SCC 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, MOHAWK COUNCIL OF KAHNAWÀ:KE

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

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TABLE OF CONTENTS

PART I: STATEMENT OF FACTS

1. The Mohawk Council of Kahnawà:ke ("MCK") adopts the facts as outlined in the Southwind ("Appellants") Factum[1].

PART II: OVERVIEW AND POSITION

2. This Court must establish new foundations for equitable remedies for Crown breaches of its fiduciary duties to reflect the true nature of Indigenous rights and title, the scope and magnitude of the losses induced by Indigenous land takings and the goals of achieving restitution and reconciliation.

3. The current foundations established in *Guerin* are based on a conception of "Indian title" with "limited nature" and an impoverished view of the Crown's corresponding fiduciary duty that served colonial interests. These arose through the application of the factually, legally and morally wrong Doctrine of Discovery and disregard for the true foundations of Aboriginal title[2]

4. The trial judge's decision defines breaches and loss based on a hypothetically valid expropriation, thereby explicitly relying on the Doctrine of Discovery[3]. It errs in its characterizing the Crown's fiduciary duty and the nature of the Appellants' losses. The MCK proposes a more appropriate method for achieving restitution for lands illegally taken without consent that is based on Indigenous peoples' ongoing connection to land and proprietary interests.

PART III: ARGUMENT

A. Understanding the rights and interests that have been taken without consent

i) The Crown's statutory authority to expropriate is incompatible with Indigenous rights, as illustrated by Mohawk land tenure in Kahnawà:ke

5. The current Mohawk Territory of Kahnawà:ke has been used and occupied by the Haudenosaunee for hundreds of years. The Mohawks of Kahnawà:ke, as part of the Mohawk Nation, assert Aboriginal title to their traditional territory, including Kahnawà:ke. In the colonial context, Kahnawà:ke was confirmed as an exclusively Haudenosaunee settlement by King Louis

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[1]Appellants Factum, at paras 5 to 39.

[2] *Guerin v. Canada* [1984] 2 S.C.R. 335, at p. 337, 349, 376-379. Borrows, John. "(Ab)Originalism and Canada's Constitution." The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference 58. (2012) at pp. 368-370.

[3] *Southwind v. Canada*, 2017 FC 906, "Trial Reasons", at para. 221.

XIV in 1680 with the establishment of the Seigneury of Sault St. Louis (SSSL) for the exclusive use and benefit of the Iroquois of the Sault[4]. Since then, the Crown's acknowledgement of this proprietary interest was continuously confirmed, including by the terms the Treaty of Oswegatchie of 1760, by which the Crown promised that Mohawks would not be dispossessed of their lands or property[5].

6. Throughout the 19th century, Mohawks continued to apply Mohawk law in Kahnawà:ke, including through governance and land management practices, while colonial authorities gradually attempted to impose their jurisdiction on the Territory. While continuing to engage in treaty making, colonial leaders simultaneously excluded Indigenous inhabitants from discussions on drafting the *British North America Act*, 1867, by which they claimed authority legislate over Indigenous peoples and their lands. Canada asserted control over the management of Kahnawà:ke's funds and assets and imposed an individual land tenure system that was contrary to the Haudenosaunee system governing the individual possession of lands on the territory. By the end of the 19th century, this culminated in the imposition and application of the *Indian Act* to the Mohawk Territory of Kahnawà:ke[6].

7. The Department of Indian Affairs imposed a land tenure system (initially known as "location tickets" and currently known as the certificate of possession system) that provided individual rights of possession to lots within the reserve lands and was used to facilitate the taking of land in Kahnawà:ke. Rather than negotiate community surrenders, it was easier and significantly less expensive to expropriate individually held lots. In these cases, compensation for the taking of lands held by community members was paid to individual community members rather than the collective.

8. Canada subsequently invoked its authority under the *Indian Act* to authorize numerous land takings in Kahnawà:ke, including for the construction of: the St. Lawrence Seaway; two railway lines; four hydro lines; the Mercier Bridge; a golf club and numerous roads/highways/bridge approaches. The losses stemming from these numerous land takings are immeasurable- in addition to impacting the land base, these land takings affected Mohawks' health and governance as well as

[4] For more information, see the MCK's public information document: The Seigneury of Sault St. Louis, 2004.
[5] Beaulieu, Alain « Les garanties d'un traité disparu : le traité d'Oswegatchie, 30 août 1760, » in Revue Juridique Thémis, (2000) 34 R.J.T., p. 369-408. This article does not reflect MCK's perspective on all aspects of the treaty, including with respect to implications for sovereignty.
[6] Rück, Daniel and Marie Eve Lampron, « Où tout le monde est propriétaire et où personne ne l'est » : droits d'usage et gestion foncière à Kahnawake, 1815-1880, Revue d'histoire de l'Amérique française, Volume 70, Numéro 1–2, Été–Automne 2016, p. 31–52.

their ability to exercise Aboriginal rights, earn livelihoods and transmit language and culture.[7]

9. Consideration of the history of land tenure in Kahnawà:ke and that of other Indigenous nations over their territories is relevant to this Appeal. In Kahnawà:ke's case, the purported *Indian Act* authority to take Mohawk lands without consent was directly in conflict with Mohawk rights to their reserve lands, including title rights, SSSL rights, and the terms of the Treaty of Oswegatchie.

ii) The fiduciary duty must be defined by the Appellants' legal and practical interests and the Crown-Indigenous relationship, and not based on a racist statute that was not applied

10. The Federal Court of Appeal erred in upholding the Federal Court's sole reliance on the provisions of the *Indian Act* to define the scope of the Crown's fiduciary duty and, ultimately, to excuse the Crown's conduct.[8] The trial judge mischaracterized the breach of fiduciary duty as being "no better" than the breach of the duty to provide compensation in 1929 based on an "inevitable" expropriation.

11. However, as early as January 1924, the Crown had assured the Appellants that it would protect their interests in any land transfer and this undertaking alone triggered the Crown's fiduciary duty.[9] The Appellants' interests at stake were not limited to their reserve lands--they included their rights recognized by *Royal Proclamation of 1763* and treaties as well as those inherent in prior occupation and effective control.

12. Furthermore, defining the breaches of the Crown's fiduciary duty solely based on what the *Indian Act* did or did not permit is problematic and incompatible with equity.

13. In this case, a potential *Indian Act* expropriation was used to define the content of the fiduciary duty, breaches, and losses without any regard for the source and nature of the Appellants' legal and equitable rights and practical interests. As equity "operates on conscience", the fiduciary's statute, founded on an inequality in bargaining power imposed by the fiduciary, should not stand as an equitable defence. The Respondent should be estopped from relying upon this racist statute to limit available remedies.[10] As held in *Soulos v. Korkontzilas*, "the concept of "good conscience"... is at

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[7] Rück, Daniel, "When Bridges Become Barriers: Montreal and Kahnawake Mohawk Territory", in Metropolitan Natures: Environmental Histories of Montreal, Stéphane Castonguay and Michèle Dagenais eds., University of Pittsburgh Press, 2011, p. 228-244.
[8] *Southwind v. Canada*, 2019 FCA 171, "FCA Reasons" at paras 58 and 59.
[9] Appellants Factum, para 17; *Galambos v. Perez*, [2009] 3 S.C.R. 247, paras 77-79.
[10] M. P. Thompson, "Using Statutes as Instruments of Fraud," in 36 N. Ir. Legal Q. 358 (1985, pp. 358-376.

"the very foundation of equitable jurisdiction."[11]

14. Basing this judgment on equitable principles is essential, not only do *Indian Act* surrenders or expropriations damage Indigenous peoples' reserve land interests, they destroy *sui generis* rights that cannot be explained by reference to common law or civil law rules of property law. It should be recalled here that the legal source of Aboriginal rights and title is not state recognition, but rather the realities of the prior occupation, sovereignty and control of Indigenous peoples.[12] This is especially true in this case as the Court found that awarding compensation resulted in the Crown obtaining a valid easement equivalent to a permanent land taking. Therefore, even if the source of the discretion or power required to trigger a fiduciary duty[13] were deemed to be the *Indian Act*, the source of the legal and practical interests of the Appellants is not.

15. Expropriation requires ownership of underlying or radical title. More generally, disregard for pre-existing Indigenous rights through the *Indian Act* can only be justified by embracing the Doctrine of Discovery. Though *Guerin* was groundbreaking for its time, its indiscriminate adoption of *Johnson v. M'Intosh,*[14] and incorrect and ahistorical analysis of the *Royal Proclamation* are at the root of the inherent and irremediable contradictions in the Crown's duties and title. The *Royal Proclamation of 1763,* cited in *Guerin*, applying exclusively to British subjects, granted the Crown preemptive proprietary rights, but did not grant the Crown plenary federal powers over Indigenous

[11] *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, para 27.
[12] *Newfoundland v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020, SCC 4, at para. 49.
[13] *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, at para 27.
[14] *Johnson v. M'Intosh* 21 U.S. (8 Wheat.) 543 (1823), see Borrows, "(Ab)Originalism" at p. 368.

sovereignty[15], as demonstrated by the terms of the corresponding Treaty of Niagara[16].

16. All the criteria that trigger a fiduciary duty exist in an expropriation context (discretion, affecting interests and vulnerability). It follows that the Crown, acting in a fiduciary capacity, cannot expropriate the trust corpus--the land of an Indigenous Nation, as beneficiary--as this is fundamentally discordant with the obligations of a fiduciary, including duties to avoid conflicts of interest and of loyalty: "[t]he distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary.[17]" Courts have previously resolved this contradiction by immunizing the Crown from fiduciary obligations at the stage of considering whether expropriation is in the public interest, without having sufficiently scrutinized the problematic foundations for this legislative authority or the history of how the "public purpose" justification has been abused.

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[15] At most, discovery afforded the discoverer the sovereign right to exclude Europeans and an exclusive proprietary right of preemption. This was "the only restriction the doctrine imposed on the proprietary rights of the native". Native rights were: "as sacred and as securely safeguarded as is fee simple absolute title," from Blumm, Michael C., "Retracing the Discovery Doctrine: Aboriginal Title, Tribal Sovereignty, and their Significance to Treaty-Making and Modern Natural Resources Policy in Indian Country" (2004). Aboriginal Policy Research Consortium International (APRCi). 203.. This Court has not examined the inchoate nature of the rights "discovery" affords as a legal means of achieving title nor compared them to the effective control indigenous societies exerted over the vast continent. For instance, in the *Island of Palmas Case,* (Scott, Hague Court Reports 2d 83 (1932), (Perm. Ct. Arb. 1928), 2 U.N. Rep. Intl. Arb. Awards 829), arbitrator M. Huber found that "the title of discovery...and most extensive interpretation, exist only as an inchoate title, as a claim to establish sovereignty by effective occupation. An inchoate title however cannot prevail over a definite title founded on continuous and peaceful display of sovereignty." at p. 35

[16]Sir William Johnson explicitly stated his understanding that the Haudenosaunee intended to maintain their sovereignty and did not become subjects of the Crown in virtue of the Treaty of Niagara of 1764, see: Borrows, John, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government." In Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference. University of British Columbia Press, 1997. 155-172.

[17] *Bristol and West Building Society v. Mothew*, [1996] EWCA Civ 533.

17. There are currently well over one thousand unresolved land claims in this Country[18]. The genesis for many of these claims are aptly illustrated by the response of interior minister Frank Oliver to a question from the opposition in 1906 regarding the 'unused' reserve lands to the effect that the Indian affairs department was making efforts to acquire surrenders of 'surplus' Indian lands, noting that: "if it becomes a question between the Indians and the whites, the interests of the whites will have to be provided for[19]."

18. This illustrates that the "public interest" so often invoked by the Crown to justify its actions systematically excluded the interests of Indigenous peoples. The Crown's conflict of interests, which arose by acting for both the "public interest" and on behalf of Indigenous peoples resulted, most often, in the dispossession of Indigenous peoples from their lands. Indeed, the threat of the use of expropriation powers was often enough to induce Indigenous parties to surrender.[20] This undue influence is surely why the trial judge accepted the land taking as inevitable in this case.[21]

19. Though the trial judge accepts the Crown's breaches as "inexplicable", they may be explained as acts of institutionalized environmental racism[22]. This concept has been observed where:

> […] structures are constructed disproportionately on the lands of racialized communities because the lives of those impacted are valued less than the lives that make up the dominant society. Further, those in power to make these decisions are at a higher position on the social hierarchy, enabling domination.[23]

20. By limiting the Crown's breaches to the failure to provide compensation for an "inevitable" expropriation, the court has effectively condoned the illegal acts of environmental racism suffered by the Appellants.

21. To achieve restitution and reconciliation, this Court must apply true equity, and not the impoverished fiduciary standard reserved for Indigenous plaintiffs, to remedy the incoherence of

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[18] See: CIRNA, Specific Claims Branch "National Summary on Specific Claims", November 16, 2020.
[19]Report of the Royal Commission on Aboriginal Peoples, Volume 1, "Looking Forward, Looking Back" from the Royal Commission on Aboriginal Peoples, 1996, at p. 262.
[20] *Ibid* at p. 261.
[21] Trial Reasons, para 439.
[22] Jacobs, Beverley, "Environmental Racism on Indigenous lands and territories", May 20, 2010.
[23] Deer, Lily Ieroniawá:kon, "Plus Ten Percent for Forcible Taking: Construction of the St. Lawrence Seaway as Environmental Racism on Kahnawà:ke", HPS: The Journal of History & Political Science 2017, Vol. 5 13-25, at p. 14.

what the *Indian Act* historically permitted. This Court cannot in good conscience adopt the same approach as the lower courts and limit the characterization of the fiduciary relationship, its breaches and the Appellants' losses to what the *Act* hypothetically would have allowed. This would not lead to an equitable result and would not achieve restitution of the value of what was lost or reconciliation.

B. How to achieve restitution for what was lost

i) *Loss of land results in severe, complex, and ongoing losses for Indigenous peoples*

22. The purported effect of the trial judge's decision was to retroactively provide a flowage easement to Canada with the understanding that restitution of the lands taken would be not be possible since these would be unavailable "for eternity".[24] Given this, the MCK agrees with the Appellant that providing compensation for the land taken based on a one-time payment for the flowage easement is incorrect and insufficient. The trial judge's reasons do not demonstrate adequate consideration of the on-going nature of the losses that Indigenous people suffer as a result of illegal land takings generally, that are exacerbated when access to water is cut off.

23. The MCK disagrees with the trial judge's acceptance of calculable losses as one-time losses and, in particular, the assessment of the value of the land taken as a one-time loss calculated based on a hypothetically valid expropriation[25].

24. Permanent land takings do not result in one-time losses that one-time payments are capable of compensating. Land bases are required for Indigenous Nations to exercise governance rights and to promote Indigenous languages and cultural traditions. Moreover, the connection to the land taken remains, which also means that the loss remains in perpetuity, as Borrows notes:

> When a traditional territory is occupied by other people, Indigenous peoples still feel the land is theirs too. […] Indigenous languages, economies and world views are rooted in their homelands, and therefore reject the very idea of surrender. The English treaty language of "cede, surrender and release" does not extinguish the idea that we will always draw our life from the sun, waters, and plants that shine, flow and grow on our traditional territories[26].

25. Based on expropriations for the construction of the St. Lawrence Seaway channel through Kahnawà:ke's territory, Mohawks know that severing an Indigenous Nation's connection to land

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[24] Trial Reasons, paras 359, 528-529.
[25] Trial Reasons, para 380.
[26] Borrows, John "Earth Bound: Indigenous Resurgence", in Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings, Asch, Borrows and Tully, eds. (Toronto: University of Toronto Press, 2018), p. 59

and the water causes severe intergenerational trauma. One community member speaks of the difficulty of explaining the presence of the Seaway to future generations, another community member is noted to have said that the passage of the ice breaker in the Seaway is not greeted as a sign of spring, but rather as a painful reminder of how the Seaway came into being in the first place. Determination of the value of losses must consider the value of these on-going losses:

> Not only was the community cut off from the flow of the river, but from the movement of people, money, sustenance, and knowledge that being in and on the river provided. Added to the feeling of loss is that of confinement[27].

ii) Equitable remedies must be determined based on the ongoing Indigenous proprietary interest and connection to land

26. In this case, the trial judge did little more than determine compensation in accordance with standard expropriation law, without consideration of the Indigenous perspective on the value of losses.

27. From a Mohawk perspective, monetary compensation is a poor substitute for the restitution of land that is taken without consent. Equitable remedies must recognize the ongoing Indigenous proprietary interest and connection to land to achieve the objectives of reconciliation. This is consistent the United Nations Declaration of the Rights of Indigenous People (UNDRIP) which emphasizes reliance on Indigenous laws and land tenure systems, and restitution "in the form of lands" that are "equal in quality, size and legal status"[28] for the fair resolution of land grievances.

28. To this effect, this Court should direct that equitable remedies based on the restitution of the Indigenous proprietary interest, including constructive trusts, should be favoured whenever possible. The reasons cited in *Guerin* for not applying a constructive trust remedy are not valid where Indigenous lands have been taken for "public purposes". Firstly, contrary to what was stated in *Guerin*, unjust enrichment does not need to be demonstrated to apply a constructive trust equitable remedy[29]. Secondly, Canada was and is unjustly enriched when lands are taken for "public purposes". Furthermore, Courts must not leave such objectives and the means of attaining them unexamined. Indeed, human atrocities can and have been carried out in the name of "public purposes". Thirdly, constructive trust remedies are appropriate when it can be demonstrated that

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[27] See Chapter Three "Remembrance of Places Past: The People on the Rapids" in Phillips, S., "The Kahnawake Mohawks and the St. Lawrence Seaway", A Thesis submitted to the Faculty of Graduate Studies and Research in partial fulfillment of the requirements of the degree of Master of Arts, McGill University, July 2000, at p. 39.

[28] *United Nations Declaration on the Rights of Indigenous Peoples*, A/RES/61/295, arts 27, 28.

[29] *Guerin* at p. 386. *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 at paras 16 and 17.

"ordinary damages calculated on common law principles would not provide adequate compensation to the beneficiary for the impugned breach."[30] Indigenous land will never be a fungible commodity. Finally, constructive trusts remedies have the advantage of meeting the objectives of restitution in a manner that acknowledges the pre-existing laws and proprietary interests of Indigenous peoples as outlined in UNDRIP.

29. When constructive trust remedies are no longer available as, for example, when the Crown has authorized an illegal land taking for the benefit of private third party, the ongoing Indigenous proprietary interest and connection to land must still be reflected in the calculation of equitable compensation in order to achieve restitution and reconciliation. This includes "disgorgement of benefits and compensation for lost opportunities, for injurious affection and for all consequential damages" and the "present and reasonably foreseeable future benefits derived from the infringement by the Crown and by third parties generally[31]".

iii) Reconciliation is achieved through the recognition of Indigenous value and laws

30. In this case, reconciliation is accomplished through restitution for the Crown's illegal land taking carried out in an era of environmental racism. Authentic reconciliation necessarily involves honouring Indigenous values and laws and decolonizing the work of reconciliation by including Indigenous peoples as active participants in the claims resolution process[32]. Therefore, deference is owed to Indigenous peoples to identify what constitutes reconciliation. Non-Indigenous Canadians (including lawyers, judges, and government officials) should think twice before declaring that reconciliation has occurred, especially in the context of litigation carried out in a non-Indigenous legal system.

31. Canada's current handling of specific claims is not based on reconciliation through the timely resolution of negotiated claim:

> The [Auditor General] report also found that of the claims that entered the negotiation process, more were either closed or moved to litigation in courts or at the tribunal than were resolved through negotiation, while the department only used mediation services once to

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[30] *Semiahmoo Indian Band v. Canada*, 1997 CanLII 6347 (FCA)

[31]Mainville, Robert "Chapter 8: A proposal for Principles of Compensation" in "An Overview of Aboriginal and Treaty rights and compensation for their breach", Purich Publishing, Saskatoon, 2001, at p. 111and 112.

[32]Regan, Paulette, "Reconciliation and Resurgence: Reflections on the TRC final report", in in Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings, Asch, Borrows and Tully, eds. (Toronto: University of Toronto Press, 2018), p. 210 and 221.

overcome impasses since the services were made available in 2012[33].

32. This Court can effectively contribute to reconciliation by rejecting the approach of the lower courts and providing clear direction that remedies recognizing Indigenous proprietary interests should be favoured to ensure that the objectives of restitution and reconciliation are met. This can also help guide the resolution of claims through principle-based negotiations.

C. Conclusion

33. In order to achieve reconciliation, Canada's *Indian Act* expropriation powers must be viewed by this Court for what they are: as acts of environmental racism that are fundamentally incompatible with Indigenous rights and law and the relationship that Indigenous peoples have with their land. Consideration of Indigenous laws and land tenure systems in the resolution of land grievances is mandated by UNDRIP and the Truth and Reconciliation Commission's Calls to Action[34]. This must inform the identification and application of equitable remedies, that must be based on the recognition and restitution of the ongoing proprietary interest of Indigenous peoples in the lands that have been illegally taken.

PART IV: COSTS

34. The MCK does not seek costs and seeks that no costs be awarded against the MCK.

PART V: ORAL ARGUMENT

35. The MCK intends to present oral argument as directed by the Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the Mohawk Territory of Kahnawà:ke, Quebec, this 18th day of November, 2020.

Francis Walsh
Stacey Douglas
Counsel for the Intervener
Mohawk Council of Kahnawà:ke

[33] Vigliotti, Marco "First Nations claims process slow and ineffective; information on progress 'incomplete,' says AG", Hill Times, November 30, 2016.

[34] UNDRIP, articles 27 and 28, Truth and Reconciliation Commissions Calls to Action 45 iv.

PART VI – TABLE OF AUTHORITIES

Cases	Paragraphs
Alberta v. Elder Advocates of Alberta Society, 2011 SCC 24	14
Bristol and West Building Society v. Mothew, [1996] EWCA Civ 533	16
Galambos v. Perez, [2009] 3 S.C.R. 247	11
Guerin v. Canada [1984] 2 S.C.R. 335	3,15,28
Island of Palmas Case, (Scott, Hague Court Reports 2d 83 (1932), (Perm. Ct. Arb. 1928), 2 U.N. Rep. Intl. Arb. Awards 829)	15
Johnson v. M'Intosh 21 U.S. (8 Wheat.) 543 (1823)	15
Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam), 2020, SCC 4	14
Semiahmoo Indian Band v. Canada, 1997 CanLII 6347 (FCA)	28
Soulos v. Korkontzilas, [1997] 2 S.C.R. 217	13,28
Southwind v. Canada, 2017 FC 906	4,18,22,23
Southwind v. Canada, 2019 FCA 171	10

Other Authorities	Paragraphs
Beaulieu, Alain, Les garanties d'un traité disparu : le traité d'Oswegatchie, 30 août 1760, Revue Juridique Thémis, (2000) 34 R.J.T..	5
Blumm, Michael C., "Retracing the Discovery Doctrine: Aboriginal Title, Tribal Sovereignty, and their Significance to Treaty-Making and Modern Natural Resources Policy in Indian Country" (2004). Aboriginal Policy Research Consortium International (APRCi). 203.	15
Borrows, John. "(Ab)Originalism and Canada's Constitution." The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference 58. (2012).	3
Borrows, John, "Earthbound: Indigenous Resurgence", in Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings, Asch, Borrows and Tully, eds. (Toronto: University of Toronto Press, 2018).	24
Borrows, John, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government." In Aboriginal and Treaty Rights in Canada: Essays on Law,	15

Equality, and Respect for Difference. Vancouver: University of British Columbia Press, 1997.	
Crown Indigenous Relations and Northern Affairs Canada, Specific Claims Branch "National Summary on Specific Claims", November 16, 2020.	17
Deer, Lily Ieroniawá:kon, "Plus Ten Percent for Forcible Taking: Construction of the St. Lawrence Seaway as Environmental Racism on Kahnawà:ke", HPS: The Journal of History & Political Science 2017, Vol. 5 13-25.	19
Jacobs, Beverley, Environmental Racism on Indigenous lands and territories, May 20, 2010.	19
Mainville, Robert "Chapter 8: A proposal for Principles of Compensation" in "An Overview of Aboriginal and Treaty rights and compensation for their breach", Purich Publishing, Saskatoon, 2001.	29
Mohawk Council of Kahnawà:ke, The Seigneury of Sault St. Louis, 2004 .	5
Phillips, Stephanie, "The Kahnawake Mohawks and the St. Lawrence Seaway", A Thesis submitted to the Faculty of Graduate Studies and Research in partial fulfillment of the requirements of the degree of Master of Arts, McGill University, July 2000.	25
Regan, Paulette, "Reconciliation and Resurgence: Reflections on the TRC final report", in *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings*, Asch, Borrows and Tully, eds. (Toronto: University of Toronto Press, 2018).	30
Royal Commission on Aboriginal Peoples, Volume 1, "Looking Forward, Looking Back" Report from the Royal Commission on Aboriginal Peoples, 1996	17,18
Rück, Daniel and Marie Eve Lampron, « Où tout le monde est propriétaire et où personne ne l'est » : droits d'usage et gestion foncière à Kahnawake, 1815-1880, Revue d'histoire de l'Amérique française, Volume 70, Numéro 1–2, Été–Automne 2016, p. 31–52.	6
Rück, Daniel, "When Bridges Become Barriers: Montreal and Kahnawake Mohawk Territory", in Metropolitan Natures: Environmental Histories of Montreal, Stéphane Castonguay and Michèle Dagenais eds., University of Pittsburgh Press, 2011, p. 228-244.	8
M. P. Thompson, "Using Statutes as Instruments of Fraud," in 36 N. Ir. Legal Q. 358 (1985), pp. 358-376.	13
Truth and Reconciliation Commission of Canada, Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada (Truth and Reconciliation Commission of Canada, 2015).	33
United Nations Declaration on the Rights of Indigenous Peoples, A/RES/61/295, arts 27, 28.	27,33
Vigliotti, Marco "First Nations claims process slow and ineffective; information on progress 'incomplete,' says AG", Hill Times, November 30, 2016.	31

PART VII: STATUTORY PROVISIONS

Indian Act, R.S.C. 1927, c. 98 (the Indian Act), s. 48.	*Loi sur les Indiens*, LRC 1985, c I-5