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 FACTS

1. These interveners are First Nations with reserve lands on Lake of the Woods and the Winnipeg River, southwest of Lac Seul. They are currently in negotiations with the Crown regarding flooding caused by power dams.

2. It was erroneous for the Federal Court (the "Court") to assess compensation on the basis that Canada had a duty to expropriate Lac Seul First Nation ("LSFN") land. The Court identified the duties that Canada owed to LSFN when flooding its land, but without evidence intermixed a different matter entirely, the Crown's expropriation power, and more particularly the approaches to compensation set out in expropriation statutes.

3. Statutory expropriation is marked by unilateral action and formulaic valuations. Use of this body of law in a fiduciary breach case where First Nation land was taken and equitable compensation is called for was a palpable and overriding error.

4. If the case is remitted for further consideration it should be on terms that allow for participation by affected parties like these interveners and for consideration of alternative approaches to the assessment of equitable compensation.

PART II: ISSUES

5. The question before this Court is how principles of equitable compensation, together with legal principles applicable to the Crown-Indigenous relationship, should be applied to compensate LSFN. The position of these Interveners is that approaches involving hypothetical expropriations or negotiations in the past must be inadmissible.

PART III: ARGUMENT

Canada's power to expropriate was intermixed with Canada's duties to LSFN

6. The Court found that the flooding would have gone ahead no matter what[1] and therefore commenced an analysis of what were Canada's duties to LSFN, and what options were available:

> Before considering what Canada's specific legal duties to the LSFN were in 1929, and whether any were breached, it is essential in my view, that we first determine what options were available in 1929 to the taking of the Reserve land through flooding.[2]

7. Examination of Canada's options brought the Court to statutory expropriation law:

> The next question is this: What legal duties of the Crown to the LSFN should it have fulfilled when the Lac Seul Storage Project was to be undertaken? As discussed in detail below, Canada had the legal right to appropriate the land required either with the consent of the LSFN or without it. If one presumes that it would have acted legally, it would have done one or the other.[3] (emphasis added)

8. Here the Court intermixes legal duties to LSFN with the power of the government to expropriate interests in land. The existence of a legal right to expropriate does not carry with it any implication about whether the government must exercise that right. Further, an expropriation of a partial interest does not eliminate the right, it is carried out for the purpose of transferring the right. In this case a flowage easement would benefit the power dam property as dominant tenement, but there was no evidence of a request for expropriation from Ontario, the dam owner.[4] How can it be that Canada would not have "acted legally" unless it expropriated?

9. The Court summarized the duties that Canada owed to LSFN:

> The legal duties of the Crown vis-à-vis the LSFN in 1929 were governed by the provisions of Treaty 3, the Indian Act, RS 1927, c 84, and those otherwise imposed, as discussed above. In summary, Canada's duties were: (1) to act with loyalty and good faith to the LSFN in discharging its mandate; (2) to provide full disclosure and consult with the LSFN; (3) to act with ordinary prudence with a

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[1] *Southwind v Canada*, 2017 FC 906 at paras 292-293 ("Trial Decision") (Record of the Appellants ("AR"), Vol I, Tab 1 at pp. 104-105).
[2] Trial Decision at para 286 (AR, Vol I, Tab 1 at pp. 102-103).
[3] Trial Decision at para 295 (AR, Vol I, Tab 1 at p. 105).
[4] Trial Decision at paras 129-133 and 146 (AR, Vol I, Tab 1 at pp. 42-43 and 47).

> view to the best interest of the LSFN; and (4) to protect and preserve the band's proprietary interest in the Reserve from exploitation.[5]

10. The four enumerated duties above are from leading decisions of this Court,[6] but "the provisions of Treaty 3", and "the *Indian Act*, RS 1927, c 84" that the court superimposed upon them, are not expressive of "legal duties of the Crown." These instruments contain law that may be relevant, but they do not by themselves require that Canada expropriate First Nation land.

11. Having set out Canada's duties to LSFN, but intermixing them with the expropriation power, the Court continued with its analysis, finding that Canada had breached all of its duties, and then observed that this was "inexplicable":

> I find that Canada breached each of these duties. The way in which Canada conducted itself vis-à-vis the LSFN is inexplicable; it was contrary to the manner in which Canada dealt with other bands in similar circumstances. Particularly difficult to comprehend is why Canada took none of <u>the legal steps required</u> under the Indian Act to obtain either a surrender of the affected Reserve land from the LSFN or to expropriate it if consent from the band could not be obtained.[7] (emphasis added)

12. Here the Court again characterizes Canada's powers under the 1927 *Indian Act*[8] to expropriate reserve land as one of the "legal steps required", clearly an error. Expropriation was a legal step that was available, it was not a requirement.

<u>Complete Absence of Evidence about Expropriation</u>

13. One reason for Canada's breaches of duty to LSFN being "inexplicable" was that the Court had little evidence which could help explain Canada's conduct. The reference in the excerpt above to "the manner in which Canada dealt with other bands in similar circumstances*"* was limited to evidence from: the Stoney Indian reserves in Alberta in 1911- 1915,[9] and a memorandum written by a Canada official in 1919.[10]

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[5] Trial Decision at para 296 (AR, Vol I, Tab 1 at p. 105).
[6] Trial Decision at paras 221-226 (AR, Vol I, Tab 1 at pp. 81-83).
[7] Trial Decision at paras 297-298 (AR, Vol I, Tab 1 at p. 106).
[8] *Indian Act*, RSC 1927, c 98 ("1927 *Indian Act*").
[9] Trial Decision at paras 334-346 (AR, Vol I, Tab 1 at pp. 118-122).
[10] Trial Decision at para 132 (AR, Vol I, Tab 1 at pp. 42-43).

14. The Court observed that "the historical record reveals that the 'usual arrangement' was to obtain a flowage easement to permit flooding the land needed to permit the creation of a water reservoir in perpetuity".[11] The "usual arrangement" was set out in the 1919 memorandum referred to above, but this memorandum says nothing about expropriation.

15. The Court and the parties must be taken to have been aware that the flooding of Lac Seul in 1929 was only one part of a regime of flooding by power dams throughout the immense Winnipeg River watershed in Northwestern Ontario.[12] A mere glance at maps shows that there are dozens of Indian reserves in this watershed that would have been flooded. These interveners alone have 14 reserves on Lake of the Woods and the Winnipeg River. What the Court called "inexplicable" conduct of Canada could well have become explicable if there was evidence of what Canada actually did regarding the many other Indian reserves that were flooded under this regime.[13]

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[11] Trial Decision at para 352 (AR, Vol I, Tab 1 at p. 124).

[12] The large regime of flooding was carried out pursuant to an international treaty (*Convention and Protocol for Regulating the Level of Lake of the Woods*) and interconnected Canada and Ontario statutes, two of which are cited in the Trial Decision: the *Lac Seul Conservation Act, 1928*, 18-19 Geo V, c 32 at para 148, and *The Lake of the Woods Regulation Act, 1921*, 11-12 George V, c 38 (Canada at para 327 (AR, Vol I, Tab 1 at pp. 50 and 115-116). These massive government projects were not just in the statute law governing the Crown agencies involved at Lac Seul, but they were also in case law reports from the highest courts. The flooding on Lake of the Woods went to the Judicial Committee of the Privy Council as did the flooding on Rainy Lake. In the latter case the Committee reported that "… in [the] several years after the erection of the appellants' dam the Indian Reserves bordering on Rainy Lake and on the Rainy River … were injured by floods which were wholly or partly attributable to the action of the dam," (*Ontario & Minnesota Power Co Ltd v R*, [1925] 2 DLR 37, 1924 CarswellNat 68 (JCPC) at p. 3).

[13] The Court did not have such evidence partly because when a motion was brought near the start of the trial for production of materials about "the standards and practices of the day", the Court did not order its production. See Trial Transcript, Vol 3, pp. 2-30.

16. The Court did have evidence about how other land interests on Lac Seul were dealt with, such as the Hudson's Bay Co.[14] and the Church Missionary Society.[15] As with LSFN, there was no evidence that expropriation was even considered for these interests.

17. In the case of LSFN's land interests there is no evidence that Crown government officials ever so much as turned their minds to expropriation. What the evidence does show is that having no good options open to them, and being deeply conflicted, they made attempts to secure mitigation and compensation, however poor, but took no steps to divest LSFN of its legal right to the land.

The Trial Court's Core Error

18. Having found Canada's conduct inexplicable, but without evidence about what was done in a broader context of similar floodings, the Court focused on Canada's expropriation power, positing a theoretical expropriation that used valuation approaches from statutory expropriation law:

> The duty to act as a prudent person and the duty to protect and preserve the band's interest in the Reserve's foreshore, both require, at a minimum that the Crown take some positive and specific action. The action Canada should have taken once the project was a *fait accompli* was to advise the LSFN to see if a surrender of the Reserve foreshore could be agreed upon, and if not, to take the appropriate legal steps to appropriate the land, with due compensation paid to the band. These were legal requirements under the Indian Act. The act was not complied with.[16] (emphasis added)

19. This is the core error which is re-iterated again and again in the reasons at trial.[17] The Crown's undoubted duties to protect and preserve the LSFN's interests are conflated with a

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[14] Trial Decision at paras 150, 213, 312, and 369 (AR, Vol I, Tab 1 at pp. 50, 75, 110, and 130).
[15] Trial Decision at paras 150, 154, 213, and 312 (AR, Vol I, Tab 1 at pp. 50, 52, 75, and 110).
[16] Trial Decision at para 321-322 (AR, Vol I, Tab 1 at p. 113).
[17] This error of characterizing Canada's power to expropriate as among its duties to LSFN and stating that expropriation was legally required also appears in paragraphs 328, 329 and 358:

> [328] Canada could legally "take" the LSFN lands necessary to store the head waters behind the storage dam. It could arrange surrender on terms (with the band's consent) or it could expropriate the lands (without band's consent). Either way, Canada had a duty to act in a manner that minimally impaired the band's interests in the land."; [329] Given these duties to the LSFN, what would likely

supposed obligation to take those same interests by exercising a power to expropriate. Contrary to this and to the other statements by the Court to the same effect these were not "legal requirements". This cornerstone of the Court's analysis is incorrect as a matter of law or at least is a palpable and overriding error.[18]

20. Introduction of expropriation law into this case was a product of erroneous analysis by the Court. The existence of a discretionary power to expropriate cannot be made into a positive duty with no evidentiary grounding whatsoever. It will be a miscarriage of justice to the many First Nations with outstanding claims for loss or damage to lands if their entitlement to compensation gets mixed up with expropriation law.

There are Always Protections When the Government Takes Private Land

21. If an expropriation was actually carried out in 1929 LSFN would have at least had the protections contained in s. 48 of the 1927 *Indian Act.* The consent of the Governor General in Council was required, and terms and conditions could be imposed. LSFN was not passive, they tried multiple times to be heard, there were considerable communications between the First Nation and government officials.[19] Also Canada officials did try to impose a requirement for "fair and just compensation being made … for such damages as will be caused to the Indian reserve…" in connection with approval of the dam under the *Navigable Waters Protection Act*,

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> have occurred in 1929, vis-à-vis the Reserve land had Canada legally fulfilled its duties to the LSFN?" (emphasis added); [358] I find that what Canada would have done had it been acting legally was to either obtain a surrender of the land to be flooded for the purpose of obtaining a flowage easement, or have expropriated the land for that limited purpose."

Trial Decision at paras 328-329 and 358 (AR, Vol I, Tab 1 at pp. 116 and 126).

[18] *Houson v Nikolaisen*, 2002 SCC 33. See also *Hydro-Quebec v Matta*, 2020 SCC 37 at para 33 citing *G v Nadeau*, 2016 QCCA 167 at para 77, where the court states "a palpable and overriding error is in the nature not of a needle in a haystack, but of a beam in the eye."

[19] Trial Decision at paras 136, 183, 188, 191, 209, 214-215, 304-317 (AR, Vol I, Tab 1 at pp. 44. 62, 64-65, 72-73, 75 and 107-112).

RSC 1927, c 140, which approval was never given.[20] Reasonably, the federal cabinet would have been on notice that there were First Nation interests to protect.

22. The Court proceeded on the basis that compensation for loss of land must equal its market value as defined in expropriation statutes, but statutory expropriation law evolved as a process accompanied by an array of protections, including notice, disclosure, and right to counsel, intended to ameliorate potentially draconian impacts on the landowner.[21]

23. In *Calgary (City) v Costello*,[22] this Court affirmed that:

> "…where a power is given to a … government to expropriate individual interests in land, the statutory conditions for the exercise of that power must be strictly complied with. … the line should be drawn somewhere to give the citizen any protection. … the line should be drawn where the Legislature chose to put it and not where individual judicial discretion may fix it on a case by case basis."[23]

24. If in *Costello* this Court would not permit judicial discretion to relieve against minor departures from procedural requirements in an actual expropriation, surely there can be no such thing as judicial discretion to posit an expropriation that never happened, and to use statutory expropriation valuation approaches as the basis for "equitable" compensation to the victim of the Crown's own egregious breaches of fiduciary duty. Only First Nations' land interests are protected by constitutional Crown fiduciary duties in addition to the ordinary rights enjoyed by land owners. Permitting judicial discretion to retroactively impose an imaginary expropriation undermines not just ordinary protections, but also constitutional ones.

25. Further, it is inequitable in favour of the Crown that a hypothetical historical expropriation can be imposed without LSFN having had an opportunity to avail itself of compensation approaches not captured in formulaic Crown-authored statutes. Prior to being overridden by statute, "value to owner," a flexible common law concept sensitive to the realities of the

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[20] Trial Decision at paras 161 (AR, Vol I, Tab 1 at pp. 55).
[21] Kenneth J Boyd, *Expropriation in Canada, A Practitioner's Guide*, (Aurora: Canada Law Book Inc, 1988) at p. 5 ("Boyd"); *Toronto Area Transit Operating Authority v Dell Holdings Ltd*., [1997] 1 SCR 32 at paras 20-23.
[22] *Calgary (City) v Costello*, [1983] 1 SCR 14 ("*Costello*").
[23] *Costello* at pp. 26-27.

landowner, could be used to assess compensation when government took land.[24] The land interest that LSFN lost was valued by the Court at appraised fair market value of $1.29 an acre, but the land interest in question had never been lawfully taken. There is ample Canadian authority that when a use of land has already become a reality, such as the use in this case as a reservoir for hydro power production, compensation payable to the owner may be dramatically enhanced.[25] Similarly, the principles of equivalent reinstatement arise from expropriation of lands that involve special uses with the focus on reinstating the landowner with an equivalent property suitable for the relevant "special" use.[26]

26. Simple fair market value can be a terribly misplaced measure for calculating compensation where much of the loss is essentially social and cultural. In remote areas especially, First Nations may be severely undercompensated if this standard is imposed or applied reflexively:

> Proceeding by way of comparables is a proven and reliable method for appraising the value of real estate in a city, or in other areas where the market is active and transactions are numerous. It may not be satisfactory when dealing with remote areas where few transactions take place.[27]

27. More generally, this Court has clearly stated that losses of First Nation land and associated values cannot be measured only on an economic basis.[28] There must be allowance for flexibility. For example, measuring social trauma and low quality of life caused by loss or damage to land, and the consequent severe cultural and economic disruption and deprivation, as occurred at LSFN, might be done better by reference to income and living standards data as measures of wellbeing lost, as opposed to by reference to impossibly fictitious land transactions.

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[24] Boyd at p. 5.
[25] Eric CE Todd, *The Law of Expropriation and Compensation in Canada*, 2d ed (Toronto: Carswell, 1992), pp. 146-152; *Saint John Priory of Canada Properties v. Saint John (City)*, [1972] SCR 746; *Fraser v R*, [1963] SCR 455.
[26] Sam Adkins et al, "Calculating the Incalculable: Principles of Compensating Impacts to Aboriginal Title" (2016) 54:2 Alta L Rev 351 at pp. 362-364.
[27] *Lower Kootenay Indian Band v Canada*, [1991] FCJ No. 529 at p. 44.
[28] *Osoyoos Indian Band v Oliver (Town)*, 2001 SCC 85 at para 46.

Approaches Involving Hypothetical Expropriations or Negotiations in the Past Must be Inadmissible

28. Whereas in the Trial Decision Justice Zinn hypothesized an expropriation in 1929, Justice Gleason in the Federal Court of Appeal would have returned the case to the Court for reconsideration on the "realistic contingency" of the LSFN's loss of opportunity to negotiate in 1929.[29] But a 1929 expropriation and a 1929 negotiation are both profoundly inappropriate hypotheticals. Indigenous people were "wards of the state".[30] The 1927 *Indian Act* expressly prohibited the raising of money for "the prosecution of any claim" without Canada's permission.[31] In neither an expropriation nor a negotiation would LSFN in 1929 have had sufficient agency to vindicate its interests, and the record is clear that Canada would not have helped.

Present Day Negotiations Should Not be Subverted

29. Contemporary negotiations are another matter entirely. First Nations today can and do advance their own interests without the severe legal disabilities that burdened them in the past.

30. The agency of First Nations is of particular importance in the ongoing work of reconciliation, which this Court has established is the fundamental goal with respect to Aboriginal claims.[32] Breach of fiduciary duty claims must be approached in the context of the historical relationship, the legal parameters of colonization, as well as the importance of First Nations' perspectives and unique social values.

31. The law of Crown fiduciary duty itself crystalized with the 1984 decision in *Guerin v R*,[33] and is only recently being regularly applied retrospectively. Since then, First Nations have been able to bring forward claims and negotiate for historical and ongoing losses. In particular, First Nations with reserve flooding claims can now negotiate compensation on a potentially wide range

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[29] *Southwind v Canada*, 2019 FCA 171 at paras 82-84, 94 and 97 (AR, Vol I, Tab 2 at pp. 225 and 228-230).
[30] *St. Ann's Island Shooting & Fishing Club Ltd v R*, [1950] SCR 211 at p. 219.
[31] 1927 *Indian Act* at s 141.
[32] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 1. See also *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53.
[33] *Guerin v R*, [1984] 2 SCR 335.

of bases, including the value to them of the social and communal consequences of the loss and damage to their land, balanced against the Crown's desire for legal regularization of the flooding.

32. Such negotiations can take place under the umbrella of the *Specific Claims Tribunal Act*[34], but the hypothetical historical expropriation approach that was used in this case is inconsistent with the compensation approach in the legislation.[35] First Nations may be presented with two substantially different models for valuing the same injuries: one to be applied by the Specific Claims Tribunal and another to be applied by the courts.

33. Should this case stand for the principle that First Nations whose reserve land has been damaged or taken without legal authority must accept compensation based on imaginary past expropriations using fictional land market transactions, or even based on imaginary past negotiations that took place when they were under severe legal disabilities, they will be subverted in their ability to pursue the legal remedy of their choice, which is to negotiate and obtain fair compensation in the present day.

PART IV: COSTS

34. The Interveners do not seek costs and request that none be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Victoria, British Columbia, the 17th day of November, 2020.

Mike Sobkin as agent for
Donald R. Colborne

Counsel for the Interveners Big Grassy First Nation, Onigaming First Nation, Naotkamegwanning First Nation, and Niisaachewan First Nation

[34] *Specific Claims Tribunal Act*, SC 2008, c 22.
[35] *Specific Claims Tribunal Act*, SC 2008, c 22 at s 20.

PART VII: TABLE OF AUTHORITIES

Statutes **Para.**

Cases **Para.**

Other Authorities **Para.**