where a trustee holds a beneficiary's property over time, evidentiary difficulties in relation to valuing the property will be resolved against a fiduciary who created the difficulties.[27]

29. To the extent that the approach proposed by the Coalition might put LSFN in a better financial position today than it would have been in had Canada lawfully obtained a flowage easement in 1929, that result is just, appropriate and consistent with the purpose of equitable compensation. Because of the important role of fiduciary law in regulating "socially useful" relationships, the law "has always contained within it an

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[23] *Williams Lake* at para 34
[24] *Canson* at 547.
[25] *Guerin* 362; *Canson* at 545-546; *Whitefish Lake Band of Indians v Canada (Attorney General),* 2007 ONCA 744 at paras 60, 102 [*Whitefish*]; *Beardy's & Okemasis Band #96 and #97 v Her Majesty the Queen in Right of Canada,* 2016 SCTC 15 at paras 102, 151.
[26] *Whitefish* at para 102.
[27] Waters, Donovan W M, Gillen, Mark R & Smith, Lionel D. eds, Waters' Law of Trusts in Canada, 4th ed (Toronto: Carswell, 2012) at 1288-1289 [BOA, Tab 9].

element of deterrence."[28] As a result, it is sometimes necessary to assess equitable compensation on the basis more favourable to the beneficiary than an approach that puts the parties in the financial positions they would have been in had the fiduciary acted lawfully at the time of the breach.[29] As the fiduciary relationship has trust rather than self-interest at its core, the balance must favour the wronged party.[30]

D. Conclusion

30. Assessing equitable compensation for historical breaches of Crown-Indigenous fiduciary duty presents unique challenges that require a flexible approach to ensure fair and equitable outcomes. The proper approach requires that one "look to the policy behind compensation for breach of fiduciary duty and determine what remedies will best further that policy."[31] That policy includes the imperative of reconciliation, which demands truth telling about the past. In this case, equity and reconciliation require a remedy informed by an assessment of the highest and best use of the reserve land unlawfully lost to LSFN for over 90 years.

PART IV - SUBMISSIONS CONCERNING COSTS

31. The Coalition seeks no costs and requests that no costs be awarded against it.

PART V - ORDER SOUGHT

32. The Coalition confirms its intention to present oral argument by video conference.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Vancouver, British Columbia, the 16 day of November, 2020.

Brenda Gaertner | Peter Millerd | Erica Stahl

[28] *Hodgkinson v Simms,* [1994] 3 SCR 377 at 453 [*Hodgkinson*].
[29] *Hodgkinson* at 453-55.
[30] *Canson* at 543.
[31] *Canson* at 544-545.

PART VI - TABLE OF AUTHORITIES

Paragraph

Statutes

Other Authorities