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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Overview

1. The Appellants have raised the issue of how principles of equitable compensation, together with legal principles applicable to Crown-Indigenous relationships, should be applied to compensate them for their losses.[1] The Respondent has characterized the issue as whether the courts below erred in assessing the equitable compensation owed to the Appellants.[2]

2. Justice Brown's Order allowing the interventions specifically noted that interveners were not "entitled to raise new issues or to adduce further evidence or otherwise to supplement the record of the parties".[3] However, the majority of the interveners have done just that, raising a variety of issues that are not rooted in the issues raised by the main parties in the appeal. The new issues and arguments raised by the interveners do not assist the Court in deciding this appeal and should be left for cases in which they are directly raised.

Assembly of Manitoba Chiefs (AMC)

3. AMC suggests that the application of the principles of equitable compensation fails to reflect and fully account for the First Nation's loss with their primary point being that courts should assess equitable compensation with regard to First Nations' laws and perspective.[4] The implementation of these factors requires specific evidence in each case, as the circumstances of each matter will be unique. The concerns of AMC regarding reconciliation are addressed below at paragraph 23.

4. The trial in this matter lasted 54 days. Many witnesses testified, including several experts called by the Appellants. Thousands of exhibits were entered into evidence.[5] Notwithstanding the rejection of some of the Appellants' expert evidence, over half of the

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[1] Appellant's Factum at para 67.
[2] Respondent's Factum at para 48.
[3] Order of Brown J., dated October 22, 2020.
[4] Assembly of Manitoba Chief's Factum at para 6.
[5] *Southwind v Canada*, 2017 FC 906 at paras 12-76 [*Trial Decision*] (Record of the Appellant [*AR*], Vol I, Tab 1 at 7-26).

court's compensation award was comprised of compensation for non-calculable and non-quantifiable losses, such as loss of hay fields and the flooding of grave sites.[6]

Tseshaht First Nation (Tseshaht)

5. Tseshaht's argument strays into the merits of the appeal, which is beyond the role of an intervener. Tseshaht's primary argument appears to be the need for proportionality, which would require compensation based on the most favourable use of the property.[7] This argument suggests that the approach used by the courts below amounted to an overriding and palpable error. [8]

6. The equitable compensation assessed by the courts below calculated the land at its highest value, based on the evidence led at trial.[9] The argument that the land should have been assessed based on a revenue sharing arrangement of hydro-generation was not accepted by the Trial Judge, based on his assessment of the evidence.[10]

Attorney General of Saskatchewan (Saskatchewan)

7. Saskatchewan's factum impermissibly raises a new issue regarding the interest of dam operators in the assessment of equitable compensation.[11] This is a matter that should be left for a case that squarely raises the issue, with a proper evidentiary foundation.

8. Saskatchewan also raises two additional matters.[12] The first - third party rights - is not raised by the main parties in this appeal, and its resolution should wait for a case in which it is squarely raised. As to the second , paragraph 17 of *Cowper-Smith v Morgan*, 2017 SCC 61, simply stands for a general proposition concerning "proprietary estoppel" as a cause of action. The Respondent refers to its submissions in its main responding factum, at paragraph

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[6] *Ibid* at paras 509-512 (*AR*, Vol I, Tab 1 at 173-174).
[7] Tseshaht First Nation's Factum at para 22.
[8] *Ibid* at para 29.
[9] *Trial Decision*, *supra* note 5 at paras 376-395 (*AR* Vol I, Tab 1 at 132-139).
[10] *Ibid* at paras 330-375 (*AR* Vol I, Tab 1 at 116-132).
[11] Attorney General of Saskatchewan's Factum at paras 16-17.
[12] *Ibid* at paras 36 and 40.

80, that the creation of an easement in this case would require the consent of the Governor in Council and is outside the scope of this matter.

Manitoba Keewatinowi Okimakanak Inc (MKO)

9. MKO's primary argument is that the principle of *restitution in integrum* (restoration to the original condition) must be applied and that principles of compensation should be informed by international law, particularly cases from the Inter-American Court of Human Rights, New Zealand and Australia.[13] The appellants have not pled this principle, nor have they argued for its application in this Court or the courts below. Further, the legislative and legal contexts in which many of these cases have been decided are important. For example, in paragraph 17 of their factum, MKO refers to a New Zealand decision regarding a tribunal that had specific legislative authority to return land to the New Zealand Maori. The legal, legislative and factual bases of that case are far different from the present appeal.

Anishinabek Nation (AN)

10. AN impermissibly raises new issues about the application of unwritten constitutional principles and *Charter* values in the context of this appeal. These issues were not argued by the parties or addressed by the courts below. The application of these instruments is not a straightforward matter. As this Court has said, even in the constitutional context, unwritten constitutional principles should not be used to create rights beyond those already reflected in the written text of the constitution.[14] Similarly, the concept of *Charter* values also has minimal utility in this appeal since *Charter* values are most often used as an aid to statutory interpretation, but only in cases where there is genuine ambiguity as to the meaning of a provision.[15]

Treaty Land Entitlement Committee of Manitoba Inc (TLEC)

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[13] Manitoba Keewatinowi Okimakanak Inc's Factum at paras 2-3 and 15.
[14] *British Columbia v Imperial Tobacco Canada Ltd.*, 2005 SCC 49 at para 65.
[15] *Wilson v British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 47 at para 25.

11. TLEC proposes four guiding principles that they say should be taken into account in this appeal and beyond, with general application to all Crown breaches of Aboriginal or treaty rights.[16] The respondent agrees with the general goal of reconciliation; however, it is well beyond the limited scope of this reply to deal with concerns and complexities that may be raised by the application of the proposed principles. For example, it is not clear how equitable principles of compensation would have a role in causes of action where equitable principles do not necessarily apply as a matter of law. Also, the proper economic model used to determine historical losses will depend on the particular claim and corresponding evidence, including expert economic or accounting evidence. It is difficult to see how one economic model would be appropriate for all cases.

Wauzhushk Onigum Nation (WON)

12. There is no basis for WON's argument that the Trial Judge failed to apply the principles set out by this Court in *Guerin v The Queen*, [1984] 2 SCR 335 (*Guerin SCC*).[17] The Trial Judge conducted a detailed review of the relevant jurisprudence, including *Guerin SCC*, and properly set out the content of Canada's fiduciary duty to the appellants.[18] The Trial Judge did not "invent 'alternative facts'".[19] Rather, he looked back to when Canada's breach of fiduciary duty occurred in 1929 and, with the benefit of hindsight and the evidentiary record, assessed what position the Appellants would have been in but for the breach.

13. WON fails to recognize that in addition to compensation for calculable losses, the Trial Judge also awarded equitable compensation for non-calculable losses, including non-quantifiable losses that continue today, assessed at over $16M.[20] Further, the appellants' electricity generation claim was dismissed based on the Trial Judge's assessment of the evidence at trial, including expert evidence.[21] Finally, while WON takes issue with the respondent's

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[16] Treaty Land Entitlement Committee of Manitoba Inc's Factum at paras 2 and 4.
[17] Wauzhushk Onigum Nation's Factum at paras 1 and 11-14.
[18] *Trial Decision*, *supra* note 5 at paras 219-285 (*AR*, Vol I, Tab 1 at 80-102).
[19] Wauzhushk Onigum Nation's Factum at para 14.
[20] *Trial Decision*, *supra* note 5 at paras 443-444 and 504-512 (*AR*, Vol I, Tab 1 at 152-153 and 171-174).
[21] *Ibid* at paras 318 and 350-375 (*AR*, Vol I, Tab 1 at 112-113 and 124-132).

valuation evidence at trial, the Trial Judge properly concluded that Bell's method of valuation was "appropriate and proper".[22] In any event, the Appellants did not lead any expert evidence regarding the fair market value of the flooded lands or with respect to any premium they allege Canada should have negotiated in relation to the lands.

Big Grassy First Nation, Onigaming First Nation, Naotkamegwanning First Nation and Niisaachewan First Nation

14. These interveners' primary argument is that the Trial Judge erred by considering expropriation law in assessing the equitable compensation owing to the Appellants. Contrary to their submissions, the Trial Judge did not find that Canada had a duty to expropriate the Appellants' land.[23] Rather, the Trial Judge's reliance on expropriation law was driven by his factual findings, not challenged in this Court, that the project would have always proceeded through a surrender or expropriation, with compensation based on the fair market value of the flooded lands.[24] In any event, the Appellants' compensation was not limited to what they would have received under expropriation law, as the Trial Judge took a number of intangible losses into account in assessing the non-calculable compensation he awarded to the Appellants.[25] Finally, these interveners' reference to flooding on other Reserves in Northwestern Ontario is not grounded in the evidence of this case and does not assist in resolving this appeal.[26]

Coalition of Union of British Columbia Indian Chiefs, Penticton Indian Band and Williams Lake First Nation (the Coalition)

15. The Coalition argue that there is a need to ensure consistency in adjudication of historical claims between courts and the Specific Claims Tribunal.[27] In addition to being an

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[22] *Ibid* at para 380 (*AR*, Vol I, Tab 1 at 135).
[23] Big Grassy First Nation, Onigaming First Nation, Naotkamegwanning First Nation and Niisaachewan First Nation's Factum at para 2.
[24] *Trial Decision*, *supra* note 5 at paras 292 and 318 (*AR*, Vol I, Tab 1 at 104 and 112-113).
[25] *Ibid* at paras 509-512 (*AR*, Vol I, Tab 1 at 173-174).
[26] Big Grassy First Nation, Onigaming First Nation, Naotkamegwanning First Nation and Niisaachewan First Nation**'s** Factum at para 15.
[27] The Coalition's Factum at paras 8-11.

impermissible new issue, this concern is unfounded for the reasons explained below at paragraph 30. The Coalition also emphasizes that the courts' assessment of equitable compensation should take into account the Indigenous perspective and Indigenous laws. While undoubtedly true, this must be done within the context of the trial and based on the evidence adduced by the parties, which is what was done in this case. In addition, the Coalition ignores that the Trial Judge took the ongoing impacts of the flooding into account in his assessment of non-calculable losses.[28]

Federation of Sovereign Indigenous Nations (FSIN)

16. FSIN focus their submissions on the application of a two-part test for the assessment of equitable compensation.[29] The Appellants did not advance this methodology at trial and, in particular, did not claim the current replacement value of the flooded lands. Further, the appellants' electricity generation claims were properly dismissed by the Trial Judge based on his detailed findings of fact and assessment of the expert evidence.

17. FSIN impermissibly raises the methodology for bringing forward historical losses to present day values.[30] The Trial Judge's findings on how to bring forward historical losses to present day values were not appealed by either party.

Kwantlen First Nation (Kwantlen)

18. Kwantlen's submissions stress the importance of deterrence in an award of equitable compensation for a breach of Canada's fiduciary duty to Indigenous peoples.[31] The Trial Judge properly took the need for deterrence into account in his compensation award. The Respondent relies on its submissions in its main responding factum at paragraphs 95-96. Kwantlen's argument that the Trial Judge erred by refusing to award punitive damages is not at issue in this appeal, the appellants' not having pursued it at the Federal Court of Appeal.[32]

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[28] *Trial Decision*, *supra* note 5 at paras 509-512 (*AR*, Vol I, Tab 1 at 173-174).
[29] Federation of Sovereign Indigenous Nations' Factum at paras 7-19.
[30] *Ibid* at paras 20-34.
[31] Kwantlen Factum at paras 24-29.
[32] *Southwind v Canada*, 2019 FCA 171 at para 100 [*Appeal Decision*] (*AR*, Vol I, Tab 2 at 230-231).

Similarly, Kwantlen's submissions with respect to aboriginal title constitute a new issue as they do not arise on the facts of this case and were therefore not addressed by the parties and courts below.[33]

Atikameksheng Anishnawbek First Nation (AAFN)

19. The AAFN's submissions impermissibly focus on new issues related to the methodology for bringing forward historical losses to present day values. Specifically, the AAFN's submissions focus on how various decisions have dealt with the issue of bringing forward historical losses to present day values.[34] The Trial Judge's findings on how to do so were not appealed by either party and are not an issue before this Court. The AAFN's submissions on this point constitute a new issue that the intervener is prohibited from raising.

Assembly of First Nations of Quebec and Labrador (APNQL)

35. L'APNQL soutient que le juge de première instance a commis une erreur en ne tenant pas compte des dispositions de la *Loi sur les Indiens* qui, selon elle, auraient permis aux appelants de négocier une indemnisation pour leurs terres inondées supérieure à la juste valeur marchande.[35] Tout d'abord, la seule preuve d'expert au procès concernant la valeur des terres inondées était la preuve sur laquelle le juge de première instance s'est appuyé. Il n'y a pas eu de preuve d'expert sur une quelconque prime au-dessus de la juste valeur marchande parce que les appelants ont fondé leur preuve au procès sur leurs réclamations concernant la production d'électricité. Deuxièmement, le juge de première instance a établi des conclusions de fait, non contestées devant cette Cour, selon lesquelles le projet aurait toujours été mis en œuvre en 1929 et que si le défendeur n'avait pas manqué à son devoir, il aurait obtenu la cession des terres de réserve à inonder ou aurait exproprié les droits d'inondation nécessaires.[36]

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[33] Kwantlen's Factum at paras 12-15 and 22-23.
[34] AAFN's Factum at paras 15-17.
[35] Mémoire de l'APNQL, aux para 11-27.
[36] *Décision de première instance*, aux para 325-328 et 383 (*DA*, vol I, onglet 1, pp 114-116 et 135-136.

20. L'argument de l'APNQL selon lequel le juge de première instance aurait dû avoir recours à la common law fédérale et adopter les principes d'équité au lieu d'appliquer le droit de l'expropriation pour calculer l'indemnité équitable est une nouvelle question qui n'a été soulevée par aucune des parties devant les tribunaux inférieurs. Le juge de première instance a estimé que l'indemnité équitable incluait à la fois les pertes calculables et non calculables.[37]

Assembly of First Nations (AFN)

21. Contrary to the AFN's argument respecting the standard of review, there are no extricable questions of law.[38] Also contrary to the AFN's submissions, the courts are required to determine equitable compensation on the basis of the evidence before them. The appellants had the opportunity to produce evidence at trial regarding what they "lost as a result of the breach".[39] They should not be permitted to provide additional new evidence now, having failed to provide it at first instance, under the guise of the lower courts failing to apply "a progressive interpretation of the principles of equitable compensation".[40]

22. Regarding the *United Nations Declaration*, the respondent reiterates that fiduciary law and the principles of equitable compensation, as set out by this Court and applied by the courts below, provide both a domestic approach to redress that reflects the objectives found in the UN Declaration and the means for determining appropriate redress consistent with the UN Declaration.[41]

Chemawawin Cree Nation (CCN)

23. CCN incorrectly posits that the Trial Judge reduced the respondent's fiduciary duty to the appellants to an obligation to do no more than pay the expropriation value of private lands. The Trial Judge highlighted the content of the respondent's fiduciary duty, which encompassed a number of elements including a duty of loyalty and good faith and a duty to

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[37] *Décision de première instance*, *supra* note 5, aux para 443-444 et 504-512 (*DA*, vol I, onglet 1, pp 152-153 et 171-174).
[38] Factum of Her Majesty the Queen in right of Canada, filed October 26, 2020, at paras 49-54.
[39] The AFN's Factum, at para 10.
[40] The AFN's Factum, at paras 28 and 35.
[41] See Factum of Her Majesty the Queen in right of Canada, filed October 26, 2020, at para 94.

protect the appellants' proprietary interest in the reserve from exploitation.[42] The content of this duty is not under appeal.

24. The respondent agrees with CCN that the courts' assessment of equitable compensation should take into account the Indigenous perspective. However, this must be done within the context of the trial or proceeding itself, by way of evidence put forward by the parties. That is exactly what took place in this case. Finally, CCN's argument related to treaty interpretation is outside the scope of this appeal, and CCN's argument that the lands should be valued based on profit is not grounded in the evidence and does not assist in the resolution of this appeal.

Mohawk Council of Kahnawà:ke (MCK)

25. MCK impermissibly raises new issues, outside the scope of this appeal, concerning the Crown's statutory authority to expropriate and the content of the respondent's fiduciary duty. MCK further provides new evidence respecting Mohawk laws and history in Kahnawà:ke that are irrelevant to the issues under appeal. It bears emphasizing that the Trial Judge was confined to making a decision based on the evidence before him, as presented by the parties and their chosen witnesses. This includes evidence respecting the Indigenous perspective.

26. A common theme throughout many interveners' facta, including MCK's, is an argument that the Trial Judge erred by considering expropriation law in calculating equitable damages. However, it must not be forgotten that the Trial Judge went on to consider the appellants' intangible losses that were not capable of mathematical calculation, adding over $16M in equitable compensation to the judgment for this purpose. The Trial Judge relied on expropriation law only to: (a) determine what opportunity the appellants lost, but for the Crown's failure to deal with the reserve lands in accordance with the law; and (b) assist in calculating that part of the appellants' losses that were capable of some form of calculation.

West Moberly First Nations (West Moberly)

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[42] *Trial Decision*, *supra* note 5 at paras 226-227 (*AR*, Vol I, Tab 1 at 83-84).

27. West Moberly's arguments regarding treaty interpretation, *stare decisis* and the relative value of reserve lands versus non-reserve treaty lands are all outside the scope of this appeal. Further, there is no requirement that a court identify all of the issues that they are not deciding on appeal, nor is there any practical utility in so doing.

28. In their submissions, West Moberly conflates damages with equitable compensation. These are two distinct concepts, each with their own set of legal principles and rules. Issues relating to damages are of no consequence to this appeal.

The Grand Council Treaty #3 (Grand Council)

29. The arguments raised by the Grand Council respecting breach of treaty obligations and treaty interpretation are outside the scope of this appeal. The appellants did not pursue their claim for breach of treaty at trial, focussing solely on their claim respecting breach of fiduciary duty.[43] Furthermore, the Trial Judge could only determine the issues on the basis of the evidentiary record before him. To the extent that the appellants had a perspective and position on the meaning of Treaty 3's terms, they ought to have provided that evidence to the court. In addition, the appellants do not allege any specific error respecting the Trial Judge's interpretation of Treaty 3.[44]

Elsipogtog First Nation (Elsipogtog)

30. Elsipogtog impermissibly raises a new issue about whether the existing appeal must be determined in a manner consistent with the *Specific Claims Tribunal Act*, SC 2008, c 22 (the *Act*). In any event, Elsipogtog's submissions that inconsistencies will result in impacts to reconciliation are unfounded. First, Indigenous groups who meet the criteria in the *Act* can choose to use the specific claims process or not. Second, the Tribunal has the statutory power to determine any questions of law or fact in relation to any matter within its jurisdiction, including the ability to distinguish, where necessary and appropriate, court decisions which were made outside the scope of the Tribunal's statutory scheme.[45]

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[43] *Ibid* at paras 8, 226 and 296 (*AR*, Vol I. Tab 1 at 6, 83 and 105). See also *Written Submissions of the Plaintiffs*, section III(A) at pages 15-18 (*AR*, Vol II, Tab 5 at 21-24).
[44] *Appeal Decision*, *supra* note 32 at paras 51-52 (*AR*, Vol I, Tab 2 at 213-214).
[45] *Specific Claims Tribunal Act*, SC 2008, c 22, s 13(1)(a).

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

Christopher Rupar | Dayna Anderson | Michael Roach

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

TABLE OF AUTHORITIES

Legislation			Cited at para
1.	*Specific Claims Tribunal Act*, SC 2008, c 22, s 13(1)(a)	*Loi sur le Tribunal des revendications particulières*, LC 2008, ch 22, art 13(1)(a)	31

Jurisprudence		Cited at para
1.	*British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49	10
2.	*Southwind v Canada*, 2017 FC 906	4, 6, 12-15, 20-21, 24
3.	*Southwind v Canada*, 2019 FCA 171	18, 29
4.	*Wilson v British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 47	10