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)

FACTUM OF THE INTERVENER ANISHINABEK NATION

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

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I. OVERVIEW

1. The Anishinabek Nation ("AN") First Nations continue to use and occupy the lands and waters of their territories and have so done since time immemorial. Today, section 35 of the *Constitution Act, 1982*, recognizes and affirms Aboriginal and Treaty rights.[1] As the First Peoples of the land, rights holders, and as Treaty partners with the Crown, the AN brings a critical and unique perspective to the issues in this Appeal.

2. The AN agrees with the Appellant that the approach to equitable compensation must align with the principles of reconciliation and the Honour of the Crown. The application of equitable compensation must also be consistent with the unwritten constitutional principle of the protection of minorities and the *Charter* value of substantive equality. Finally, it must align with this Court's fiduciary and constitutional jurisprudence and the key principles set out in the *United Nations Declaration on the Rights of Indigenous Peoples* ("*UNDRIP*").

II. ISSUES

3. The central issue before this Court is whether the courts below erred in law in their approach to assessing equitable compensation. The AN will specifically address whether the approach of the court must align with the constitutional principle of the protection of minorities, the *Charter* value of substantive equality, and the principles in *UNDRIP* that are relied upon where there are wrongful takings of Indigenous lands.

III. ARGUMENT

4. In the unique constitutional, legal, and societal importance of the Crown-Indigenous relationship, assessing equitable compensation requires the courts to award compensation in a manner that meaningfully advances reconciliation. It must remedy the historic disadvantage suffered by Indigenous Peoples as a result of Crown conduct.[2] To do so requires remedies that are

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[1] *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 35.

[2] See e.g. Canada, *Royal Commission on Aboriginal Peoples, Report of the Royal Commission on Aboriginal Peoples: Looking Forward Looking Back*, vol 1 (Ottawa: Supply and Services Canada, 1996) [*RCAP Final Report*]; Canada, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol 1a (Ottawa: National Inquiry into Missing and Murdered Indigenous Women and Girls, 2019) [*MMIWG Inquiry Final Report*].

also deterrent in nature, enforce the trust at the core of the fiduciary relationship, and maintain its foundational purpose. These core principles include "the integrity of socially and economically valuable, or necessary, relationships of high trust and confidence that facilitate and flow from human interdependency."[3] In the context of the Crown-Indigenous relationship, the courts must appreciate the *sui generis* fiduciary relationship.[4]

5. To maintain coherence within Canadian law, the courts have interpreted and developed the law consistent with unwritten constitutional principles,[5] *Charter* values,[6] and international law and norms.[7] As this Court held in *Dolphin Delivery*:

> … I should make it clear, however, that [the application of the Charter] is a distinct issue from the question whether the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution. The answer to this question must be in the affirmative. In this sense, then, the Charter is far from irrelevant to private litigants whose disputes fall to be decided at common law. …[8]

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[3] *Beardy's and Okemasis #96 and #97 v Her Majesty the Queen in Right of Canada*, 2015 SCTC 3 at para 83. See also *Whitefish Lake Band of Indians v Canada (Attorney General)*, 2007 ONCA 744 at para 57.

[4] See e.g. *Guerin v The Queen*, [1984] 2 SCR 335 (SCC) at 384-385 (describing nature of Crown fiduciary duty in context of *sui generis* Crown-Indigenous relationship).

[5] *Reference re Secession of Quebec*, [1998] 2 SCR 217 (SCC) at paras 49, 51.

[6] *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573 (SCC) at 602-603. See also Mark C. Power & Darius Bossé, "Une tentative de clarification de la présomption de respect des valeurs de la Charte canadienne des droits et libertés" (2014) 55 Les Cahiers de Droit 775 at 781-782.

[7] See the following examples of the application of international laws and norms in the interpretation of Canadian law: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 (SCC) at paras 70, 74 (international law has domestic import and "interpretations that reflect [international law] values and principles are preferred" at para 70; legal decisions must be made with respect to an approach that respects "humanitarian and compassionate" values at para 74); *Castonguay Blasting Ltd v Ontario*, 2013 SCC 52 at para 20 (drawing upon precautionary principle from international environmental law); *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313 (SCC) at 348-350 (per Dickson CJ, dissenting on other grounds) (drawing upon international human rights law and norms to interpret freedom of association under *Charter*); *R v Sharpe*, [2001] 1 SCR 45 (SCC) at paras 175, 178 (drawing upon international legal norms on child welfare and best interests of the child when considering *Charter* freedom of expression claim regarding child pornography); *First Nations Child and Family Caring Society of Canada v Canada*, 2012 FC 445 at para 353, aff'd 2013 FCA 75.

[8] *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573 (SCC) at 603 [McIntyre J. writing for the majority]. This applies to both *Charter* values and the protection of minorities, as all of the unwritten constitutional principles are of equal importance and no one "principle [trumps] or [excludes] the operation of any other": *Reference re Secession of Quebec*, [1998] 2 SCR 217 (SCC) at para 49.

6. In sum, the approach to equitable compensation for First Nations must reflect the legal values governing the Crown-Indigenous relationship.[9] These include, but are not limited to:

(i) The constitutional principle that minorities must be protected;

(ii) The *Charter* value, enshrined in s. 15, that substantive equality for historically disadvantaged groups in Canada should be achieved; and

(iii) The international legal principle, enshrined in the *UNDRIP*, of the provision of appropriate redress for the dispossession of lands, territories or resources.

(i) The approach to assessing equitable compensation must respect the unwritten constitutional principle of the protection of minorities

7. In *Reference Re Secession of Quebec*, this Court unanimously held that the protection of minorities is an underlying constitutional principle which "inform[s] and sustain[s] the constitutional text" and is a "major [element] of the architecture of the Constitution itself and [is] as such its lifeblood."[10]

8. The AN submits that both equitable principles and Aboriginal law jurisprudence, including the equitable presumption of most advantageous use,[11] provide the Court with the flexibility needed to tailor an approach to protect First Nation rights and interests.

9. The contextual approach must reflect both the unique historic and modern realities of each First Nation as a minority worthy of protection. It must reflect the losses suffered by the First Nation as a result of a fiduciary breach by the Crown. Instead, in this case, the Crown profited at the expense of the First Nation beneficiary.[12] The Crown was aware of the devastating impacts the

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[9] See e.g. *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573 (SCC) at 592-593, 600 ("in my view, there can be no doubt that [the *Charter*] does apply [to the common law]" at 592; "The courts are, on course, bound by the *Charter* as they are bound by all law" at 600).

[10] *Reference re Secession of Quebec*, [1998] 2 SCR 217 (SCC) at paras 49, 51 (underlying unwritten constitutional "values" or "principles" as basis for constitutional duty to negotiate in good faith upon an affirmative answer by a clear majority to a clear referendum question on secession).

[11] *Guerin v The Queen*, [1984] 2 SCR 335 (SCC) at 362-363. See also *Canson Enterprises Ltd v Boughton & Co*, [1991] 3 SCR 534 (SCC) at 545–546.

[12] *Southwind et al v Canada et al*, (17 August 2020) Ottawa 38795 SCC (Factum of the Appellant at para 10, 39) (discussing how Canada, Manitoba and Ontario benefitted from the project, while LSFN suffered harms and did not benefit from the electricity generated by the Project as their Reserve was not serviced with electricity until the early 1980s).

flooding would have on the First Nation and its reserve lands. The full access, use and benefit of the lands was taken for the benefit of non-Indigenous majority interests, over the protests of the First Nation and with full Crown knowledge of the wrongdoing.[13]

10. It is wrong for the Crown to deprive a First Nation of its livelihood, natural resources, use of sacred and traditional territory, and homes without compensation.[14] Valuing the lands on the basis of their assumed bare value, as opposed to the highest and most profitable use, cannot protect the minority nor uphold the Honour of the Crown.

11. The AN submits that the courts below erred in law in their assessment of equitable compensation by failing to apply the presumption of "most advantageous or profitable use" as broadly and generously as required to compensate for the unconscionable wrong of flooding on reserve for eternity. This is critical in cases where lands are protected by Treaty promises, the subject of fiduciary obligations, and the surrender requirements of the *Indian Act*.[15]

12. As the guardians of the Constitution,[16] it is imperative that Canadian courts avoid applying approaches to compensation which – as the unanimous Court held in *Re Secession* – indulge the "temptation" for the majority to "ignore fundamental rights in order to accomplish collective goals more easily or effectively".[17]

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[13] *Southwind et al v Canada et al*, (17 August 2020) Ottawa 38795 SCC (Factum of the Appellant at para 7). See also *Southwind v Canada*, 2017 FC 906 at paras 126-144, 152-162 (Justice Zinn discusses the extent of the Crown's knowledge of the damage).
[14] *Southwind et al v Canada et al*, (17 August 2020) Ottawa 38795 SCC (Factum of the Appellant at para 105).
[15] *Southwind v Canada*, 2017 FC 906 at paras 93, 105.
[16] See e.g. *Hunter et al v Southam Inc*, [1984] 2 SCR 145 (SCC) at 155.
[17] *Reference re Secession of Quebec*, [1998] 2 SCR 217 (SCC) at para 74 ("Although democratic government is generally solicitous of those rights, there are occasions when the majority will be tempted to ignore fundamental rights in order to accomplish collective goals more easily or effectively"). See also *Mahe v Alberta*, [1990] 1 SCR 342 (SCC) at 372 ("minority language groups cannot always rely upon the majority to take account of all of their linguistic and cultural concerns. Such neglect is not necessarily intentional: the majority cannot be expected to [understand them all]").

(ii) The approach to assessing equitable compensation must accord with the constitutional principle, enshrined in s. 15 of the *Charter*, of substantive equality

13. Perpetuating prejudice or disadvantage engages and offends the guarantee of substantive equality protected by s. 15 of the *Charter*.[18] In *Withler*, this Court held that the "[p]erpetuation of disadvantage typically occurs when the law treats a historically disadvantaged group in a way that exacerbates the situation of the group."[19] The s. 15 analysis requires a contextual approach that will consider the position of the disadvantaged group or individual based on the enumerated or analogous grounds in s. 15 of the *Charter*.[20]

14. It is well-established that Indigenous Peoples in Canada are systemically disadvantaged compared to non-Indigenous people and that these disadvantages are the result of colonialism and racialized oppression.[21] This persisting disadvantage is inextricably linked to Crown conduct in the context of colonialism and this racialized oppression continues to have widespread effects on Indigenous Peoples. This Court has recognized the importance of situating discussions of equality in the appropriate historical context, including Crown actions and omissions which have led directly to the historic disadvantage and systemic inequality of Indigenous Peoples.[22] In *Kapp*, this Court wrote of the "indisputable" disadvantage of Indigenous Peoples in Canadian society and that "[t]his disadvantage, rooted in history, continues to this day.[23]

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[18] *Canadian Charter of Rights and Freedoms*, s 15, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*]. *R v Kapp*, 2008 SCC 41 at para 15, citing *Andrews v Law Society of British Columbia*, [1989] 1 SCR (SCC) at 171. See also *Withler v Canada*, 2011 SCC 12 at para 2 (substantive equality as the "animating norm of s. 15(1)"); *Fraser v Canada*, 2020 SCC 28 (most recent restatement by this Court).

[19] *Withler v Canada*, 2011 SCC 12 at para 35 (McLachlin CJ & Abella J writing for unanimous court).

[20] *Withler v Canada*, 2011 SCC 12 at para 37.

[21] It is well established that, as part of the colonial history of Canada, Indigenous Peoples have suffered the impacts of numerous breaches of the Crown's fiduciary duty as well as discriminatory and oppressive policies. This includes but is not limited to Treaty breaches, residential schools, the pass system, Indian Day Schools, and Indian hospitals: see e.g. *RCAP Final Report*, *supra* note 2; *MMIWG Inquiry Final Report*, *supra* note 2.

[22] *Corbière v Canada*, [1999] 2 SCR 203 (SCC) at para 67 ("…in the case of equality rights affecting Aboriginal people and communities, the legislation in question must be evaluated with special attention to the rights of Aboriginal peoples, the protection of the Aboriginal and treaty rights guaranteed in the Constitution, the history of the Aboriginal people in Canada, and with respect for and consideration of the cultural attachment and background of all Aboriginal women and men").

[23] *R v Kapp*, 2008 SCC 41 at para 59.

15. This Court has held that the law must develop in a manner that is consistent with *Charter* values.[24] Where this Court gives guidance on the application of the principles of equitable compensation for the lower courts and administrative tribunals to follow, that guidance must be consistent with *Charter* values. [25]

16. Certainly, where there are potential conflicts in the interpretation or application of a common law rule, the Court must prefer the interpretation that aligns with *Charter* principles and the one that avoids the perpetuation of disadvantage. The principles of equitable compensation, applied correctly and in coherence with the *Charter*, must avoid perpetuating disadvantage.

17. The lower courts adopted an approach to assessing equitable compensation based on a hypothetical expropriation (the alternative most favourable to the Crown).[26] The AN submits that this is contrary to *Charter* values as it imposes a Crown-centred perspective that perpetuates the historic disadvantage suffered by First Nations.[27]

18. In order to apply equitable compensation principles consistently with substantive equality, the focus should be to compensate for the full value of what was lost, presuming the most

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[24] *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 (SCC) at paras 91-97 (describing proper approach when common law is inconsistent with *Charter* values). This approach was recently confirmed in *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 61 ("It has long been accepted that, where it will not upset the appropriate balance between judicial and legislative action, courts should apply and develop the rules of the common law in accordance with the values and principles enshrined in the Charter").

[25] *R v Salituro*, [1991] 3 SCR 654 (SCC) at 675, citing L'Heureux-Dube in *Cloutier v Langlois*, [1990] 1 SCR 158 (SCC) at 184 ("Where the principles underlying a common law rule are out of step with the values enshrined in the *Charter*, the courts should scrutinize the rule closely. If it is possible to change the common law rule so as to make it consistent with *Charter* values, without upsetting the proper balance between judicial and legislative action … then the rule ought to be changed"). See also *R v Swain*, [1991] 1 SCR 933 (SCC) at 978-979; *RWDSU, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd*, 2002 SCC 8 at para 20.

[26] *Southwind et al v Canada et al*, (17 August 2020) Ottawa 38795 SCC (Factum of the Appellant at para 108)

[27] This Court recently held that "limited public funds" (a majority-centered approach) is insufficient justification for government failure to uphold constitutionally-mandated minority language rights: see *Conseil scolaire francophone de la Colombie-Britannique (CSFCB) v British Columbia*, 2020 SCC 13 at para 153 ("Public funds are limited by definition. …The fair and rational allocation of limited public funds represents the daily business of government. …This is not a pressing and substantial objective that can justify an infringement of rights and freedoms. Treating this role as such an objective would lead society down a slippery slope and would risk watering down the scope of the *Charter*").

advantageous use. The courts must put the beneficiaries back in the position they would have been in had the Crown acted honourably and based on the most advantageous use, with the benefit of hindsight.[28] This is a contextual approach that ends the historic disadvantage.

19. Compensating the First Nation by assessing the *most likely Crown decision* rather than the *most advantageous use of the land* fails to account for the unique fiduciary relationship and the First Nation's loss. The First Nations were promised beneficial and advantageous land use through Treaty and reserve creation.[29] However, the lower courts focused the compensation analysis on what the Crown *likely would have done* rather than identifying the full extent of the loss experienced by the First Nation as a result of Crown conduct. The lower courts' approach leaves the loss of the First Nation beneficiary without full compensation, perpetuating the disadvantage of the First Nation.

20. The First Nation is deprived of the use of reserve land and will be so deprived forever: this is the loss that is experienced and for which First Nations must be wholly compensated. This Court has been clear that interpretations of rights and interests must always be considered from the Aboriginal perspective.[30] The Aboriginal perspective and the presumption that the Crown must always act honourably operates to support a just result.

21. In addition, the lower court approached compensation from the perspective of the reality at the time of the breach (i.e.: a hypothetical one-time expropriation) rather than considering the most advantageous use with the benefit of hindsight (i.e.: storage for hydro-electric generation). The Court then failed to properly appreciate the unique Crown-Indigenous relationship when it erroneously decided that the Crown would have or should have treated the First Nation in the same

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[28] *Southwind v Canada*, 2017 FC 906 at paras 220, 224, 283–284. See also *Beardy's and Okemasis #96 and #97 v Her Majesty the Queen in Right of Canada*, 2015 SCTC 3 at para 102 ("Legal presumptions are generally rebuttable. But it makes no sense to consider the "presumption" of most advantageous use rebuttable. When a trust asset is lost due to the wrongful act of a trustee, it is not available for use by the beneficiary. Therefore, evidence that the beneficiary would have spent the money, had it been received, could not benefit the defaulting fiduciary in an assessment made as of the date of trial. The use of the term "presumption" in relation to "most advantageous use" does not, in context, open the doorway to rebuttal").

[29] *Southwind v Canada*, 2017 FC 906 at para 105.

[30] *Mitchell v MNR*, 2001 SCC 33 at para 117 ("In assessing aboriginal claims, courts are required to take into account "the perspective of the aboriginal peoples themselves", citing *R v Sparrow*, [1990] 1 SCR 1075 (SCC) at p 1112 and *R v Van der Peet*, [1996] 2 SCR 507 at para 49.

manner as all other non-Indigenous and non-beneficiary parties.[31] Contrary to the jurisprudence of this Court, this approach mistakenly applies formal equality over substantive equality, which as this Court recognized in *Withler* has the impact of perpetuating disadvantage.[32]

22. The AN respectfully submits that the proper equitable compensation analysis, one that accounts for the most advantageous use of the lands with the benefit of hindsight, is aligned with the law of fiduciary, the constitutional rights and status of First Nations and *Charter* values. If equitable compensation is truly to advance reconciliation, justice must be done and historic disadvantage must end. This must be true for all historic breaches of fiduciary duty as addressed before the Specific Claims Tribunal, in negotiations, and before the courts.[33]

(iii) The approach to assessing equitable compensation must accord with international laws and norms, including *UNDRIP*

23. The AN submits that the application of equitable compensation principles at common law must be in harmony with constitutional and *Charter* values and those values included in *UNDRIP*.

24. *UNDRIP* is a relevant and persuasive interpretive source that must inform domestic considerations of legal matters impacting the rights of Indigenous peoples. This proposition has already been accepted by courts in Canada[34] and in other commonwealth countries (such as New Zealand, Australia and Belize).[35] Canadian governments, including the Respondent Canada, have

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[31] *Southwind v Canada*, 2017 FC 906 at para 371 (First Nation's losses based on claims by Hudson's Bay Company, the Lac Seul Church Missionary Society and others: "In all of the other cases involving the flooding of Lac Seul, when arriving at a value for the easement, the parties took into account the damages that would occur as a result of the flooding, such as having to relocate graves, move buildings, timber loss, etc. The same would, in my view, have been done when considering the value of the LSFN land. In addition, there would have been a payment for the value of the land itself."

[32] *Withler v Canada*, 2011 SCC 12 at para 41, citing *Andrews v Law Society of British Columbia*, [1989] 1 SCR (SCC) at 164.

[33] See *Doré v Barreau du Québec*, 2012 SCC 12 at para 24 ("It goes without saying that administrative decision-makers must act consistently with the values underlying the grant of discretion, including Charter values"); *Divito v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47 at para 49 ("the Minister's discretion … must be exercised reasonably, including in compliance with relevant Charter values").

[34] *First Nations Child and Family Caring Society of Canada v Canada*, 2012 FC 445 at para 353, aff'd 2013 FCA 75.

[35] See e.g.: *Takamore v Clarke*, [2011] NZCA 587 at paras 252-254, appeal dismissed [2012] NZSC 116 (New Zealand); *Auruken Shire Council & Anor v CEO Office of Liquor Gaming and Racing in the Department of Treasury*, [2010] QCA 37 at para 33, Supreme Ct Queensland (Australia); *Cal et al v*

stated their full support for *UNDRIP* as applied to First Nations and in the application of s. 35 of the Constitution.[36] Canadian governments have also taken additional steps to "implement" it in domestic law and beyond our constitutional articles.[37] Minister Carolyn Bennett has stated that by adopting and working fully to implement *UNDRIP*, Canada is "breathing life into Section 35 of Canada's Constitution, which provides a full box of rights for Indigenous peoples".[38]

25. Canada is a signatory and this Court has long recognized key international legal principles as a "relevant and persuasive" source of law.[39] This is critical when interpreting statutes and the *Charter*. International values and norms have also been used to reformulate and interpret common law rules to align with the applicable norms and principles of international law.[40]

26. The important values and key principles include the following:

- the prevention and provision of appropriate redress for the dispossession of Indigenous Peoples' lands, territories or resources (Article 8);
- providing just and fair redress for actions or omissions that deprive Indigenous Peoples of their own means of subsistence or development, including the ability to engage freely in their traditional or other economic activities (Article 20);
- taking effective – and where appropriate, special – measures to ensure the continuing improvement of Indigenous peoples' economic and social conditions (Article 21); and
- affording legal recognition and protection to the lands, territories and resources that Indigenous peoples have traditionally owned, occupied or otherwise used or acquired, in order to permit the exercise of Indigenous peoples' rights to use, develop and control them (Article 26).[41]

AG of Belize and Minister of Natural Resources and Environment, Claims No. 171 and 172 of 2007, Consolidated Claims, Supreme Court of Belize (18 October 2007) at paras 131-132 (Belize).

[36] *Southwind et al v Canada et al*, (17 August 2020) Ottawa 38795 SCC (Factum of the Respondent at para 94).

[37] Bill C-262, *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples*, 1st Sess, 42nd Parl, 2015 (third reading 30 May 2018) notably, Bill C-262 died on the order paper; Bill 41, *Declaration on the Rights of Indigenous Peoples Act*, 4th Sess, 41st Leg, British Columbia, 2019 (assented to 28 November 2019), SBC 2019, c 44.

[38] Government of Canada, "Canada Becomes a Full Supporter of the United Nations Declaration on the Rights of Indigenous Peoples", News Release (10 May 2016).

[39] *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313 at 348 (per Dickson CJ, dissenting on other grounds). See also e.g. *R v Sharpe*, [2001] 1 SCR 45 at paras 175, 178.

[40] *Ezokola v Canada*, 2013 SCC 40 at para 9.

[41] *United Nations Declaration on the Rights of Indigenous Peoples* [*UNDRIP*], 13 September 2007,

27. Indeed, at Article 28, *UNDRIP* explicitly recognizes "the right to redress",[42] stating that:

> 1. Indigenous peoples have the right to redress, by means that can include **restitution or, when this is not possible, just, fair and equitable compensation**, for the 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.
>
> 2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

28. A one-size-fits-all approach to assessing the value of First Nation lands fails to provide redress for and modern-day protection from the dispossession of those lands. First Nations were consistently dispossessed of lands through the actions of the Crown. Appropriately compensating First Nations must not merely meet the standard of what is reasonable in a non-Indigenous context. Instead, it must uphold the Honour of the Crown, promote reconciliation, and align with all applicable constitutional and international principles. This includes the protection of minorities, substantive equality, and the norms and principles found in *UNDRIP*.

29. For the reasons set out above, AN submits that it is imperative for this Court to develop the law and the approach to compensation for First Nations that accords with the protection of minorities, the *Charter* value of substantive equality, and international principles found in *UNDRIP*. The guidance this Court gives to future decision makers (in the courts, the Specific Claims Tribunal, and Crown negotiators) must avoid perpetuating disadvantage. It must finally provide meaningful redress for breaches related to Indigenous lands.

IV. COSTS

30. The AN does not seek costs and asks that no costs be awarded against it.

GA Res. 61/295, UNGAOR, 61st Sess., Supp. No. 49 Vol. III, UN Doc. A/61/49 (endorsed by Canada 12 November 2010), arts 8, 20, 21, and 26.

[42] *UNDRIP*, *supra* note 41 at art 28 (emphasis added).

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

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Cynthia Westaway

Counsel for the Intervener, the Anishinabek Nation

VI. TABLE OF AUTHORITIES

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