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

APPLICANTS (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 (RESPONDENTS)

RESPONSE TO APPLICATION FOR LEAVE TO APPEAL
(Pursuant to Rule 27 of the Rules of the Supreme Court of Canada, SOR/2002-156)

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MEMORANDUM OF ARGUMENT OF THE ATTORNEY GENERAL OF CANADA

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PART I – STATEMENT OF FACTS

A. Overview

1. The central issue in this case is whether the Applicant received reasonable compensation for the flooding damage caused by the Lac Seul Storage Project in 1929.[1] This is a fact specific determination involving the weighing and assessment of the expert evidence adduced at trial. After a lengthy and complex trial with 22 expert witnesses, Mr. Justice Zinn awarded the Applicant $30 million in equitable compensation for the flooding of their reserve resulting from the Lac Seul Storage Project.

2. The equitable compensation awarded by Mr. Justice Zinn is supported by the evidence and fairly compensates the Applicant for its losses. To the extent that money can accomplish it, the compensation awarded puts the Applicant back in the position that it would have been in had Canada not breached its fiduciary duty to the Applicant in 1929. In dismissing the Applicant's appeal, the majority of the Court of Appeal applied settled principles of fiduciary law and equitable compensation established by this Court in *Guerin*, *Blueberry River* and *Canson* to the unique facts of this case. Further, all the courts below properly rejected the Applicant's revenue sharing claim.

3. The flooding from the Lac Seul Storage Project unquestionably damaged the Applicant's reserve and adversely affected the people who lived there. However, the proposed appeal does not raise any legal questions of national or public importance requiring this Court's intervention. Given the fact-based nature of this case, there is no uncertainty in the law that requires clarification from this Court. Canada therefore asks that the application for leave to appeal be dismissed.

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[1] *Southwind v Canada*, 2019 FCA 171 (the "Appeal Decision") at para 18, Application for Leave to Appeal filed 09 September, 2019 ("ALA"), Vol. I, Tab 2B.

B. Facts and Procedural History

Background:

4. The Applicant is a Treaty No. 3 First Nation with a reserve located on Lac Seul's shores in north-western Ontario.[2]

5. In 1911, Canada started exploring the use of Lac Seul for the Lac Seul Storage Project (the "Project"). Specifically, waters from Lac Seul could be released into the English River and then the Winnipeg River, which would improve the dependability of water flows for hydro-electric purposes.[3]

6. On February 28, 1928, Her Majesty the Queen in Right of Canada ("Canada"), Her Majesty the Queen in Right of Manitoba ("Manitoba"), and Her Majesty the Queen in Right of Ontario ("Ontario") entered into the *Lac Seul Storage Agreement* ("*LSSA*")[4]. Under the *LSSA*, Ontario was to construct, own, and operate a dam at the outlet of Lac Seul for the purposes of conservation, regulation and power development.[5]

7. In 1929, construction of the Ear Falls Dam (the "Dam") was completed. By 1934, water levels on Lac Seul had risen.[6] The flooding at Lac Seul covered 11,304 acres of the Applicant's reserve.[7]

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[2] *Southwind v Canada*, 2017 FC 906 (the "Trial Decision) at para 104, ALA, Vol. I, Tab 2A.
[3] Trial Decision at paras 116-118, 121, 123-124.
[4] Trial Decision at paras 145, 148. The *LSSA* was enshrined in legislation by Canada in the *Lac Seul Conservation Act, 1928*, 18-19 Geo V, c 32, and by Ontario in *An Act Respecting the Lac Seul Storage, 1928,* 18 George V, c 12.
[5] Trial Decision at para 146 referencing *LSSA* para 2.
[6] Trial Decision at para 392.
[7] Trial Decision at paras 2, 218, 385; Appeal Decision at para 9.

8. The Ear Falls Generating Station, which is adjacent to the Dam, went into operation in early 1930.[8] The Dam and Ear Falls Generating Station are located approximately 80 kilometers from Lac Seul First Nation's ("LSFN") reserve.[9] The water power site is located on Ontario's Crown land.[10]

9. Flooding from the Dam in the 1930s affected several parties located at Lac Seul such as the Applicant, Anglican Church Missionary Society, Hudson's Bay Company, Ontario provincial Crown land, Triangle Fish Company, and Canadian National Railways.[11]

10. In 1943, after extensive negotiations, Canada, Ontario, and Manitoba agreed to pay the Applicant $72,539 for its flooding damages. From the $72,539, $5,000 was deducted to pay Keewatin Lumber Company for its timber losses on reserve and $17,276 was deducted to pay Ontario for excess acres included in the reserve.[12] The Applicant therefore received a net payment of $50,263 for flooding damages, which included $8,000 for 8,000 acres of flooded reserve lands.[13] The compensation paid to the Applicant also included amounts for housing, hay lands, improvements, graves and timber.[14]

11. On February 18, 2009, Ontario Power Generation ("OPG") opened a new generating station at Lac Seul called the Lac Seul Generating Station ("LSGS"). The LSGS is adjacent to the Ear Falls Generating Station.[15] The LSGS harnesses water power generated by the Dam and is jointly-owned by LSFN and OPG on a 25%-75% basis.[16] Between August 2009 and July 2016, LSFN received approximately $3.8 million from the partnership and will continue to receive

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[8] Trial Decision at para 162.
[9] Trial Decision at para 346.
[10] Trial Decision at para 346; Trial Decision at para 146 referencing *LSSA* para 2.
[11] Trial Decision at para 213.
[12] Trial Decision at paras 106, 111, 200-201, 206, 208.
[13] Trial Decision at paras 207-208, 213.
[14] Trial Decision at para 445. The Applicant received $31,039 for housing, $8,000 for hay lands, $10,000 for improvements, $500 for moving graves and $15,000 for timber.
[15] Trial Decision at para 216.
[16] Trial Decision at para 16.

revenue on an ongoing basis.[17] This revenue sharing agreement was the first agreement of its kind between an Ontario power company and a First Nation.[18]

Decision of Trial Judge:

12. The trial commenced in September 2016 and lasted 54 days.[19] Mr. Justice Zinn (the "Trial Judge") heard from 24 witnesses, 22 of whom were experts, and 8,347 documents were entered as exhibits at trial.[20]

13. The Applicant sought $403 million in hydroelectric benefit losses resulting from Canada's alleged breach of fiduciary duty.[21] The Applicant based its claim on the theory that, in 1929, Canada should have negotiated a revenue-sharing agreement on their behalf for the electricity generated at three downstream generating stations located on the English River in Ontario and six downstream generating stations located on the Winnipeg River in Manitoba.[22] The Applicants also sought compensation for losses related to erosion, community infrastructure, timber dues, and punitive damages.[23]

14. In his decision, the Trial Judge found that Canada breached the fiduciary duties it owed the Applicant and awarded $30 million in equitable compensation.[24] The $30 million in equitable compensation included both calculable and non-calculable losses. The calculable losses were based on the following heads of damages that the Court found should have been paid to the Applicant: a) consideration for flooding rights (flowage easement) over the Applicant's reserve lands payable in 1929; b) timber dues payable in 1929; c) improper deduction for excess

[17] Trial Decision at para 16.
[18] Transcript of Cross-Examination of James R. (Northcote) Gillis, 26 Oct 2016, p. 68, line 25-p. 69, line 28, Respondent's Documents in Support, Tab 2.
[19] Appeal Decision at para 10
[20] Trial Decision at para 12.
[21] Trial Decision at paras 10 and 38.
[22] Trial Decision at paras 9, 38, 350, 372; Appeal Decision at paras 25, 36, 57, 106-107 and 140.
[23] Trial Decision at paras 359, 513.
[24] Trial Decision at 511 and 512.

reserve acreage in 1943; and, d) community infrastructure payable in 2008.[25] The Court assessed these losses by applying an economic model to the historic losses that brought these amounts forward to 2017 dollars and then subtracting amounts credited to Canada.[26]

15. The non-calculable losses were other losses suffered by the Applicant that were not susceptible to mathematical calculation.[27] These included items such as loss of livelihood both on and off-Reserve and overall damage to the aesthetic of the lake shore due to the failure to remove the timber prior to flooding.[28] Many of these losses were found to have persisted over decades, with some still continuing.[29]

16. The Trial Judge found that the flooding on the Reserve was never authorized under the *Indian Act*.[30] While Canada had the legal authority to take the affected reserve lands by either surrender or expropriation,[31] it failed to take the proper steps to execute this authority. There was no evidence at trial as to why Canada never obtained a surrender or expropriated the flooded reserve lands and none of the historians who testified could provide an explanation.[32] The Trial Judge therefore concluded that Canada's conduct was "inexplicable" and "contrary to the manner in which Canada dealt with other bands in similar circumstances."[33]

17. The Trial Judge determined that had Canada acted legally, it would have either obtained a surrender of the reserve lands to be flooded or expropriated the necessary flooding rights. He further found that the amount of compensation would be the same under both approaches, and

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[25] Trial Decision at paras 443, 505 and 508.
[26] The amounts credited to Canada were $8,000 for lost lands and $10,000 for timber losses paid to LSFN in 1943: Trial Decision at paras 452, 508.
[27] Trial Decision at paras 444, 508-512.
[28] Trial Decision at para 444.
[29] Trial Decision at para 512.
[30] Trial Decision at paras 218(x)-(xii), 298 and 322.
[31] *Indian Act*, RSC, 1927, c 98, ss 48, 50-51; Trial Decision at paras 132, 322, 324, 326
[32] Trial Decision, *supra*, para 524; Direct Examination of Betsey Baldwin, 14 Nov 2016, p. 43, lines 20-26, Respondent's Documents in Support, Tab 3.
[33] Trial Decision at para 298.

that if the price could not be agreed upon, Canada would have used its expropriation powers.[34] The Trial Judge therefore concluded that the Applicant should have been compensated with a one-time payment, based on an expropriation model, and not based on a theory of negotiating an on-going revenue sharing scheme.[35] The Trial Judge made numerous findings of fact rejecting the Applicant's argument that Canada should have negotiated an on-going revenue-sharing scheme on its behalf.[36]

18. With respect to the value of the flooded reserve land, Canada retained Mr. Bell ("Bell") to provide an expert opinion as to their value.[37] The Applicant did not present expert evidence on the value of the flooded reserve lands. Instead, they retained Mr. Wilson ("Wilson") to critique Bell's work. As a result, the Trial Judge ruled that Wilson could not provide his own opinion as to the value of the reserve lands.[38] In any event, the Trial Judge noted Mr. Wilson's agreement with Mr. Bell's valuation if it was without reference to the hydroelectric project.[39]

19. The Trial Judge found Bell's method of valuation to be "appropriate and proper" and adopted his conclusions.[40] Using Bell's evidence, the Trial Judge found that the Applicant should have been paid $1.29 per acre for flooded reserve lands in 1929, as opposed to the $1 per acre it – and every other party impacted by the flooding at Lac Seul - received in 1943.[41]

20. The Trial Judge made the following additional relevant findings:

    a) The Applicant's claims for erosion losses and punitive damages were dismissed.[42]

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[34] Trial Decision at 359.
[35] Trial Decision at paras 233, 239, 296, 357, 358.
[36] Trial Decision at para 351-356.
[37] Trial Decision at para 57.
[38] Trial Decision at paras 42, 57; Appeal Decision at para 140; Transcript of Qualifications of Norris Wilson, 31 Oct 2016, p. 31, lines 1-11, Respondent's Documents in Support, Tab 4.
[39] Trial Decision at para 379.
[40] Trial Decision at para 380.
[41] Trial Decision at paras 204, 213(6)(7), 384.
[42] Trial Decision at paras 430 and 525.

b) With respect to Applicant's loss of use expert, the Court concluded that she was "an advocate for the First Nation rather than an independent expert" and gave her evidence no weight.[43]

c) The deductions made to LSFN's compensation in 1943 for Keewatin Lumber Company's timber losses ($5,000) and the excess reserve acreage ($17,256) were a breach of Canada's fiduciary duty to LSFN.[44]

d) Canada's third party claims against Manitoba and Ontario were dismissed.[45]

Federal Court of Appeal Decision:

21. The Applicant appealed the decision of the Trial Judge. The Applicant's primary argument was that the Trial Judge erred in refusing to award compensation for the value of the revenue-sharing agreement they alleged Canada should have negotiated on their behalf. Alternatively, the Applicant argued that the value of the flooded reserve land should have been calculated in an amount greater than that fixed by the Trial Judge.[46]

22. On June 10, 2019, the Federal Court of Appeal dismissed the appeal, with Justice Gleason dissenting. Both the majority and minority agreed that there was no basis to award the Applicant compensation for the lack of a revenue-sharing agreement.[47] The majority and dissent also:

a) agreed that the Trial Judge's approach to ask "what likely would happen absent the breach?" was the correct approach;[48]

[43] Trial Decision at paras 87-90. This finding was not appealed to the Court of Appeal.
[44] Trial Decision at paras 445-447; Appeal Decision at para 31.
[45] Trial Decision at paras 539-552.
[46] Appeal Decision at paras 18, 36-43 and 64.
[47] Appeal Decision at paras 57-63 and 106-107.
[48] Appeal Decision at paras 79, 80 and 108.

b) upheld the Trial Judge's finding that the scenarios the Applicant advanced were not likely;[49] and,

c) agreed that the Trial Judge did not err in finding that the Applicant would have been compensated with a one-time payment for the loss of the flooded reserve land.[50]

23. On the question of the quantum of compensation awarded for the loss of the flooded reserve lands, the majority found that the Trial Judge's determination regarding the comparability of the 1914 Kananaskis Falls development project in Alberta (the "Kananaskis Project") was a factual determination based entirely on the historical record.[51] As a result, while the Trial Judge may have distinguished the Kananaskis Project in part on an incorrect basis, it did not amount to an overriding and palpable error justifying appellate intervention. The majority concluded that based on the appeal record, the Trial Judge's finding that the two projects were different was sound and that his determination that $1.29 per acre was the proper compensation for the flooded reserve land should not be disturbed.[52]

24. The majority also agreed with the Trial Judge's finding that Canada did not have a duty to negotiate compensation for the flooded lands over and above their fair market value.[53] In that regard, the majority noted that the Applicant did not introduce any expert evidence regarding the fair market value of the flooded land or any related premium that should have been paid.[54]

25. In dissent, Justice Gleason would have allowed the appeal on the basis that the Trial Judge committed a legal error in distinguishing the Kananaskis Project. Specifically, the Trial Judge erred by misapprehending Canada's power to expropriate the reserve lands for the Kananaskis

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[49] Appeal Decision at para 63 and 106-107.
[50] Appeal Decision at para 64 and 108.
[51] Appeal Decision at paras 113.
[52] Appeal Decision at paras 113-114.
[53] Appeal Decision at paras 138-139.
[54] Appeal Decision at para 140.

Project.[55] Justice Gleason found that it was impossible to know what consequences flowed from this error; therefore, she would have set aside the award of compensation in its entirety and returned the matter to the Trial Judge for reconsideration.[56]

26. The Applicant now seeks leave to appeal to this Court from the Federal Court of Appeal's decision.

PART II – QUESTION IN ISSUE

27. The issue on this application is whether the proposed appeal raises any question of public or national importance that justifies the granting of leave by the Court.

28. Canada's position is that no such question exists. Rather, this case involves a fact-based assessment of damages based on the specific evidence lead at trial, including the expert evidence. The Trial Judge applied well-settled principles of fiduciary law and equitable compensation to the specific facts of this case. The result fairly compensates the Applicant for flooding losses related to the Project.

PART III – STATEMENT OF ARGUMENT

A. No Issue of Public Importance as Existing Jurisprudence Provides Sufficient Guidance

29. While redressing past wrongs involving Canada's Indigenous peoples is of undoubted significance, the proposed appeal does not raise any legal questions of national or public importance requiring this Court's intervention. The parties, Trial Judge and Court of Appeal all agreed on the key principles of the law of fiduciary duty and equitable compensation that were

[55] Appeal Decision at paras 92-96.
[56] Appeal Decision at paras 97.

determinative in this case. In particular, there is no dispute that the goal of equitable compensation is to put a plaintiff in the position that it would have been in but for the breach.[57]

30. The Court of Appeal noted the wider set of issues on which the parties had agreed.[58] Specifically, the parties agree that Canada owed the Applicant a fiduciary duty, that it breached that duty, and that the appropriate remedy was the awarding of equitable compensation. The question of the appropriate quantum of compensation was the primary issue in dispute between the parties.

31. The Applicant cites many of the well-established and uncontroversial principles regarding the law of fiduciary duty and principles of equitable compensation established by this Court that apply to the Crown's dealings with reserve lands.[59] However, the general principles of equitable compensation were not at issue in this case. Rather, it was their application to the specific facts in this case that was in dispute. Specifically, what was at issue was the factual question of what amount of equitable compensation was required in order to restore the Applicant to the position that it would have been in but for Canada's breach of fiduciary duty. This is a fact and case specific determination that involved an assessment of the evidence, including expert evidence, by the Trial Judge. It is not an issue on which guidance from this Court is required.

32. The Applicant argues that guidance from this Court is necessary to help resolve "novel issues" currently being dealt with by the Specific Claims Tribunal (the "Tribunal"). The Applicant does not specify exactly what the "novel" issues arising at the Tribunal relating to equitable compensation are or how they arise in this case.[60] To the extent that issues of public importance arise in decisions from the Tribunal, this Court should deal with those issues in the context of an actual Tribunal decision and not this case.

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[57] *Guerin v The Queen*, [1984] 2 SCR 335 at 357 and 372; *Canson Enterprises Ltd. v Boughton & Co.*, [1991] 3 SCR 534 at 556 and 577.
[58] Appeal Decision at paras 46-52.
[59] Applicant's Memorandum of Argument at paras 40-43, ALA, Vol. II, Tab 3.
[60] Applicant's Memorandum of Argument at para 46, ALA, Vol. II, Tab 3.

33. The Federal Court of Appeal's decision did not depart from established jurisprudence regarding Canada's fiduciary duty to First Nations or the applicable principles of equitable compensation. In addition, there is no uncertainty in the general applicable legal principles, nor is this a case of conflicting appellate court decisions that require this Court's intervention. The assessment of damages following the application of settled principles of fiduciary law and equitable compensation to the facts of a specific case is not a matter for which leave to appeal ought to be granted.

B. Applicant Fairly Compensated for its Losses

34. Central to the Trial Judge's decision was the question of what would have happened in 1929 had Canada fulfilled its fiduciary duty to the Applicant. The Trial Judge referred to this hypothetical scenario as the "non-breach" world, where he had to consider "what would likely have occurred in 1929, vis-à-vis the Reserve land had Canada legally fulfilled its duties to the LSFN?"[61] This approach is in accordance with well-established legal principles requiring the Trial Judge to determine what amount of equitable compensation was required in order to put the Applicant back in the position that it would have been in had Canada not breached its fiduciary duty in 1929.[62]

35. As part of his analysis of the "non-breach" world, the Trial Judge noted the public importance of the Project and reasonably held that, "[t]here is no reasonable likelihood that that the project would have been shelved had the LSFN or Indian Affairs refused to have the land flooded."[63] Accordingly, based on the historical evidence, there was no possible scenario where the Project would not have been undertaken in 1929.[64]

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[61] Trial Decision at para 329.
[62] *Guerin v The Queen*, [1984] 2 SCR 335 at 357 and 372; *Canson Enterprises Ltd. v Boughton & Co.*, [1991] 3 SCR 534 at 556 and 577.
[63] Trial Decision at paras 292, 327.
[64] Trial Decision at paras 292, 318.

36. Having found that the Project would have always proceeded in the "non-breach" world, the Trial Judge determined that Canada would have - and should have - obtained a surrender of the reserve lands to be flooded or expropriated the necessary flooding rights. This conclusion was based on the historical record and the usual practice in 1929 for taking lands to create a reservoir.[65]

37. Canada could have sought a surrender with the Applicant's consent or if not, it could have expropriated the entire or a lesser interests in the lands.[66] With either option, the Trial Judge noted that Canada had a duty to ensure that LSFN received reasonable compensation for its lands.[67] Rather than speculating why Canada did not seek a surrender, the Trial Judge noted that "[t]he reality is that [Canada] could have expropriated the land legally and the loss to the LSFN would be exactly the same."[68] The conclusion that Canada had a duty to obtain a reasonable price for the Applicant's flooded reserve lands is consistent with the relevant jurisprudence, the *Indian Act*, and basic expropriation principles.[69] It was also consistent with the fact that other parties impacted by the flooding received a one-time payment.[70] The Trial Judge therefore concluded that LSFN should have been compensated with a one-time payment based on an expropriation model, and not based on an on-going revenue sharing scheme.[71]

38. As explained by the Court of Appeal, in an expropriation, the value to be paid is the value to the owner, and not the value to the taker, as it existed at the date of taking.[72] The manner in which the majority of the Court of Appeal applied these established principles of expropriation

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[65] Trial Decision at paras 350-371.
[66] Trial Decision at paras 296, 325-328.
[67] Trial Decision at para 383.
[68] Trial Decision at paras 318, 524.
[69] Trial Decision at paras 296, 326, 383, 384; *Osoyoos Indian Band v Oliver (Town)*, [2001] 3 SCR 746, 2001 SCC 85 at paras 52-56 and 128-130; *Commodore v Canada*, 2001 FCA 387 at para 6; *Blueberry River Indian Band v Canada*, [1995] 4 SCR 344 at paras 52-56.
[70] Trial Decision at paras 352, 365, 369-371.
[71] Trial Decision at paras 233, 239, 296, 357, 358.
[72] Appeal Decision at paras 67-80. See also: Eric CE Todd, *The Law of Expropriation and Compensation in Canada*, 2d ed (Toronto: Carswell, 1992), p 4-5, 11-12, 158-160; *Diggon-Hibben Ltd v R*, [1949] SCR 712, paras 3, 8; *Woods Manufacturing Co v R*, [1951] SCR 504, p 3.

to the unique facts of this case is not a matter of public importance that warrants granting leave to appeal to this Court.

39. With respect to the value of the flooded reserve lands, the Court of Appeal noted that the Applicant did not introduce any expert evidence regarding the fair market value of the flooded land or any related premium that should have been paid.[73] Bell's evidence was the only expert evidence before the Trial Judge as to the value of the reserve lands in 1929. The trial record, therefore, does not support an alternative valuation as suggested by the Applicant. The Applicant's argument that Canada could, and should, have paid more than fair market value for the land was correctly found by the Trial Judge to be "…nothing more than optimistic speculation".[74]

40. Contrary to the Applicant's assertion, the Trial Judge did not award compensation based on the "worst case scenario".[75] Rather, the Trial Judge made numerous detailed findings of fact, based on the evidence at trial, regarding what would have actually happened in 1929 had Canada not breached its duty to the Applicant. The Trial Judge's analysis and use of the "non-breach" world did not amount to a hypothetical reconstruction that perpetuates historic wrongs to Indigenous groups. The compensation awarded by the Trial Judge restored the Applicant to the positon it would have been in but for Canada's breach of fiduciary duty based on the evidence at trial. The assessment of damages in a historical case such as this will always require the consideration of the hypothetical scenario in which the breach does not occur.

41. The Applicant also incorrectly asserts that the Trial Judge's decision ignores the Aboriginal perspective regarding the loss they suffered and their special connection to the land.[76] As part of the non-calculable losses, Justice Zinn awarded compensation that took into account the flooding's negative impacts on hunting and trapping, hay lands, gardens, and rice fields,

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[73] Appeal Decision at para 140.
[74] Trial Decision at para 383.
[75] Applicant's Memorandum of Argument at para 52, ALA, Vol, II, Tab 3.
[76] Applicant's Memorandum of Argument at 33(a), ALA, Vol. II, Tab 3.

including off reserve losses.[77] Moreover, as noted by the Trial Judge, the Applicant's focus at trial was on their electricity generation claims and not their loss of use claims.[78] The quantification of the Applicant's loss of use claims were advanced through the Applicant's loss of use expert, whose evidence was rejected by the Trial Judge on the basis that she was acting as an advocate for the Applicant.[79]

Electricity Generation Claims Correctly Dismissed:

42. The issue of whether Canada should have negotiated a hydro revenue sharing arrangement on the Applicant's behalf in 1929 was dismissed by all judges below and does not raise any issue of national importance.[80] In rejecting the argument that Canada was required to negotiate an on-going revenue-sharing scheme on the Applicant's behalf, the Trial Judge made the following findings of fact:

a) The Trial Judge preferred the evidence of Canada's electricity generation expert to that of the Applicant's expert, and found that the Applicant expert's valuation of the electricity generation claims was neither reasonable nor conservative.[81]

b) None of the other parties impacted by the flooding at Lac Seul received any type of revenue sharing deal.[82]

c) The Columbia River Treaty between Canada and the United States that the Appellants relied on was "of little to no value in assessing what Canada should have done in 1929."[83]

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[77] Trial Decision at paras 512, 444.
[78] Trial Decision at para 9.
[79] Trial Decision at paras 86 – 91.
[80] Trial Decision at paras 318, 350-357.
[81] Trial Decision at para 83.
[82] Trial Decision at paras 351-356.
[83] Trial Decision at para 349.

d) The draft unsigned 1928 memo relied upon by the Applicant's expert in his analysis and calculations was given no weight as there several problems with this memo, including that it did not represent market price negotiations and there was no analysis to explain the $1 per horsepower figure it cited.[84]

43. At the Federal Court of Appeal, the Applicant continued to argue that Canada should have negotiated a revenue sharing agreement in 1929 on its behalf.[85] Both the majority and dissent agreed that Canada's fiduciary duty to the Applicant did not include any duty to negotiate a revenue sharing arrangement on behalf of the Applicant.[86] The Applicant's argument that it should have received compensation for hydro-electric generation is based on the specific facts and evidence, including expert evidence, lead at trial. It is not an issue that warrants intervention by this Court.

Stoney Band Not A Relevant Precedent:

44. The discussion in the courts below regarding the factual comparison of the Kananaskis Project does not raise any issue of national importance. The Trial Judge found that the Kananaskis Project was not comparable to the Applicant's situation in 1929. The Kananaskis Project had a water power "site" that was located on the Stoney Band's reserve.[87] However, in the Applicant's case, the water power "site" was not located on the LSFN's reserve. Rather, it was located some 80 kilometers away from the Applicant's reserve on Ontario Crown land.[88] Further, the Stoney Band did not receive any income from electricity generation at downstream stations, which was what the Applicant was seeking in this claim.[89]

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[84] Trial Decision at para 354.
[85] Appeal Decision at para 57.
[86] Appeal Decision at paras 57, 63, 106-107.
[87] Trial Decision at para 218(xxx).
[88] Trial Decision at para 346.
[89] Trial Decision at paras 342 and 346.

45. Contrary to the Applicant's argument, the Trial Judge assessed their losses presuming the most advantageous use and with the benefit of hindsight. The Applicant's arguments are general in nature and ignore the Trial Judge's specific findings of fact dismissing their claims for an ongoing revenue sharing scheme. In fact, the Trial Judge specifically looked back to when the breach occurred in 1929 and, with the benefit of hindsight and the evidentiary record, assessed what position the Applicant would have been in had there been no breach. Based on the evidence, the Trial Judge correctly determined that, had Canada acted legally, the reserve lands would have been taken in 1929 through expropriation or surrender.[90] He then reasonably assessed the Applicant's losses, calculable and non-calculable.[91] He also properly concluded that Canada, through the exercise of the ordinary diligence required of a fiduciary, cannot have been expected to have negotiated a revenue sharing arrangement for the Appellants in 1929.[92]

C. Principle of Reconciliation Does not Require Granting of Leave in this Case

46. The Applicant argues that this Court should grant leave in this case because of the fundamental importance of reconciliation and the role that courts play in achieving this goal.

47. Canada agrees that the goal of reconciliation is of fundamental importance. In the present case, reconciliation includes the final resolution of a historical dispute by an independent trier of fact based on the evidence presented at trial and the awarding of equitable compensation that reasonably compensates the Applicant for its losses related to the Project. As Justice Wilson observed in Guerin, "I do not think it is the function of this Court to interfere with the *quantum* of damages awarded by the trial judge if no error in principle in determining the measure of damages has been demonstrated….The trial judge's task was not an easy one but I think he 'did the best he could'"[93]

48. At trial, Canada recognized its past wrongs and acknowledged that it breached the fiduciary duty it owed the Applicant. The Applicant notes that this case proceeded through the specific

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[90] Trial Decision at paras 358.
[91] Trial Decision at paras 443-444, 504-512.
[92] Trial Decision at paras 318, 350-357.
[93] *Guerin v The Queen*, [1984] 2 SCR 335 at 363.

claims process and that the parties did not reach any settlement.[94] A resolution outside of the court process would have been a preferable outcome for this dispute, but that is not always possible. Reconciliation, in this case, involved the Trial Judge awarding equitable compensation that reasonably compensated the Applicant for its losses related to the flooding and by the bringing of finality to the historical dispute over the amount of compensation owing to the Applicant.

49. As previously discussed, the decision of the Trial Judge was fully consistent with the principles of fiduciary duty and the law of equitable compensation. It was also a fact-based determination that turned on the Trial Judge assessment of the specific evidence lead at trial, including the expert evidence. His analysis of the positions of the parties, the weighing of expert evidence and the assessment of equitable compensation in order to resolve a historical claim is entitled to deference. No issue of public or national importance is raised in the specific circumstances of this case.

50. With respect to the Court of Appeal's decision, the majority applied well-settled jurisprudence to the facts of this case. This is not a case where there are conflicting appellate level decisions warranting this Court's intervention. Rather the courts below applied settled principles from this court in *Guerin*[95], *Osoyoos*[96], *Wewaykum*[97], *Blueberry River*[98] and *Canson*[99]. There is no uncertainty as to the general legal principles that apply to the resolution of this case that require clarification by this Court.

51. The Applicant argues that the remedy provided by the Trial Judge does not adequately deter Canada from breaching its fiduciary obligations; however, the need for deterrence was fully considered by the Trial Judge in his decision.[100] Contrary to the Applicant's assertion, there is

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[94] Applicant's Memorandum of Argument at para 18, ALA, Vol. II, Tab 3.
[95] *Guerin v The Queen*, [1984] 2 SCR 335; Trial Decision at paras 221-222, 240-241.
[96] *Osoyoos Indian Band v Oliver (Town)*, 2001 SCC 85; Trial Decision at para 360.
[97] *Wewaykum Indian Band v Canada*, [2002] 2 SCR 245; Trial Decision at para 223.
[98] *Blueberry River Indian Band v Canada*, [1995] 4 SCR 344; Trial Decision at para 221.
[99] *Canson Enterprises Ltd. v Boughton & Co.*, [1991] 3 SCR 534; Trial Decision at paras 232-233, 285.
[100] Trial Decision at para 525. See also 239, 245, 267, 281, 518 and 524.

no basis to say that the decisions from the courts below will impede the resolution of claims or create challenges for courts to determine just remedies in cases involving historical breaches of fiduciary duty by Canada. While the Trial Judge's decision is unsatisfactory to the Applicant, it does not mean that future cases involving the historical breach of a fiduciary duty cannot be resolved either through negotiation or adjudication in the courts.

52. The decision at issue is of obvious importance to the Applicant. However, the courts below applied well-settled jurisprudence to the unique facts of this case. The quantum of equitable compensation assessed by the Trial Judge is reasonable, fully supported by the evidence lead during a 54-day trial, and fairly compensates the Applicant for its losses. As such, this application for leave does not raise any issues warranting review by the Court.

PART IV – COSTS

53. Canada asks for its costs in opposing the leave application in the event the application for leave to appeal is dismissed.

PART IV – ORDER SOUGHT

54. That leave to appeal be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Ottawa, this 23rd day of October, 2019.

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

PART VI – TABLE OF AUTHORITIES

Legislation			Cited at para
1.	*An Act Respecting the Lac Seul Storage, 1928*, 18 George V, c 12	French version unavailable	6
2.	*Indian Act*, RSC, 1927, c 98 s 48 s 50 s 51 Hyperlinks to the provisions unavailable	French version unavailable	16
3.	*Lac Seul Conservation Act, 1928*, 18-19 George V, c 32	French version unavailable	6

Jurisprudence		Cited at para
1.	*Blueberry River Indian Band v Canada*, [1995] 4 SCR 344	37, 50
2.	*Canson Enterprises Ltd. v Boughton & Co.*, [1991] 3 SCR 534	29, 34, 50
3.	*Commodore v Canada*, 2001 FCA 387	37
4.	*Diggon-Hibben Ltd v R*, [1949] SCR 712	38
5.	*Guerin v The Queen*, [1984] 2 SCR 335	29, 34, 47, 50
6.	*Osoyoos Indian Band v Oliver (Town)*, [2001] 3 SCR 746, 2001 SCC 85	37, 50
7.	*Wewaykum Indian Band v Canada*, [2002] 4 SCR 245	50
8.	*Woods Manufacturing Co v R*, [1951] SCR 504	38

Secondary Sources		Cited at para
1.	*The Law of Expropriation and Compensation in Canada*, 2d ed (Toronto: Carswell, 1992), p 4-5, 11-12, 158-160	38

File No. T-2579-91

FEDERAL COURT

ROGER SOUTHWIND et al.

Plaintiffs

- and -

HER MAJESTY THE QUEEN IN RIGHT OF CANADA ET AL.

Defendants

*** * * * ***

PROCEEDINGS HELD AT

Supreme Court of Canada Building
East Court Room
301 Wellington Street
Ottawa, ON
Wednesday, October 26, 2016

Volume 18

*** * * * ***

BEFORE:

The Honourable Justice Zinn

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MR. GILLIS: You'd get a lower number.
MR. ROACH: Right. And that's not what you did?
MR. GILLIS: That's not what I did.
MR. ROACH: You didn't consider that.
MR. GILLIS: I didn't, no.
MR. ROACH: And it's a calculation you could have done?
MR. GILLIS: It's possible.
MR. ROACH: Okay. So I want to take a look at your page 23 of your PowerPoint and the sharing agreements. We touched on this a little bit.
(SHORT PAUSE)
MR. ROACH: Okay. So here we're looking -- I mean, you -- we've covered this in your testimony with my friend, but these are your First Nation precedent agreements, modern ones; is that correct?
MR. GILLIS: Yes.
MR. ROACH: Certainly. Page 23 of your PowerPoint.
MR. GILLIS: Yeah. Yes.
MR. ROACH: Okay. So you agree that all these -- these are all post-2008; correct?
MR. GILLIS: Yeah.
MR. ROACH: All right. And for partnerships involving direct ownership -- here we're talking with OPG in Ontario, the first example we have direct ownership participation is the Lac Seul Agreement in 2008?

MR. GILLIS: That's right.
MR. ROACH: Right. So it's only very recently that OPG has been doing these types of agreements?
MR. GILLIS: Yes.
MR. ROACH: Okay. So, I mean, you'd agree with me these examples are not precedents that you'd look at back in 1929 to see what type of agreement would have been put in place? I mean, they're 79-plus years from the date of the Lac Seul Storage Agreement.
MR. GILLIS: Sure. I think part of this is probably a legal question; you know, what's the most appropriate way to look at value. Can we take a -- you know, a modern-type agreement and apply it on a retroactive basis or you take agreements that are done at the time? In my first report that's what I did, and in my second report I went the other way.
MR. ROACH: Okay. Well, I'm just trying to follow through. I mean, we've talked about that your calculations you'd done follows a model starting in 1930 and there's a switchover in 1961; we've talked about that.
So I'm just looking at here these precedents. So if we start in 1929, we see what type of deal could or should have been done. These examples are not relevant that from the perspective of 1929.
MR. GILLIS: These are not happening in 1929.
MR. ROACH: They're happening 80 years later.

No. T-2579-91

FEDERAL COURT

ROGER SOUTHWIND et al.

Plaintiffs

- and -

HER MAJESTY THE QUEEN IN RIGHT OF CANADA ET AL.

Defendants

*** * * * ***

PROCEEDINGS HELD AT

Supreme Court of Canada Building
East Court Room
301 Wellington Street
Ottawa, ON
Monday, November 14, 2016

Volume 23

*** * * * ***

BEFORE:

The Honourable Justice Zinn

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Lac Seul, but it seems to relate to the same type of case, a flooding over reserve and the procedures for dealing with that type of flooding.

And McGill, Director McGill makes the point that the damages need to be addressed as per the *Indian Act* and that there's two ways, he says, to do so. The first is a:

> "...surrender by the Indians, assented to by [the] majority of the male members of the band of the full age of twenty-one years."

Following which there would be an:

> "...acceptance of the surrender by the Governor in Council."

And the second is by expropriation, which he says can occur, expropriation, that is, under section 48 of the *Indian Act*.

So those are the two descriptions of procedures that I found in my research.

MS. FRANCIS: And for the case of the flooding of the Lac Seul Reserve, did you ever find an Order in Council authorizing that flooding?

DR. BALDWIN: No surrenders or Orders in Council, no.

MS. FRANCIS: Do you know why?

DR. BALDWIN: I don't know why.

MS. FRANCIS: I would like to turn, now, to page 69 of the Baldwin Report.

File No. T-2579-91

FEDERAL COURT

ROGER SOUTHWIND et al.

Plaintiffs

- and -

HER MAJESTY THE QUEEN IN RIGHT OF CANADA ET AL.

Defendants

*** * * * ***

PROCEEDINGS HELD AT

Supreme Court of Canada Building
East Court Room
301 Wellington Street
Ottawa, ON
Monday, October 31, 2016

Volume 19

*** * * * ***

BEFORE:

The Honourable Justice Zinn

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JUSTICE ZINN: Okay. We'll qualify him and I'll just read it out for the record, then:

Mr. Wilson is qualified as an expert in the valuation of land and improvements, and is qualified to give opinion evidence as to whether the analysis, opinions, and conclusions in the Charles Bell Real Estate Appraisals Limited report are appropriate and reasonable.

In giving this evidence he must do so within the standards applicable to technical reviews as provided for in the Canadian Uniform Standards of Professional Appraisal Practice, and shall not give opinions of value.

With that we'll call Mr. Wilson back, and Mr. Bell. I take it that's Mr. Bell at the back of the room.

Thank you, Mr. Wilson. Just for your benefit you have been qualified -- well, okay.

Our technical issues always seem to take longer than anything else. Is that working?

Okay, Mr. Wilson, just for your benefit; I have qualified you as an expert in the valuation of land and improvements, and you are qualified to give opinion evidence as to whether the analysis, opinions, and conclusions in the Charles Bell Real Estate Appraisals Limited report are appropriate and reasonable.

In giving this evidence, you must do so within the standards applicable to technical reviews as provided for in the Canadian Uniform Standards of Professional Appraisal Practice, and you shall not give