

**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)

**REPLY TO RESPONSE TO APPLICATION FOR LEAVE TO APPEAL
(ROGER SOUTHWIND, FOR HIMSELF, AND ON BEHALF OF THE MEMBERS OF
THE LAC SEUL BAND OF INDIANS, AND LAC SEUL FIRST NATION,
APPLICANTS)**

(Pursuant to Rule 28 of the *Rules of the Supreme Court of Canada*)

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

**Rosanne Kyle, Elin Sigurdson and Elisa
Penn**
Mandell Pinder LLP
Barristers and Solicitors
422 - 1080 Mainland Street
Vancouver, BC V6B 2T4
Tel: 604.681.4146 Fax: 604.681.0959
E-mail: rosanne@mandellpinder.com
elin@mandellpinder.com
elisa@mandellpinder.com

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

Marie-France Major
Supreme Advocacy LLP
Suite 100 - 340 Gilmour Street
Ottawa, ON K2P 0R3
Tel: 613.695.8855 Fax: 613.695.8580
E-mail: mfmajor@supremeadvocacy.ca

**SOLICITORS FOR THE RESPONDENT
HER MAJESTY THE QUEEN IN RIGHT
OF CANADA:**

Michael Roach and Sarah Sherhols
Attorney General of Canada
Department of Justice
Civil Litigation Section
50 O'Connor Street, 5th Floor
Ottawa, ON K1A 0H8
Tel.: 613.670.6313 Fax: 613.954.1920
E-mail: Michael.roach@justice.gc.ca
sarah.sherhols@justice.gc.ca

**SOLICITORS FOR THE RESPONDENT
HER MAJESTY THE QUEEN IN RIGHT
OF ONTARIO:**

Leonard Marsello and Dona Salmon
Attorney General for Ontario
Crown Law Office - Civil
8th Floor, 720 Bay Street
Toronto, ON M7A 2S9
Tel.: 416.326.4939 Fax: 416.326.4181
E-mail: leonard.marsello@ontario.ca
dona.salmon@ontario.ca

**SOLICITORS FOR THE RESPONDENT
HER MAJESTY THE QUEEN IN RIGHT
OF MANITOBA:**

Glenn McFetridge and Kirsten Wright
Manitoba Justice - Civil Legal Services
405 Broadway, Suite 730
Winnipeg, MB R3C 3L6
Tel.: 204.945.2843 Fax: 204.948.2826
E-mail: Glenn.McFetridge@gov.mb.ca
Kirsten.Wright@gov.mb.ca

**AGENTS FOR THE RESPONDENT
HER MAJESTY THE QUEEN IN
RIGHT OF CANADA:**

Christopher Rupar
Attorney General of Canada
50 O'Connor Street, Suite 500, Room 556
Ottawa, ON K2P 6L2
Tel.: 613.941.2351 Fax: 613.954.1920
E-mail: Christopher.rupar@justice.gc.ca

**AGENTS FOR THE RESPONDENT
HER MAJESTY THE QUEEN IN
RIGHT OF ONTARIO:**

Karen Perron
Borden Ladner Gervais LLP
Barristers & Solicitors
Suite 1300, 100 Queen Street
Ottawa, ON K1P 1J9
Tel.: 613.369.4795 Fax: 613.230.8842
E-mail: kperron@blg.com

**AGENTS FOR THE RESPONDENT
HER MAJESTY THE QUEEN IN
RIGHT OF MANITOBA:**

D. Lynne Watt
Gowling WLG (Canada) LLP
Barristers & Solicitors
2600 - 160 Elgin Street
Ottawa, ON K1P 1C3
Tel.: 613.786.8695 Fax: 613.563.9869
E-mail:lynne.watt@gowlingwlg.com

TABLE OF CONTENTS

	Page
PART I - APPLICANTS' REPLY	1
A. The Appeal does not Raise a Factual Dispute	1
B. The Relevant Law is not Settled	3
C. How Equitable Compensation Should be Determined is a Matter of Public Importance	5
PART II - TABLE OF AUTHORITIES	6

PART I - APPLICANTS' REPLY

1. Canada's Response mischaracterizes the issues arising in the proposed appeal. By incorrectly characterizing the issues as fact-based, Canada ignores the legal issues of national public importance that are raised.

2. The central issue is not whether the Applicant, Lac Seul First Nation ("LSFN") received reasonable compensation. Rather, it is whether the courts below properly applied equitable compensation principles in the context of an unlawful taking of LSFN's reserve lands for a public purpose.

3. Canada's argument that this is primarily a factual dispute in an area of settled law is misleading and incorrect. There are no factual issues raised in the proposed appeal, and this Court has not had the opportunity to address how equitable principles must be applied in the types of circumstances arising in this case.

A. The Appeal does not Raise a Factual Dispute

4. Canada's Response addresses a factual dispute that is not before the Court.¹ LSFN's proposed appeal challenges the way in which the courts below applied principles of equitable compensation, not their findings of fact.

5. This Court has held that the role of appellate courts is to "delineate and refine legal rules and ensure their universal application."² Questions of law are questions that deal with the scope, effect, and application of a legal rule or test to be applied in determining the rights of the parties.³ The application of the wrong test to a set of agreed facts is an error of law.⁴

6. These are precisely the types of issues that arise in the proposed appeal. LSFN seeks leave to appeal so that this Court can delineate and refine the legal rules in the context of an unlawful taking of reserve lands for a public purpose; provide guidance on the scope, effect, and

¹ Respondent's Memorandum of Argument at para 1.

² *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33 at para 9.

³ *Canadian National Railway Co. v Bell Telephone Co.*, [1939] SCR 308 at p 316.

⁴ *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at para 39.

application of the legal rules to be applied in this type of case; and consider whether the courts below applied the wrong test to determine equitable compensation.

7. Assessing compensation necessarily requires application of legal principles; it is never merely “a fact specific determination”.⁵ Compensation principles are very different in tort, breach of contract and breach of fiduciary duty cases given the nature of those wrongs. The same set of facts will attract very different assessments of compensation depending on the cause of action, which is solely a result of applicable legal principles.

8. The Trial Judge’s findings of fact are not at issue. Rather, LSFN seeks to appeal on errors of law arising from his unprecedented application of equitable principles to the facts. This application was inconsistent with equitable principles, including but not limited to the principle that a remedy should return to the *cestui que trust* compensation “for what the object would be worth.”⁶ Equitable compensation is a restitutionary remedy where compensation is a substitute for “*in specie* restoration of an asset.”⁷ None of those principles were properly applied in the decisions below.

9. The central issue at trial was how to value LSFN’s loss. The Trial Judge assessed the loss based on how much money LSFN would have received for its lands had Canada expropriated its lands in 1929 pursuant to modern expropriation principles.⁸ This approach is fundamentally inconsistent with equitable principles. First, it ignores the lands’ highest and best use. Second, it fails to restore what LSFN lost as a result of Canada’s breach – the use of its reserve land for the past 89 years and indefinitely into the future.

10. Canada’s Response also mischaracterizes the findings of the courts below in a manner that suggests that this case only amounts to a factual dispute about inadequate payment. The references in Canada’s Response to a “revenue sharing claim” reveal a misunderstanding of LSFN’s argument.⁹ The Crown may not have had a fiduciary duty to negotiate a revenue sharing agreement with LSFN in 1929, but once the Crown breached its fiduciary duty, equitable

⁵ Respondent’s Memorandum of Argument at para 1.

⁶ *Canson Enterprises Ltd v Boughton & Co*, [1991] 3 SCR 534 at para 41.

⁷ *Beardy’s & Okemasis Band #96 and #97*, 2016 SCTC 15 at para 89.

⁸ *Southwind v Canada*, 2017 FC 906 (CanLII) [*Southwind FC*] at paras 378 and 497.

⁹ Respondent’s Memorandum of Argument at para 45.

compensation became payable based on LSFN's loss of its reserve lands. Considering the value of a revenue sharing agreement is simply one way to assess compensation for LSFN's loss of use of its reserve lands. This is one of the central issues of this appeal; if a court is going to apply a hypothetical scenario to assess compensation, it must use that hypothetical to determine and value the plaintiff's lost opportunity. To do otherwise is inconsistent with equitable and constitutional principles.

11. Canada's Response also mischaracterizes undisputed facts. For example, Canada says there were extensive negotiations that led to the negotiation of compensation for LSFN.¹⁰ This suggests that LSFN negotiated its compensation, when the reality is that LSFN was not consulted on the compensation and remained in the dark regarding these negotiations until decades later.¹¹

12. Canada takes issue with LSFN's position that other courts and tribunals would benefit from clarity being provided on novel issues in this appeal.¹² However, this Court's decision will necessarily have impacts in a variety of contexts, including by guiding decisions of the Specific Claims Tribunal where the Tribunal is tasked with awarding compensation in cases involving unlawful takings for public purposes. This Court's guidance on the issues arising in this case is necessary for other cases to be equitably and consistently adjudicated.

13. The issues in the proposed appeal are questions of law appropriate for appellate review and Canada's factual straw man argument does not diminish the issues of public importance that require this Court's jurisprudential guidance. Canada's submissions are not substantively responsive to the leave application.

B. The Relevant Law is not Settled

14. Canada's Response that the legal issues on appeal are settled is incorrect. The application of the principles of equitable compensation is not settled in the present context, and the existing general principles were not properly applied here to achieve an equitable remedy.¹³ None of the existing authorities analyze how equitable remedies should be determined where there is an unlawful taking of lands for public purposes, and in particular, where the lands continue to be

¹⁰ Respondent's Memorandum of Argument at para 10.

¹¹ *Southwind FC* at paras 533-535.

¹² Respondent's Memorandum of Argument at para 10.

¹³ Respondent's Memorandum of Argument at para 50.

trespassed upon today. The courts below referenced these cases but failed to connect the remedy to the deprivation, in light of the unique Aboriginal interest at stake.

15. The approach adopted by the courts below was entirely novel and unprecedented, which highlights the need for guidance from this Court. The Trial Judge crafted a retroactive *de facto* expropriation scenario to determine equitable compensation, even though there was no expropriation. While the courts below cited equitable principles of compensation in their decision, there is no legal support for the expropriation approach that they utilized. In addition, the way the lower courts applied equitable principles was inconsistent with broader principles of Aboriginal law, the honour of the Crown, and the obligations of a fiduciary. Their approach, in practice, failed to address the seriousness of Canada's breaches and improperly diminished the loss that LSFN has continued to live with every day for the past 89 years.

16. This case is factually distinct from existing jurisprudence, given that it involves the illegal taking of reserve lands for a public purpose. The case law offers little guidance on how courts are to apply principles of equitable compensation in this type of situation, and how to do so in a manner that is consistent with the ongoing nature of fiduciary obligations, the unique relationship between Indigenous peoples and their lands, and the standard of conduct required of fiduciaries.¹⁴

17. Canada's Response makes it clear that the legal principles at stake require clarification. Canada argues that whether LSFN has been awarded "reasonable compensation" has already been determined.¹⁵ However, reasonableness is not the standard for compensation for breach of fiduciary duty. The standard is whether the compensation is in conformity with equitable principles. This case is fundamentally about how both equity and reconciliation can be achieved where the Crown has acted in a manner inconsistent with its solemn obligations to an Indigenous community. This is not achieved by applying a "likely scenario" in 1929, when the Band has suffered losses for 89 years and continues to suffer these losses today. Such a remedy fails to adequately address the Crown's breaches of its fiduciary obligations. For LSFN, the water still floods their lands, the Crown is still in breach, and the framework for equitable compensation

¹⁴ *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 at para 46.

¹⁵ Respondent's Memorandum of Argument at para 37.

applied by the courts below has not addressed what has been lost by LSFN: the ongoing use and benefit of their lands for the past 89 years.

C. How Equitable Compensation Should be Determined is a Matter of Public Importance

18. The real question on this appeal is how courts must apply principles of fiduciary law, equitable compensation and Aboriginal law to unlawful takings of reserve lands for public purposes. This is not a factual dispute; it is a legal question which raises issues of national importance that should be heard by this Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

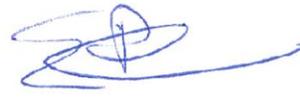
DATED at Vancouver, in the Province of British Columbia, the 4th day of November, 2019.



Rosanne Kyle



Elin Sigurdson



Elisa Penn

PART II - TABLE OF AUTHORITIES

	Paragraph(s)
Cases	
<u><i>Beardy's & Okemasis Band #96 and #97</i>, 2016 SCTC 15</u>	8
<u><i>Canada (Director of Investigation and Research) v. Southam Inc.</i>, [1997] 1 S.C.R. 748</u>	5
<u><i>Canadian National Railway Co. v Bell Telephone Co.</i>, [1939] SCR 308</u>	5
<u><i>Canson Enterprises Ltd v Boughton & Co.</i>, [1991] 3 SCR 534</u>	8
<u><i>Housen v. Nikolaisen</i>, [2002] 2 S.C.R. 235, 2002 SCC 33</u>	5
<u><i>Southwind v Canada</i>, 2017 FC 906 (CanLII)</u>	9, 11
<u><i>Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)</i>, 2018 SCC 4</u>	16