SCC FILE NUMBER: 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

– 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, ATIKAMEKSHENG 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

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FACTUM OF THE INTERVENER THE ELSIPOGTOG FIRST NATION

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

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PART I – OVERVIEW

1. Elsipogtog First Nation ("Elsipogtog" or "the First Nation") intervenes with leave of this Court granted on October 22, 2020.

2. Elsipogtog is a First Nation situated in New Brunswick, along the shoreline of the Richibucto River north of Moncton. It has filed a specific claim with the federal government based on the loss of 90% of the reserve lands, originally set aside for it by the Lieutenant Governor of the colony of New Brunswick in 1802, and unlawfully taken in 1824. The claim has recently been accepted for negotiation. It is very familiar with the process for the resolution of specific claims, including the mechanics of the *Specific Claims Tribunal Act* (**"*SCTA*"**),[1] by virtue of its current and past engagement in the process and by virtue of retaining lawyers who served as counsel to the Specific Claims Tribunal for a combined decade, and since the Tribunal's inception.

3. Elsipogtog intervenes on the issue of the principles of equitable compensation applied by the Trial Judge and upheld by the Federal Court of Appeal, and particularly their inconsistency with the principles of compensation under the *SCTA.* Elsipogtog submits that the compensation scheme of the *SCTA* should be considered by this Honourable Court in this appeal, given its importance as a reflection of principles accepted and endorsed by First Nations and as a vehicle for reconciliation. Allowing the appeal would provide this Honourable Court with the opportunity to articulate principles of compensation consistent with, or at least not inconsistent with, the *SCTA*. Dismissal of the appeal would risk inconsistent or unfair rulings from the SCT and between SCT and court decisions. Dismissal would also hinder the reconciliation of Indigenous and other Canadians, by creating delay and uncertainty in the resolution of historic grievances that continue to burden Crown-Indigenous relations. This Honourable Court has the rare opportunity in this appeal to clarify principles of compensation, facilitating the fair and efficient resolution of specific claims, and advance rather than hinder reconciliation.

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[1] *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*].

PART II – QUESTIONS IN ISSUE

4. The central issue in this appeal relates to compensation for harms caused by Canada's fiduciary breaches, which Elsipogtog submits should be done in a way that is consistent with the objective of reconciliation and with legislation, in particular the *SCTA*.

PART III – ARGUMENT

5. This submission will first provide background on the specific claims resolution process. It will then show how the ruling at issue undermines the coherence of the *SCTA*. It then shows why it is important to consider the *SCTA* in this proceeding, and how dismissing the instant appeal may lead to inconsistent rulings as well as delays and potentially insurmountable obstacles in the reconciliation of Indigenous Canadians and the Crown with respect to specific claims.

A. Background: The Specific Claims Resolution Process

6. The specific claims resolution process is the way many First Nations with claims similar to that in the instant appeal seek resolution of their claims. Specific claims are historic, are against the federal Crown, and relate to the administration of land or assets and to the fulfilment of treaties. Where Crown breaches are ongoing, such as in the instant case, a claim may be advanced before the courts. However, for many First Nations, the specific claims process' disallowance of Crown defences to claims based on the passage of time[2] makes it the only option for resolving their claims. More than 500 claims are currently under consideration by the government or the Specific Claims Tribunal (**"SCT"**),[3] and First Nations continue to research and develop more claims as they are discovered through research, litigation, awareness and oral history.

7. Briefly, specific claims follow two general stages: negotiation and adjudication. Once a specific claim is submitted to the government, the Specific Claims Branch of Crown-Indigenous Relations and Northern Affairs Canada (the **"Branch"**) determines whether it will offer to negotiate the claim in whole or in part. It is time-limited in both its review and in the negotiation

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[2] *SCTA*, *supra* note 1, s 19.
[3] "Reporting Centre on Specific Claims" (last modified 21 September 2020), online: <services.aadnc-aandc.gc.ca/SCBRI_E/Main/ReportingCentre/External/externalreporting.aspx>.

itself. If the Branch fails to respond or negotiate in a timely manner, rejects a claim or negotiations fail, the First Nation claimant may file a claim with the SCT and commence adjudication.[4]

8. The SCT is governed by the *SCTA*, which provides that a roster of superior court judges adjudicate claims fully and finally.[5] Since its operational inception in 2011, the SCT has contributed to shaping the definition of the Crown's lawful obligations in the context of claims such as the one at issue here, both in terms of their breach, their obligation to compensate, and the guiding principles in an assessment of compensation in equity.[6] Indeed, the Trial Decision discussed two SCT judgments when considering applicable principles of equitable compensation.[7] The courts consider such cases less often and arguably offer no equivalent body of jurisprudence.[8]

9. The *SCTA* enumerates six grounds on which a claim may be found valid and thus compensable. One concerns breaches of treaty and other agreements; another concerns fraud by Crown agents. The four of potential significance in this submission concern violations of the *Indian Act*, breach of fiduciary duty in the administration of reserve lands, an illegal disposition of reserve lands, or the failure to compensate for reserve lands taken or damaged under legal authority.[9]

10. When a claim is found to be valid on one of these grounds, the *SCTA* then prescribes detailed compensation principles. It provides at section 20(1)(c) that the Tribunal is to apply "principles of compensation applied by the courts". Moving from the general to the specific, it

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[4] *SCTA*, *supra* note 1, s 16(1); Indian and Northern Affairs Canada, *The Specific Claims Policy and Process Guide* (Ottawa: Indian Affairs and Northern Development, 2009) at 9, online (pdf): <publications.gc.ca/collections/collection_2010/ainc-inac/R32-248-2009-eng.pdf> [INAC, *Policy and Process Guide*].
[5] *SCTA*, *supra* note 1, s 6(2)-(4).
[6] See e.g. *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 at paras 45-50, 132 [*Williams Lake*]; *Canada v Kitselas First Nation*, 2014 FCA 150 at paras 37-38, 49-50, 54; *Huu-Ay-Aht First Nations v HMQ*, 2016 SCTC 14 at paras 253-59 [*Huu-Ay-Aht*]; *Beardy's & Okemasis Band #96 and #97 v HMQ*, 2016 SCTC 15 at paras 78-79, 87-91 [*Beardy's*]; *Doig River First Nation and Blueberry River First Nations v HMQ*, 2018 SCTC 5 at para 264.
[7] *Southwind v Canada*, 2017 FC 906 at paras 259-84 [Trial Decision]; citing *Huu-Ay-Aht*, *supra* note 6 and *Beardy's*, *supra* note 6.
[8] *Williams Lake*, *supra* note 6 at para 29.
[9] *SCTA*, *supra* note 1, s 14.

then lays out particular principles that apply with respect to valuing reserve land in two different circumstances. For land "taken under legal authority" but inadequately compensated, compensation shall be awarded for the market value of the land at the time of the taking brought forward to present value. If the lands were damaged under legal authority, the SCT shall also award the "value of the damage done to reserve lands brought forward to the current value of the loss."[10] By contrast, for "lands were never lawfully surrendered, or otherwise taken under legal authority," the *SCTA* provides that compensation shall be based on the "current, unimproved market value" of the lands, plus the value of the loss of use of those lands brought forward to present value.[11]

B. Inconsistencies with the Trial Decision and the *SCTA* Compensation Scheme

11. The Trial Decision approach to compensation is inconsistent with the principles in the *SCTA*. Applying the instant case to the *SCTA* framework, it is clear that the Trial Judge found that the claim was valid under section 14 of the *SCTA*: there had been a breach of fiduciary duty and a violation of the *Indian Act* in the failure to expropriate or obtain a surrender of the lands.[12] Under the scheme of the *SCTA*, sub-section 20(1)(g) and (h) would apply, compensating the First Nation for lands that were "never lawfully surrendered, or otherwise taken under legal authority." However, the Trial Decision applied sub-section 20(1)(e) and (f), namely, the value of land at the time of the taking and damage done to the lands brought forward to present value,[13] which applies at the SCT where land was taken under legal authority but was inadequately compensated. This is squarely inconsistent with the provisions of the *SCTA* and, if the appeal is dismissed, will create binding precedent for the SCT which contradicts the provisions of its governing statute.

C. Reconciliatory Role of the *SCTA*

12. The *SCTA* is a reconciliatory instrument that should be considered even outside of the SCT. It is the product of historic and significant collaboration between the Government of Canada and the Assembly of First Nations.[14] The AFN and Canada negotiated its terms, the compensation terms particularly, and First Nations continue to be involved in the operation and review of the Specific Claims Tribunal.[15] Elsipogtog submits that it is the only legal instrument that clearly

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[10] *SCTA*, *supra* note 1, s 20(1)(e)-(f).
[11] *SCTA*, *supra* note 1, s 20(1)(g)-(h).
[12] Trial Decision, *supra* note 7 at paras 226, 296-98.
[13] Trial Decision, *supra* note 7 at paras 457-48, 467, 496.
[14] *SCTA*, *supra* note 1, Preamble, para 6.
[15] *SCTA*, *supra* note 1, ss 12(2), 41.

reflects First Nations buy-in and agreement to the terms of the resolution of their historical grievances, including their compensation. In no other piece of legislation or law has the perspective of First Nations been so fully taken into account, in terms of their actual participation in determining the adjudicative principles governing their claims. It constitutes a melding or compromise of government and First Nations views, an example of the possibility of co-existence and collaboration. It is, in a word, an example of reconciliation. For this reason, Elsipogtog submits that the compensation framework set out in the *SCTA* should be viewed as a reflection of a fair and reconciliatory approach to resolving specific claims, and deviations from it must reflect the same considered accommodation and inclusion of the Indigenous perspective as went into developing it. As several of our fellow intervenors have capably argued, there is no evidence that the Indigenous perspective was given such consideration by the lower courts.

D. Risks to Rule of Law

13. If the instant appeal is dismissed and the Trial Decision allowed to stand, the internal coherence of the *SCTA* will be undermined. This increases the risks of inconsistent rulings from the SCT, as well as between the SCT and other adjudicative mechanisms not bound by the *SCTA*, such as the courts. Elsipogtog submits that this amounts to a risk to the rule of law, which demands fairness and equality before the law.

14. The substantial risk of incoherence lays in the divergence in the general and more specific provisions of the *SCTA* governing compensation. The *SCTA* requires that the SCT must apply "the principles of compensation applied by the courts," as well as the specific provisions of the *SCTA* governing compensation for land taken under legal authority and not lawfully surrendered or otherwise taken under legal authority. Here, the principles of compensation applied by the Trial Court do not conform to the specific provisions that follow; they disregarded the breaches of obligation they found in the Crown's conduct in the flooding of Lac Seul First Nation ("**LSFN**") land, in finding *hypothetical* lawfulness. It is not clear how the SCT would reconcile the inconsistency, for example in a case involving facts similar to the instant one. The tools used by the Trial Judge to determine the applicable principles of compensation – the use of a *hypothetical* taking, effectually translating to a legal taking for the purposes of assessing equitable compensation – are not available to the SCT. Under section 20, reserve lands are either taken with legal authority, or they are not. A taking may not be *hypothetically* legal. It is arguably not within

the SCT's jurisdiction, as a statutory body, to make such a finding. At the very least, it is unclear, and could cause uncertainty and delay pending judicial review, contrary to the SCT's mandate.

15. Even if the use of hypothetical legality is possible, it is not difficult to foresee inconsistent decisions resulting from incoherence in the *SCTA*. The SCT would likely be forced to distinguish the instant case, if it stood, on a factual basis. That is, the more factually-analogous a claim to the instant one, the more likely the SCT would apply the approach of the Trial Judge; the less factually-analogous, the more likely the provisions of 20(1)(g) and (h) would apply. Claims that may be factually dissimilar in terms of the Crown's wrongdoing may yet be similar in other legally significant ways, however, making such differences in compensation unfair. Take, for example, claims involving a flawed surrender and a flawed expropriation, respectively. Both may be undertaken for a public works project. It is foreseeable that land taken for a similar public purpose, both without First Nation consent but by different means – surrender versus expropriation – may be compensated by different provisions of the *SCTA* and indeed different compensatory regimes in the result. This seems to be manifestly unfair to the First Nation, who likely played no role in the decision to seek a surrender or an expropriation, and is illogical from a compensation perspective.

16. The risk of inconsistent decisions between the SCT and courts or other adjudicative tribunals becomes even greater, owing to the non-binding nature of the *SCTA* in other forums.

17. The inconsistency will have real and immediate effects for claims currently in the compensation stage at the Tribunal. Several of these involve contexts and histories not adjudicated outside of the SCT, which nonetheless stand to be affected by the instant decision. For example, *Williams Lake*, the validity of which was affirmed by this Honourable Court, is now in the compensation phase of its claim before the Tribunal. It is one of the many cases at the Tribunal concerning reserve creation issues in the Maritimes, Quebec and British Columbia, and in which the SCT has generally found that Crown officials breached their obligations by, *inter alia*, the failure to set aside specific lands of significance to the First Nation in question in the reserves allotted to them. Allowing the Trial Decision to stand would introduce some uncertainty around the relevance of the breaches of fidudiary duty found in the validity decision and whether they can

be disregarded, as they arguably were in the lower court decisions, in the determination of applicable principles of equitable compensation.

18. Elsipogtog submits that this should not be condoned. Progress which has been made in certainly and finally determining divisive and harmful historic claims should not be disrupted by the introduction of new areas of uncertainty. We ask that this Honourable Court, with the benefit of the awareness of the diversity of types of claims which the instant decision will affect, clarify the consequences of Crown breaches of its legal obligations in a manner that is consistent with the *SCTA* and with the basic principle that the nature of breaches should not be disregarded in the calculation of equitable compensation.

E. Risks to Reconciliation

19. The uncertainty that the dismissal of the instant appeal would create with respect to the compensation of specific claims would have knock-on effects on the resolution of specific claims down the line, ultimately affecting the speed and even the possibility of reconciliation.

20. The specific claims process is affected by developments in the case law through the Federal Government's stated objective with respect to resolving specific claims, which is to "discharge its lawful obligations."[16] SCT jurisprudence is highly relevant in determining what the Crown's "lawful obligations" are in terms of their breach and compensation, as it addresses claims that the government failed to resolve. Assuming the good faith desire of the Crown to resolve claims, it is logical to assume that the positions it takes on whether lawful obligations were breached and how they might be discharged have been influenced by SCT jurisprudence. Moreover, the Specific Claims Policy largely reflects the compensation scheme in the *SCTA*.

21. Allowing the Trial Decision to stand would create inconsistency and uncertainty with respect to applicable legal principles. It would become more difficult for Branch negotiators to determine what the government's "lawful obligations" are with respect to compensation in equity and more difficult for First Nations to value their claims. It would also make it more likely that there would be a significant difference between Crown and First Nation valuation of claims, to the extent that Crown negotiators favour the lower-value approach followed in the instant case and

[16] INAC, *Policy and Process Guide*, *supra* note 4 at 5.

First Nations continue to look to the *SCTA* for governing principles. This would make negotiations more protracted; potentially lead to settlements that First Nations do not consider to be a full and final answer to the historic injustice it suffered; and, in the worst case, possibly lead to the failure of negotiations altogether.

22. This would be bad for Canada and all Canadians. The resolution of specific claims is integral to reconciliation, for Elsipogtog and for hundreds of other First Nations. The Preamble of the *SCTA* acknowledges the reconciliatory function of the *SCTA*,[17] as does Canada's Specific Claims Policy.[18] In order for First Nations and Canada to move forward, historic wrongs must be addressed. All Canadians have an interest in the fair resolution of specific claims,[19] and a failure to address specific claims in a meaningful and timely way can lead to tragic events, such as in Oka, Ipperwash, Caledonia, Gustapheson Lake, and others.[20]

23. The risks of failure of negotiations could be even higher for claims that will not end up before the SCT. Where claimants may not avail themselves of an independent adjudicative mechanism, at the SCT or in the courts, they have less leverage in opposition to Crown negotiating positions and claim valuations. To the extent that the Trial Decision will justify a lower valuation of claims by negotiators, claimants in this position will have less ability to negotiate values upward. There are many claims that this will affect: those such as Elsipogtog and many other Mi'kmaq nations which exceed the compensation cap at the SCT; those who seek more than just a monetary remedy; or those including non-pecuniary losses; or those whose value does not justify the costs of a lawyer which is required at the SCT.[21] Claimants in these categories will be further disadvantaged in a process in which they are already disadvantaged by the absence of independent adjudication leading to a fair recovery of proven losses.

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[17] *SCTA*, *supra* note 1, Preamble, paras 3, 6; *Tsleil-Waututh Nation v Her Majesty the Queen in Right of Canada*, 2014 SCTC 11 at paras 40-44.
[18] Indian and Northern Affairs Canada, *Specific Claims: Justice at Last* (Ottawa: Indian Affairs and Northern Development, 2007) at 3, online (pdf): <publications.gc.ca/collections/collection_2007/inac-ainc/R2-480-2007E.pdf>.
[19] *SCTA*, *supra* note 1, Preamble, para 2.
[20] Standing Senate Committee on Aboriginal Peoples, Negotiation or Confrontation: It's Canada's Choice (December 2006) (Chair: Hon Gerry St. Germain) at iii, 4, 33-34, 40.
[21] *SCTA*, *supra* note 1, ss 20(1)(a), (b), (d)(ii); *Specific Claims Tribunal Rules of Practice and Procedure*, SOR/2011-119, r 7(1); *Mohawks of the Bay of Quinte v Canada (Indian Affairs and Northern Development)*, 2013 FC 669.

24. Elsipogtog believes that it can provide an illustration of how allowing the instant appeal to stand would adversely affect its ability to negotiate its claim in the ways discussed above. Its claim relates to a unilateral change in the size of the Richibucto River Reserve in 1824, in the colony of New Brunswick. A colonial council wrote down the size of the Reserve by approximately 46,600 acres representing roughly 90% of the Reserve without compensation or consent. Elsipogtog understands this to be a clear illegal taking of its land, to be compensated by its current unimproved market value and the value of its loss of use over time. It remains concerned, however, about the extent to which Crown negotiators may argue that the land *hypothetically* could have been taken legally, justifying compensation on the basis of its historical value brought forward. Such arguments have little merit, but in the absence of a recourse to the SCT or the courts, Elsipogtog may face a compensation offer from the Crown of far less than what it is expecting and less than what it deems necessary to adequately compensate for its historical losses.

25. An offer based on the Trial Decision approach would be detrimental to Elsipogtog not only for monetary reasons, but also for reasons related to reconciliation. The land at issue was central to the First Nation's sustenance, its role in the system of trade and alliances, and its identity and place in the world. Its taking, flying in the face of the *Royal Proclamation, 1763* and the treaties of peace and friendship, constituted a fundamental and original betrayal that continues to colour Elsipogtog's view of the Crown and its subjects. Making amends for this betrayal would start to heal these wounds and put to rest the mistrust that has coloured relations since the early 1800s. Offering only partial amends would not suffice. Any further delay or obstacle in the process of finally resolving Elsipogtog's claim will have a clear impact on the project that this Honourable Court has deemed as the "governing ethos" of Indigenous-Crown relations – being reconciliation, not competition, entrenched in section 35 – and has repeatedly called for.[22] Reconciliation is not facultative. Rather, reconciliation is a legal imperative woven by the various pronouncements and principles enunciated by this Honourable Court.

PART IV – SUBMISSIONS ON COSTS

26. Elsipogtog First Nation does not seek costs.

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[22] See e.g., *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 17; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 1; *Lax Kw'alaams Indian Band v Canada (Attorney General)*, 2011 SCC 56 at para 12.

PART V – ORDER SOUGHT

27. Elsipogtog First Nation adopts the submissions of the Appellants with respect to the order sought.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of November, 2020.

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