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

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PART I - OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. West Moberly First Nations ("WMFN" or "West Moberly") intervenes in this appeal on two points. First, it seeks to assist the Court by providing submissions on the breadth of Indigenous experience that must be accounted for within an approach to assessment of compensation. Specifically, WMFN submits that this Court should ensure that its decision does not state or imply that loss of land off of a reserve is inherently less harmful to a First Nation than is loss of reserve land. Rather, its approach should provide room to accommodate the full spectrum of experiences of First Nations, accounting for the Indigenous perspective as to what was lost by the Nation. Whether land is or is not on a reserve is not dispositive as to its value to a Nation, and the locus of a loss lying off of a reserve should not be treated as a mitigating factor on a damages calculation.

2. Second, WMFN intervenes out of a concern that it and other First Nations will be prejudiced by this appeal if the treaty interpretation upon which this case rests is treated as binding in subsequent matters. This case is being argued upon the assumption that, regardless of Lac Seul First Nation's ("LSFN") lack of consent, the dam could have been lawfully constructed in 1929. Thus, Canada has framed a "no-breach" scenario as one where the dam still would be built, even absent consent. This, as the Federal Court of Appeal noted, requires acceptance of an interpretation of Treaty 3 that would allow construction of the dam without LSFN's consent. This is an interpretation of Treaty 3 that was applied by the Trial Judge without submissions from the parties and without evidence as to the historical context or Indigenous law of the Indigenous Treaty partners.

3. WMFN accepts that the Court will decide the case on the basis that it was argued by the parties, and does not ask this Court to question whether Treaty 3 would allow the destruction occasioned by the dam to occur without consent. However, WMFN submits that the Court should clarify in its reasons that it has not made a determination as to whether this treaty interpretation is correct. Rather, other litigants should be free to lead historical evidence, establish Indigenous law, and argue for interpretations of historical treaties inconsistent with the interpretation applied in this case.

B. Facts

4. West Moberly is a "band" as defined in the *Indian Act*, R.S.C. 1985, c. I-5, and is an "Aboriginal people" within the meaning of section 35 of the *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (UK), 1982 c. 11. West Moberly is one of the successor First Nations to the Hudson's Hope Band of Indians, who adhered to Treaty No. 8 in 1914.

PART II - QUESTIONS IN ISSUE

5. WMFN's submissions will address the following two issues:

a. Should this Honourable Court formulate an approach to assessment of compensation that states or suggests that loss of reserve land is intrinsically more deserving of compensation than is loss of land off of a reserve?

(a) Should treaty interpretation done in the absence of a historical record or consideration of Indigenous law be treated as binding on non-parties to the litigation?

PART III - STATEMENT OF ARGUMENT

6. WMFN fundamentally agrees with LSFN that the approach to damages for breach of a First Nation's constitutionally protected rights must account for the Indigenous perspective as to what was lost by the First Nation. It intervenes in this case to raise two narrow points concerning (a) the importance of formulating an approach to compensation that does not arbitrarily devalue the importance of land off of reserve and (b) the precedential value of interpretation of a treaty done in the absence of a historical record or consideration of the Indigenous law of the Indigenous treaty partner.

Loss of Land off of Reserves

7. This Court is being asked to remit the question of compensation to the trial judge, with directions on the correct approach.[1] WMFN offers its perspective to the Court to assist in formulating the approach to compensation. Specifically, WMFN seeks to avoid a situation where

[1] Appellants' factum, at para 70.

the unique facts of this case lead to an approach to damages which necessarily privileges loss of reserve land over loss of other land to a First Nation.

8. WMFN is concerned about the risk of devaluing loss of land off of reserve because the appellants have argued this case in a manner that could suggest that breaches of duty that lead to loss of reserve land are inherently more harmful. Specifically, the appellants suggest that that it is "particularly" important to deter breaches of fiduciary duties "given the power imbalance…in respect of reserves"[2], have framed reserve lands as the "property" of the First Nation,[3] rely on the "inherent and unique value of reserve lands for the community"[4], and have noted this Court's description of protection of reserve lands for future generations as a "central purpose of the *Indian Act*".[5]

9. WMFN is concerned that this framing could lead this Court to adopt an approach which states or implies that a loss occurring off of reserve is a mitigating factor for calculation of damages. This would be an undesirable result. The analysis of damages should foremost consider the specific and unique consequences to the First Nation's constitutionally protected rights, regardless of whether the locus of that loss is on or off reserve.

10. Loss of treaty land which is off of a reserve, or the loss of an ability to practice a right on treaty land outside the reserve, can be just as (or even more) harmful to a First Nation as loss of reserve land. Treaty land outside of a reserve, or practices that take place on such land, can be of profound cultural, spiritual, and religious significance. Preservation of such treaty land can be necessary to safeguard the ability to maintain a traditional mode of life.[6] To give special status to reserve land because it is the "property" of a First Nation is to impose a Western conception of value, rather than to recognize that what makes a location valuable and irreplaceable to a First Nation often will not depend on whether they "own" that property within a land title system.

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[2] *Ibid* at para 90.
[3] *Ibid* at para. 91.
[4] *Ibid* at para. 112.
[5] *Ibid* at para. 103.
[6] *West Moberly First Nations v. British Columbia (Chief Inspector of Mines),* 2011 BCCA 247, at paras. 137-140.

11. Ensuring that undue primacy is not given to loss of reserve lands is especially important to First Nations in British Columbia, due to the unique history of reserve creation in the Province. West Moberly, like many First Nations whose traditional territory lies in what is now British Columbia, was assigned a relatively small reserve. Its reserve is approximately 1/10 the size of LSFN's reserve. Reserve land in British Columbia was allocated in a manner unique in North America, with the Crown creating many small reserves instead of a smaller number of large reserves. This was the outcome of a dispute as between the Federal and British Columbia governments over how large reserves ought to be in the Province.[7] The approach to reserve creation in British Columbia is explained by Professor Cole Harris:

> The allocation of reserves in British Columbia defined two primal spaces, one for Native people and the other for virtually everyone else. By the 1930s, the space set aside for Native people comprised more than 1,500 small reserves scattered across the province, a reserve geography with no close North American equivalent. Basically, it was the product of the pervasive settler assumptions, backed by the colonial state, that most of the land they encountered in British Columbia was waste, waiting to be put to productive use: or, where Native people obviously were using the land, that their uses were inefficient and therefore should be replaced… Such assumptions, coupled with self-interest and a huge imbalance of power, were sufficient to dispossess Native people of most of their land. They were located on many small reserves rather than a few large ones (as many had advocated) for a variety of reasons: the provincial government argued that small reserves would force Native people into the workplace, there to learn the habits of industry, thrift, and materialism, thus becoming civilized; and also (less stated) to provide cheap seasonal labour for burgeoning industries – arguments that joined self-interest with altruism.[8]

12. The Nations who signed or adhered to Treaty 8, including WMFN's ancestors, did so only after receiving assurances that they would remain free to move about their traditional territory, and would not be parked on reserves.[9] As was noted in the Treaty Commissioners' report concerning Treaty 8, the Treaty Commissioners "assured them that the treaty would not lead to any forced interference with their mode of life" and "they would be as free to hunt and fish after the treaty as

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[7] *West Moberly First Nations v. British Columbia,* 2020 BCCA 138, at para. 180.
[8] Cole Harris, *Making Native Space: Colonialism, Resistance, and Reserves in British Columbia* (Vancouver: UBC Press, 2002), at p. 265 [Emphasis added].
[9] See *R. v. Horseman,* [1990] 1 SCR 901 at 909 (per Wilson J., dissenting); *R. v. Badger,* [1996] 1 SCR 771, at para. 39.

they would be if they never entered into it".[10] On the topic of reserves, the Treaty Commissioners noted:

> The Indians are given the option of taking reserves or land in severalty. As the extent of the country treated for made it impossible to define reserves or holdings, and as the Indians were not prepared to make selections, we confined ourselves to an undertaking to have reserves and holdings set apart in the future, and the Indians were satisfied with the promise that this would be done when required. There is no immediate necessity for the general laying out of reserves or the allotting of land. It will be quite time enough to do this as advancing settlement makes necessary the surveying of the land. Indeed, the Indians were generally averse to being placed on reserves. It would have been impossible to have made a treaty if we had not assured them that there was no intention of confining them to reserves. We had to very clearly explain to them that the provision for reserves and allotments of land were made for their protection, and to secure to them in perpetuity a fair portion of the land ceded, in the event of settlement advancing.[11]

13. West Moberly's ancestors may have been given a relatively small reserve, but only after adhering to a Treaty predicated on the promises that they will have no forced interference with their mode of life, that they will remain as free to hunt and fish as they were before the Treaty, and that they will not be confined to a reserve. The plain intention was that land outside of the reserve would continue to have central importance to their way of life. It follows that the approach to calculating damages for breach of a treaty should recognize that, at least for some Nations, loss of key non-reserve land can be every bit as devastating as loss of reserve land is to another.

14. West Moberly takes no issue with the appellants' argument that "[r]eserves are not fungible or replaceable".[12] However, it submits that what can make reserves neither fungible nor replaceable is not unique to reserve land, but rather applies more broadly to aboriginal connections to land stemming from a Nations' unique and shared connection to a place. As explained by Iacobucci J.:

> 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

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[10] Canada, Parliament, "Report of the Commissioners for Treaty No. 8" 22 September 1899 in *Sessional Papers,* No. 14 (1900) at xxxvi [Emphasis added] ("Treaty Commissioners' Report").
[11] Treaty Commissioners' Report, emphasis added.
[12] Appellants' Factum, at para 93.

> land and the inherent and unique value in the land itself which is enjoyed by the community.[13]

15. It is for this reason that the loss of land off of a reserve can be just as, or even more, devastating to a First Nation. What matters is not whether land is on a reserve or not, but rather whether compensation is based on a fair and full assessment of the totality of the loss suffered by the affected nation caused by the destruction of land.

16. To be clear, West Moberly is not suggesting that it is appropriate to discount the harm that can be caused by loss of reserve land, nor is it diminishing the loss suffered by the appellants. Rather, West Moberly submits that this Honourable Court should ensure its judgment is not read in a way that may prejudice Nations who face loss of treaty rights related to non-reserve land. Specifically, it ought not to suggest or imply that a loss of reserve land is necessarily more harmful to the practice of treaty rights than is loss of other land covered by the treaty.

Precedential Value of Treaty Interpretation

17. Canada's position on this appeal rests upon a fundamental assumption: if Canada had not breached its duties to Lac Seul First Nation, it would still have lawfully been able to construct the Ear Falls Dam. This presumption underlies Canada's discussion of a "no-breach" scenario. This leads Canada to suggest that "had Canada acted legally, the reserve lands would have been taken in 1929 through expropriation or surrender"[14] and that "there was no possible scenario where the Project would not have been undertaken in 1929".[15] Consequently, Canada posits a "non-breach" scenario where the flooding still occurs. [16]

18. The suggestion that the dam was inevitable is found in the findings of fact of the trial judge, who concluded "there is no realistic contingency that the Lac Seul Storage Project would not have been undertaken when it was and thus no realistic contingency that the LSFN Reserve land would not have been flooded in 1929."[17]

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[13] *Osoyoos Indian Band v. Oliver (Town)*, 2001 SCC 85, at para. 46.
[14] Canada Factum, at para. 70.
[15] *Ibid* at para. 72.
[16] The framing of a "breach" scenario vs. the hypothetical "non-breach" scenario is a theme carried through Canada's factum. See paras. 70, 74, 77, 82, and 83.
[17] *Southwind v. Canada,* 2017 FC 906, at para. 294.

19. However, the conclusion that the dam is inevitable even in a "non-breach" scenario necessarily presupposes that construction of the dam even without LSFN's consent was permitted under the Treaty. Gleason J.A., dissenting but not on the point, recognizes that implicit in the conclusion that the lands could have been lawfully taken in 1929 is the proposition that Treaty 3 allows Canada to take and flood reserve lands without LSFN's consent:

> [51] Implicit in the Federal Court's reasoning on this point is that Treaty 3 would not have impeded Canada from taking reserve land for public purposes without securing the Lac Seul First Nation's consent.

20. If Treaty 3, properly interpreted, only allows for the taking of reserve lands with LSFN's consent, then a hypothetical "no-breach" scenario does not include flooding of the lands at all. Canada could not comply with its fiduciary duty while breaching the terms of Treaty 3. Canada's entire argument about what a "no-breach" scenario should be understood as entailing, and what damages are appropriate, rests therefore upon an interpretation of Treaty 3. If that interpretation were incorrect, then Canada might not have been able to construct the dam at all in the "no-breach" scenario, at least unless it secured LSFN's consent.

21. WMFN is not asking this Court to revisit the interpretation of Treaty 3 in this case. Rather, it seeks to avoid the foreseeable prejudice it and other First Nations will suffer if they are bound by an interpretation arrived at by a Court who was not put in the best position to interpret the Treaty. Specifically, the difficulty with the interpretation of Treaty 3 in this case from WMFN's perspective is that it was done in the absence of evidence or submissions on the issue. Gleason J.A. in the Court below accepted that historical evidence is "often necessary for treaty interpretation", but concluded that "the parties' choice not to lead such evidence cannot prevent the Federal Court from interpreting Treaty 3 to the extent the Court needed to do so to resolve the issues before it"[18]

22. WMFN does not question the proposition that a Court may exercise its discretion to resolve a treaty interpretation issue that is before it, regardless of whether the parties led evidence or made argument on the point. However, WMFN submits that the interpretations given to treaties in the

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[18] *Southwind v. Canada*, 2019 FCA 171 ("FCA Decision"), at para. 52, per Gleason J.A. (dissenting, but not on this point).

absence of such evidence cannot and should not be interpreted as binding in subsequent cases considering the same or similar treaty provisions.

23. At present there is a significant risk that, absent an explicit statement from this Court recognizing that other First Nations will not be bound by interpretations given without a full record, the treaty interpretation accepted or implicitly endorsed by this Court will be treated as binding pursuant to the principles of *stare decisis*. This is because there is currently disagreement amongst provincial courts of appeal as to whether interpretation of a treaty is a question of law. The Alberta Court of Appeal recently held that treaty interpretation was a question of law;[19] however the British Columbia Court of Appeal has since disagreed explicitly with this conclusion, finding that interpretation of treaty rights is a matter of mixed fact and law.[20] If it is accepted that treaty interpretation is a matter of law, then the ordinary principles of *stare decisis* would dictate that any interpretation of a treaty taken by a higher court should be treated as binding by lower courts, regardless of any differences in the factual records upon which that conclusion was reached.

24. WMFN does not say that this Court must determine whether treaty interpretation is generally a question of law or mixed fact and law. It says only that if a court interprets a treaty in the absence of a full factual record or in the absence of consideration of the Indigenous law of the Indigenous treaty partner, this should not be treated as a conclusion of law that is binding on other First Nations in subsequent cases pursuant to the doctrine of *stare decisis*. Rather, a First Nation should be free to advance evidence and argument for its interpretation of its constitutionally protected treaty rights without being prejudiced by previous interpretations made on an incomplete record.

25. There is good reason to prefer treaty interpretation done with a proper factual foundation[21] and with reference to the law and constitutional order of the Indigenous system of the First Nation

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[19] *Fort McKay First Nation v Prosper Petroleum Ltd.*, 2019 ABCA 14, at para. 39. For other examples of appellate Courts describing the interpretation of a treaty as a question of law see *Lac La Ronge Indian Band v. Canada,* 2001 SKCA 109 at para. 148 and *Halfway River First Nation v. British Columbia (Ministry of Forests),* 1999 BCCA 470.
[20] *West Moberly First Nations v. British Columbia,* 2020 BCCA 138, at paras. 128-130.
[21] *R. v. Sioui***,** 1990 CanLII 103 (SCC), [1990] 1 S.C.R. 1025 at p. 1045; *R. v. Marshall*, 1999 CanLII 665 (SCC), [1999] 3 S.C.R. 456 at para. 11; *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9, [2009] 1 S.C.R. 222 at paras. 54-55.

treaty partner.[22] When a factual record concerning the negotiation, signing and adherence of a Treaty and the Indigenous law of the Indigenous treaty partners is presented by a First Nation, a lower court should be free to adopt the best interpretation of the treaty available, regardless of whether it has been argued previously on the basis of an incomplete record.

26. In the present case, if this Court accepts Canada's framing that in the "no-breach" scenario the dam would still be constructed, WMFN submits that the Court should make clear it is not deciding generally as to whether Treaty 3 allowed the construction of the dam without LSFN's consent. Rather, it is submitted that any acceptance of a "no-breach" scenario in which the dam could be built in any event should be recognized as the result of how the case was litigated by the parties, and not a conclusive finding by this Court on the proper interpretation of Treaty 3 (or other historical treaties with similar language).[23] In this way, the parties' decision to not lead evidence

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[22] See e.g. Patrick Macklem, "Indigenous Peoples and the Ethos of Legal Pluralism in Canada", in Macklem and Sanderson, e.d. *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights*, (Toronto: University of Toronto Press, 2016), at 18-34; Michael Coyle, "As Long as the Sun Shines: Recognizing That Treaties Were Intended to Last", in Borrows and Coyle, ed. *The Right Relationship: Reimagining the Implementation of Historical Treaties*, (Toronto: University of Toronto Press, 2017), at pp. 39-69; John Borrows, "Earth Bound: Indigenous Resurgence and Environmental Reconciliation", in Asch, Borrows and Tully, ed., *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings*, (Toronto: University of Toronto Press, 2018) ("*Resurgence and Reconciliation*"), at pp. 49-81; Michael Asch, "Confederation Treaties and Reconciliation: Stepping Back into the Future", in *Resurgence and Reconciliation*, at pp. 30-48.

[23] The language of Treaty 3 on the key issues of the power to take up land generally and the power to take reserve land is very similar to that in other numbered treaties, including notably from WMFN's perspective Treaty 8. Regarding the power to take up land generally, Treaty 3 contemplates the taking of "such tracts as may, from time to time, be required or taken up for settlement, mining, lumbering or other purposes", while Treaty 8 contemplates the taking of "such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes." Regarding the taking of land on reserve, Treaty 3 states "such sections of the reserves above indicated as may at any time be required for Public Works or buildings of what nature so ever may be appropriated for that purpose by Her Majesty's Government of the Dominion of Canada, due compensation being made for the value of any improvements thereon", while Treaty 8 says "such portions of the reserves and lands above indicated as may at any time be required for public works, buildings, railways, or roads of whatsoever nature may be appropriated for that purpose by Her Majesty's Government of the Dominion of Canada, due compensation being made to the Indians for the value of any improvements thereon, and an equivalent in land, money or other consideration for the area of the reserve so appropriated."

on the Treaty and to not address the Indigenous law of the Treaty partners will not be allowed to prejudice other Nations in asserting their rights in other cases.

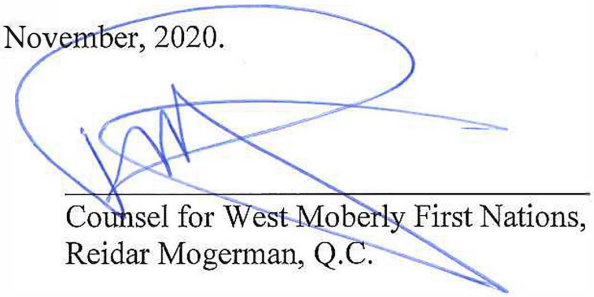
PART IV - COSTS SUBMISSION

27. WMFN does not seek costs and asks that no costs be ordered against it.

PART V - NATURE OF ORDER SOUGHT

28. WMFN makes no submissions in respect of the order on the merits of the appeal itself.

DATED at Vancouver, BC this 16th day of November, 2020.



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PART VI - TABLE OF AUTHORITIES

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