

**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,
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO and
HER MAJESTY THE QUEEN IN RIGHT OF MANITOBA**

Respondents

AND:

**ASSEMBLY OF MANITOBA CHIEFS, TSESHAHT FIRST NATION, ATTORNEY
GENERAL OF SASKATCHEWAN, MANITOBA KEEWATINOWI OKIMAKANAK INC.,
TREATY LAND ENTITLEMENT COMMITTEE OF MANITOBA INC., ANISHINABEK
NATION, WAUZHUSHK ONIGUM NATION, BIG GRASSY FIRST NATION,
ONIGAMING FIRST NATION, NAOTKAMEGWANNING FIRST NATION AND
NIISAACHEWAN FIRST NATION, COALITION OF THE UNION OF BRITISH
COLUMBIA INDIAN CHIEFS, PENTICTON INDIAN BAND AND WILLIAMS LAKE
FIRST NATION, FEDERATION OF SOVEREIGN INDIGENOUS NATIONS,
ATIKAMEKSHENENG ANISHINAWBEK FIRST NATION, KWANTLEN FIRST NATION,
ASSEMBLY OF FIRST NATIONS, ASSEMBLY OF FIRST NATIONS QUEBEC-
LABRADOR, GRAND COUNCIL TRATY #3, MOHAWK COUNCIL OF KANAWA:KE,
ELSIPOGTOG FIRST NATION, CHEMAWAWIN CREE NATION, AND WEST
MOBERLY FIRST NATIONS**

Interveners

**FACTUM OF THE INTERVENER KWANTLEN FIRST NATION
(Pursuant to Rules 37 & 42 of the *Rules of the Supreme Court of Canada*)**

JFK Law Corporation
Barristers and Solicitors
340 – 1122 Mainland Street
Vancouver, BC V6B 5L1

**Tim Dickson,
Robin A. Dean
Naomi Moses**

Gowling WLG (Canada) LLP
Barristers & Solicitors
2600 - 160 Elgin Street
Ottawa, ON K1P 1C3

Guy Régimbald
Tel.: 613-786-0197
Fax: 613-563-9869

Tel: 604-687-0549
Fax: 604-687-2696

Email: tdickson@jfklaw.ca
rdean@jfklaw.ca
nmoses@jfklaw.ca

Counsel for the Intervener Kwantlen First Nation

Mandell Pinder LLP
422 1080 Mainland Street
Vancouver BC V6B 2T4

Rosanne Kyle
Elin Sigurdson
Elisa Penn
Tel: (604) 681-4146
Fax: (604) 681-0959
Email: rosanne@mandellpinder.com

Counsel for the Appellants

Attorney General of Canada
Department of Justice Canada
Civil Litigation Section
50 O'Connor Street, 5th Floor
Ottawa ON K1A 0H8

Christopher M. Rupar
Dayna Anderson
Michael Roach
Tel: (613) 967-6290
Fax: (613) 954-1920
Email: christopher.rupar@justice.gc.ca

Counsel for the Respondent, Her Majesty the Queen in Right of Canada

Ministry of the Attorney General
720 Bay Street, 8th Floor
Toronto, ON M7A 2S9

Leonard F. Marsello,
Dona Salmon
Tel: 416-326-4939
Fax: 416-326-4181
Email: leonard.marsello@ontario.ca

Email: guy.regimbald@gowlingwlg.com

Ottawa Agent to Counsel for the Intervener
Kwantlen First Nation

Supreme Advocacy LLP
100 340 Gilmour Street
Ottawa ON K2P 0R3

Marie-France Major
Tel: (613) 695-8855
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Ottawa Agent for Counsel for the Appellants

Attorney General of Canada
Department of Justice Canada
Civil Litigation Section
50 O'Connor Street, 5th Floor
Ottawa ON K1A 0H8

Robert J. Frater, Q.C.
Tel: (613) 967-6289
Fax: (613) 954-1920
Email: robert.frater@justice.gc.ca

Ottawa Agent to Counsel for the Respondent, Her Majesty the Queen in Right of Canada

Borden Ladner Gervais LLP
World Exchange Plaza
1300-100 Queen Street
Ottawa, ON K1P 1J9

Nadia Effendi
Tel: 613-787-3562
Fax: 613-230-8842
Email: neffendi@blg.com

Counsel for the Respondent,
Her Majesty the Queen in Right of Ontario

Manitoba Justice
730-405 Broadway
Winnipeg, MB
R3C 3L6

Kirsten Wright
Tel: 204- 945-2843
Fax: 204- 948-2826
Email: kirsten.wright@gov.mb.ca

Counsel for the Respondent,
Her Majesty the Queen in Right of Manitoba

Fox Fraser LLP
1800 4 Street SW #1630
Calgary, AB T2S 2S5
Tel: (403) 910-5392
Fax: (403) 407-7795
Email: cfox@foxfraserlaw.com

Counsel for the Intervener, Assembly of
Manitoba Chiefs

Devlin Gailus Watson
201 - 736 Broughton Street
Victoria, BC V8W 1E1

Christopher Devlin
Tel: (250) 361-9469
Fax: (250) 361-9429
Email: christopher@dgwlaw.ca

Counsel for the Intervener Tseshah First Nation

Attorney General of Saskatchewan
820 1874 Scarth Street
Regina SK S4P 4B3

P. Mitch McAdam, Q.C.
Macrina Badger
Tel: (306) 787-7846
Fax: (306) 787-9111

Ottawa Agent for the Respondent,
Her Majesty the Queen in Right of Ontario

Gowling WLG (Canada) LLP
2600-160 Elgin Street
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel: 613-786-8695
Fax: 613-788-3509
Email: lynne.watt@gowlingwlg.com

Ottawa Agent for the Respondent,
Her Majesty the Queen in Right of Manitoba

Champ and Associates
43 Florence Street
Ottawa, ON K2P 0W6
Tel: (613) 237-4740
Fax: (613) 232-2680
Email: broy@champlaw.ca
Ottawa Agent to Counsel for the Intervener,
Assembly of Manitoba Chiefs

Supreme Advocacy LLP
100 - 340 Gilmour Street
Ottawa, ON K2P 0R3

Eugene Meehan, Q.C.
Tel: (613) 695-8855 Ext: 101
Fax: (613) 695-8580
Email: emeehan@supremeadvocacy.ca

Ottawa Agent to Counsel for the Intervener
Tseshah First Nation

Gowling WLG (Canada) LLP
2600-160 Elgin Street
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel: 613-786-8695
Fax: 613-788-3509
Email: lynne.watt@gowlingwlg.com

Email: mitch.mcadam@gov.sk.ca
macrina.badger@gov.sk.ca

Counsel for the Intervener, Attorney General
of Saskatchewan

Olthuis, Kleer, Townshend LLP
250 University Ave. 8th floor
Toronto, ON M5H 3E5

Kate Kempton
Kevin Hille
Telephone: (416) 981-9374
FAX: (416) 981-9350
Email: kkempton@oktlaw.com

Counsel for the Intervener, Manitoba
Keewatinowi Okimakanak Inc.

Duboff Edwards Haight & Schachter
1900 - 155 Carlton Street
Winnipeg, MB R3C 3H8

Harley I. Schachter
Tel: (204) 942-3361
Fax: (204) 942-3362
Email: schachter@dehslaw.com

Counsel for the Intervener, Treaty Land
Entitlement Committee of Manitoba Inc.

Westaway Law Group
55 Murray Street, Suite 230
Ottawa, ON K1N 5M3

Cynthia Westaway
Geneviève Westaway
K.R. Virginia Lomax
Tel: (613) 722-6339
Fax: (613) 722-9097
Email: cynthia@westawaylaw.ca

Counsel for the Intervener Anishinabek Nation

Ottawa Agent to Counsel for the Intervener,
Attorney General of Saskatchewan

Supreme Advocacy LLP
100- 340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major
Tel.: (613) 695-8855 Ext: 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Ottawa Agent to Counsel for the Intervener,
Manitoba Keewatinowi Okimakanak Inc.

Westaway Law Group
55 Murray Street, Suite 230
Ottawa, ON K1N 5M3

Geneviève Boulay
Tel: (613) 702-3042
Fax: (613) 722-9097
Email: genevieve@westawaylaw.ca

Ottawa Agent to Counsel for the Intervener,
Treaty Land Entitlement Committee of Manitoba
Inc.

Westaway Law Group
55 Murray Street, Suite 230
Ottawa, ON K1N 5M3

Esther De Vos
Tel: (613) 702-3042
Fax: (613) 722-9097
Email: genevieve@westawaylaw.ca

Ottawa Agent to Counsel for the Intervener,
Anishinabek Nation

David Garth Leitch Professional Corp.
23 Edith Drive
Toronto, ON M4R 1Y9

David G. Leitch
Tel: (416) 573-8947
Email: dgl@dgleitch.ca

Counsel for the Intervener, Wauzhushk Onigum Nation

Woodward & Company
1022 Government St., Suite 200
Victoria, BC V8W 1X7

Eamon P. Murphy
Tel: (250) 383-2356
Fax: (250) 380-6560
Email: eamon@woodwardandcompany.com

Counsel for the Intervener, Big Grassy Frist Nation et al.

Mandell Pinder LLP
422 1080 Mainland Street
Vancouver, BC V6B 2T4

Brenda Gaertner
Peter Millerd
Erica Stahl
Tel: (604) 681-4146
Fax: (604) 681-0959
Email: brenda@mandellpinder.com

Counsel for the Intervener, Coalition of Union of British Columbia Indian Chiefs et al.

Maurice Law
300, 602 - 12th Avenue S.W.
Calgary, AB T2R 1J3

Ronald S. Maurice
Steven W. Carey
Tel: (403) 266-1201
Fax: (403) 266-2701
Email: rmaurice@mauricelaw.com

Nelligan O'Brien Payne LLP
50 O'Connor Street, Suite 300
Ottawa, ON K1P 6L2
Christopher Roothan
Tel: (613) 231-8311
Fax: (613) 788-3667
Email: christopher.rootham@nelliganlaw.ca

Ottawa Agent to Counsel for the Intervener, Wauzhushk Onigum Nation

Michael Sobkin
331 Somerset Street West
Ottawa, ON K2P 0J8

Tel: (613) 282-1712
Fax: (613) 288-2896
Email: msobkin@sympatico.ca

Ottawa Agent to Counsel for the Intervener, Big Grassy Frist Nation et al.

Supreme Advocacy LLP
100- 340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major
Tel: (613) 695-8855 Ext: 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Ottawa Agent to Counsel for the Intervener, Coalition of Union of British Columbia Indian Chiefs et al.

Supreme Advocacy LLP
100- 340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major
Tel: (613) 695-8855 Ext: 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Counsel for the Intervener, Federation of
Sovereign Indigenous Nations

Maurice Law

300, 602 - 12th Avenue S.W.
Calgary, AB T2R 1J3

Ronald S. Maurice

Steven W. Carey

Tel: (403) 266-1201

Fax: (403) 266-2701

Email: rmaurice@mauricelaw.com

Counsel for the Intervener, Atikameksheng
Anishnawbek First Nation

Assembly of First Nations

55 Metcalfe Street, Suite 1600
Ottawa, ON K1P 6L5

Stuart Wuttke

Tel: (613) 241-6789 Ext: 228

Fax: (613) 241-5808

Email: swuttke@afn.ca

Counsel for the Intervener, Assembly of First
Nations

Dionne Schulze senc

507, Place d'Armes
Bureau 502
Montréal, QC H2Y 2W8

David Schulze

Tel: (514) 842-0748

Fax: (514) 842-9983

Email: dschulze@dionneschulze.ca

Counsel for the Intervener, Assembly of First
Nations Quebec-Labrador

First Peoples Law

55 East Cordova Street, Suite 502
Vancouver, BC V6A 0A5

Ottawa Agent to Counsel for the Intervener,
Federation of Sovereign Indigenous Nations

Supreme Advocacy LLP

100- 340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major

Tel: (613) 695-8855 Ext: 102

Fax: (613) 695-8580

Email: mfmajor@supremeadvocacy.ca

Ottawa Agent to Counsel for the Intervener,
Atikameksheng Anishnawbek First Nation

Supreme Law Group

900 - 275 Slater Street
Ottawa, ON K1P 5H9

Moira Dillon

Tel: (613) 691-1224

Fax: (613) 691-1338

Email: mdillon@supremelawgroup.ca

Ottawa Agent to Counsel for the Intervener,
Assembly of First Nations

Conway Baxter Wilson LLP

400 - 411 Roosevelt Avenue
Ottawa, ON K2A 3X9

David P. Taylor

Tel: (613) 691-0368

Fax: (613) 688-0271

Email: dtaylor@conway.pro

Ottawa Agent to Counsel for the Intervener,
Assembly of First Nations Quebec-Labrador

Goldblatt Partners LLP

500-30 Metcalfe St.
Ottawa, ON K1P 5L4

Bruce McIvor

Tel: (604) 685-4240

Fax: (604) 283-9349

Email: bmciwor@firstpeopleslaw.com

Counsel for the Intervener, Grand Council
Treaty #3

Mohawk Council of Kahnawà:ke

P.O. Box 720

Mohawk Territory of Kahnawà:ke,

QC J0L 1B0

Francis Walsh

Stacey Douglas

Tel: (450) 632-7500

Fax: (450) 638-3663

Email: francis.walsh@mck.ca

Counsel for the Intervener, Mohawk Council of
Kahnawà:ke

Semaganis Worme

300 - 203 Packham Avenue

Saskatoon, SK S7N 4K5

Donald E. Worme, Q.C.

Alisa R. Lombard

Aubrey D. Charette

Mark Ebert

Tel: (306) 664-7175

Fax: (306) 664-7176

Email: dworme@swllegal.ca

Counsel for the Intervener, Elsipogtog First
Nation

Arvay Finlay LLP

816 - 1175 Douglas Street

Victoria, BC V8W 2E1

Catherine J. Boies Parker

Mark Underhill

John Trueman

Tel: (250) 380-2788 Ext: 5

Colleen Bauman

Tel: (613) 482-2463

Fax: (613) 235-3041

Email: cbauman@goldblattpartners.com

Ottawa Agent to Counsel for the Intervener, Grand
Council Treaty #3

Power Law

130 Albert Street, Suite 1103

Ottawa, ON K1P 5G4

Maxine Vincelette

Tel: (613) 702-5560

Fax: (613) 702-5560

Email: mvincelette@powerlaw.ca

Ottawa Agent to Counsel for the Intervener,
Mohawk Council of Kahnawà:ke

Gowling WLG (Canada) LLP

160 Elgin Street, Suite 2600

Ottawa, ON K1P 1C3

Jeffrey W. Beedell

Tel: (613) 786-0171

Fax: (613) 788-3587

Email: jeff.beedell@gowlingwlg.com

Fax: (888) 575-3281

Email: cboiesparker@arvayfinlay.ca

Counsel for the Intervener, Chemawawin Cree
Nation

Camp Fiorante Matthews Mogerma

400-856 Homer Street

Vancouver, BC V6B 2W5

Reidar M. Mogerma, Q.C.

Naomi Kovak

Chya Mogerma

Tel: (604) 689-7555

FAX: (604) 689-7554

Email: rmogerma@cfmlawyers.ca

Counsel for the Intervener, West Moberly First
Nations

Ottawa Agent to Counsel for the Intervener,
Chemawawin Cree Nation

Michael Sobkin

331 Somerset Street West

Ottawa, ON K2P 0J8

Tel: (613) 282-1712

Fax: (613) 288-2896

Email: msobkin@sympatico.ca

Ottawa Agent to Counsel for the Intervener, West
Moberly First Nations

Table of Contents

PARTS I AND II: OVERVIEW AND POSITION ON THE QUESTIONS IN ISSUE	1
PART III: STATEMENT OF ARGUMENT	1
A. General Remedies for Breach of Fiduciary Duty	1
B. The Crown’s Breach of Fiduciary Duty to Indigenous Peoples	3
(1) The Crown’s fiduciary duty to Indigenous peoples is a relationship of overarching importance that transcends common law categories	5
(2) Compensation: the value for the Indigenous group of what was lost	6
(3) Deterrence: the need to enforce compliance	7
(4) Gain-based remedies must be available in appropriate circumstances	9
(5) Punitive damages	10
PART IV: ORDERS SOUGHT	10
PART VII: TABLE OF AUTHORITIES	12

PARTS I AND II: OVERVIEW AND POSITION ON THE QUESTIONS IN ISSUE

1. This case affords this Court the opportunity to provide guidance on the proper approach to remedies for the Crown's breach of its fiduciary duty to Indigenous peoples, particularly with respect to equitable compensation. Kwantlen First Nation ("Kwantlen") intervenes to assist the Court by identifying specific considerations in that regard.

2. Among other considerations, this Court should affirm the importance of ensuring that the Crown is deterred from breaching its fiduciary duty to Indigenous peoples. By asserting sovereignty over the lands now called Canada, and through a range of more specific actions since, the Crown has in myriad ways assumed control over specific Indigenous interests, including not only reserve lands but also Aboriginal title lands and other tangible interests. That control is subject to the honour of the Crown and the fiduciary duty that arises from it in particular circumstances, which aim to advance the reconciliation of Indigenous peoples' rights and interests with the Crown's assumption of sovereignty. The Crown's fiduciary duty is an indispensable element of that reconciliation process. It is essential that Indigenous peoples – as well as non-Indigenous Canadians – are able to trust it will be upheld.

3. Kwantlen agrees with the appellants that the courts below erred in their approach to equitable compensation, but Kwantlen focuses its submissions on the analytical approach to remedying the Crown's breach of its fiduciary duties to Indigenous peoples more generally without reference to the specific facts of this case.

PART III: STATEMENT OF ARGUMENT

A. General Remedies for Breach of Fiduciary Duty

4. The usual remedies for breach of fiduciary duty are well-established.

5. Gain-based remedies – including disgorgement, constructive trust and account of profits – are available where the fiduciary has earned a profit through breach of their duty of loyalty to

the beneficiary.¹

6. Equitable compensation is available when disgorgement, constructive trust or account of profits are inappropriate.² It can be used to restore to the beneficiary what was wrongfully taken by the fiduciary.³ And it can be awarded to compensate the beneficiary for the particular loss it has suffered by way of the breach, regardless of whether the fiduciary received a corresponding gain.⁴ The remedy can be ordered in a wide range of fiduciary scenarios, including the failure to perform the beneficiary's instructions,⁵ physical and emotional abuse,⁶ breach of the duty of loyalty,⁷ non-disclosure of information,⁸ and misstatement.⁹

7. Punitive damages may accompany equitable compensation to provide added deterrence.¹⁰

8. Two main policy objectives underpin these remedies: (1) compensation of losses suffered by the beneficiary and (2) deterrence of wrongful behaviour by the specific fiduciary and similarly-positioned fiduciaries. With respect to compensation, the beneficiary is entitled to be put "in as good a position pecuniarily as ... before the injury".¹¹ In addition to compensation, "the law of fiduciary duties has always contained within it an element of deterrence."¹² The goals of equity are "not only to compensate the plaintiff but to deter fiduciaries from abusing their powers."¹³ Through the deterrent effect of remedial orders "the law is able to monitor a given relationship society views as societally useful while avoiding the necessity of formal regulation

¹ *Strother v 3464920 Canada Inc*, [2007 SCC 24](#) [*Strother*] at paras 75-77, Binnie J. and at para 151, McLachlin CJ.; McCamus, John D., "[Prometheus Unbound: Fiduciary Obligation in the Supreme Court of Canada](#)" *Canadian Business Law Journal* 28.1 (1997): 104-440 at 109, 128.

² *Canson Enterprises Ltd. v Boughton & Co.*, [\[1991\] 3 SCR 534](#) [*Canson*] at 556, McLachlin J.

³ *Ibid* at 547, McLachlin J.

⁴ *Hodgkinson v Simms*, [\[1994\] 3 SCR 377](#) [*Hodgkinson*] at 440, La Forest J.

⁵ *Guerin v The Queen*, [\[1984\] 2 SCR 335](#) [*Guerin*].

⁶ *Frame v Smith*, [\[1987\] 2 SCR 99](#); *Norberg v Wynrib*, [\[1992\] 2 SCR 226](#).

⁷ *Hodgkinson*.

⁸ *Canson*.

⁹ *Nocton v Lord Ashburton*, [1914] AC 932 (HL) [*Nocton*]. (See Appellants' BOA).

¹⁰ *M.(K.) v M.(H.)*, [\[1992\] 3 SCR 6](#) at 82 and *Mustaji v Tjin* (1996), [25 BCLR \(3d\) 220 \(CA\)](#) at paras 36-37.

¹¹ *Nocton* at 952, Viscount Haldane; *Hodgkinson* at 440, La Forest J. (See Appellants' BOA).

¹² *Hodgkinson* at 453, La Forest J.; *Canson* at 547, McLachlin J.

¹³ *Canson* at 547, McLachlin J.; See also *Whitefish Lake Band of Indians v Canada (Attorney General)*, [2007 ONCA 744](#) [*Whitefish*] at para 57.

that may tend to hamper its social utility.”¹⁴

9. Given that in the case of breach of fiduciary duty “equity is concerned, not only to compensate the plaintiff, but to enforce the trust which is at its heart”,¹⁵ the appropriate remedy for the breach must achieve *both* of the objectives of compensation and deterrence. Remedies for breach of fiduciary duty are flexible, and how the two policy objectives should be met in a given case will depend upon the specific facts.¹⁶ For instance, where the fiduciary has wrongfully made a gain that is greater than the loss incurred by the beneficiary, then a gain-based remedy such as disgorgement or account of profits may appropriately achieve both compensation and deterrence.¹⁷ Where, on the other hand, the fiduciary has made no gain or the gain is less than the actual monetary loss suffered by the beneficiary, then equitable compensation may be the appropriate remedy,¹⁸ possibly with the addition of punitive damages.

10. Again, equitable remedies are flexible and should be tailored to the factual context.

B. The Crown’s Breach of Fiduciary Duty to Indigenous Peoples

11. In this case, the factual context involves the Crown’s fiduciary duty to an Indigenous people in respect of its reserve land, and the breach of that duty by interference with the use and enjoyment of that land. As discussed further below, the taking of or interference with reserve land is a scenario that gives rise to breach of the fiduciary duty with disturbing frequency.

12. But the Crown may also breach its fiduciary duty in respect of other Indigenous interests in land, including Aboriginal title. For it not to constitute a breach of s. 35, the Crown’s interference with Aboriginal title land by the Crown must be justified. As part of the justification test, the Crown must demonstrate that its actions are consistent with the fiduciary duty it owes to the Indigenous nation, which requires that the Crown has respected the fact that Aboriginal title is a collective interest inhering in present and future generations of the Indigenous group and that

¹⁴ *Hodgkinson* at 453, La Forest J.; *Lac Minerals Ltd v International Corona Resources Ltd*, [1989] 2 SCR 574 [*Lac Minerals*] at 672, La Forest J.

¹⁵ *Canson* at 543, McLachlin J.

¹⁶ *Whitefish* at para 51.

¹⁷ Berryman, J. “[Equitable Compensation for Breach by Fact-Based Fiduciaries: Tentative Thoughts on Clarifying Remedial Goals](#)” Alb. L.R. 37(1) 95-113 [Berryman], at 98.

¹⁸ *Ibid* at 99.

its actions are proportionate in the circumstances (ie rationally connected, minimally impairing and proportionate in impact).¹⁹

13. There are, of course, important differences between Aboriginal title and reserve land. Perhaps most importantly for this case, Aboriginal title is constitutionally protected. The Crown does not have a statutory right to expropriate it, and consequently the Crown would need to justify any taking of it. But this Court has also found that, aside from those and some other differences, the two interests in land are “fundamentally similar”.²⁰ As the Court observed in *Osoyoos*, “both interests are inalienable except to the Crown, both are rights of use and occupation, and both are held communally.”²¹

14. In deciding the case at bar, it is important for at least two reasons that this Court keep Aboriginal title in mind. First, as the Court noted in *Osoyoos*, “when describing the features of the aboriginal interest in reserve land it is useful to refer to this Court’s recent jurisprudence on the nature of aboriginal title”,²² because of the similarities between the two interests. In *Delgamuukw* and *Tsilhqot’in* in particular this Court has articulated a rich conception of the nature of Aboriginal title and the Crown’s fiduciary duty in respect of it. While being sensitive to the differences between the two interests, this Court should draw on that understanding of Aboriginal title to inform the nature of the Crown’s fiduciary duty in respect of reserve land, and the loss to Indigenous people when such land is taken.

15. Second, this Court should be mindful that there will arise cases involving unjustified breach of Aboriginal title for which remedies will need to be found. A number of Aboriginal title cases are currently in process in British Columbia, and more of course can be expected to be litigated in the future. Still other claims to Aboriginal title are being negotiated through the BC Treaty Process or other processes. In all of these settings more guidance on remedies is needed

¹⁹ *Tsilhqot’in Nation v British Columbia*, [2014 SCC 44](#) [*Tsilhqot’in*] at paras 77, 84-88.

²⁰ *Osoyoos Indian Band v Oliver (Town)*, [2001 SCC 85](#) [*Osoyoos*] at para 41, citing Dickson J. in *Guerin* at 379: “The Indian interest in the land is the same in both cases” and *Delgamuukw v British Columbia*, [\[1997\] 3 SCR 1010](#) [*Delgamuukw*] at paras 116–21.

²¹ *Osoyoos* at para 42.

²² *Ibid.* at para 41.

and this Court should be mindful that the parties and courts involved in those processes will likely look to the Court's judgment in this case in that regard.

16. With those introductory comments, we turn to identifying key aspects of the approach to remedies for breach of the Crown's fiduciary duty in respect of Indigenous peoples.

(1) The Crown's fiduciary duty to Indigenous peoples is a relationship of overarching importance that transcends common law categories

17. While remedies for the Crown's breach of fiduciary duty to Indigenous peoples need to respond to particular factual contexts, among the elements that are always constant are the nature and importance of that fiduciary relationship. The fiduciary duty arises from the honour of the Crown where the Crown has assumed discretionary control over specific Aboriginal interests.²³ The honour of the Crown in turn derives from the Crown's assertion of sovereignty in the face of prior occupation.²⁴ The Crown's fiduciary duty is "of overarching importance in this country".²⁵ It is only by enforcing that "high standard of honourable dealing" that we can "protect Aboriginal and treaty rights while also allowing the reconciliation of Aboriginal interests with those of the broader society."²⁶

18. These points about the source and importance of the fiduciary duty have at least two implications. First, it is apparent that the Crown's fiduciary duty to Indigenous peoples bears little resemblance to a duty arising from contract or tort. It ultimately arises from a unilateral assertion of sovereignty; it is grounded in the public law doctrine of the honour of the Crown; in respect of Indigenous interests in land, it is owed to Indigenous nations in respect of collective rights; and it is of "overarching importance" to the project of reconciliation in this country.

19. This point is important because of the debate in this Court's seminal judgments on equitable compensation as to whether equitable compensation should be governed more by analogy to common law principles applicable to contract and tort, as opposed to the equitable

²³ *Haida Nation v British Columbia (Minister of Forests)*, [2004 SCC 73](#) at para 18.

²⁴ *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, [\[2004\] SCC 74](#) at para 24.

²⁵ *Whitefish* at para 57.

²⁶ *R v Sparrow*, [\[1990\] 1 SCR 1075](#) at 1109; *Tsilhqot'in* at para 139.

principles on which equitable compensation has always been based. Briefly summarized, Justice La Forest tended to favour incorporating common law principles into equitable remedies.²⁷ By contrast, McLachlin J. (as she then was) viewed equitable compensation as being distinct in method of assessment and quantification. She extrapolated from trust principles, although she also sometimes drew support from the common law.²⁸ The result of this debate has implications for the role of causation and remoteness, whether contributory negligence or appointment principles are applied, the effect of limitation periods, the heads of damages recoverable, the date of damage assessment, issues of mitigation, the continued role of equitable presumptions (including the *Brickenden* rule and whether the beneficiary would have made the best use of the property), and the integration of equitable discretionary maxims.²⁹

20. This Court should resist any pull to conflate the Crown's breach of fiduciary duty to Indigenous peoples with breach of contract or tort. The fiduciary duty is highly distinct from those common law doctrines. To the extent that analogies must be drawn, they should be to equitable doctrines such as breach of trust and confidence, and not to contract or tort.³⁰

21. Second, the societal importance of the Crown's fiduciary duty to Indigenous peoples demands the law ensures it is upheld, by way of robust remedies for its breach.³¹ In short, this is a context where the law must be particularly concerned not to allow the fiduciary to abuse its powers, as discussed further below.

(2) Compensation: the value for the Indigenous group of what was lost

22. The purpose of compensation as an equitable monetary remedy is to "restore to the plaintiff what has been lost as a result of the breach."³² As in other areas of law, including proof of Aboriginal title and treaty interpretation, the Indigenous perspective must stand on an equal

²⁷ *Canson* at 585-589 and *Hodgkinson* at 444.

²⁸ See, in particular, *Canson* at 543-556.

²⁹ Berryman, at 97-98.

³⁰ In addition to McLachlin J.'s judgment in *Canson*, see the judgments of Dickson J. (as he then was) and Wilson J. in *Guerin* at 390 and 360-63.

³¹ *Hodgkinson* at 453, La Forest J.

³² *Canson* at 556, McLachlin J.

footing to the common law approach.³³

23. For Indigenous nations whose lands have been unlawfully taken or used, the fair market value of the land will almost never adequately compensate them for what they have lost. While Aboriginal title land has “an inescapably economic aspect”, it also has “an inherent and unique value in itself, which is enjoyed by the community” that holds the title.³⁴ The same can be said of reserve land, which is “fundamentally similar” to Aboriginal title land.³⁵ In each case, the Aboriginal “interest in land is more than just a fungible commodity”.³⁶ Rather, the land over which an Indigenous nation holds Aboriginal title or which comprises a reserve is a *homeland* and a necessary foundation for the nation’s cultural continuity and flourishing. What was taken from the Indigenous group cannot be restored merely by furnishing sufficient money to buy replacement lands. Additional compensation is required to reflect the magnitude of the loss.

(3) Deterrence: the need to enforce compliance

24. As noted above, given its “overarching importance” in our society, the Crown’s fiduciary duty to Indigenous peoples necessitates strong remedies to deter future breaches. The degree to which deterrence is required will be shaped in part by the facts of the given case. But in many cases of the Crown’s breach of fiduciary duty to Indigenous peoples, the remedy will need to be augmented beyond what the compensation objective might otherwise require. For at least three reasons, simply compensating what the Indigenous nation lost will, in many cases, be insufficient to safeguard the integrity of the relationship.

25. First, there are simply too many scenarios in which the Crown owes a fiduciary duty to expect that Indigenous nations will take on the immense burden of seeking just compensation in every case where the duty is breached. By virtue of assuming ownership of and sovereignty over

³³ *Delgamuukw* at para 149; *Tsilhqot’in* at para 14; *R v Badger*, [1996] 1 SCR 771 at para 52; *Spookw v Gitksan Treaty Society*, 2017 BCCA 16 at para 52; see e.g. *Restoule v Canada (Attorney General)*, 2018 ONSC 7701 at paras 13, 14, 64.

³⁴ *Delgamuukw* at paras 129, 169; see also *Tsilhqot’in* at paras 67, 70, 121.

³⁵ *Osoyoos* at para 41, citing Dickson J. in *Guerin* at 379, Dickson J.: “The Indian interest in the land is the same in both cases” and *Delgamuukw* at paras 116–21.

³⁶ *Osoyoos* at para 46; see also *Delgamuukw* at para 129.

the land, pledging its honour in fulfilment of the Treaties, and arrogating oversight of Indian bands through the *Indian Act*, the Crown bears fiduciary duties to Indigenous peoples in myriad contexts: from dealing with reserve lands, to implementing Treaty promises, regulating Aboriginal rights to fish and hunt, and approving development on lands subject to claims of Aboriginal title. At the same time, the vast majority of Indigenous nations are economically marginalized. Generally their financial means to fund litigation are highly constrained, and advance costs have been said to be exceptional.³⁷

26. Second, breach of the fiduciary duty erodes faith in the honour of the Crown, and thereby the project of reconciliation that is its ultimate purpose. The reconciliation project requires that Indigenous people have confidence that the Crown will carry out its promises and its duties, that it will zealously serve their interests when a fiduciary duty arises, and that it will otherwise deal with them honourably. So too do non-Indigenous Canadians need to be able to have confidence that their governments are acting honourably and fairly in respect of Indigenous peoples. When the Crown breaches its fiduciary responsibilities there is much cost to the broader reconciliation project that lies beyond the immediate loss to the Indigenous group.

27. Third, there is a particularly grave need to deter the misappropriation of Indigenous lands. As a result of colonialism, non-Indigenous settlement and the federal government's mismanagement, south of the sixtieth parallel, the lands acknowledged to be Indigenous make up less than one-half of one percent of the Canadian land mass.³⁸ As observed by the Royal Commission on Aboriginal Peoples:

In addition to the devastating impact of settlement and development on traditional land-use areas, the actual reserve or community land base of Aboriginal people has shrunk by almost two-thirds since Confederation, and on-reserve resources have largely vanished. The history of these losses includes the abject failure of the Indian affairs department's stewardship of reserves and

³⁷ *British Columbia (Minister of Forests) v Okanagan Indian Band*, [2003 SCC 71](#) at para 32.

³⁸ Report of the Royal Commission on Aboriginal Peoples, Vol 2: [Restructuring the Relationship](#), at 416, citing DIAND, Schedules of Indian Bands, Reserves and Settlements Including Membership and Population Location and Area in Hectares (Ottawa: Government Services Canada, 1992).

other Aboriginal assets. As a result, Aboriginal people have been impoverished, deprived of the tools necessary for self-sufficiency and self-reliance.³⁹

28. This stripping away of the Indigenous land base is one of the most brutal impacts of colonialism, as “land is absolutely fundamental to Aboriginal identity.”⁴⁰ The governments must be firmly deterred from further encroaching on Indigenous lands in breach of their fiduciary duty. Merely compensating the Indigenous nation for the market value of land will not deter governments from allowing for the appropriation of those lands for use in natural resource projects, as the profits to be made through such projects will often dwarf the potential compensation owed. Unlike with contractual duties, the law must seek to deter “efficient breaches” of fiduciary duties.⁴¹ Moreover, tying the quantum of equitable compensation to what ought to have been paid at the time of the breach would not achieve deterrence because it would allow the Crown to refrain from paying when it should have, and to pay only if and when a nation wins a daunting lawsuit against it.⁴²

29. Where a monetary award corresponding to the Indigenous nation’s loss would not constitute adequate deterrence, then the courts must increase that award to achieve deterrence, possibly through use of the following kinds of remedy.

(4) Gain-based remedies must be available in appropriate circumstances

30. Where the fiduciary has gained through their breach of fiduciary duty, equity’s usual approach is to strip that gain from the fiduciary and restore it to the beneficiary, by way of constructive trust, account of profits, or potentially equitable compensation.⁴³ The objective can either be restitutionary or prophylactic, the latter being to “teach faithless fiduciaries that conflicts of interest do not pay”.⁴⁴ Disgorgement of gains can be ordered even where the

³⁹ *Ibid* at 418. See also 452, 461, 462.

⁴⁰ *Ibid* at 417.

⁴¹ *Atlantic Lottery Corp. Inc. v Babstock*, [2020 SCC 19](#) [*Atlantic Lottery*] at para 56.

⁴² *Hodgkinson* at 453-54, La Forest J.

⁴³ *Berryman*, at 98.

⁴⁴ *Strother* at para 77.

beneficiary has suffered no loss and the remedy would constitute a large windfall to them.⁴⁵

31. There is no reason the same approach should not be taken where the Crown misappropriates Indigenous lands and gains as a result.

(5) Punitive damages

32. Last, where the Crown has not gained economically by its breach of fiduciary duty, such that disgorgement remedies are inappropriate, punitive (or exemplary) damages may be awarded in addition to equitable compensation to achieve a satisfactory measure of deterrence. Courts should not take an overly restrictive view of whether punitive damages should be awarded. For one thing, breach of fiduciary duty is among the wrongs that will most commonly merit punitive damages.⁴⁶ For another, the controlling question is not whether the fiduciary's conduct was "malicious, oppressive and high-handed" but whether the equitable compensation award is sufficient to achieve the objective of deterrence and the associated objectives of punishment (retribution) and denunciation.⁴⁷ As discussed above, there is a heightened need to deter Crown breaches of its fiduciary duties to Indigenous peoples that may not be met by merely compensating for an Indigenous nation's particular loss. The trial judge failed to consider that heightened need and he erred in his analysis on punitive damages as a result.⁴⁸

PART IV: ORDERS SOUGHT

33. Kwantlen First Nation does not seek any order, and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 18TH DAY OF NOVEMBER,
2020.

⁴⁵ *Ibid.* See also *Phipps v Boardman*, [\[1966\] UKHL 2](#) (BAILII), [1967] 2 AC 46 (HL) and *Regal (Hastings) Ltd. v Gulliver*, [\[1942\] UKHL 1](#) (BAILII), [1967] 2 AC 134 (HL), and, more recently, *Atlantic Lottery* at paras 24, 32.

⁴⁶ *Whiten v. Pilot Insurance Co.*, [2002 SCC 18](#) at para 67.

⁴⁷ *Ibid* at paras 68, 74.

⁴⁸ *Southwind v Canada*, [2017 FC 906](#) at paras 513-525.



Tim Dickson
Robin A. Dean
Naomi Moses

Counsel for the Intervener, Kwantlen First Nation

PART VII: TABLE OF AUTHORITIES

<u>NAME</u>	<u>PARA NO.</u>
CASES:	
<i>Atlantic Lottery Corp. Inc. v Babstock</i> , 2020 SCC 19	28, 30
<i>British Columbia (Minister of Forests) v Okanagan Indian Band</i> , 2003 SCC 71	25
<i>Canson Enterprises Ltd. v Boughton & Co.</i> , [1991] 3 SCR 534	8, 9, 19, 20, 22
<i>Delgamuukw v British Columbia</i> , [1997] 3 SCR 1010	13, 14, 22, 23
<i>Frame v Smith</i> , [1987] 2 SCR 99	6
<i>Guerin v The Queen</i> , [1984] 2 SCR 335	6, 13, 20, 23
<i>Haida Nation v British Columbia (Minister of Forests)</i> , 2004 SCC 73	17
<i>Hodgkinson v Simms</i> , [1994] 3 SCR 377	6, 8, 19, 21, 28
<i>Lac Minerals Ltd v International Corona Resources Ltd</i> , [1989] 2 SCR 574	8
<i>M.(K.) v M.(H.)</i> , [1992] 3 SCR 6	7
<i>Mustaji v Tjin</i> (1996), 25 BCLR (3d) 220 (CA)	7
<i>Norberg v Wynrib</i> , [1992] 2 SCR 226	6
<i>Osoyoos Indian Band v Oliver (Town)</i> , 2001 SCC 85	13, 14, 23
<i>Phipps v Boardman</i> , [1966] UKHL 2 (BAILII), [1967] 2 AC 46 (HL)	30
<i>R v Badger</i> , [1996] 1 SCR 771	22
<i>R v Sparrow</i> , [1990] 1 SCR 1075	17
<i>Regal (Hastings) Ltd. v Gulliver</i> , [1942] UKHL 1 (BAILII), [1967] 2 AC 134 (HL)	30
<i>Restoule v Canada (Attorney General)</i> , 2018 ONSC 7701	22
<i>Spookw v Gitxsan Treaty Society</i> , 2017 BCCA 16	22
<i>Strother v 3464920 Canada Inc.</i> , 2007 SCC 24	5, 30
<i>Southwind v Canada</i> , 2017 FC 906	32

<u>NAME</u>	<u>PARA NO.</u>
<i>Taku River Tlingit First Nation v British Columbia (Project Assessment Director)</i> , [2004] SCC 74	17
<i>Tsilhqot'in Nation v British Columbia</i> , 2014 SCC 44	12, 14, 17, 22, 23
<i>Whitefish Lake Band of Indians v Canada (Attorney General)</i> , 2007 ONCA 744	8, 9, 17
<i>Whiten v. Pilot Insurance Co.</i> , 2002 SCC 18	32
SECONDARY SOURCES	
Berryman, J. “ Equitable Compensation for Breach by Fact-Based Fiduciaries: Tentative Thoughts on Clarifying Remedial Goals ” Alb. L.R. 37(1)	9, 19, 30
McCamus, John D., “ Prometheus Unbound: Fiduciary Obligation in the Supreme Court of Canada ” Canadian Business Law Journal 28.1 (1997): 104-440	6
Report of the Royal Commission on Aboriginal Peoples, Vol 2: Restructuring the Relationship , (Ottawa: Government Services Canada, 1992)	27, 28