

Case Summary

Southwind v Canada, 2021 SCC 28

On July 16, 2021 the Supreme Court of Canada (“SCC” or “the Court”) released its decision in *Southwind v Canada*. The *Southwind* decision provides important guidance on how to assess equitable compensation for Canada’s historic breaches of fiduciary obligations to Indigenous peoples, especially with respect to a surrender or taking of reserve lands. In an eight to one decision, the SCC confirmed that equitable compensation must reflect the highest value of the lands taken. The “highest value” includes the lands’ value to any public project they were used for, their value from the Indigenous people’s perspective, and compensation for impacts on the community. At the heart of this decision was the Court’s recognition of the importance of the Indigenous relationship with land and its affirmation of the depth of the Crown’s fiduciary obligations when the Crown seeks to use reserve lands for public projects.

Facts and Procedural History

In the early part of the 20th century, Canada, Manitoba and Ontario started examining Lac Seul in northwestern Ontario as a potential storage reservoir that would be the lynchpin of a massive hydro-electric development project. The Lac Seul First Nation (“LSFN”) had a large reserve on Lac Seul set aside under Treaty 3, but Canada did not inform LSFN of its plans.

By 1929, Canada and the provinces had built the Lac Seul Conservation Dam. Within about 5 years, the dam flooded over 11,000 acres of LSFN’s reserve destroying homes, gravesites, wild rice harvesting areas, muskrat trapping areas, and timber. Canada knew that these damages were an inevitable consequence of the project and would be devastating to LSFN, but never took steps to inform or consult with LSFN about the dam. When LSFN raised their concerns with Canada, Canada assured LSFN that it would protect their interests to the fullest possible extent. Canada broke this promise. Canada also never took any steps to legally acquire the reserve lands it flooded: there was no surrender, expropriation, or flowage easement. To this day, the flooded lands remain part of LSFN’s reserve and are still being used without legal authority for the benefit of the hydro-electric project.

In 1991, LSFN sued Canada for breaching its fiduciary duty and obligations under the *Indian Act* and Treaty 3. LSFN sought equitable compensation for the substantial and ongoing losses they have suffered and continue to suffer as a result of Canada's actions. At trial, the Federal Court agreed that Canada had breached its fiduciary duties and should pay equitable compensation to LSFN. However, the Federal Court decided that equitable compensation to LSFN should be assessed based on what Canada would have done if it had followed minimum legal standards in 1929.

The Federal Court decided that if Canada had followed the law in 1929, it would have taken a flowage easement over LSFN's reserve lands and paid LSFN the value of those lands for agricultural and traditional purposes. This approach resulted in an award of \$30 million, which did not reflect the full loss to LSFN, the value of the lands to LSFN, or the lands' value to the hydro-electric project. The majority of the Federal Court of Appeal upheld this approach and the \$30 million award.

The SCC's Decision

Reconciliation, the Honour of the Crown and Fiduciary Obligations with respect to Reserve Lands

The SCC affirmed that the fiduciary relationship between Indigenous peoples and the Crown is of fundamental importance to Canada.¹ Fiduciary relationships are characterized in part by the vulnerability of one party (the beneficiary) to the power exercised by the other party (the fiduciary). Within fiduciary relationships, fiduciary duties exist to ensure that the fiduciary does not use its power to harm or profit from the beneficiary.

The Court held that reconciliation and the honour of the Crown are at the foundation of the Crown's fiduciary duty to Indigenous peoples.² When reserve lands are at stake, the Crown's fiduciary obligations are shaped by the *sui generis* nature of the Indigenous interest in their reserve lands.³ The Court affirmed that Indigenous interests in lands are central to Indigenous identity and culture, and that the Crown's power over Indigenous interests in land lies at the heart of the Crown-Indigenous fiduciary relationship.⁴ In particular, reserve lands have cultural importance and reflect the essential relationship between Indigenous peoples and the land, which may include a spiritual relationship.⁵

¹ *Southwind v Canada*, 2021 SCC 28 at para 60.

² *Ibid* at para 55.

³ *Ibid* at para 63.

⁴ *Ibid* at para 77.

⁵ *Ibid* at paras 63, 107.

While a reserve may have been set aside for a First Nation because those lands were economically important to the First Nation, reserve lands are not a fungible commodity.⁶ Consequently, a strong fiduciary duty arises where the Crown is exercising control over a First Nation's reserve land.⁷ The fiduciary duty imposes heavy obligations on Canada to act with loyalty and good faith, provide full disclosure, and protect and preserve the Nation's interest in their reserve to the greatest possible extent, which includes an obligation to negotiate for the best possible compensation for those lands.⁸

Assessing Equitable Compensation

When the Crown breaches its fiduciary obligations to Indigenous peoples, the remedy will seek to restore the beneficiary to the position they would have been in had the Crown not breached its duty. When it is not possible to restore the lost asset - in this case, land - then equitable compensation is the preferred remedy.⁹ Equitable compensation seeks to restore the value of the thing lost through the fiduciary's wrongful actions - often referred to as restoring the beneficiary's lost opportunity.¹⁰

Equitable compensation must be assessed in a way that furthers reconciliation and upholds the honour of the Crown. The SCC found that the Federal Court erred by compensating LSFN based on what Canada *likely would have done* if it had followed the law in 1929, which was expropriate a flowage easement.¹¹ The Federal Court improperly focused on Canada's legal power to expropriate lands for public works and LSFN's lack of bargaining power at the time the dam was built, effectively relying on LSFN's vulnerability to its fiduciary, Canada, as a factor to limit compensation. The SCC strongly rejected this approach: "Obviously, Canada is not permitted to use its legal power over [LSFN] to force an unfair settlement on [LSFN]. Such reasoning effectively turns Canada's fiduciary obligation on its head, allowing Canada to benefit from the very discretionary power over the LSFN which is the source of its fiduciary duty."¹²

⁶ *Ibid.*

⁷ *Ibid* at para 62.

⁸ *Ibid* at paras 64, 104-106, 111-114.

⁹ *Ibid* at para 68.

¹⁰ *Ibid* at para 69.

¹¹ *Ibid* at paras 11, 89.

¹² *Ibid* at para 99.

Rather, equitable compensation must be assessed based on what Canada *ought to have done* as a fiduciary.¹³ Fiduciaries have to do more than merely comply with the minimum legal requirements, and fiduciary obligations cannot be defined or limited by statutory discretion or by what “realistically would have happened.”¹⁴ Trial courts must first define the fiduciary obligations arising from the fiduciary relationship, then identify the breach, and then assess the value of the beneficiary’s lost opportunity.¹⁵ Equity will presume that the plaintiff would have put the lost asset to its most favourable use (also referred to as the “highest and best use”), but the plaintiff bears the burden of leading evidence to establish the reasonable or realistic value of that use.¹⁶ At this point, courts can consider realistic contingencies that may increase or decrease the value of the most favourable use.¹⁷ Courts can consider proxies and hypothetical scenarios when considering realistic contingencies, but the hypothetical scenario must fulfill the Crown’s fiduciary obligations. The Federal Court erred in this case by basing compensation on a hypothetical scenario that would not have fulfilled the Crown’s fiduciary obligations.¹⁸

The SCC determined that Canada’s breach of fiduciary duty caused LSFN to lose the opportunity to negotiate an agreement that would have protected its interests to the greatest possible extent. As LSFN’s fiduciary, Canada should have first tried to find a way for the project to proceed with LSFN’s consent, and compensation should have been decided through a negotiated surrender in which Canada sought the highest compensation possible for LSFN.¹⁹ This compensation should have at least reflected the value of the lands from LSFN’s perspective, their value to the hydro-electric project, and compensation for the impacts the project would have on the community.²⁰

If Canada failed to obtain LSFN’s consent and decided to use its expropriation powers in order to further the public project, the fiduciary duty does not melt away.²¹ Canada still would have had to compensate LSFN in a manner that reflected the value of the lands to the hydro-electric project, their

¹³ *Ibid* at paras 11, 89.

¹⁴ *Ibid* at paras 89, 97-98, 100, 111, 132.

¹⁵ *Ibid* at para 83.

¹⁶ *Ibid* at para 80.

¹⁷ *Ibid* at para 132.

¹⁸ *Ibid* at paras 123, 131.

¹⁹ *Ibid* at paras 12, 95, 109-112, 118, 121-122.

²⁰ *Ibid* at paras 95, 109-113, 140.

²¹ *Ibid* at paras 12, 94, 101-102.

value to LSFN, and compensation for the impacts the project would have on the community. Canada is never entitled to take *sui generis* Indigenous interests in land in the same manner that it expropriates fee simple interests in land.²² The honour of the Crown requires nothing less.

Deterrence

Deterrence is a matter of justice, and an important part of the ongoing project of reconciliation between Canada and Indigenous peoples.²³ It is crucial that equitable remedies deter fiduciaries from misusing their powers.²⁴ Deterring the Crown from breaching its fiduciary duty to Indigenous peoples encourages it to act honourably and orients it towards the ongoing project of reconciliation.²⁵

The SCC was clear that equitable compensation awards must both restore the beneficiary *and* deter the fiduciary from breaching its obligations in future.²⁶ After assessing the value of the lost opportunity, the trial judge must seriously consider whether the total award will be an effective deterrent, one which reflects the honour of the Crown and the goal of reconciliation.²⁷

Concluding Thoughts

The *Southwind* decision provides much needed clarity on the principles of equitable compensation, the proper approach to assessing the value of a lost opportunity, and the role that equitable compensation plays in restoring First Nations and deterring the Crown from breaching its fiduciary duties. The Court affirmed the importance of the Indigenous interest in reserve lands; the importance of consent, negotiation, and the Indigenous people's perspective; and the strong fiduciary obligations imposed on the Crown when it exercises power over reserve lands. This decision will assist First Nations across the country to obtain justice and accountability for the Crown's past breaches of fiduciary duty.

²² *Ibid* at para 110.

²³ *Ibid* at paras 55, 144.

²⁴ *Ibid* at para 72.

²⁵ *Ibid* at para 144.

²⁶ *Ibid* at paras 128, 144.

²⁷ *Ibid* at para 144.