S.C.C. 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, HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO and HER MAJESTY THE QUEEN IN RIGHT OF MANITOBA

RESPONDENTS

- and -

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PART I – OVERVIEW

1. The Chemawawin Cree Nation ("CCN") intervenes in this case because its own reserve land was flooded for hydro-electric purposes after Canada obtained a surrender in breach of its fiduciary duty to CCN. The principles that govern the Crown's fiduciary duty when reserve land is taken for public purposes, and the principles for determining appropriate compensation when the duty is breached, are of critical importance to CCN.

2. Any just resolution of claims by First Nations who have been deprived of their lands requires the recognition of the powerful role of First Nations' relationship to their lands in sustaining the well-being of their communities, and the need to account for the full range of harms suffered when their connection with the land is impaired. The Crown, as fiduciary and treaty partner, has an obligation to protect that connection. When a First Nation's land is taken or used for public purposes, the Crown's fiduciary obligation requires preservation, to the greatest extent possible, of the First Nation's interests in the land. This includes their interest in using the benefits generated from the land to sustain their people and their cultures in a manner that permits them to prosper and flourish.

3. Reserve lands held under treaty are not mere real estate – they are foundational to a First Nations' continuing existence as a people. The trial judge treated the Crown's breach of fiduciary duty as a mere failure to provide the compensation that would have been payable for an expropriation of privately held land. This approach fails to take into account the special nature of a First Nation's interest in reserve lands, particularly those held under a treaty, and the distinct fiduciary relationship that is grounded in the pre-existing sovereignty and territorial rights of First Nations. The special nature of First Nations' interests includes the social, cultural, spiritual components of their unique relationship with the land, and the autonomy to use the land as a platform and driver of economic growth and development for the community into the future. The Crown's fiduciary obligation requires it to ensure that all of those interests are protected, and where that is not possible, that the First Nation's loss is fully compensated.

4. Assessing the land's value based on expropriation principles does not compensate the First Nation for what it has lost, and does not hold the Crown to the standard required of a fiduciary and treaty partner. As Justice Gleason held in her dissenting judgment, the Crown could have sought a

surrender of the land. The Crown's fiduciary duty would have required it to ensure, *inter alia*, that the First Nation was fully informed about the project's impact on all of their interests, and that the terms of any surrender were not improvident in light of those impacts. If the full extent of the First Nation's loss from the flooding could not be adequately addressed, including the protection of their treaty right to maintain their mode of life and sustain themselves from the land, permitting a surrender would not be consistent with the Crown's fiduciary obligations.

5. If the Crown breaches its obligations with respect to First Nations' land taken for a public purpose, equity supports a flexible approach to compensation that allows a First Nation to request, and the court to award, a remedy that will make it whole. One appropriate approach is to base compensation on the value that is realized from the new use of the lands. This approach is consistent with restoring the relationship between the benefits from the land and the First Nation, and replaces what they should have received - a negotiated settlement consistent with the honour of the Crown and a mutually respectful treaty partnership.

PART II - POSITION ON THE APPELLANT'S QUESTIONS

6. The Chemawawin Cree Nation takes no position on the outcome of the appeal.

PART III - STATEMENT OF ARGUMENT

7. The trial judge's approach reduced the fiduciary duty to nothing more than an obligation to pay the expropriation value of privately held land. The trial judge found Canada was only obliged to "obtain a fair and reasonable price" which the judge equated with "fair market value of the land" and that this was the measure of Lac Seul First nation ("LSFN")'s loss.[1] The effect of this finding is that the First Nation's interest in land is treated the same as that of an ordinary land owner, who would normally also be entitled to market value upon a forced taking. This approach leads to an absurd result: the Crown's fiduciary obligation to the First Nation will be fulfilled if the Crown treats the land as it would that of any other landowner to whom no such obligation is owed, that is, by providing market value. In fact, the fiduciary duty requires much more.

[1] *Southwind v. Canada*, 2017 FC 906 ("*Southwind FC*") para. 383.

The Nature of First Nations' Interest in Reserve Land and the Crown's Fiduciary Duty

8. The honour of the Crown – an organizing principle in Aboriginal law – recognizes that when the Crown asserted sovereignty over Canadian territories, it did so in the face of pre-existing Aboriginal sovereignty and territorial rights.[2] When the Crown assumes "discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty".[3] The link between First Nations' interests in the land and pre-existing sovereignty is key to understanding that reserve land is not merely fungible acreage, but rather a means for First Nations to exercise their autonomy and sustain their people and their cultures into the future, in a manner that permits them to prosper and flourish. The Crown's fiduciary obligation includes safeguarding these various interests that First Nations have in their land.

9. This Court recognized in *Osoyoos* that it is inappropriate to apply common law real property rules to First Nations' reserve lands.[4] The majority held that reserve lands are intended to preserve the "important cultural component that reflects the relationship between an Aboriginal community and the land and the inherent and unique value in the land itself which is enjoyed by the community"[5] – and, indeed, which forms part of their very identity. This is consistent with what the Royal Commission on Aboriginal Peoples said about the relationship between First Nations and their land:

> Aboriginal people have told us of their special relationship to the land and its resources. This relationship, they say, is both spiritual and material, not only one of livelihood, but of community and indeed of the continuity of their cultures and societies.[6]

10. When a First Nation loses the use of its lands, the core of the harm is interference with the First Nation's relationship with those lands, a relationship that anchors their autonomy, their culture, their well-being, and their livelihood. When this deprivation occurs in the context of a

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[2] *Mitchell v. M.N.R.*, 2001 SCC 33, para. 9; *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, paras. 68-72; *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, para. 42.
[3] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida Nation*], para. 18.
[4] *Osoyoos Indian Band v. Oliver (Town)*, 2001 SCC 85 [*Osoyoos*], paras. 44-47.
[5] *Osoyoos*, para. 46; see also *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, para. 83.
[6] Report of the Royal Commission on Aboriginal Peoples, 1996, Vol. 2, Part 2, online, p. 438.

breach of the Crown's fiduciary obligations, an effective remedial response must be capable of addressing all of these negative impacts.

11. Expropriation law principles are unsuitable for this task. The calculation of compensation under expropriation principles presupposes that the land is fungible, and that the landowner can use the compensation to obtain replacement land in the free market that is roughly comparable in quantity and quality to the land taken. This is not true of First Nations land.[7] As Robert Mainville explains:

> [t]he concept of market value appeals to a commercial perspective, but it fails to take into account the special relationship and bond between Aboriginal Peoples and their traditional lands and activities, and it ignores the cultural, spiritual, and social aspects of Aboriginal and treaty rights. Aboriginal cultures are often rooted in a relationship with particular territories. The use of such territories for activities unrelated to or incompatible with traditional Aboriginal activities can result in the disruption of Aboriginal societies – a damaging effect that can never be captured in the concept of market value.[8]

12. There can be no doubt that First Nations have a unique relationship with their land that is distinct from ordinary incidents of land ownership. Loss associated with the deprivation of the use of land for many decades, as occurred here, is not fully compensated by an award of market value.

13. For the goals of equitable compensation to be fully realized, compensation must restore, as far as possible, the position of the First Nation in every respect. Although fiduciary law already embraces the concept of restitution, there is a further reason to do so here: to repair, maintain, and protect the special relationship between Canada and the First Nation. In the First Nations context, restitution involves many dimensions beyond the economic cost. While the nature of losses and long-term impacts will vary, numerous harms not captured in an expropriation model are likely to arise when First Nations are deprived of the benefit of their traditional territories, including social, cultural, spiritual and environmental impacts.[9]

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[7] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 [*Delgamuukw*], para. 129; *Osoyoos*, para. 45.
[8] Mainville, Robert, *An Overview of Aboriginal and Treaty Rights and Compensation for their Breach* (Saskatoon: Purich Publishing, 2001) ("Mainville, *An Overview*"), p. 93.
[9] Appellants' Factum, paras. 6, 30-38.

14. The economic component of the loss is multidimensional and intertwined with the First Nations' autonomy and cultural survival as a people. This includes not only the obvious loss of land as a means of providing an ongoing livelihood, but the deprivation of the right to control future land uses that may be more profitable. Without the benefit of autonomy over the land base they were entitled to under the Treaty, a First Nation's ability to provide opportunities for their community into the future may be severely impaired.

Lands held under treaty are the subject of the treaty partnership

15. First Nations like LSFN are also not ordinary landowners because they are partners within an ongoing treaty relationship.[10] Treaties are sacred agreements[11] setting out the framework whereby Indigenous and settler peoples have agreed to share lands and resources: "the first step in a long journey that is unlikely to end any time soon."[12]

16. A critical aspect of the treaty partnership is the Crown's commitment to protect lands and resources for the use of the First Nation in order to continue their way of life and their relationship to the land.[13] Lands held under treaty arrangements are not only ancestral homes, they are a key component of the reconciliation of competing sovereignties that treaties are meant to achieve.

17. When land and resources that are fundamental to the rights of First Nations are taken for other purposes, it is not just a promise that is broken: the *relationship* itself is undermined. As Justice La Forest, concurring in *Delgamuukw*, pointed out, "fair compensation in the present context is not equated with the price of a fee simple. Rather, compensation must be viewed in terms of the right and in keeping with the honour of the Crown."[14]

18. Further, the character of Aboriginal and treaty rights - including the collective, cultural and historical nature of these rights - requires that losses "should be compensated not only in terms of

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[10] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 [*Mikisew Cree*], para. 25; *Haida*, para. 32.
[11] *R. v. Sioui*, [1990] 1 S.C.R. 1025, p. 1063.
[12] *Mikisew Cree*, para. 56.
[13] Report of the Royal Commission on Aboriginal Peoples, 1996, Vol. 1, online, p. 161.
[14] *Delgamuukw*, para. 203.

present value, but also in terms that take into account the loss of the future uses of the land and the consequential long-term impacts on the affected Aboriginal society."[15]

19. Arguably, as LSFN's treaty partner, Canada did not have the ability to unilaterally decide how the LSFN's land would be used. Given the lack of evidence about Treaty 3, it is not necessary or appropriate for the Court to decide this point. But at the very least, the nature of treaty making makes it clear that the Crown should not be permitted to unilaterally decide that the benefits of the new use of land it mandated would accrue to others, and not the LSFN. Such unilateral action is "the antithesis of reconciliation and mutual respect."[16] Under Treaty 3, the LSFN was entitled to have all of the benefits of the land, which include economic, spiritual and cultural components. If some truly compelling public need requires that LSFN be deprived of its ability to determine the use of the land, it was entitled to an arrangement that would satisfy the requirement that treaty partners act in a mutually respectful and beneficial manner. It is for the loss of that fair and respectful arrangement that LSFN must be compensated.

Remedies must minimize the extent First Nations are deprived of the benefits of their land

20. The trial judge held that Canada would have fulfilled its fiduciary obligation to LSFN if it had paid fair market value for the land "either through using its power of appropriation or through negotiations with LSFN."[17] Indeed, the trial judge said that if Canada had "done better" than paying market price for the land "it is arguable that it would have violated its duty to the citizens of Canada to act in the public interest."[18] The trial judge rejected any assessment of damages based on Canada's failure to negotiate a revenue sharing agreement, in part on the basis that the LSFN would not have been able to bargain for one. And he rejected compensation based on the value of the land for hydro-electric purposes because that was inconsistent with the law on expropriation and because he said it would have put LSFN in a better position than it would have been in if the Crown had fulfilled its fiduciary obligations in 1929.

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[15] Mainville, *An Overview*, p. 111.
[16] *Mikisew Cree*, para. 49.
[17] *Southwind FC*, para. 383.
[18] *Southwind FC*, para. 383.

21. The CCN respectfully submits that this approach should not be adopted by this Court. Given the unique role and value of First Nations land, and the Crown's fiduciary duty to protect the myriad of interests that First Nations have in maintaining their connection to their land, appropriate arrangements cannot be limited to providing compensation based on expropriation principles. Indeed, in most cases, any fair and respectful settlement would require more.

22. The content of what would constitute a fair and respectful arrangement cannot be limited by the fact that the First Nation would have exercised very little bargaining power in its negotiation with the Crown. This would be inconsistent with the very nature of a fiduciary duty. The question is not "what would the First Nation have been able to bargain with the Crown?" but rather "what was consistent with the Crown's obligation?"

23. Nor does the need for the Crown to have regard to the "public interest" mean that it is limited to paying the bare minimum required under expropriation law. The appropriate balance between the "public interest" and the Crown's fiduciary obligation to the First Nation may be to utilize the land for the public purpose, but to ensure any financial returns generated by the new use of the land be given, in whole or in part, to the First Nation. At the very least, a settlement consistent with the Crown's fiduciary duty must ensure that a First Nation is able to continue to exercise to the same degree any treaty or other rights that require a land base, and that the community has the same potential for economic growth and stability as it did prior to the taking.

24. The trial judge recognized that in *Osoyoos*, this Court held that when reserve land is expropriated for a public purpose, the Crown has a fiduciary obligation to minimize the negative effects of the expropriation on the First Nation.[19] The same requirement that harms be minimized should apply whenever a First Nation is deprived of the use of their land for a public purpose. Similarly, remedies for the wrongful taking of reserve land should be aimed at minimizing the extent to which First Nations are deprived of the benefits of having use and control of their land.

25. One method of achieving this is to base compensation on some measure of the value of the use of the land as realized by the Crown. The remedies sought by LSFN based on revenue sharing or on the value of the land for hydro-electric uses are consistent with this approach.

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[19] *Southwind FC*, paras. 328 and 361; *Osoyoos*, para. 52.

26. Such remedies are appropriate because they can at least partially restore the relationship between the benefits produced by the land and the First Nation. While the benefits are of a different kind than were previously being produced, they are still benefits from the land, and the land was meant to be used to benefit the First Nation.

27. This approach does not "put the claimant in a better position than they would have been for the breach," or "provide the plaintiff with a windfall amount that bears no relation to the actual harm suffered."[20] Nor do these kinds of remedies run contrary to any principle that the plaintiff should only be compensated for losses caused by the breach of fiduciary duty.

28. It is clear that the Crown's failure to protect LSFN's interest in its reserve land has led to the situation where LSFN no longer receives the benefits being produced from its lands. If the Crown had effectively protected LSFN's interests, it would have either prevented the flooding or put in place an arrangement consistent with the fiduciary obligation and the honour of the Crown. This would have been aimed at minimally impairing the LSFN's connection to its land. Ensuring that LSFN received benefits from its land even if it lost the use of its land is consistent with this.

29. Such an arrangement could not be in any way exploitive, and the Crown could not have taken advantage of any imbalance in the bargaining power between itself and the LSFN. As a result, the terms of such an agreement should have been consistent with LSFN receiving full compensation for all future losses, and the Crown paying the highest amount compatible with a feasible project. It would never be consistent with the honour of the Crown for the Crown to take a First Nation's land in order to increase its own revenues or the profits of third parties. To the extent there were excess financial gains realized in fulfilling a public purpose, those could have been directed to the First Nation, without impairing the "public purpose" of the taking.

30. In any event, this Court has acknowledged the possibility that equitable remedies might improve the beneficiary's economic situation. One of the most important policy objectives of trust law is that a fiduciary must not gain from the breach of its obligation. If the fiduciary's profit is greater than the beneficiary's loss, the profit is a better standard of compensation.[21] This is

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[20] Respondent's Factum, para. 66.
[21] *Moore International (Canada) Ltd. v. Carter*, 1984 CanLII 518 (BC CA) [*Moore*], para. 23.

sometimes justified as the "prophylactic purpose" of disgorgement which "advances the policy of equity, even at the expense of a windfall to the wronged beneficiary."[22]

31. Indeed, the unique three-way relationship between First Nations, their land and the Crown makes it inappropriate to suggest that First Nations receive a "windfall" when compensation for the loss of reserve land is based on the value of that land in the hands of the Crown. First Nations' rights to their land are not held only under a statute or a land registration system devised by the Crown. First Nations have their own legal orders that ground their authority over their lands, and the inter-societal law that governs First Nations rights in Canada recognizes that their legal interests in land are ultimately sourced in their pre-existing sovereignty and territorial rights over their land.[23] The Crown's assertion of sovereignty over those territories, which the Crown relies on to exercise authority over those lands, can only be consistent with the honour of the Crown if it is reconciled with First Nations' continuing interest in the land. If the Crown is going to develop reserve lands for other purposes, sharing the benefits with the First Nation is consistent with an honourable treaty partnership.

32. Subsuming the question of compensation into the expropriation framework erases key concerns of equity. Expropriation principles may preclude valuing the land based on the unique use made of it after expropriation, but there is no reason why that limitation must be imported into the Crown's fiduciary obligation. In the context of the special fiduciary relationship between the Crown and First Nations, valuing the land as it is *actually being used* restores the relationship between the First Nation and the benefits flowing from their land, while ensuring that any increase in value that results from the fiduciary's breach finds its way to the beneficiary. In this manner, the treaty promise of two peoples moving forward together in partnership can be fulfilled.

33. In *Atlantic Lottery*, this Court reaffirmed the longstanding use of gain-based remedies for breach of fiduciary duty, and held that such remedies may be appropriate in common law situations if other remedies are inadequate, and extraordinary circumstances warrant such an award. [24]

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[22] *Strother v. 3464920 Canada Inc*., 2007 SCC 24 (CanLII), [2007] 2 S.C.R. 177, para. 77.
[23] Slattery, Brian, "Making Sense of Aboriginal and Treaty Rights" *Canadian Bar Review* 79.2 (2000): 198.
[24] *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, paras. 32 and 53.

34. In some cases, where both the fiduciary's gains and the beneficiary's losses can be established, either may be considered in an action for breach of fiduciary duty.[25] In such cases, "the plaintiff is not required to elect one remedy or the other. He may lead evidence of both his own loss and his fiduciary's profit. And the trial judge may then make an award of compensation that is supported by the evidence."[26] Given the difficulties of proving and quantifying many of the losses experienced by the First Nations who are deprived of their land, including those related to cultural, spiritual and environmental values, it should be open to First Nations to elect to quantify at least part of their compensation based on some measure of the value received by the Crown.

Conclusion

35. The Crown's fiduciary duty to protect reserve lands, particularly those established under a treaty, arises from the honour of the Crown. It requires the Crown, where there is a taking of that land for a compelling public purpose, to preserve, to the greatest extent possible the First Nation's ability to sustain themselves through the receipt of benefits derived from the use of their land. Where the Crown fails to do so, the principles of equitable compensation require the complete restoration of the position of the First Nation, including their myriad interests in, and connection to that land. Basing the level of compensation on the increased value of the lands or the revenues made from the lands restores the critical sustaining relationship between First Nations and their land, and gives real meaning to the obligation of the Crown to act honourably with respect to the taking of First Nations lands.

PART IV - ORDERS SOUGHT

36. The CCN does not seek any order, and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated: November 17, 2020

as agent for

Catherine Boies Parker Q.C., Mark G. Underhill, John Trueman and Caroline North
Counsel for the Intervener, Chemawawin Cree Nation

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[25] *Can. Aero v. O'Malley*, 1973 CanLII 23 (SCC), [1974] S.C.R. 592, pp. 621-622.
[26] *Moore*, para. 20.

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