Court File No. 38795

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

ROGER SOUTHWIND, FOR HIMSELF, AND ON BEHALF OF THE MEMBERS OF THE LAC SEUL BAND OF INDIANS AND LAC SEUL FIRST NATION

APPELLANTS

AND:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO and HER MAJESTY THE QUEEN IN RIGHT OF MANITOBA

RESPONDENTS

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(ROGER SOUTHWIND, FOR HIMSELF, AND ON BEHALF OF THE MEMBERS OF THE LAC SEUL BAND OF INDIANS AND LAC SEUL FIRST NATION, APPELLANTS)
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PART I - ARGUMENT

1. The Appellants Lac Seul First Nation ("LSFN") make the following submissions in response to the factum filed by the Attorney General of Saskatchewan ("Saskatchewan").

A. The status of the Lands is not in issue on this Appeal

2. Saskatchewan says that the question of "what happens to the land" must be decided in this case, and that "the trial judge recognized an easement which authorized the flooding of a portion of LSFN's reserve, as part of his award of equitable compensation."[1] LSFN submits that the issue of the status of their flooded lands ("Lands") does not need to be resolved in this appeal and is not before the Court: no easement was found or declared by the Courts below, and the Lands were never taken from LSFN's reserve ("Reserve"). The Lands remain part of their Reserve, albeit in a flooded state.

3. The Trial Judge did not grant a declaration of an easement at trial.[2] Canada agreed there was no easement or other interest registered against the Lands, and that LSFN retains the Lands within their Reserve.[3] LSFN did not sue Canada to make the flooding legal, and neither Canada nor Ontario sought an easement. At trial, both Ontario and LSFN submitted that the Federal Court lacked the jurisdiction to alter provincial property rights.[4] As there was no controversy about LSFN having retained their Lands in the Reserve, the Trial Judge did not issue a declaration that LSFN's legal interests in the Lands and the freeboard area had not been encumbered or extinguished.[5]

4. The Trial Judge's statement that "[t]he result of this payment is that Canada retroactively obtains a flowage easement up to 1172 meters, while the flooded shoreline remains part of the

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[1] Factum of the Intervener Attorney General of Saskatchewan ("**Saskatchewan Factum**") at paras 3-4.
[2] Judgment of Justice Zinn, Appellants' Record ("**AR**"), Vol I, Tab 1 at 189.
[3] Federal Court Reasons ("**Trial Reasons**") at para 528, AR Vol I, Tab 1 at 180; Written Trial Submission of Canada at para 134, AR Vol III, Tab 6 at 61.
[4] Written Trial Submission of Ontario at para 297, AR Vol IV, Tab 9 at 256; Written Trial Reply Submission of the Plaintiffs at para 52, AR Vol IV, Tab 10 at 332.
[5] Trial Reasons at para 527-528, AR Vol I, Tab 1 at 180.

Reserve"[6] resulted in confusion. However, any outstanding confusion about the Court's meaning was resolved at the Federal Court of Appeal.

5. The Federal Court of Appeal did not need to address whether there was an easement because all parties agreed there was not one. LSFN raised the issue as a result of the Trial Judge's comments.[7] Canada agreed that the Trial Judge's Order did not grant any easement, given that an easement would have required the Governor in Council's consent, and that the issue of an easement was outside the scope of the litigation.[8] Ontario participated in the appeal just to address this point, and said it was plain on the face of the judgment that the Trial Judge did not award an easement of any kind.[9] Since the parties agreed that the Federal Court did not grant an easement, the Court of Appeal held that the issue was not relevant to its disposition of the appeal.[10]

6. On appeal to this Court, Canada agrees that a flowage easement was not and could not have been granted or declared by the trial court, being outside the scope of the litigation and the Federal Court's jurisdiction.[11] The Federal Court itself has confirmed that the question of provincial property rights is outside of the Federal Court's jurisdiction.[12] Given there was no easement sought or declared at trial, and the parties agreed it was not an issue on appeal and was outside the Federal Court's jurisdiction, it was appropriate that the Appellants did not raise the existence of an easement before this Court. It is not an issue that has been "left hanging".[13] The status of the Lands is understood by the parties to the appeal.

7. Saskatchewan is conflating the issue of equitable compensation with the technical legal issue of how the flooding could become legal, which is not before this Court. As this issue simply does not arise in this case, it appears that Saskatchewan is seeking to use this appeal to litigate its

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[6] Trial Reasons at para 529, AR Vol I, Tab 1 at 180.
[7] Federal Court of Appeal Factum of the Appellants LSFN at paras 84-87, Supplemental Appellants' Record ("**SAR**"), Tab 1 at 29-31.
[8] Federal Court of Appeal Factum of Canada ("**Canada FCA Factum**") at paras 60-61, SAR, Tab 2 at 56-57.
[9] Federal Court of Appeal Factum of Ontario at paras 42-46, SAR, Tab 3, p. 80-81; Federal Court of Appeal Reasons ("**FCA Reasons**") at para 45, AR Vol I, Tab 2 at 211.
[10] FCA Reasons at para 45, AR Vol I, Tab 2 at 211.
[11] Factum of the Respondent Canada ("**Canada SCC Factum**") at paras 80-81.
[12] *Huron-Wendat Nation of Wendake v. Canada*, 2014 FC 1154 at para 65.
[13] Saskatchewan Factum at para 17.

own separate dispute, which is ongoing in another venue.[14] LSFN submits Saskatchewan should not be entitled to take the issues away from the parties on this appeal.

B. Saskatchewan mischaracterizes the Appellants' case

8. LSFN submits that the argument advanced by Saskatchewan mischaracterizes the issues this Court is addressing on appeal by describing the status of the Lands as taken[15] and the loss for which LSFN seeks a remedy as the loss of their Lands.[16]

9. Contrary to Saskatchewan's submission, LSFN's Lands were never taken or transferred to another party and their use was never authorized by any means.[17] It is plain on the record and in the Trial Judge's findings that Canada took no steps at any time to legally authorize a "taking" of the Lands.[18] Nor was there any finding that Canada issued a permit under s. 34 of the *1927 Indian Act*.[19] No party to this appeal has asked for a declaration that the Lands have been "taken".[20] Unlike in *Guerin* or *Blueberry River,* relied on by Saskatchewan to suggest that LSFN is "not entitled to get the land back", the Lands in this case were never taken and no interest in the Lands was conveyed to another party.[21]

10. The Appellants have appropriately characterized the remedy they are seeking, based on the reality of the situation, and are not attempting to "have it both ways".[22] Although the Lands remain part of the Reserve, LSFN have been deprived of their ability to access, use and benefit from those Lands since 1929. As a result, LSFN are not seeking the return of their Lands; instead, LSFN

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[14] Saskatchewan Factum at para 6; unlike in the *Peter Ballantyne Cree Nation* cases referred to by Saskatchewan at paras 38-39 of its Factum, there is no issue in this case as to whether rights have been granted to a third party.

[15] Saskatchewan Factum at para 25.
[16] Saskatchewan Factum at paras 3, 33, 44.
[17] Saskatchewan Factum at paras 12, 25, 26.
[18] Trial Reasons at paras 6, 162, AR Vol I, Tab 1 at 6, 55; "*A History of the Lac Seul Storage Project, Flooding on the Lac Seul Indian Reserve No. 28, and Related Compensation to the Lac Seul Band, 1873 to 1943*" Exh 7971, Appellants' Record before the Federal Court of Appeal ("**FCA AR**"), Part C, Vol CCXXXIX at 119.
[19] *Indian Act*, RS 1927, c 84, s 34, Exh 1307, FCA AR, Part C, Vol L at 11.
[20] Trial Reasons at para 528, AR Vol I, Tab 1 at 180.
[21] Saskatchewan Factum at paras 28, 29.
[22] Saskatchewan Factum at para 44.

seeks, and has always sought, compensation for their loss of the use and benefit of their Lands on the basis of their most advantageous use.

11. LSFN agrees with Saskatchewan to the extent that Saskatchewan argues that an equitable remedy for LSFN must reflect what was actually lost.[23] In this case, because of Canada's breaches of fiduciary duty, LSFN have been deprived of the use and benefit of their Lands since 1929 and for eternity. The remedy must reflect that loss in order to achieve equitable goals.

12. LSFN also agrees with Saskatchewan that the appropriate remedy is equitable compensation, and that equitable compensation for LSFN's losses must be backward and forward-looking, reflecting LSFN's past, current and future losses.[24] However, the Lands do not have to have been taken for the loss of their use and benefit to be compensated on that basis.

13. Contrary to Saskatchewan's submissions, the Court did not compensate LSFN on the basis that "an easement is in place".[25] The Court compensated LSFN on the basis of what it hypothesized Canada would have paid had Canada expropriated the Lands for the limited purpose of obtaining a flowage easement.[26] No expropriation or surrender actually took place and no easement was ever granted. The Appellants' appeal centres on the fact that no steps were taken to authorize the use of the Lands, or to protect LSFN's interests and compensate them for their loss of the use and the benefit of the Lands. Compensation for a fictional easement that was never granted cannot achieve the goals of equity or reconciliation as it does not address what LSFN lost.

14. Saskatchewan's submissions highlight the inappropriateness of the approach adopted by the Courts below, and reflect the error made by the Trial Judge and echoed in Canada's submissions. Recharacterizing the unlawful use of LSFN's Lands as a "taking" or easement for which LSFN should have been compensated with a one-time payment in 1929 shifts the focus of the analysis away from restoring what LSFN actually lost: the ongoing use and benefit of their Lands. Saskatchewan also mischaracterizes the breaches the Trial Judge expressly found.[27] The Court did not identify Canada's breach as a failure to promptly pay for the use of the Lands, but

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[23] Saskatchewan Factum at paras 18, 21.
[24] Saskatchewan Factum at para 33.
[25] Saskatchewan Factum at para 41.
[26] Trial Reasons at paras 358-359, AR Vol I, Tab 1 at 126.
[27] Saskatchewan Factum at para 25.

rather as, *inter alia*, breaches of Canada's duties to protect LSFN's Lands from exploitation and act in their best interests.[28]

C. The Appeal does not involve the interests of innocent third parties

15. This case is not, as suggested by Saskatchewan, about innocent third parties' interests in the Lands, obtained in good faith without notice of wrongdoing.[29] On the facts of this case, it is clear that Ontario, the dam owner, was one of the architects of the project and one of the parties who benefitted from the situation that resulted in LSFN's losses. Ontario had the opportunity to participate in this appeal and did not do so, and argued at the Federal Court of Appeal that there was no easement. It is reasonable to infer that had Ontario believed any interest in the Lands it may (rightly or wrongly) possess could be threatened, it would have taken a position on that issue.

16. The Appellants do not seek any relief in this case against the dam operator, and did not ask for injunctive relief or specific performance that would affect dam operations.[30] The fact that the use is unlawful (in that it has never been properly authorized) does not mean that LSFN are seeking to have the Lands unflooded or the dam removed. This "straw man" argument advanced by Saskatchewan simply has no place in this appeal.

17. To the extent that Saskatchewan's submissions seek direction from this Court on whether certain remedies should be available in entirely different factual and legal contexts that are not before this Court, LSFN submits those submissions should be disregarded.

D. Public interest does not eliminate fiduciary duty

18. Saskatchewan's suggestion that a fiduciary duty only arises when a decision to expropriate reserve lands has been made is incorrect.[31] This Court was clear in *Wewaykum* that Canada has a fiduciary duty to protect and preserve reserve lands from exploitation once a reserve is created.[32]

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[28] Trial Reasons at paras 296-297, AR Vol I, Tab 1 at 105-106.
[29] Saskatchewan Factum at paras 21, 26.
[30] Fourth Amended Statement of Claim of the Plaintiffs, FCA AR, Vol I, Part A, Tab 3 at 205-208.
[31] Saskatchewan Factum at para 23.
[32] *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 SCR 245 [***Wewaykum***] at paras 86 and 100.

19. The proposition that the Crown has "many hats" is of no assistance to Saskatchewan's argument. Canada agrees that it breached its duties and those breaches were "inexplicable" and inconsistent with the honour of the Crown.[33]

20. The law is clear that just because Canada possesses certain powers in its role as a fiduciary does not mean that every use of those powers will be permissible. The Crown's authority must only be exercised in a manner consistent with the Crown's fiduciary duties. In this case, the fact that the flooding was for a public purpose does not absolve Canada from the obligation to fulfil its fiduciary duties to LSFN. To the contrary: had Canada carried out a lawful expropriation, that process would have required the consent of the Governor in Council, which would have had the obligation to ensure the bargain was not exploitative of LSFN, given Canada's fiduciary duties to LSFN in that context. As this Court commented in *Opetchesaht*:

> 86 […] Where the greater public good so requires, interests in reserve land may be expropriated: s. 35. The procedure is strictly regulated and subject to consent of the Governor in Council, exercised by Cabinet, which owes the Indians a fiduciary duty to act in their best interests. The process is politically sensitive and open to public scrutiny.[34]

21. Crown consent in the case of surrender or expropriation is not a mere rubber stamp on the path to doing whatever the Crown desires. As this Court highlighted in *Osoyoos*, this process has at its heart the obligation to protect the Indigenous community from exploitation, including in the context of an expropriation.[35]

22. The notion that a public purpose inspired the wrongdoing does not absolve Canada from restoring LSFN on a basis that is responsive to what LSFN lost. The Court in *Semiahmoo* was alive to this, holding that the Crown is held to a strict standard of conduct and emphasizing that the Crown's fiduciary obligation includes withholding consent to a project, even one with a public purpose, where the transaction is exploitative.[36]

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[33] Canada SCC Factum at para 59.
[34] *Opetchesaht Indian Band v. Canada,* [1997] 2 SCR 119 at para 86 (per McLachlin J in dissent not on this point).
[35] *Osoyoos Indian Band v Oliver (Town)*, 2001 SCC 85, [2001] 3 SCR 746, at paras 154-155.
[36] *Semiahmoo Indian Band v Canada*, Appellants' Book of Authorities [**BA**], Tab 5, [1998] 1 FC 3, [1997] FCJ No 842 (QL) at para 45.

23. Saskatchewan argues for a blanket rule imposing a standard that "where the Crown has devoted the land to a public purpose" and in doing so "alienated reserve land to an innocent third party in violation of its fiduciary duties", the land cannot be restored to a wronged First Nation.[37] Such a conclusion is simply beside the point of this litigation, where there was no surrender or expropriation and the Trial Judge did not retroactively create an easement.

24. In addition, Saskatchewan's argument does not square with the applicable equitable principles that are before this Court. There should be no general rule such as the one proposed by Saskatchewan that would create an override of the Crown's fiduciary duties and not require the Crown to meet the requisite standard of loyalty and good faith in the discharge of the Crown's obligations to Indigenous groups.

25. Saskatchewan's approach risks endorsing an error akin to that committed by the Courts below, excusing and countenancing breaches of fiduciary obligation and restoring the Crown by papering over wrongdoing. An equitable approach does not condone the Crown breaking its own laws and rendering fiduciary and legal obligations meaningless by regularizing the Crown's bad conduct after the fact and failing to restore to the First Nation what it actually lost.

26. It is fundamental to the Crown-Indigenous fiduciary relationship, going back to the *Royal Proclamation of 1763*, that the Crown is positioned between the First Nation and third parties to protect against exploitation of First Nations' lands.[38] Saskatchewan's proposed approach treats this requirement as though it has no meaning or content. Saskatchewan's proposal would not achieve deterrence and would not hold the fiduciary to its solemn obligation or protect the relationship of public importance, which is the foundational purpose of fiduciary law.[39]

E. Saskatchewan's argument is inconsistent with principles of equitable compensation

27. As Saskatchewan correctly notes, the goal of equitable compensation is to restore a beneficiary, without the limits on the calculation of damages that exist in tort and contract.[40] The focus of this appeal needs to remain on the correct principles and methodology for achieving such

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[37] Saskatchewan Factum at paras 26-27.
[38] *Wewaykum* at para 80.
[39] Rotman, Leonard I. "Fiduciary Law" (Toronto: Thomas Canada Limited, 2005), BA, Tab 9 at 635-637.
[40] Saskatchewan Factum at para 18.

restoration for LSFN. Saskatchewan's submission focuses on a way to protect third party interests (by a judge-made easement), a question that is not at issue in this appeal, and which does not assist in clarifying how LSFN should be restored based on equitable principles and principles of Aboriginal law.

28. Saskatchewan's approach furthermore highlights the errors in principle and flawed approach to the law that undermine the decisions of the Courts below. Saskatchewan's arguments replicate the errors of the Trial Judge, including his incorrect pre-determination of the scope of available remedy (an expropriation payment) before even identifying Canada's breaches and the resulting losses suffered by LSFN.[41]

29. LSFN submits that the focus on certain steps that Canada *never took* is emblematic of one of the errors of law and principle that LSFN are asking this Court to address. The question before this Court is not whether the Trial Judge's findings of fact were correct; it is a question of whether, in assessing equitable compensation, the Courts below applied the right principles. An approach to those principles that results in a remedy for a different loss than what was actually suffered by LSFN does not accord with applicable remedial goals and leads to an incorrect assessment of equitable compensation for LSFN.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of November, 2020.

Rosanne Kyle	Elin Sigurdson	Kendra Shupe

[41] Trial Reasons at para 286, AR Vol I, Tab 1 at 102-103.

PART II - TABLE OF AUTHORITIES