



**SUPREME COURT OF CANADA**

**CITATION:** Southwind v. Canada,  
2021 SCC 28

**APPEAL HEARD:**  
December 8, 2020

**JUDGMENT RENDERED:**  
July 16, 2021

**DOCKET:** 38795

**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**  
Respondent

- and -

**Attorney General of Saskatchewan, Assembly of Manitoba Chiefs, Tseshah  
First Nation, Manitoba Keewatinowi Okimakanak Inc., Treaty Land  
Entitlement Committee of Manitoba Inc., Anishinabek Nation, Wauzhushk  
Onigum Nation, Big Grassy First Nation, Onigaming First Nation,  
Naotkamegwanning First Nation, Niisaachewan First Nation, Coalition of the  
Union of British Columbia Indian Chiefs, Penticton Indian Band, Williams  
Lake First Nation, Federation of Sovereign Indigenous Nations,  
Atikameksheng Anishnawbek First Nation, Kwantlen First Nation, Assembly  
of First Nations, Assembly of First Nations Quebec-Labrador, Grand Council  
Treaty #3, Mohawk Council of Kahnawà:ke, Elsipogtog First Nation,  
Chemawawin Cree Nation and West Moberly First Nations**  
Interveners

**CORAM:** Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe,  
Martin and Kasirer JJ.

**REASONS FOR JUDGMENT:** Karakatsanis J. (Wagner C.J. and Abella, Moldaver, Brown, Rowe, Martin and Kasirer JJ. concurring)  
(paras. 1 to 147)

**DISSENTING REASONS:** Côté J.  
(paras. 148 to 194)

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SOUTHWIND v. CANADA

**Roger Southwind, for himself and on behalf of the members  
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*Appellants*

v.

**Her Majesty The Queen in Right of Canada**

*Respondent*

and

**Attorney General of Saskatchewan,  
Assembly of Manitoba Chiefs,  
Tseshaht First Nation,  
Manitoba Keewatinowi Okimakanak Inc.,  
Treaty Land Entitlement Committee of Manitoba Inc.,  
Anishinabek Nation,  
Wauzhushk Onigum Nation,  
Big Grassy First Nation,  
Onigaming First Nation,  
Naotkamegwanning First Nation,  
Niisaachewan First Nation,  
Coalition of the Union of British Columbia Indian Chiefs,  
Penticton Indian Band,  
Williams Lake First Nation,  
Federation of Sovereign Indigenous Nations,  
Atikameksheng Anishnawbek First Nation,  
Kwantlen First Nation,  
Assembly of First Nations,  
Assembly of First Nations Quebec-Labrador,  
Grand Council Treaty #3,  
Mohawk Council of Kahnawà:ke,  
Elsipogtog First Nation,  
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*Interveners*

**Indexed as: Southwind v. Canada**

**2021 SCC 28**

File No.: 38795.

2020: December 8; 2021: July 16.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

*Aboriginal law — Fiduciary duty — Reserve land — Remedy — Equitable compensation — Part of First Nation’s reserve land flooded to power hydroelectricity generation without consent of First Nation, without compensation and without lawful authorization — Claim filed against Canada for breach of fiduciary duty and of obligations under Indian Act and applicable treaty — Trial judge concluding that Canada breached fiduciary duty to First Nation and awarding equitable compensation for loss of flooded land — Whether trial judge erred in assessment of equitable compensation.*

The Lac Seul First Nation (“LSFN”) is a Treaty 3 First Nation in Northern Ontario. Its reserve is located on the southeastern shore of Lac Seul. In 1929, a dam to power hydroelectricity generation to Winnipeg was completed pursuant to an

agreement that Canada, Ontario and Manitoba had entered into. The project involved raising the water level of Lac Seul by 10 feet, or approximately 3 metres, to create a water reservoir. Canada was aware from the outset that flooding Lac Seul would cause considerable damage to the LSFN's reserve. Despite repeated warnings about these impacts, the project advanced without the consent of the LSFN, without any compensation, and without the lawful authorization required. As a result of the project, almost one-fifth of the best land on the LSFN reserve was permanently flooded. The damage was extensive and included the destruction of homes, wild rice fields, gardens, haylands, and gravesites.

The LSFN submitted a claim for flooding damages in 1985. In 1991, S, for himself and on behalf of the members of the Lac Seul Band of Indians, filed a civil claim against Canada in Federal Court for breach of Canada's fiduciary duty and its obligations under the *Indian Act* and Treaty 3. The trial judge concluded that Canada failed to meet its fiduciary duty to the LSFN in respect of its reserve land and that the appropriate remedy was equitable compensation. The LSFN proposed various models of compensation at trial, and led evidence regarding agreements with another First Nation in contemporaneous hydroelectric projects ("Kananaskis Falls Projects"), which the trial judge distinguished. The trial judge valued the flooded land as if it had been lawfully expropriated according to general expropriation law. In doing so, he excluded the value of the land for hydroelectricity generation. He also assessed other calculable losses and non-calculable damages for a total award of \$30,000,000. On appeal, the LSFN challenged the trial judge's evaluation of equitable compensation for

the loss of the flooded lands. The majority of the Court of Appeal dismissed the appeal. A dissenting judge would have allowed the appeal, agreeing that the value calculated for the flooded land should have taken into account downstream hydroelectricity generation and concluding that the trial judge also made a legal error in distinguishing the Kananaskis Falls Projects.

*Held* (Côté J. dissenting): The appeal should be allowed. The award for equitable compensation is set aside and returned to the Federal Court for reassessment.

*Per* Wagner C.J. and Abella, Moldaver, **Karakatsanis**, Brown, Rowe, Martin and Kasirer JJ.: Canada breached its obligation to preserve and protect the LSFN's interest in the reserve, which included an obligation to negotiate compensation for the LSFN on the basis of the value of the land to the hydroelectricity project. The LSFN is entitled to equitable compensation for the lost opportunity to negotiate for an agreement reflecting the value of the land to the hydroelectricity generation project.

The specific nature of the Crown's fiduciary duty to Indigenous Peoples, especially over reserve land, informs how equitable compensation must be assessed. The Crown's fiduciary duty is rooted in the obligation of honourable dealing and in the overarching goal of reconciliation between the Crown and the first inhabitants of Canada. The honour of the Crown — and the *sui generis* fiduciary duty to which it gives rise — is a vital component of the relationship between the Crown and Indigenous Peoples. The Crown's fiduciary duty structures the role voluntarily undertaken by the

Crown as the intermediary between Indigenous interests in land and the interest of settlers.

The fiduciary duty itself is shaped by the context to which it applies, which means that its content varies with the nature and the importance of the right being protected. A strong fiduciary duty arises where the Crown is exercising control over a First Nation's land. In a case involving reserve land, the *sui generis* nature of the interest in reserve land informs the fiduciary duty. The importance of the interest in reserve land is heightened where it was set aside as part of an obligation that arose out of a treaty. The fiduciary duty imposes the following obligations on the Crown: loyalty, good faith, full disclosure, and, where reserve land is involved, the protection and preservation of the First Nation's quasi-proprietary interest from exploitation, including exploitation by the Crown itself. In the context of a surrender of reserve land, the Court has recognized that the duty also requires that the Crown protect against improvident bargains, manage the process to advance the best interests of the First Nation, and ensure that it consents to the surrender. In an expropriation, the obligation to ensure consent is replaced by an obligation to minimally impair the protected interest.

When the Crown breaches its fiduciary duty, the remedy will seek to restore the plaintiff to the position the plaintiff would have been in had the Crown not breached its duty. Equitable compensation is the preferred remedy when restoring the plaintiff's assets *in specie* is not available. It is a discretionary and restitutionary

remedy that is assessed rather than precisely calculated. As its purpose is to make up the plaintiff's loss, it aims to restore the actual value of the thing lost through the fiduciary's breach, referred to as the plaintiff's lost opportunity. By restoring the beneficiary's lost opportunity, it deters wrongdoing and enforces the trust at the heart of the fiduciary relationship. While equitable compensation is equity's counterpart to common law damages, analogy with common law damages may not be appropriate given equity's purpose, which differs from the purpose of obligations through tort and contract.

The proper approach to equitable compensation recognizes that the applicable rules will depend both on the nature of the fiduciary relationship and the fiduciary obligations. The trial judge must begin by closely analyzing the nature of the fiduciary relationship so as to ensure that the loss is assessed in relation to the obligations owed by the fiduciary. The loss must be caused in fact by the fiduciary's breach, and the causation analysis is not limited by foreseeability, that is, remoteness. While the fiduciary's breach must have caused, in fact, the plaintiff's lost opportunity, common law limiting factors developed in legal causation will not readily apply. There must be a close relationship between the fiduciary duty and the fiduciary remedy. Because equity assesses the loss at the date of trial and with the benefit of hindsight, it compensates the plaintiff for the lost opportunity, regardless of whether the opportunity could have been foreseen at the time of the breach. The benefit of hindsight means that the most valuable use of the asset between breach and date of trial is not always



foreseeable at the time of breach. The assessment of equitable compensation is also guided by presumptions that equity makes against breaching fiduciaries.

In the instant case, the trial judge's reasons are tainted by legal errors reviewable on a correctness standard. The trial judge erred in concluding that a hypothetical expropriation — the minimum statutory obligation — would have fulfilled Canada's fiduciary obligations. This legal error impacted his assessment of equitable compensation because it led him to rely on general principles of expropriation law to value the loss and to conclude that compensation would not be assessed at a higher value than the minimum required under an expropriation. The fundamental error of the trial judge was that he focused on what Canada would likely have done instead of what Canada ought to have done as a fiduciary.

The fiduciary duty required more than compensation based upon expropriation principles in this case for three reasons. First, the presence of legal discretion to take or expropriate the land in the *Indian Act* did not define the obligations imposed by Canada's fiduciary duty. The fiduciary duty, not just the *Indian Act*, imposed substantive obligations on how Canada was to exercise its discretion over the reserve land. The provisions in the *Indian Act* accommodated the exercise of the Crown's fiduciary duty by recognizing the discretion of the Crown to negotiate, or the discretion of the Governor in Council to determine the terms of a taking or expropriation. There was therefore no conflict between the requirements of the *Indian Act* and the requirements imposed by the fiduciary duty. The equitable presumption of

legality or lawfulness, which prevents breaching fiduciaries from reducing compensation by arguing that they would not have complied with the law, is of little assistance in determining either the fiduciary obligations or the assessment of loss. The presumption cannot be inverted and used to limit compensation by suggesting that the fiduciary is expected to do no more than what the law, not equity, requires. Moreover, Canada's legal powers to expropriate cannot be considered as a factor to limit compensation. Canada is not permitted to benefit from the very discretionary power over the LSFN which is the source of its fiduciary duty.

Second, the fiduciary duty required more than compensation based upon expropriation principles because the fact that the land was required for a public work did not negate the obligations imposed by Canada's fiduciary duty. The fiduciary duty continues to apply even if the land is needed for a public work. While the Crown can decide that a public work is in the public interest and should thus proceed, the manner in which it proceeds is subject to the fiduciary duty.

Third, the fiduciary duty required more than compensation based upon expropriation principles because the principles of expropriation law are fundamentally different than those underlying Indigenous interest in land. Expropriation law is not the appropriate legal framework governing historic breaches of the Crown's fiduciary duty to protect a First Nation's interest in reserve land. The fiduciary obligations in this case must reflect the nature of the interest, the impact of the loss on the First Nation, the importance of the relationship, and reconciliation, which is the overarching goal of the

fiduciary duty itself, based in the honour of the Crown. In the context of an expropriation or taking, the Crown is required to minimally impair the protected interest. Where the Crown decides that reserve land is necessary for a public work and takes that land without the consent of the First Nation, the fiduciary duty requires the Crown to seriously consider the impact on the First Nation and how best to minimize that impact. As a fiduciary, the Crown has the duty to preserve the First Nation's quasi-proprietary interest in the land as much as possible and to ensure fair compensation reflecting the *sui generis* interest.

The duty to preserve the interest to the greatest extent possible is not met if expropriation principles are applied in this case. Even though the expropriation value considers the highest and best use of the land at the time of expropriation, this generally does not include the value of the land to the scheme itself because expropriation law seeks to provide landowners with the compensation necessary to purchase replacement land. Conversely, *sui generis* Indigenous interests in land are fundamentally different as reserve land is not a fungible commodity and Indigenous interests in land are at the centre of the relationship between the Crown and Indigenous Peoples. Instead, given the LSFN's *sui generis* interest in the reserve land and the impact on the LSFN, the duty required Canada to capture the full potential value of the land for the land's intended use, notwithstanding its legal power to expropriate. Canada must always keep the First Nation informed, attempt to negotiate a surrender before proceeding to an expropriation, and ensure compensation reflecting the nature of the interest and the impact on the community.

Canada ought to have first attempted to negotiate a surrender. Canada's fiduciary obligations required it to ensure the highest compensation possible, including compensation for the land's anticipated use as land for hydroelectricity generation. If negotiations for a surrender of the land were unsuccessful, Canada could have proceeded through a taking or expropriation, but even in an expropriation, Canada was required to preserve the LSFN's interest in the land to the greatest extent possible and should have secured compensation for the LSFN that reflected the nature of the interest, the impact on the community, and the value of the land to the project.

The lost opportunity in this case is the opportunity to negotiate a surrender reflecting the highest value of the land, which was its use for hydroelectricity generation: the LSFN is entitled to compensation for that lost opportunity. The valuation of the LSFN's lost opportunity must reflect Canada's obligation to negotiate compensation based upon the best price that could have been obtained for the land's use for hydroelectricity generation. In this case, the presumption of highest and best use means that the land should be valued on the basis of its actual use as flooded land for hydroelectricity generation and allows equitable compensation to focus on a successful negotiated surrender because that more clearly aligns with the nature of the breach, which included a failure to keep the LSFN informed and a failure to prevent the project from proceeding until the negotiations for compensation had been resolved. Equity can presume that the LSFN would have consented to a negotiated settlement at the best price the Crown could have realistically obtained at the time. The value of the flooded land must be reassessed.

*Per Côté J. (dissenting):* There is no basis to interfere with the trial judge's equitable compensation assessment. The trial judge assessed compensation for the value of the flooded lands in 1929 based on a thorough examination of the facts as established in the record. As there is no reviewable error in the trial judge's analysis, the appeal should be dismissed.

S and the LSFN have not established a basis for interfering with the trial judge's valuation. The trial judge's determination that the LSFN should have been compensated through a one-time payment in 1929 based on an expropriation model is not an extricable error, and thus not reviewable on a correctness standard. The trial judge's findings regarding what would have actually happened in 1929 had Canada not breached its duty to the LSFN are factual determinations, not legal ones. No particular findings of fact by the trial judge have been identified as constituting a palpable and overriding error.

The trial judge made no reviewable errors. The trial judge applied settled principles of equitable compensation, including the special importance of its deterrent effect in furthering the ongoing project of reconciliation between Canada and Indigenous peoples. He looked back to when the breach occurred, and, with the benefit of hindsight and the evidentiary record, assessed what position the LSFN would have been in but for the breach. He determined that, had Canada acted legally, it would have taken the reserve lands in 1929 through expropriation or surrender. Based on the

evidence before him, the trial judge assessed the losses presuming the highest and best use and with the benefit of hindsight.

While there is agreement with the majority that equitable compensation in this case should be assessed on the basis of a negotiated surrender, there is disagreement with the majority's view that the lost opportunity equates to a lost opportunity to negotiate a surrender of the lands for hydroelectricity generation. The value of the compensation that Canada should have negotiated for the LSFN cannot be assessed in an evidentiary or factual vacuum and the majority seeks to impose a greater obligation on a trial judge than the law demands. The majority's characterization presupposes that the trial judge had the requisite factual basis to make such a finding, while it is clear from the record that he did not. At trial, no evidence was provided regarding a one-time payment for the flooded lands for hydroelectric purposes. S and the LSFN must bear the consequences of their trial strategy, even though they have changed tack on appeal. Therefore, the trial judge was correct to find that the argument that Canada could, and should, have paid more than fair market value for the lands was nothing more than optimistic speculation.

The trial judge's determination regarding the comparability of the Kananaskis Falls Projects and the Lac Seul situation is a factual determination. His finding that the Kananaskis Falls Projects were not a relevant proxy was supported by the limited evidence before him. That evidence does not substantiate a finding that he made a palpable and overriding error in refusing to award a sum in excess of the fair

market value of the lands. It is simply speculation to conclude that Canada's differing approach for the Kananaskis Falls Projects leads to the conclusion that it breached its duty in this case.

Moreover, the trial judge's inclusion of a robust non-calculable loss analysis allowed him to meaningfully consider the impact of the flooding on the LSFN. He appropriately acknowledged and incorporated the impact on the community and the LSFN's perspective in his analysis. The total equitable compensation awarded ensures that S and the LSFN are compensated for the value of the lands.

### **Cases Cited**

By Karakatsanis J.

**Applied:** *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *Osoyoos Indian Band v. Oliver (Town)*, 2001 SCC 85, [2001] 3 S.C.R. 746; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; **distinguished:** *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245; **considered:** *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534; **referred to:** *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511; *R. v. Desautel*, 2021 SCC 17; *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*,

2018 SCC 4, [2018] 1 S.C.R. 83; *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9, [2009] 1 S.C.R. 222; *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344; *Re Dawson; Union Fidelity Trustee Co. v. Perpetual Trustee Co.* (1966), 84 W.N. (Pt. 1) (N.S.W.) 399; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377; *Whitefish Lake Band of Indians v. Canada (Attorney General)*, 2007 ONCA 744, 87 O.R. (3d) 321; *Stirrett v. Cheema*, 2020 ONCA 288, 150 O.R. (3d) 561; *AIB Group (UK) plc v. Mark Redler & Co. Solicitors*, [2014] UKSC 58, [2015] A.C. 1503; *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142; *Target Holdings Ltd. v. Redferns*, [1996] 1 A.C. 421; *Brickenden v. London Loan & Savings Co.*, [1934] 3 D.L.R. 465.

By Côté J. (dissenting)

*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Whitefish Lake Band of Indians v. Canada (Attorney General)*, 2007 ONCA 744, 87 O.R. (3d) 321; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *Modern Cleaning Concept Inc. v. Comité paritaire de l'entretien d'édifices publics de la région de Québec*, 2019 SCC 28, [2019] 2 S.C.R. 406; *Nelson (City) v. Mowatt*, 2017 SCC 8, [2017] 1 S.C.R. 138; *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157, [2018] 2 F.C.R. 344; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377; *National Westminster Bank plc v. Morgan*, [1985] 1 All E.R. 821.

#### **Statutes and Regulations Cited**



*Constitution Act, 1982*, s. 35.

*Expropriation Act*, R.S.C. 1985, c. E-21.

*Expropriations Act*, R.S.O. 1990, c. E.26.

*Indian Act*, R.S.C. 1927, c. 98, ss. 48, 50, 51.

*Royal Proclamation, 1763* (G.B.), 3 Geo. 3 [reproduced in R.S.C. 1985, App. II, No. 1].

*Unemployment Relief Act, 1930*, S.C. 1930, c. 1.

### **Treaties and Agreements**

Treaty No. 3 (1873).

### **Authors Cited**

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Slattery, Brian. “The Aboriginal Constitution” (2014), 67 *S.C.L.R.* (2d) 319.

APPEAL from a judgment of the Federal Court of Appeal (Nadon, Webb and Gleason JJ.A.), 2019 FCA 171, [2020] 1 F.C.R. 745, 89 C.L.R. (4th) 1, 15 L.C.R. (2d) 99, [2019] F.C.J. No. 672 (QL), 2019 CarswellNat 2362 (WL Can.), affirming a decision of Zinn J., 2017 FC 906, 74 C.L.R. (4th) 4, [2018] 4 C.N.L.R. 63, 6 L.C.R. (2d) 73, [2017] F.C.J. No. 966 (QL), 2017 CarswellNat 5620 (WL Can.). Appeal allowed, Côté J. dissenting.

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*David G. Leitch*, for the intervener the Wauzhushk Onigum Nation.

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The judgment of Wagner C.J. and Abella, Moldaver, Karakatsanis, Brown, Rowe, Martin and Kasirer JJ. was delivered by

KARAKATSANIS J. —

[1] At the beginning of the twentieth century, Canada needed more electricity to fuel Winnipeg’s economic growth. The governments of Canada, Manitoba, and Ontario decided to create a water reservoir in northern Ontario to power hydroelectricity generation. They settled on Lac Seul, which flows into both Ontario and Manitoba, and determined that if they raised the water level of Lac Seul by 10 feet, or approximately 3 metres, they could generate substantial electricity. Construction of the dam was completed in 1929 and the water steadily rose through the 1930s. The project was a success for the three governments.

[2] The project was also a tragedy for the Lac Seul First Nation (LSFN). The LSFN's reserve (Reserve) is located on the southeastern shore of Lac Seul. Almost one-fifth of its best land was flooded and its members were "deprived of their livelihood, robbed of their natural resources, and driven out of their home[s]" (2017 FC 906, [2018] 4 C.N.L.R. 63, at para. 156).

[3] Canada was aware from the outset that flooding Lac Seul by 10 feet would cause "very considerable" damage to the Reserve. In the late 1920s, the Supervisor responsible for valuing the loss warned that the Reserve would be "ruined for any purpose [for] which it was set aside", that the members of the First Nation were "helpless to avert this calamity", and that they viewed their future "with utter dismay" (Trial Reasons, at paras. 152 and 156).

[4] Despite repeated warnings from government officials about the impact that the project would have on the First Nation, the project advanced without the consent of the Lac Seul First Nation, without any compensation, and without the lawful authorization required.

[5] Since the *Royal Proclamation, 1763* (G.B.), 3 Geo. 3 (reproduced in R.S.C. 1985, App. II, No. 1), Indigenous interests in land, including reserve land, cannot be taken or used without legal authorization from the Crown. The *Indian Act*, R.S.C. 1927, c. 98, permitted expropriation for public works, but only with the approval of Cabinet through the Governor in Council. Treaty No. 3 (1873), that set aside the reserve land for the LSFN, required "due compensation" for any taking or

appropriation. In addition, this Court recognized in *Guerin v. The Queen*, [1984] 2 S.C.R. 335, and subsequent decisions, that the Crown is subject to a fiduciary duty when it exercises control over Indigenous interests. This fiduciary duty imposes strict obligations on the Crown to advance the best interests of Indigenous Peoples.

[6] The trial judge concluded that Canada failed to meet its fiduciary duty to the Lac Seul First Nation in respect of its interest in Reserve land. On appeal, Canada does not dispute this conclusion.

[7] Canada did not keep the LSFN informed about the project; did not consult the LSFN; did not negotiate on the LSFN's behalf to get the best compensation possible; did not use its power to refuse to authorize the project until the other parties agreed to fair compensation; and the compensation Canada did manage to negotiate — 14 years after the flooding began — was inadequate. This was unlawful and egregious conduct, even by the standards of the time. As the trial judge observed, this outcome was “inexplicable” (para. 298).

[8] The results of Canada's failures are tragic and well documented. Roughly 17 percent of the Reserve — 11,304 acres or approximately 4,575 hectares — is now permanently flooded. Homes were destroyed, as were wild rice fields, gardens, haylands, and gravesites. Fishing, hunting, and trapping were all impacted. The LSFN was separated because one part of the Reserve became an island. And, despite the sacrifices suffered by the LSFN to make the hydroelectricity project possible, the Reserve was not provided with electricity until the 1980s.

[9] The LSFN challenges the trial judge's evaluation of equitable compensation for the loss of the flooded lands. The issue for this Court is how to assess equitable compensation for the loss caused by Canada's breach of fiduciary duty. The central inquiry is: what position would the beneficiary be in had the fiduciary fulfilled its obligations?

[10] The trial judge valued the flooded land based on its value in 1929, with 10 percent valued as waterfront land and 90 percent valued as bushland. He determined that because Canada was authorized to expropriate the land for a public work under the *Indian Act* provisions in force at the time, the land should be valued based upon an expropriation in 1929. Thus, the trial judge concluded that the First Nation was not entitled to be compensated for any value that the land provided to the hydroelectricity project itself.

[11] In my view, this approach to equitable compensation for breach of fiduciary duty is flawed. By looking solely at the amount the LSFN would have received if Canada had complied with the general law relating to expropriation, the trial judge gave no effect to the unique obligations imposed by the fiduciary duty. The trial judge improperly focused on what Canada would *likely have done*, as opposed to what Canada *ought to have done* as a fiduciary. While I agree with much of the trial judge's analysis, this error tainted his assessment of equitable compensation.

[12] The fiduciary duty imposes heavy obligations on Canada. The duty does not melt away when Canada has competing priorities. Canada was under an obligation

to preserve and protect the LSFN's interest in the Reserve. This included an obligation to negotiate compensation for the LSFN on the basis of the value of the land to the hydroelectricity project. Compensation must be assessed on that basis.

[13] I would allow the appeal and remit the case back to the Federal Court for reassessment of the equitable compensation to include the value of the flooded land to the hydroelectricity project.

#### I. Background

[14] The LSFN is a Treaty 3 First Nation in Northern Ontario. The members are Anishinaabe people. According to Chief Clifford Bull, they have always been lake dwellers who travelled through the water, kept their homes and gardens near the water, cultivated wild rice in the water, fished in the water, and hunted near the water.

[15] The LSFN's traditional territory extends from the Trout Lake region in northwestern Ontario, southeast through the Lac Seul region, and northeast towards Lake St. Joseph. The LSFN has one Reserve, called the Lac Seul Indian Reserve No. 28, which is located on the southeastern shore of Lac Seul in northern Ontario. The Reserve has three communities — Kejick Bay, Whitefish Bay, and Frenchman's Head.

[16] The Reserve was created under Treaty 3, which required Canada to select and set aside reserves that would be "most convenient and advantageous for each band or bands of Indians". In 1875, the LSFN chose Lac Seul as the site of the Reserve



because of the resources along the shoreline and the social, cultural, and spiritual importance of the area.

[17] In the early twentieth century, Canada wanted to provide more electricity to Winnipeg. By 1911, Canada identified Lac Seul as a potential reservoir for hydroelectricity generation (Project). Lac Seul flows into the English River in Ontario, which in turn flows into the Winnipeg River in Manitoba. In 1915, the Dominion Water Power Branch, within the Department of the Interior, prepared a report noting that a 10 foot flooding of Lac Seul would increase the power potential on the English River by 233 percent.

[18] In the same year, the Manitoba Hydrographic Survey began preliminary fieldwork. Chief John Akewance of the LSFN first became aware of the potential Project through the fieldwork, and wrote to Indian Agent R. S. McKenzie in 1915 outlining his concerns. Canada advised the Indian Agent that “there is no present intention to raise the waters of Lac Seul” (Trial Reasons, at para. 127).

[19] The fieldwork report was released in 1916 and noted that the Project would flood portions of the Reserve. In 1917, Canada recommended to Ontario that it obtain flowage rights over the land that would need to be flooded. In 1919, Canada informed itself about the procedure for granting flowage rights on reserve land:

If after negotiation the offer is accepted on behalf of the Indians, or amended and so accepted, the amount of compensation agreed upon is

deposited with the Minister of Finance for the use of the band of Indians and the land is surrendered.

(Trial Reasons, at para. 132)

Canada wrote to Ontario again in 1921 urging that they reserve the flooding rights.

There is no record of a response.

[20] In 1924, Chief Paul Thomas met with Indian Agent Frank Edwards to express the LSFN's concerns. Agent Edwards told Chief Thomas that Canada would "protect their interests as far as possible" (Trial Reasons, at para. 137 (emphasis in original)).

[21] In February 1928, Canada, Ontario, and Manitoba entered into the Lac Seul Storage Agreement which governed the construction and ownership of the Project. The agreement apportioned the capital costs among the governments, which included "the cost of acquiring flooding privileges or other necessary easements" and "compensation for timber, buildings and improvements, including Ontario Crown Lands, Indian Lands and lands owned by private individuals" (Trial Reasons, at para. 147).

[22] In April 1928, Ontario wrote to affected landowners regarding the Project. Ontario also notified the Department of Indian Affairs and indicated that the water levels would be raised by approximately 12 feet. In the summer of 1928, H. J. Bury, the Supervisor of Indian Timber Lands, appraised the value of the LSFN's anticipated losses at \$120,200. Ontario disagreed with the estimate. Mr. Bury reiterated his position

in two internal memoranda. On May 14, 1929, he wrote that “[t]he reserve is ruined for any purpose [for] which it was set aside . . . for the Indians” (Trial Reasons, at para. 156). Two days later, he wrote:

There are 688 Indians on the reserve, who are helpless to avert this calamity, and who view the future with utter dismay, but I feel that the associated governments concerned, will not permit these Indians to be deprived of their livelihood, robbed of their natural resources, and driven out of their home[s], without not only allowing them generous monetary compensation, but also make provision, during the period of years in which they will have to re-adjust themselves to new and strange conditions, for exclusive trapping rights for them in a district remote from civilization.

(Trial Reasons, para. 156)

[23] On May 17, 1929, the Deputy Superintendent General of Indian Affairs wrote to his superior that “[t]he situation is certainly serious; and hardship and disaster appear to face these poor Indians unless some arrangement is made at once, providing for reasonable compensation and the allocation of suitable hunting and fishing grounds elsewhere” (Trial Reasons, at para. 157). No agreement regarding compensation to the LSFN was reached with Ontario.

[24] Ontario applied for necessary approvals in July 1928. The application noted that “[i]t will be necessary in connection with the proposed work to acquire flowage rights over lands on an Indian Reserve” (Trial Reasons, at para. 159 (emphasis deleted)). Even though those rights were never acquired, the dam was completed by June 1929. The power site, the Ear Falls Generating Station, was completed and began delivering power in February 1930.

[25] The flooding of Lac Seul was delayed by disagreements between Canada and Ontario regarding timber clearing. Ontario wanted to harvest its Crown timber prior to flooding. To resolve the impasse, Canada proposed that the timber clearing could be accomplished as an unemployment project under Canada's depression-era *Unemployment Relief Act, 1930*, S.C. 1930, c. 1. As negotiations for this relief project unfolded, Canada assured the LSFN's members that "their interests will be protected to the fullest possible extent" (Trial Reasons, at para. 181 (emphasis in original)).

[26] In July 1933, Canada's Minister of the Interior signed the agreement for the relief project. A week later, the local Indian Agent and the timber supervisor assured the LSFN that the water would not be raised "for several years to come" (Trial Reasons, at para. 183). The relief project was a failure. Less than 700 acres were cleared at a cost of over \$850,000 to Canada. Members of the LSFN were excluded from employment in the project.

[27] Despite the assurances given to the LSFN, the waters of Lac Seul began to rise in 1934. The damage was extensive. Agent Edwards estimated that at least 29 houses would need to be rebuilt — in total, one-quarter to one-third of the houses ultimately had to be moved or replaced. Between 1935 and 1939, additional damage was documented. In August 1936, Canada's Superintendent General of Indian Affairs wrote to Ontario's Minister of Lands and Forests:

. . . the Lac Seul Indian Reserve has been flooded to such a serious extent that we have been compelled already to construct many new houses for the Indians at a cost of \$25,000 and the flood conditions have not only

submerged the Indian hay lands, gardens and cultivated land, but have also seriously impaired the efforts of these Indians to earn their livelihood.

. . . The Indians of this Reserve have been definitely assured that their interests would be fully protected and they are at present much disturbed and alarmed at the damage already caused. [Emphasis deleted.]

(Trial Reasons, at para. 192)

[28] In March 1937, Mr. Bury wrote a memorandum regarding the ongoing failure to provide compensation. He wrote:

I desire to again draw your attention to the serious breach of faith that our Department has made with the Indians of the Lac Seul Reserve, respecting promises made to them regarding flooding compensation . . .

. . .

I consider that these Indians have been very shabbily treated. Their Reserve lands, timber, houses, gardens, rice beds, musk-rat swamps have been flooded now for some years, and we still procrastinate[.] [I]f it had been a white settlement, no person would have dared to flood the property, without paying compensation before flooding took place. [Emphasis deleted.]

(Trial Reasons, at para. 194)

[29] Negotiations between Canada and Ontario continued. In 1940, Ontario determined that \$50,000 would be a “fair valuation” of compensation, but Ontario also claimed it was owed compensation for what it viewed as excess acres on the Reserve as well as outstanding claims for timber clearing. The LSFN was not consulted nor informed of the impending settlement.

[30] In 1943, Canada and Ontario finally agreed to a claim amount of \$72,539, with deductions of \$5,000 to pay a timber claim submitted by a lumber company and \$17,276 to pay Ontario for “excess acres” on the Reserve. The balance, \$50,263, was deposited into the LSFN’s trust account on November 17, 1943.

[31] By contrast, Ontario and Canada negotiated compensation with other non-Indigenous groups whose property fell within the flood plain of the dam project, such as the Anglican Church Missionary Society, the Hudson’s Bay Company, and the Canadian National Railway. For instance, the Anglican Church Missionary Society received compensation for the timber destroyed in the floods and for the costs of relocating its church and cemetery. Similarly, the Hudson’s Bay Company engaged in protracted negotiations with the federal government that resulted in compensation not only for “Flowage Rights” over the company’s territory, but also for the value of the buildings and other facilities.

[32] Canada’s conduct towards the LSFN also differs from its conduct in three earlier projects that impacted another First Nation. In the early 1910s, Calgary Power and Transmission sought permission from Indian Affairs to flood reserve lands of the Stoney Indian Band in Alberta for three hydroelectricity projects (Kananaskis Falls Projects). For all three projects, Canada negotiated a surrender on behalf of the First Nation and insisted on compensation reflecting the value of the land to hydroelectricity generation. Calgary Power entered into three agreements which provided two forms of

compensation: a one-time payment for flooded land and a yearly water power rental agreement. This compensation was based upon the value of the land to the project.

[33] Here, there was never a negotiated surrender of the land by the LSFN and Canada did not at any point expropriate the land in accordance with the provisions of the *Indian Act*. Nonetheless, the Project was completed in 1929 and the lands were steadily flooded throughout the 1930s. A total of 11,304 acres, approximately 17 percent of the Reserve, is now flooded. The flooding destroyed wild rice fields, gardens, and haylands for livestock. It impacted fishing and damaged homes, campsites, and shoreline infrastructure. The flooding damaged and exposed graves that were not relocated prior to the flooding. One of the LSFN's communities, Kejick Bay, became an island separated from the other communities.

[34] In September 1985, the LSFN submitted a claim for flooding damages to the Specific Claims Branch of the Department of Indian and Northern Affairs Canada. In 1991, Roger Southwind, for himself and on behalf of the members of the Lac Seul Band of Indians, filed a civil claim against Canada. In November 2006, 63 years after the settlement, the LSFN entered into an agreement with Ontario Power Generation (OPG), the current operator of the Ear Falls Generating Station. The agreement included \$11,200,000 in compensation for losses arising from the Ear Falls Generating Station on the LSFN's traditional territory, but expressly excluded damages caused by the flooding in the 1930s. The settlement included a plan to open a new generating station and provided the LSFN with the opportunity to purchase an equity position of

25 percent. In February 2009, OPG opened the new generating station in partnership with the First Nation. In 2009, a causeway was built to finally reconnect Kejick Bay Island and the Reserve mainland. The LSFN contributed \$1,750,000 to this and a related project.

A. *Trial Decision, 2017 FC 906, [2018] 4 C.N.L.R. 63 (Zinn J.)*

[35] In 1991, Roger Southwind, for himself and on behalf of the members of the Lac Seul Band of Indians, filed a civil claim against Canada in Federal Court for breach of Canada's fiduciary duty and its obligations under the *Indian Act* and Treaty 3. The trial, which lasted more than 50 days, began before Justice Zinn in September 2016.

[36] The parties called 24 witnesses, 22 of whom were expert witnesses whose testimony included how to value the loss and bring that loss forward to present value. The plaintiff proposed various models for assessing compensation, including a revenue-sharing agreement, the loss of revenues from traditional activities, and a land lease. The plaintiff also led evidence regarding Canada's arrangements with another First Nation in contemporaneous hydroelectricity projects. Both parties called expert witnesses to testify about different models for translating historic losses into present value.

[37] The trial judge held that Canada owed the LSFN a fiduciary duty in respect of land reserved for its benefit under Treaty 3. He particularized the following



obligations: a duty of loyalty and good faith in the discharge of its mandate as a trustee of the Reserve land; a duty to provide full disclosure and consult with the band; a duty to act with ordinary prudence with a view to the best interests of the LSFN; and a duty to protect and preserve the band's proprietary interests in the Reserve from exploitation (para. 226). The trial judge found that Canada breached each of these obligations.

[38] Canada accepted that equitable compensation was the appropriate remedy for breach of fiduciary duty. The trial judge summarized the principles of equitable compensation as follows: (1) the goal of equitable compensation is to restore what the plaintiff has lost due to the breach; (2) the plaintiff's loss is an opportunity that was not realized because of the breach; (3) the plaintiff's loss must be assessed with the benefit of hindsight and not based on what was foreseeable or known at the date of the breach; (4) the losses are to be determined on a common sense view of causation; (5) the court must assume the plaintiff would have made the most favourable use of the trust property; and (6) the court must assume that the defendant would have carried out its duties in a lawful manner (para. 285).

[39] In applying these principles, the trial judge focused on what would have happened had Canada not breached its duties. He determined that the Project was a public work and it would have been completed. Opposition from the LSFN or the Indian Affairs branch would likely not have stopped the Project. Indeed, the trial judge found that Canada could have legally taken the lands without the LSFN's consent through expropriation. The trial judge determined that it was unlikely that the LSFN

could have negotiated a revenue-sharing agreement. He distinguished agreements reached with a First Nation in earlier hydroelectricity projects, which included both a one-time payment and annual rent, on the bases that the hydroelectricity generating stations were located on the reserves rather than downstream and the utility company in the earlier projects had no authority to expropriate the land, but Canada did have that authority in this Project.

[40] In light of these findings, the trial judge determined that Canada would have likely obtained a negotiated settlement for a flowage easement or expropriated the land for the limited purpose of facilitating the Project. He assessed the market value of the flooded land based upon a hypothetical flowage easement, valued as if it had been lawfully expropriated according to general expropriation law. In doing so, the trial judge rejected expert opinion seeking to incorporate the value of the land for hydroelectricity generation, reasoning that any value “attributable to the project” was to be excluded under both the *Expropriation Act*, R.S.C. 1985, c. E-21, and the *Expropriations Act*, R.S.O. 1990, c. E.26. He therefore assessed the value of the flooded land at \$1.29 per acre based on its value as 90 percent bushland and 10 percent waterfront land, concluding that “the suggestion that Canada could and should have paid more than this for the land, amounts to nothing more than optimistic speculation” (para. 383).

[41] The trial judge then assessed other calculable losses. He ordered \$13,847,870 in calculable damages. The calculable damages included: \$3,272,572 for

the hypothetical flowage easement, based on the \$1.29 per acre value in 1929; \$7,836,252 for timber dues; \$1,959,094 for the excess acreage deduction; and \$1,913,949 for community infrastructure. He then deducted amounts that Canada had previously paid.

[42] The trial judge also added \$16,152,130 in non-calculable damages for a total award of \$30,000,000. The trial judge assessed the non-calculable losses based on factors including the amount of the calculable loss, the duration of the non-quantifiable losses, the loss of hayland, gardens, and rice fields, and the separation of two LSFN communities.

B. *Appeal Decision, 2019 FCA 171, [2020] 1 F.C.R. 745 (per Nadon and Webb J.J.A., Gleason J.A. Dissenting)*

[43] Roger Southwind, for himself, and on behalf of the members of the Lac Seul Band of Indians and the Lac Seul First Nation (LSFN or Appellant), appealed the assessment of equitable compensation to the Federal Court of Appeal. The Appellant's primary argument was that the trial judge should have included the loss of a revenue-sharing agreement in the compensation. In the alternative, the Appellant argued that the trial judge was incorrect in his approach to assessing compensation for the flooded land, in applying current expropriation law instead of the law applicable in 1929, and in distinguishing the Kananaskis Falls Projects.

[44] In dissent, Gleason J.A. would have allowed the appeal. While she rejected the primary argument that the breach resulted in the loss of a revenue-sharing agreement, she agreed that the value calculated for the flooded land should have taken into account downstream hydroelectricity generation. The trial judge was wrong to discount the possibility that Canada could have pursued a negotiated settlement that would have included a premium on the land in light of the Project. As a fiduciary, Canada “was arguably required to pursue a negotiated surrender before proceeding to expropriation as a negotiated resolution would probably have been less detrimental to the Lac Seul First Nation” (para. 84). The trial judge also made a legal error in distinguishing the Kananaskis Falls Projects. Canada had identical legal powers in each case but behaved differently.

[45] For the majority, Nadon J.A. (Webb J.A. concurring) dismissed the appeal. He disagreed with Gleason J.A. that the trial judge committed any error of law or any palpable and overriding error. More specifically, he disagreed that the trial judge erred in distinguishing the Kananaskis Falls Projects. Comparing the two projects was a factual determination; there was no palpable and overriding error of fact; and there was no legal error that went to the core of the determination. Thus, the trial judge was entitled to distinguish the projects and assess the fair market value of the land at \$1.29 per acre.

### C. *Applicable Provisions*

[46] The provisions of the *Indian Act* in force in 1929 provided two ways to remove land from a reserve. Section 48 governed takings for a public purpose:

**48.** No portion of any reserve shall be taken for the purpose of any railway, road, public work, or work designed for any public utility without the consent of the Governor in Council, but any company or municipal or local authority having statutory power, either Dominion or provincial, for taking or using lands or any interest in lands without the consent of the owner may, with the consent of the Governor in Council as aforesaid, and subject to the terms and conditions imposed by such consent, exercise such statutory power with respect to any reserve or portion of a reserve.

2. In any such case compensation shall be made therefor to the Indians of the band, and the exercise of such power, and the taking of the lands or interest therein and the determination and payment of the compensation shall, unless otherwise provided by the order in council evidencing the consent of the Governor in Council, be governed by the requirements applicable to the like proceedings by such company, municipal or local authority in ordinary cases.

...

4. The amount awarded in any case shall be paid to the Minister of Finance for the use of the band of Indians for whose benefit the reserve is held, and for the benefit of any Indian who has improvements taken or injured.

[47] Land could also be surrendered by consent under ss. 50 and 51.

[48] Treaty 3 states:

And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and also to lay aside and reserve for the benefit of the said Indians, to be administered and dealt with for them by

Her Majesty's Government of the Dominion of Canada, in such a manner as shall seem best, other reserves of land in the said territory hereby ceded, which said reserves shall be selected and set aside where it shall be deemed most convenient and advantageous for each band or bands of Indians, by the officers of the said Government appointed for that purpose, and such selection shall be so made after conference with the Indians; provided, however, . . . that the aforesaid reserves of lands, or any interest or right therein or appurtenant thereto, may be sold, leased or otherwise disposed of by the said Government for the use and benefit of the said Indians, with the consent of the Indians entitled thereto first had and obtained.

. . .

It is further agreed between Her Majesty and Her said Indians that such sections of the reserves above indicated as may at any time be required for Public Works or buildings of what nature soever may be appropriated for that purpose by Her Majesty's Government of the Dominion of Canada, due compensation being made for the value of any improvements thereon.

## II. Parties' Submissions

[49] The LSFN submits that the courts below erred in their application of the principles of equitable compensation. The central issue is how to compensate the LSFN in a manner that accords with equitable and constitutional principles, including reconciliation and the honour of the Crown. The trial judge erred in considering how Canada would likely have proceeded before considering how Canada as a fiduciary ought to have proceeded. A hypothetical expropriation is the wrong paradigm and improperly shifts the analysis from restoring what the LSFN lost to fixing Canada's unlawful conduct. A hypothetical expropriation also ignores Canada's fiduciary obligations and, even if an expropriation had been pursued, Canada had to impair the LSFN's interest as little as possible. It was also incorrect to view Canada's breaches as inevitable, and, in any event, whether the flooding was inevitable does not break the

causal connection between Canada's breach and the LSFN's loss. The Appellant submits that the trial judge did not properly consider the LSFN's perspective and the unique nature of its losses and connection to the land. Finally, the Appellant submits that the trial judge's approach does not deter Canada's behaviour.

[50] Canada submits that the trial judge fairly compensated the LSFN for its losses. On the merits of the appeal, Canada submits that the principles of equitable compensation are settled and were properly applied by the courts below. The LSFN cannot be compensated for a scenario that would have never occurred. At trial, the LSFN was claiming compensation for a loss — a revenue-sharing agreement — that was not caused by the breach. The trial judge referred to a hypothetical expropriation scenario to determine what likely would have happened without a breach, in line with this Court's jurisprudence. The determination that Canada would have obtained a flowage easement was appropriate in light of the evidence and would have fulfilled Canada's duty to minimally impair the right. Finally, Canada submits that the compensation award respects the goal of reconciliation and fulfills the deterrent requirement.

[51] Canada also submits that the LSFN is improperly making a new argument before this Court by asking that the land be valued on the basis of its use for flooding purposes. The pleadings, Canada argues, show that the plaintiff sought a revenue-sharing agreement at trial, not the value of the land for flooding purposes. It asks that this Court not entertain what it submits is a new issue.

### III. Analysis

[52] The issue in this appeal is whether the trial judge erred in his assessment of equitable compensation, specifically in relation to the value of the flooded land. To determine whether the trial judge erred, I must consider the content of the fiduciary duty in this case, what obligations it imposed, and how the trial judge assessed equitable compensation in light of those obligations.

[53] My analysis proceeds in three parts. First, I consider the relevant principles of the Crown's relationship to Indigenous Peoples, and more specifically of the fiduciary duty that may arise. Second, I consider the principles of equitable compensation for breach of fiduciary duty. Third, I apply those principles to the trial judge's assessment of equitable compensation.

#### A. *Canada's Fiduciary Duty to Indigenous Peoples*

[54] The existence of a fiduciary duty is not in dispute in this appeal. Canada does not contest the trial judge's determination that Canada owed a fiduciary duty to the LSFN and breached that duty. However, the specific nature of the Crown's fiduciary duty to Indigenous Peoples, especially over reserve land, informs how equitable compensation must be assessed.

[55] The Crown's fiduciary duty is rooted in the obligation of honourable dealing and in the overarching goal of reconciliation between the Crown and the first



inhabitants of Canada (*Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at paras. 17-18). Professor Slattery describes the honour of the Crown as a “grounding postulate of Canadian constitutional law” (B. Slattery, “The Aboriginal Constitution” (2014), 67 *S.C.L.R.* (2d) 319, at p. 320). McLachlin C.J. explained in *Haida Nation* that the “process of reconciliation flows from the Crown’s duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown’s assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people” (para. 32; see also *R. v. Desautel*, 2021 SCC 17, at para. 22). This is an ongoing project that seeks the “reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship” (*Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, at para. 10).

[56] This Court first acknowledged a fiduciary duty in *Guerin*. In *Guerin*, Canada argued that it could not be subject to a fiduciary duty and, at best, the Crown’s control over Indigenous interests in land is a political trust which is unenforceable by the courts (p. 371). Dickson J., writing for a majority, rejected Canada’s argument. Instead, he found that Indigenous interests in land are “a pre-existing legal right not created by Royal Proclamation, by s. 18(1) of the *Indian Act*, or by any other executive order or legislative provision” (p. 379; see also J. T. S. McCabe, *The Honour of the Crown and its Fiduciary Duties to Aboriginal Peoples* (2008), at pp. 150-51). In other words, the Indigenous interest in land *did not flow from the Crown*; it pre-existed the Crown’s assertion of sovereignty.

[57] Through the *Royal Proclamation, 1763*, the Crown undertook discretionary control over these pre-existing Indigenous interests in land. The *Proclamation* provided: “And We do hereby strictly forbid, on Pain of our Displeasure, all our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without our especial leave and Licence for that Purpose first obtained.” The *Indian Act* and its predecessor statutes formalized the process for setting aside reserve land and the Crown’s legal control over that land. The Crown thus undertook the “historic responsibility . . . to act on behalf of the Indians so as to protect their interests in transactions with third parties” (*Guerin*, at p. 383). In *Guerin*, this Court recognized that a fiduciary duty arose because the Crown interposed itself between Indigenous lands and those who want to lease or purchase the land, thereby exercising discretionary control over the land (pp. 383-84). The Crown has a duty that is “in the nature of a private law duty” (p. 385).

[58] In *Osoyoos Indian Band v. Oliver (Town)*, 2001 SCC 85, [2001] 3 S.C.R. 746, Gonthier J., dissenting, but not on that point, clarified that the same fiduciary duty applies even where the reserve is not situated on traditional territory in which the First Nation may have a pre-existing legal interest. He noted: “. . . an interest in reserve lands to which no aboriginal title attaches and an interest in non-reserve lands to which aboriginal title does attach are the same with respect to the generation of a fiduciary obligation on the part of the Crown” (para. 163).

[59] *Guerin* set to rest the idea that the trust-like language of historic treaties, laws, and proclamations constituted a mere “political trust” unenforceable in courts. Instead, an enforceable *sui generis* fiduciary duty arose where the Crown asserted discretionary power over Indigenous Peoples’ specific Aboriginal interests and assumed responsibility for those interests (*R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1108). This relationship is not paternalistic in nature; it emerged in a context where the military capacities of Indigenous Peoples were strong and the Crown needed to mitigate the risk of conflict between Indigenous Peoples and settlers (*Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, at para. 66; Slattery, at pp. 322 and 326).

[60] Rooted in the honour of the Crown, the Crown’s fiduciary duty exists to further a socially important relationship. It structures the role voluntarily undertaken by the Crown as the intermediary between Indigenous interests in land and the interest of settlers. Professor Rotman, in the context of fiduciary relationships generally, puts it this way: “. . . while it may appear that the fiduciary concept exists to protect beneficiaries’ interests, that effect is merely ancillary to its protection of fiduciary relationships” (L. I. Rotman, “Understanding Fiduciary Duties and Relationship Fiduciarity” (2017), 62 *McGill L.J.* 975, at pp. 987-88). In the context of our national history, the relationship between the Crown and Indigenous Peoples goes to the very foundation of this country and to the heart of its identity. Indeed, the need to reconcile the assertion of Crown sovereignty with the pre-existence of Indigenous Peoples, and to reconcile Indigenous and non-Indigenous Canadians is of “fundamental importance”

(*R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 310, per McLachlin J., dissenting, but not on this point). The honour of the Crown — and the *sui generis* fiduciary duty to which it gives rise — is a vital component of the relationship between the Crown and Indigenous Peoples.

[61] However, not all aspects of this relationship are fiduciary in nature (*Haida Nation*, at para. 18; *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245, at paras. 81 and 83). The fiduciary duty does not attach to every interest of Indigenous Peoples. As Binnie J. stated in *Wewaykum*, “[t]he fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests” (para. 81). The fiduciary duty imposes heavy obligations when it does arise. The fiduciary duty may arise when the Crown exercises discretionary control over cognizable Indigenous interests or where the conditions of a private law *ad hoc* fiduciary relationship are met (*Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, [2018] 1 S.C.R. 83, at para. 44; *Manitoba Metis*, at paras. 48-50; *Wewaykum*, at para. 85).

[62] The fiduciary duty itself is shaped by the context to which it applies, which means that its content varies with the nature and the importance of the right being protected (*Williams Lake*, at para. 55; *Wewaykum*, at para. 86; *Manitoba Metis*, at para. 49). The Crown’s control over Indigenous interests in land is at the core of the relationship between the Crown and Indigenous Peoples. Consequently, a strong fiduciary duty arises where the Crown is exercising control over a First Nation’s land.

The same is true where the Crown is exercising control over Aboriginal and treaty rights that are protected under s. 35 of the *Constitution Act, 1982* (*Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9, [2009] 1 S.C.R. 222, at para. 46).

[63] In a case involving reserve land, the *sui generis* nature of the interest in reserve land informs the fiduciary duty. Reserve land is not a fungible commodity. Instead, reserve land reflects the essential relationship between Indigenous Peoples and the land. In *Osoyoos*, Iacobucci J. wrote that Aboriginal interests in land has an “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” (para. 46). The importance of the interest in reserve land is heightened by the fact that, in many cases such as this one, the reserve land was set aside as part of an obligation that arose out of treaties between the Crown and Indigenous Peoples.

[64] The fiduciary duty imposes the following obligations on the Crown: loyalty, good faith, full disclosure, and, where reserve land is involved, the protection and preservation of the First Nation’s quasi-proprietary interest from exploitation (*Williams Lake*, at para. 46; *Wewaykum*, at para. 86). The standard of care is that of a person of ordinary prudence in managing their own affairs (*Williams Lake*, at para. 46). In the context of a surrender of reserve land, this Court has recognized that the duty also requires that the Crown protect against improvident bargains, manage the process to advance the best interests of the First Nation, and ensure that it consents to the

surrender (*Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344, at paras. 35 and 96). In an expropriation, the obligation to ensure consent is replaced by an obligation to minimally impair the protected interest (*Osoyoos*, at para. 54).

B. *Principles of Equitable Compensation*

[65] The basic principles of equitable compensation are not in dispute in this appeal. However, the parties disagree about their application to breaches of the Crown’s fiduciary duty in relation to land held for the benefit of Indigenous Peoples.

[66] As I shall explain, equitable compensation is a loss-based remedy that deters wrongdoing and enforces the trust at the heart of the fiduciary relationship. It differs from common law damages because of the “unique foundation and goals of equity” (*Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, at p. 543, per McLachlin J.). The trial judge must begin by closely analyzing the nature of the fiduciary relationship so as to ensure that the loss is assessed in relation to the obligations owed by the fiduciary. The loss must be caused in fact by the fiduciary’s breach, and the causation analysis is not limited by foreseeability (to use the language in *Canson*, at p. 552, where foreseeability was used synonymously with remoteness in this context).

[67] This Court’s decision in *Guerin* explained that, although a fiduciary relationship is different than a traditional trust relationship, breach of the Crown’s

fiduciary duty gives rise to the same equitable remedies as breach of trust (p. 376; see also *Wewaykum*, at para. 94). The available equitable remedies include, among others, accounting for profits, constructive trust, and equitable compensation (*Canson*, at p. 588, per La Forest J.) Accounting for profits and constructive trust are gains-based remedies, meaning they are measured by the fiduciary's gain rather than the plaintiff's loss. The purpose is to *undo* the fiduciary's gain. Equitable compensation, on the other hand, is a loss-based remedy; the purpose is to *make up* the plaintiff's loss (S. L. Bray, "Fiduciary Remedies", in E. J. Criddle, P. B. Miller and R. H. Stikoff, eds., *The Oxford Handbook of Fiduciary Law* (2019), 449, at pp. 449 and 456).

[68] When the Crown breaches its fiduciary duty, the remedy will seek to restore the plaintiff to the position the plaintiff would have been in had the Crown not breached its duty (*Guerin*, at p. 360, citing *Re Dawson; Union Fidelity Trustee Co. v. Perpetual Trustee Co.* (1966), 84 W.N. (Pt. 1) (N.S.W.) 399 (S.C.); *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at p. 440) When it is possible to restore the plaintiff's assets *in specie*, accounting for profits and constructive trust are often appropriate (see *Guerin*, at pp. 360-61; *Hodgkinson*, at pp. 452-53). When, however, restoring the plaintiff's assets *in specie* is not available, equitable compensation is the preferred remedy (*Canson*, at p. 547). The LSFN seeks equitable compensation in this case because what it lost — its land — cannot be returned. It is therefore unnecessary to consider gains-based remedies.

[69] Equitable compensation is equity's counterpart to common law damages (see *Whitefish Lake Band of Indians v. Canada (Attorney General)*, 2007 ONCA 744, 87 O.R. (3d) 321, at para. 48). It is discretionary and restitutionary in nature, aiming to restore the actual value of the thing lost through the fiduciary's breach, referred to as the plaintiff's lost opportunity (*Canson*, at pp. 547-48, 551-52, 555 and 585).

(1) Causation

[70] To award equitable compensation, there must be factual causation: the fiduciary's breach must have caused, in fact, the plaintiff's lost opportunity (*Canson*, at p. 551; see also *Stirrett v. Cheema*, 2020 ONCA 288, 150 O.R. (3d) 561, at para. 69). This basic principle, that equitable compensation restores the lost opportunity caused in fact by the fiduciary's breach, is uncontroversial. However, there has been debate about the extent to which the causation analysis should borrow from the common law of damages and import limiting factors such as foreseeability.

[71] In concurring reasons in *Canson*, McLachlin J. stressed the differences between equitable remedies and common law damages, explaining that the purpose of equity is to enforce the trust which lies at its heart (p. 543). Analogy with common law damages may not be appropriate given this misalignment between the purpose of fiduciary obligations and obligations through tort and contract. The same point was adopted by Lord Reed J.S.C. in *AIB Group (UK) plc v. Mark Redler & Co. Solicitors*, [2014] UKSC 58, [2015] A.C. 1503, at para. 83:



In negligence and contract the parties were taken to be independent and equal actors, concerned primarily with their own self-interest. Consequently, the law sought a balance between enforcing obligations by awarding compensation, and preserving optimum freedom for those involved in the relationship. The essence of a fiduciary relationship, by contrast, was that one party pledged herself to act in the best interests of the other. The freedom of the fiduciary was diminished by the nature of the obligation she had undertaken. The fiduciary relationship had trust, not self-interest, at its core.

[72] Another difference between equitable compensation and common law damages is that equity is especially concerned with deterring wrongful conduct by fiduciaries. As Professor Rotman observed, “[b]eneficiaries are . . . implicitly dependent upon and peculiarly vulnerable to their fiduciaries’ use, misuse, or abuse of power over their interests” (p. 991). It is therefore crucial that equitable remedies deter fiduciaries from misusing their powers. By restoring the beneficiary’s lost opportunity, equitable compensation enforces the fiduciary relationship and deters the fiduciary’s wrongful conduct.

[73] Due to these differences, rather than relying on common law principles, McLachlin J. explained that the proper approach to equitable compensation “is to look to the policy behind compensation for breach of fiduciary duty and determine what remedies will best further that policy” (*Canson*, at p. 545). McLachlin J.’s approach was subsequently followed by this Court in *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142, and recognizes that the applicable rules will depend both on the nature of the fiduciary relationship and the fiduciary obligations: “Differences between different types of fiduciary relationships may, depending on the circumstances, dictate

different approaches to damages” (*Canson*, at p. 546). In other words, “[t]he rules appropriate to a breach of duty by a trustee . . . have to be determined in the light of the characteristics of the obligation in question” (*AIB*, at para. 93). There must be a close relationship between the fiduciary duty and the fiduciary remedy, and the fiduciary duty must “forcefully shape the content of [the] fiduciary remed[y]” (Bray, at p. 451). Thus, while factual causation will always apply to equitable compensation in the sense that the fiduciary’s breach must cause in fact the plaintiff’s loss, common law limiting factors will not readily apply because of the nature of the fiduciary relationship and obligations.

[74] Equity assesses the loss at the date of trial and with the benefit of hindsight (*Guerin*, at pp. 361-62, per Wilson J.; *Canson*, at p. 556; *Target Holdings Ltd. v. Redferns*, [1996] 1 A.C. 421 (H.L.), at pp. 437-39). This means that equity compensates the plaintiff for the lost opportunity caused by the breach, regardless of whether that opportunity could have been foreseen at the time of breach. McLachlin J. described the analysis as follows:

The plaintiff’s actual loss as a consequence of the breach is to be assessed with the full benefit of hindsight. Foreseeability is not a concern in assessing compensation, but it is essential that the losses made good are only those which, on a common sense view of causation, were caused by the breach.

(*Canson*, at p. 556)

[75] McLachlin J.’s use of the phrase “common sense view of causation” in *Canson* should not be taken to mean that the causation analysis in equitable

compensation cases will always have an “intuitively obvious answer” (*AIB*, at para. 95). This is not always the case; trial judges are often faced with difficult questions of causation in claims for equitable compensation. Instead, the phrase “common sense” clarifies that the rules developed in legal causation, such as foreseeability, do not readily apply in equity: “The requirement that the loss must result from the breach of the relevant equitable duty does not negate the fact that ‘causality’ in the legal sense as limited by foreseeability at the time of breach does not apply in equity” (*Canson*, at p. 552). Professor Rotman explains the same point as follows:

Each starts with the idea of “but for,” “cause-in-fact,” or “*sine qua non*,” causation. This generally satisfies Equity, but the common law requires more; it demands a finding of materiality or substantial cause to link the impugned activity with the harm to the plaintiff. Further, the common law imports ideas of foreseeability (or reasonable contemplation) and remoteness into its assessment of causality. . . . These other considerations do not readily enter into Equity’s assessment of fiduciary accountability.

(*Fiduciary Law* (2005), at p. 634).

See, also, *Target Holdings*, where Lord Browne-Wilkinson observed that “the common law rules of remoteness of damage and causation do not apply” (p. 434).

[76] Canada argues that in valuing the loss the benefit of hindsight cannot mean that the beneficiary is put in a better position than it would have been in had the fiduciary observed its duty *at the time* of breach. This argument was explicitly rejected by this Court in *Blueberry River*, where McLachlin J. wrote that concern about “unexpected windfall” amounted to “bringing foreseeability into the fiduciary analysis through the back door” (para. 103). Similarly, in *Guerin*, compensation was assessed

at a higher level than would have been possible at the moment of breach because the most valuable use of the asset between breach and date of trial was not foreseeable at the time of breach. Concerns about a “windfall” cannot therefore subtract from the “equitable approach of looking at what actually happened to values in later years” (*Canson*, at p. 551). Equity will not be limited by foreseeability, unless it is “necessary to reach a just and fair result” (*Hodgkinson*, at p. 443, per La Forest J.).

[77] There are very good reasons why foreseeability does not apply to the Crown’s breach of fiduciary duty in this case. In *Canson*, La Forest J. held that it would not apply where a fiduciary has discretionary control over a beneficiary’s property (p. 578). Indigenous interests in land are quasi-proprietary in nature; they are at the heart of the Crown-Indigenous relationship and are central to Indigenous identity and culture (*Wewaykum*, at paras. 74 and 86; *Osoyoos*, at para. 46). Moreover, in *Guerin*, Wilson J. accepted that foreseeability would not apply to breaches of the Crown’s fiduciary duty towards Indigenous Peoples (pp. 360-62; see also *Whitefish Lake*, at paras. 52-55). The Crown’s fiduciary duty is grounded in the honour of the Crown and breaches of the duty are different in kind than private law breaches of contract or tort.

(2) Equitable Presumptions

[78] To achieve these purposes of equitable compensation, the assessment is also guided by presumptions that equity makes against breaching fiduciaries.

[79] Equity presumes that the plaintiff would have made the most favourable use of the trust property (*Guerin*, at pp. 362-63; *Canson*, at p. 545; *Oosterhoff on Trusts: Text, Commentary and Materials* (9th ed. 2019), by A. H. Oosterhoff, R. Chambers and M. McInnes, at p. 1018). In *Guerin*, for example, the Musqueam Indian Band expected certain advantageous terms in a lease agreement that Canada negotiated on its behalf with a private developer. Canada failed to secure those terms, but instead entered into a less-favourable agreement that was not authorized by the band. In determining how to compensate the band for breach of Canada's fiduciary duty, however, the trial judge determined that the favourable lease terms were not the appropriate measure of compensation because no third party would have agreed to such terms and that measure of loss was not, therefore, causally connected to the breach. The trial judge then considered what the highest and best use of the asset was between breach and date of trial, finding that it was a residential development. This was even though the trial judge found that the area would likely not have developed until some years after the breach. As McLachlin J. observed in *Canson*, the trial judge "assessed, as best he could, the value of the actual opportunity lost as a result of the breach" (p. 552).

[80] The focus is always on whether the plaintiff's lost opportunity was caused in fact by the fiduciary's breach. Equity will assess that opportunity under the *presumption* that the beneficiary would have put the asset to its most favourable use. The most favourable use must be realistic. The common law requires a plaintiff to lead evidence to that effect.

[81] There are additional equitable presumptions that are applicable in appropriate cases. The presumption of legality, discussed in more detail below, prevents breaching fiduciaries from reducing compensation by arguing they would not have complied with the law.

[82] Another presumption, the so-called Brickenden rule, applies where the fiduciary breached a duty to disclose material facts. The breaching fiduciary is prevented from arguing that the outcome would be the same regardless of whether the facts were disclosed (*Brickenden v. London Loan & Savings Co.*, [1934] 3 D.L.R. 465 (P.C.)).

[83] In summary, equitable compensation deters wrongful conduct by fiduciaries in order to enforce the relationship at the heart of the fiduciary duty. It restores the opportunity that the plaintiff lost as a result of the fiduciary's breach. The trial judge must begin by closely analyzing the nature of the fiduciary relationship so as to ensure that the loss is assessed in relation to the obligations undertaken by the fiduciary. The loss must be caused in fact by the fiduciary's breach, but the causation analysis will not import foreseeability into breaches of the Crown's fiduciary duty towards Indigenous Peoples. Equitable presumptions — including most favourable use — apply to the assessment of the loss. The most favourable use must be realistic. The trial judge must be satisfied that the assessment reflects the value the beneficiary could have actually received from the asset between breach and trial and the importance of the relationship between the Crown and Indigenous Peoples.

C. *Application*

[84] In light of these principles, I turn now to the question of whether the trial judge erred in his assessment of equitable compensation.

[85] The standards of review identified in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, apply to awards of equitable compensation. Questions of law are reviewable on a standard of correctness. The application of the relevant equitable principles to the facts is reviewable on a standard of palpable and overriding error, absent an extricable error in principle which is reviewed on a correctness standard. As discussed below, the trial judge's reasons are tainted by legal errors reviewable on a correctness standard.

[86] As noted above, the trial judge concluded that Canada owed a fiduciary duty to the LSFN and breached that duty. He determined that Canada had the following specific obligations: (1) a duty of loyalty and good faith to the LSFN in the discharge of its mandate as trustee of the Reserve land; (2) a duty to provide full disclosure and to consult with the band; (3) a duty to act with ordinary prudence with a view to the best interests of the First Nation; and (4) a duty to protect and preserve the LSFN's proprietary interest in the Reserve from exploitation. Further, the trial judge noted that Canada's duties may have expanded when it committed to the LSFN that it would protect its interest "to the fullest possible extent" (para. 227). The trial judge held that Canada breached these duties. These findings are not challenged in this Court.

[87]           However, the trial judge also concluded that Canada's duty only required it to obtain the amount provided for under general expropriation law as payment for a hypothetical flowage easement. He reached this conclusion largely based on the following findings: the Project could not be stopped because Canada, Ontario, and Manitoba wanted it completed; the LSFN had little bargaining power to extract a better deal; Canada could have lawfully expropriated the Reserve land as a public work and paid only the amount required under applicable expropriation law; and, realistically, the LSFN would have surrendered the land or it would have been expropriated under those terms. The trial judge suggests that paying anything greater than fair market value would have violated Canada's duties to the Canadian public. He assessed the value of the flooded land at an average of \$1.29 an acre as bushland and waterfront land, based on Canada's evidence regarding the 1929 value of the land *without* the Project. The trial judge determined the value of this loss at the time of the trial to be \$3,272,572.

[88]           Canada submits that the trial judge correctly considered the "non-breach" world and determined, based upon the evidence, that a flowage easement measured by expropriation values is what would have likely happened had Canada not breached its duties.

[89]           I agree with the Appellant that the trial judge erred in concluding that a hypothetical expropriation — the minimum statutory obligation — would have fulfilled Canada's fiduciary obligations. This legal error impacted his assessment of equitable compensation because it led him to rely on general principles of expropriation law to



value the loss and to conclude that compensation would not be assessed at a higher value than the minimum required under an expropriation. The fundamental error of the trial judge was that he focused on what Canada would *likely have done* instead of what Canada *ought to have done* as a fiduciary.

(1) The Appellant Is Not Precluded From Raising These Arguments on Appeal

[90] First, as a preliminary matter, I would reject Canada’s argument that there are procedural obstacles to considering the merits of this appeal. Canada submits that the Appellant’s proposal to assess compensation on the basis of “the use of the lands for flooding purposes” is a new issue that is not properly before this Court and should not be given effect by this Court (R.F., at para. 55). While it is true that the Appellant’s theory of compensation has changed during this litigation, the approach of valuing the lands for flooding purposes was in issue at trial.

[91] The argument that the Appellant relies on at this Court is the same argument relied on at the Court of Appeal and was subject to full submissions at both the Court of Appeal and this Court. The “use of the lands for flooding purposes” assessment is the approach that was accepted as one of two alternatives by Gleason J.A. in dissent below and rejected by Nadon J.A. for the majority.

[92] More importantly, the argument that the land should be valued on the basis of its use as flooded land for the Project was an issue at trial. The LSFN proposed various models of compensation at trial and the primary model — a revenue-sharing

agreement — presumes that the use is as land flooded for hydroelectricity generation. According to the trial judge, the LSFN’s main theory at trial was the “loss of opportunity for hydroelectric benefits” (para. 10). The Appellant’s expert witness, Norris Wilson, also testified that the value of the land must include the anticipated improvements in the land due to the hydroelectricity project. The trial judge rejected this approach (para. 380). The evidence from the Kananaskis Falls and related agreements was also available to the trial judge and the trial judge correctly understood the implication of this evidence to be that the land would be valued on the basis of its “usefulness in connection with the development of power” (para. 381). The trial judge acknowledged that those agreements were “relied upon by the LSFN as a precedent of what Canada ought to have obtained to protect the interests of the LSFN” (para. 24). Thus, I see no bar to addressing the merits of this appeal.

(2) The Nature of the Fiduciary Obligations

[93] Following the approach taken by this Court in *Guerin*, the first step in assessing equitable compensation is to determine what the fiduciary would have been expected to do had it not breached its obligations.

[94] In applying what Canada’s obligations to the LSFN required in this case, the trial judge focused on the fact that Canada could legally expropriate the land under s. 48 of the *Indian Act* because the Project was a public work. This led the trial judge to improperly conclude that Canada’s fiduciary obligations required Canada to do no more than the minimum required in an expropriation of fee simple lands. As I shall

explain, the fiduciary duty required more than compensation based upon expropriation principles in this case for three reasons. First, the presence of legal discretion to take or expropriate the land in s. 48 of the *Indian Act* did not define the obligations imposed by Canada's fiduciary duty. Second, the fact that the land was required for a public work did not negate the obligations imposed by Canada's fiduciary duty. And third, the principles of expropriation law are fundamentally different than those underlying Indigenous interest in land. Instead, the fiduciary obligations in this case must reflect the nature of the interest, the impact of the loss on the First Nation, the importance of the fiduciary relationship, and reconciliation, which is the overarching goal of the fiduciary duty itself, based in the honour of the Crown.

[95] Therefore, for reasons that follow, I conclude that even though the land was needed for a public work, the fiduciary duty still required Canada to first attempt to negotiate a surrender with the LSFN. If negotiations failed and Canada expropriated the land under s. 48, it would at least have had to provide fair compensation reflecting the land's use as water storage for hydroelectricity generation.

(a) *The Presence of Legal Discretion in Section 48 of the Indian Act*

[96] The provisions of the *Indian Act* in force at the time provided two routes to remove land from a reserve: a taking and a surrender. Sections 50 and 51 provided that reserve land could be surrendered to the Crown with the consent of the First Nation. Alternatively, subs. 48(1) provided that land could be taken for a public work, but only with the "consent of the Governor in Council" and "subject to the terms and conditions

imposed by such consent”. Compensation was to be governed by the “requirements applicable to the like proceedings by such company, municipal or local authority in ordinary cases” *unless* “otherwise provided by the order in council” (subs. 48(2)). The *Indian Act* did not, therefore, limit the discretion of the Crown to negotiate, or the discretion of the Governor in Council to determine the terms of a taking. There was no conflict between the requirements of the statute and the requirements imposed by the fiduciary duty. The statute accommodated the exercise of the Crown’s fiduciary duty by recognizing the discretion to provide for special requirements.

[97] The provisions in s. 48 must therefore be understood in light of the *pre-existing fiduciary duty* of the Crown. The fiduciary duty, not just the *Indian Act*, imposed substantive obligations on how Canada was to exercise its discretion over the reserve land. Dickson J. explained the relationship between the Crown’s discretion its fiduciary duty as follows: “. . . discretion on the part of the Crown, far from ousting, as the Crown contends, the jurisdiction of the courts to regulate the relationship between the Crown and the Indians, has the effect of transforming the Crown’s obligation into a fiduciary one” (*Guerin*, at p. 384). Similarly, Wagner J. (as he then was) recently stated that the “fiduciary obligation requires that the Crown’s discretionary control be exercised in accordance with the standard of conduct to which equity holds a fiduciary” and that this is embodied in the “fiduciary duties of loyalty, good faith and full disclosure” (see *Williams Lake*, at para. 46). Equity, by its very nature, imposes additional considerations. The legal authority of the Crown in s. 48 does not answer the question of what the fiduciary duty required in this case. That authority imposed a

minimum — not a maximum — requirement on the exercise of the Crown’s discretion. The presence of legal discretion in the *Indian Act*, did not, therefore, negate or define the obligations imposed by the Crown’s fiduciary duty.

[98] The effect of the trial judge’s reliance on the legal powers conferred in the *Indian Act* also raises a question regarding the role of the presumption of legality in this case. The presumption of legality or lawfulness is an equitable presumption meant to prevent fiduciaries from *reducing* compensation by arguing that they would have broken the law (*Whitefish Lake*, at para. 69). It cannot be inverted and used instead to *limit* compensation by suggesting that the fiduciary is expected to do no more than what the law, not equity, requires. The trial judge placed great emphasis on what Canada would have done had it acted “legally” and equated this with what Canada should have done had it fulfilled its fiduciary duty (see, e.g., para. 358). However, correctly applied, the presumption of legality simply means that Canada is prevented from arguing that it would not have complied with the rules in the *Indian Act* or Treaty 3. The presumption is of little assistance in determining either the fiduciary obligations or the assessment of loss in this case.

[99] The trial judge’s reasons can also be read as relying on the legal powers conferred in s. 48 to improperly focus on the inequality of bargaining power between the LSFN and Canada, its fiduciary, as a factor to limit compensation. It is appropriate in assessing the lost opportunity to consider as one factor what third parties, such as Ontario or Manitoba, would have been willing to pay and what their relative bargaining

power was. However, the trial judge should not consider the “little leverage” the First Nation had with its fiduciary in assessing compensation (para. 318). Obviously, Canada is not permitted to use its legal power over the beneficiary to force an unfair settlement on the beneficiary. 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.

[100] The legal authority of Canada to expropriate the land under s. 48 therefore does not define the fiduciary duty in this case.

(b) *The Presence of a Public Work*

[101] Because of Canada’s public responsibilities to Canadians generally, it may sometimes need to consider broader public interests in addition to its *sui generis* fiduciary duty to Indigenous Peoples. While an ordinary fiduciary is not generally permitted to balance its own interests against those of the beneficiary, here, s. 48 empowers Canada to expropriate reserve land without consent if the land is needed for a public work. However, this Court’s jurisprudence shows that the fiduciary duty continues to apply even if the land is needed for a public work.

[102] This Court held in *Guerin* that Canada could not escape liability in equity by arguing that it was only bound by a public trust. In other words, the Court rejected the idea that the fiduciary duty is comparable to the normal exercise of government powers that balances competing priorities or interests. This was confirmed in *Osoyoos*

where Iacobucci J. applied the fiduciary duty to expropriations and wrote that the “public interest [cannot] trump” the Indigenous interests (para. 52). In *Osoyoos*, the Court explicitly rejected Canada’s argument that the fiduciary duty does not arise if there is a conflict between Canada’s public law duties and its obligation to hold reserve land for the benefit of a First Nation (para. 51). While the Crown can *decide* that a public work is in the public interest and should thus proceed, the *manner* in which it proceeds is subject to the fiduciary duty (para. 52; S. Luk, “Not So Many Hats: The Crown’s Fiduciary Obligations to Aboriginal Communities since *Guerin*” (2013), 76 *Sask. L. Rev.* 1, at p. 17).

[103] Similarly, this Court’s statement in *Wewaykum* that the Crown is expected to “have regard to the interest of all affected parties, not just the Indian interest”, does not support the argument that Canada must simply balance existing Indigenous interests in reserve land against other public interests (para. 96). In *Wewaykum*, Canada owed a *narrower* fiduciary duty towards the various First Nations because Canada’s actions took place prior to reserve creation and involved land on which the First Nations did not claim title based on an existing aboriginal or treaty right. The First Nations therefore did not have a quasi-proprietary interest in the land at issue at the relevant time (para. 96; Luk, at p. 19). While Canada had an obligation of loyalty, good faith, full disclosure, and ordinary diligence, there was no obligation to protect the quasi-proprietary interest. The Court emphasized, however, that once a reserve is created, the fiduciary duty expands to include the obligation of “protection and preservation of the band’s quasi-proprietary interest in the reserve from exploitation” and this includes

protection from “exploitation by the Crown itself” (*Wewaykum*, at paras. 86 and 100). In this case, there is no dispute that the LSFN had a quasi-proprietary interest in the Reserve.

(c) *The Content of the Fiduciary Duty Flows From the Nature of the Indigenous Interest and Is Not Defined by Expropriation Principles*

[104] In the context of an expropriation or taking, our jurisprudence has imposed a duty requiring the Crown to minimally impair the protected interest (*Osoyoos*, at para. 52). This means that the Crown must preserve the Indigenous interest “to the greatest extent practicable” (para. 53). This requirement of minimal impairment is consistent with Binnie J.’s observation in *Wewaykum* that the fiduciary duty also prevents exploitation of Indigenous interests by the Crown, not just by third parties. An apparent conflict with the general fiduciary obligation of strict loyalty is created where the Crown decides that reserve land is necessary for a public work and takes that land without the consent of the First Nation. To resolve this tension, the fiduciary duty requires the Crown to seriously consider the impact on the First Nation and how best to minimize that impact. As a fiduciary, the Crown has the duty to preserve the First Nation’s quasi-proprietary interest in the land as much as possible and to ensure fair compensation reflecting the *sui generis* interest. This duty applies even where the Crown considers a taking to be necessary for the public interest.

[105] Canada submits that the duty to preserve the interest to the greatest extent possible is met even if expropriation principles are applied in this case. I cannot agree.



Under an expropriation of fee simple land, the value of the land to the public work is generally removed from compensation. Therefore, even though the expropriation value considers the highest and best use of the land at the time of expropriation, this generally does not include the value of the land to the scheme itself (R. Mainville, *An Overview of Aboriginal and Treaty Rights and Compensation for Their Breach* (2001), at pp. 88-89). This is because expropriation law prevents landowners from reaping a windfall from the public work, and instead seeks to provide them with the compensation necessary to purchase replacement land. Conversely, in *Osoyoos*, the Court emphasized the unique importance of Indigenous interests in land: they are at the centre of the relationship between the Crown and Indigenous Peoples and are not fungible commodities that can be easily replaced by buying additional fee simple land (paras. 45-46; Mainville, at p. 106). This led the Court to affirm that the principles underlying Indigenous interests in land are fundamentally different from the principles underlying expropriation law (*Osoyoos*, at para. 45). Expropriation law reflects fee simple interests in land, not the *sui generis* Indigenous interests in land. Although expropriation law “can serve as a reference point from which to consider compensation in cases of justifiable infringements of Aboriginal or treaty rights, . . . it cannot serve as the governing legal framework in such cases” (Mainville, at p. 106). Expropriation law is not the appropriate legal framework governing historic breaches of the Crown’s fiduciary duty to protect a First Nation’s interest in reserve land.

[106] If expropriation law does not limit the fiduciary duty in this case, there is no basis to say that Canada’s duty to preserve the LSFN’s interest to the greatest extent

possible must *exclude* a duty to obtain compensation for the value of the land to the scheme. Instead, given the LSFN's *sui generis* interest in the Reserve land and the impact on the LSFN, the duty here clearly required Canada to capture the full potential value of the land for the LSFN. To that end, the highest and best use of the land at the time of breach was clearly the land's intended use as water storage for hydroelectricity generation.

[107] There is no doubt that the nature of the interest impacted in this case is of fundamental importance to the LSFN and lies at the heart of its relationship with the Crown. It is a quasi-proprietary interest in 11,304 acres of Reserve land that was set aside for the LSFN's communal use in exchange for traditional territory that it surrendered in Treaty 3. The location of the Reserve was established in consultation with the LSFN. The land was chosen because of its economic, cultural, and spiritual importance to its members. The land sustained its way of life, and the proximity to Lac Seul was particularly important. The riparian area — the area that was flooded — was of special importance to the LSFN. It is where its members hunted, trapped, fished and cultivated wild rice, built their homes and grew their gardens.

[108] Expropriation principles are also inappropriate given the tremendous impact that Canada knew the Project would have on the LSFN. Here, Canada knew early in the development of the Project that the impact would be catastrophic. As the trial judge noted, the local government supervisor observed at the time that the Reserve would be "ruined for any purpose [for] which it was set aside" (Trial Reasons, at

para. 156). This was followed by repeated warnings of the impact of the flooding. And the impact was ultimately as bad as had been feared. After the water levels rose, 11,304 acres of the Reserve were left flooded and rendered permanently unusable. The flooded sections were the most important sections of the Reserve — the lakefront land — land that was central to the life of the First Nation. The Project caused “very considerable” damage to the Reserve (para. 152, quoting A.R. Supp., vol. LII, at p. 316) and Mr. Bury understood, at the time, what was expected of Canada given the enormous impact: “. . . generous monetary compensation” (para. 156).

[109] The nature of the interest and the impact on the First Nation will always be relevant to assessing the appropriate compensation for the use of its reserve land. Because a First Nation must consent in a negotiated surrender, its members will clearly consider the interest they are giving up and the impact on their community. And Canada must also consider these factors as part of its obligation to protect the First Nation against an improvident bargain. Equally, where Canada proceeds through a taking, the fiduciary duty requires Canada to consider both the nature of the interest and the impact of the taking on the First Nation in assessing how to minimally impair the protected interest.

[110] While legal expropriation represents the minimum entitlement, this is not to suggest that the value of compensation in equity will always exceed a comparable expropriation of fee simple land. However, Canada is never entitled to proceed in the same manner as an expropriation of fee simple lands. Canada must always keep the

First Nation informed, attempt to negotiate a surrender before proceeding to an expropriation, and ensure compensation reflecting the nature of the interest and the impact on the community.

(d) *Summary of the Fiduciary Obligations*

[111] Therefore, the trial judge's description of the fiduciary obligations in this case was based on his narrow focus on legal discretion in s. 48. Even though 11,304 acres, or 17 percent of the Reserve, would be flooded, the trial judge determined that s. 48 allowed Canada to take the land for its value under expropriation law — without regard to the value of the land to the Project — and that the fiduciary duty required no more. This is despite the fact that Canada was warned that the Reserve would be “ruined for any purpose [for] which it was set aside”. I disagree. The fiduciary duty set a higher bar than expropriation law given the *sui generis* interest in the Reserve land and the tremendous impact on the LSFN.

[112] Instead, Canada ought to have first attempted to negotiate a surrender. Canada's fiduciary obligations to preserve the LSFN's quasi-proprietary interest, advance its best interests, and protect it from an improvident bargain required it to ensure the highest compensation possible. The LSFN's interest in the Reserve land included an interest in its anticipated use — which was as land for hydroelectricity generation. Canada was under an obligation to secure compensation for this value if the Project was to go forward and the fact that the land was needed for a public work did not change this.

[113] If negotiations for a surrender of the land by the LSFN under s. 50 of the *Indian Act* were unsuccessful, Canada could have proceeded through a taking under s. 48. However, given the impact of the flooding on the LSFN, Cabinet would have had to seriously consider how to fulfill Canada's fiduciary duty in the context of an expropriation. In a memorandum from May 1929, Mr. Bury suggested that exclusive trapping rights would have to be given to the LSFN, at least for a period of time, while the Deputy Superintendent General suggested allocating hunting and fishing grounds elsewhere. Cabinet may have decided, for example, to set aside additional reserve land or fishing or harvesting rights for the LSFN in addition to providing financial compensation. Even in an expropriation, Canada was required to preserve the LSFN's interest in the land to the greatest extent possible and should have secured compensation for the LSFN that reflected the nature of the interest, the impact on the community, and the value of the land to the Project.

[114] In sum, the trial judge was correct that Canada's fiduciary obligations to the LSFN included a duty of loyalty and good faith; a duty to provide full disclosure and to consult with the LSFN; a duty to act with ordinary prudence with a view to its best interests; and a duty to protect and preserve the LSFN's proprietary interest in the Reserve from exploitation. If Canada pursued a negotiated surrender, it would have to advance the best interests of the LSFN and protect it from an improvident bargain. In an expropriation, Canada would also have to minimally impair the protected interest. However, the duty to preserve and protect the LSFN's *sui generis* interest in the Reserve is not satisfied by the application of expropriation principles. Instead, given

the nature of the interest and the harm to the LSFN, Canada was obligated to negotiate in order to secure compensation reflecting that impact and the value of the land for its anticipated use — hydroelectricity generation. It should have negotiated for the best possible compensation. Canada breached this obligation.

(3) The Loss

[115] The value of the loss flows from the nature of the breach and the obligations that the fiduciary should have fulfilled. The valuation of the loss must reflect Canada's obligation to negotiate compensation based upon the best price that could have been obtained for the land's use for hydroelectricity generation.

[116] Here, the trial judge valued the land as bushland and waterfront land. His assessment of equitable compensation flows from his conclusion that expropriation was permitted under the *Indian Act* and that Canada would likely have compensated on the basis of expropriation law, excluding the value of the land as water storage for the Project itself. This improper conclusion underlies the trial judge's rejection of the Appellant's proposed methods of valuation at trial.

[117] At trial, the Appellant primarily relied on the hypothetical of a revenue-sharing agreement as the best valuation, but its experts also put forward additional models for evaluating the lost opportunity, including contemporaneous agreements reached with another First Nation. Canada's experts put forward evidence regarding the expropriation value. The trial judge rejected any valuation greater than a

hypothetical flowage easement based upon the limited value that expropriation law would have permitted.

[118] I have already determined that equitable compensation in this case should have been assessed on the basis that Canada was under an obligation to negotiate in order to obtain the best possible compensation based upon the value of the land to the Project. The question is how to assess this value.

(a) *Application of Equitable Compensation Principles*

[119] Before considering how to value the LSFN's lost opportunity, it is necessary to clarify how the principles of equitable compensation apply in this appeal.

[120] First, in my view, the trial judge was correct in assessing compensation on the basis of what would have happened at the time of breach had Canada fulfilled its fiduciary duty. Unlike *Guerin*, this is not a case in which the plaintiff is advancing different, more valuable uses of the land than the use that the land was actually put to. Instead, the Appellant submits that the land should be valued on the basis of its actual use as flooded land for hydroelectricity generation and that this is the most valuable use. In other words, the loss is the lost opportunity to negotiate compensation for the land's use for hydroelectricity generation, not as the opportunity to put the land to other uses since 1929. Because of the presumption of highest and best use, there may be cases where a First Nation seeks compensation for other valuable uses even where it was

inevitable that the land would have been used for a public work. However, in this case, the focus is on the use that the land was actually put to.

[121] There were two options available to Canada: a negotiated surrender under s. 51 and a taking under s. 48. Canada concedes that the lost opportunity in this case includes the opportunity to negotiate a surrender. Similarly, the trial judge accepted that Canada should have attempted to negotiate a surrender before pursuing a taking (para. 322). In my view, equitable compensation should be assessed on the basis of a negotiated surrender. A negotiated surrender more clearly aligns with the nature of the breach, which included a failure to keep the LSFN informed and a failure to prevent the Project from proceeding until the negotiation for compensation had been resolved. As Rowe J. recently emphasized in a different context, negotiation can foster reconciliation (*Desautel*, at paras. 87-91). Compensation was based on negotiated agreements with non-Indigenous parties, including the Hudson's Bay Company and the Anglican Church Missionary Society, even though Canada and Ontario owed no fiduciary duty to those parties.

[122] The presumption of most favourable use and valuable accounting also allows equitable compensation to focus on a successful negotiation in this case. The presumption focuses on choices that would be available to the beneficiary in a non-breach world, thus maintaining the causal connection. For example, equity presumes that the beneficiary would have sold securities at their highest value or developed land in the most advantageous way (*Guerin*, at p. 362). Here, Canada should have negotiated



compensation for the LSFN for the best possible price, which in this case was the value of the land to the Project, without the limitations of expropriation law. Equity can *presume* that the LSFN would have consented to a negotiated settlement at the best price the Crown could have realistically obtained at the time. But the trial judge must determine what the highest value of the land to the Project realistically was in 1929. As I will explain below, that value of the compensation that Canada should have negotiated for the LSFN is not determined based on an evidentiary presumption. It is based on evidence that was available to the trial judge, such as comparable agreements with another First Nation.

[123] As the trial judge correctly noted, equitable compensation is a discretionary remedy that is assessed and not precisely calculated (para. 465, citing *Whitefish Lake*, at para. 90). It is unlikely that the trial judge could recreate with mathematical precision what would have happened nearly a century ago had Canada fulfilled its duty. Instead, a trial judge will often have to provide a global assessment of the lost opportunity and that assessment needs to be realistic. This will often require that the trial judge assess various hypotheticals or proxies for that value.

[124] In my view, the benefit of hindsight also has a narrow application in this case, as noted by Gleason J.A. (C.A. reasons, at para. 60). The benefit of hindsight simply means that equitable compensation is not limited by foreseeability (*Canson*, at p. 555). As an illustrative example, the benefit of hindsight would be highly relevant if the trial judge had determined that the lost opportunity included the opportunity to

receive an equity interest in the Project had Canada fulfilled its obligations. Following the example from *Guerin*, that interest would be valued at the date of trial on the basis of facts known at trial — such as the development of additional power sites — that were not foreseeable at the time of breach but would clearly impact the value of any ownership interest in the Project. However, the benefit of hindsight does not aid in determining whether an equity interest is part of the lost opportunity in the first place. Again, the trial judge must rely on evidence to assess the value of the land to the Project at the time of breach.

[125] Finally, the Appellant submits that Canada has an ongoing fiduciary duty in respect of the Reserve land because the land was never lawfully taken and the third party use of the land cannot be undone. For the Appellant, the fact that the land was flooded without legal authorization appears to be relevant to the assessment of equitable compensation because it means that the ongoing nature of the breach must also be compensated.

[126] I agree that Canada has an ongoing fiduciary duty in respect of the Reserve land. However, in my view, characterizing the breach as ongoing does not affect the assessment of compensation in the way the Appellant suggests. The ongoing dimension of a breach is accommodated in a number of ways in equity. Properly understood, the presumptions of most favourable use and the benefit of hindsight recognize the ongoing dimension of the lost opportunity. If, for example, the beneficiary was deprived of the opportunity to put an interest to another use, equity already adopts the perspective that

the interest *is back in the hands of the beneficiary* and then considers the most advantageous use to which the beneficiary would have put the interest between breach and trial. This was explained in *Re Dawson*, at p. 406, and adopted by Wilson J. in *Guerin*, at pp. 361-62:

The obligation to restore to the estate the assets of which he deprived it necessarily connotes that, where a monetary compensation is to be paid in lieu of restoring assets, that compensation is to be assessed by reference to the value of the assets at the date of restoration and not at the date of deprivation. In this sense the obligation is a continuing one and ordinarily, if the assets are for some reason not restored in specie, it will fall for quantification at the date when recoupment is to be effected, and not before. [Emphasis added.]

[127] Focusing on the lawfulness of the taking would not modify or aid the analysis of the value of the LSFN's lost opportunity. The central inquiry remains: what is the measure of the plaintiff's lost opportunity in light of the breach? The lost opportunity at issue in this case is the opportunity to negotiate a surrender reflecting the highest value of the land, which was its anticipated use for hydroelectricity generation. This is the obligation that Canada failed to meet. The fact that Canada also failed to meet its obligation to comply with the provisions in the *Indian Act* does not ultimately change the value of that lost opportunity.

[128] This is not to suggest that the lawfulness of the taking should have no impact on the assessment of equitable compensation. Equitable compensation must fulfill the deterrent objectives of equity. Deterrence, in this context, aims at the fundamental goal of reconciliation and upholds the honour of the Crown. The

lawfulness of the taking could inform whether the award — in addition to compensating for the value of the lost opportunity — fulfills the deterrent function of equity.

[129] In conclusion, the LSFN is entitled to compensation for the lost opportunity to negotiate a surrender of the flooded land based on its value to hydroelectricity generation. This requires the trial judge to presume that the Project would have moved forward and that Canada would have fulfilled its fiduciary obligation at that time by ensuring the best possible compensation for the LSFN based on the value of the land to the Project.

(b) *Valuing the Lost Opportunity*

[130] The issue remains how to assess compensation based on the lost opportunity to negotiate a surrender reflecting the value of the land to the Project. In valuing the lost opportunity, the trial judge must assume that Canada fulfilled the fiduciary obligations required in a negotiated surrender, including the obligations to keep the LSFN fully informed, advance its best interests, and protect it from an improvident bargain.

[131] The Appellant submits that, because we know the use the land was put to, it was inappropriate for the trial judge to consider a *hypothetical* surrender or expropriation to assess the value of that use. I cannot agree. While there is only one proposed use of the land, the trial judge still has to determine how to value that use and

the valuation must be causally connected to the breach of Canada's obligations. Because the LSFN is to be compensated for the land's value to the Project, on the basis that it was going forward, the trial judge must consider how Canada could have proceeded to fulfill its duty. The error in the trial judge's reasons is not that he considered hypotheticals to value the lost opportunity, but that he relied on a hypothetical expropriation that would not have fulfilled Canada's fiduciary obligations.

[132] The trial judge should account for any uncertainty or realistic contingencies in assessing the evidence regarding the value of the land in a negotiated surrender. The idea of realistic contingencies, which was accepted by this Court in *Guerin*, simply reinforces the principle that the loss must be caused in fact by the breach. The trial judge has to be satisfied that the lost opportunity represents what could have happened had Canada fulfilled its obligations. It does not mean, as Canada suggests, that the fiduciary obligations themselves can be defined according to what realistically would have happened. The fiduciary obligations must always be defined first, and then the trial judge assesses reasonable, or realistic, outcomes in light of those obligations. As Gleason J.A. correctly noted, the trial judge must take into account "events that could have occurred had the fiduciary duty not been breached and that might have increased (or decreased) the value of what the beneficiary lost as a result of the breach" (C.A. reasons, at para. 82).

[133] At trial, the Appellant led evidence from the Kananaskis Falls Projects that showed that negotiations in comparable projects led to substantial compensation based

upon the lands' "usefulness in connection with the development of power". The trial judge rejected this evidence and did not assess any value for the lost opportunity to negotiate.

[134] In my view, the evidence from the Kananaskis Falls Projects was relevant to the assessment of loss in this case. The trial judge distinguished this evidence based on one factor: Calgary Power could not expropriate the land for the Kananaskis Falls Projects, but Canada could expropriate the land for this Project. However, this factor is not material. What is relevant is that Canada, the *fiduciary*, had an obligation to get the best value for the land's intended use, notwithstanding its legal power to expropriate. With respect to the Kananaskis Falls Projects, Canada insisted that Calgary Power negotiate agreements with the First Nation reflecting the value of its lands to the project. In this Project, Canada did not do so.

[135] Canada submits that the Court should defer to the trial judge's findings on the Kananaskis Falls Projects. However, but for the legal determination that Canada was under no legal duty to compensate for more than an expropriation, the trial judge's factual findings *support* the view that the Kananaskis Falls Projects were relevant to the valuation of the flooded lands in this case.

[136] The Appellant led evidence at trial regarding the compensation that Canada negotiated on behalf of the Stoney Indian Band for the Kananaskis Falls Projects:

- Horseshoe Falls 1909: Calgary Power purchased 1,000 acres at \$10 per acre plus a perpetual lease for \$1,500 per year;
- Kananaskis Falls 1914: The pre-project value of the land was \$5 to \$7 per acre, but Canada requested payment of either \$320 to \$360 per acre, as a one-time payment, or an annual rent plus \$60 to \$90 per acre as a one-time payment to reflect the value of the land to the project. This is a very substantial premium on the traditional use valuation of the land. Calgary Power ultimately agreed to pay \$9,000 for 93.85 acres (\$95.90 per acre) plus \$1,500 annually;
- Ghost River 1929: Calgary Power agreed to pay \$21,200 for 1,324.3 acres of land (\$16.00 per acre) plus 50 percent of the water power in rental fees.

[137] The trial judge made three relevant findings based on these projects: (1) hydroelectric benefits to the First Nation were allocated on the basis of the dam location, not on the basis of the lands flooded to create the water reservoir; (2) flooded lands were compensated at a fixed one-time price per acre; (3) the value of the flooded lands was not based on their value as agricultural lands but on their “usefulness in connection with the development of the power” (para. 345). Based on this, the trial judge determined that the LSFN would have been compensated with a one-time payment because the water power site was not located on the Reserve. However, when the trial judge assessed the value of that payment, he did not provide compensation for the value of the land to the Project for only one reason: Canada could expropriate the

LSFN's land and was not required to do anything more. This is contrary to the approach taken in Kananaskis Falls where Canada sought compensation for the flooded lands' "considerable value" in connection with the development of hydroelectricity. Absent this error, the trial judge's findings established that the flooded land was valued based on its usefulness to the project.

[138] Obviously, these agreements provide relevant historical evidence of how much of a premium on the undeveloped value of the land may be warranted in this case. This is not to suggest that there is no basis upon which to distinguish the various agreements reached in the Kananaskis Falls Projects as they relate to the valuation of the loss caused by Canada's failure to negotiate. It is up to the trial judge to assess how the differences in the location of the dam, or the amount of land involved, or the nature of the impact on the First Nation, would impact the value of the land for flooding purposes. Here, the trial judge determined that the evidence from the Kananaskis Falls Projects did not support a yearly rental agreement for the LSFN because the power site was not located on the Reserve. However, in assessing a lost opportunity to negotiate, the trial judge must consider all factors that would distinguish the Kananaskis Falls Projects from this Project, including the fact that the LSFN was contributing a significantly greater amount of land than the Stoney Indian Band had.

[139] The trial judge had other proxies for measuring the value of the land to the Project. For example, the LSFN led evidence regarding the value of a land lease. In that model, the LSFN's expert, Arthur J. Hosios, valued the lost opportunity if the flooded



land had been rented for comparable Treaty 3 rates since the time of breach. The land lease model assumed the flooded land would be rented for \$1.97 an acre beginning in 1929 and, adjusted only for inflation, produced a value of \$149,023,172 at the time of trial (although the model assumed 14,891 acres of flooded land instead of the 11,304 acres agreed at trial). At the very least, these values could have impacted Canada's negotiating position on behalf of the LSFN. It was also open to the trial judge to consider the evidence from later agreements where Canada was clearly fulfilling its obligations as a fiduciary.

[140] The trial judge should also give appropriate weight to the evidence regarding the impact on the community and the LSFN's perspective. A relevant factor to a negotiated surrender is clearly the impact on the First Nation and the importance of the land to the First Nation. Negotiations are not one-sided and the LSFN's perspective is an important consideration. And, if we presume that Canada had fulfilled its fiduciary obligations, the LSFN would have gone into the negotiations fully informed of the significant value of its land to the Project and the anticipated impact on its communities.

[141] Canada submits that even if it had been under an obligation to negotiate for the value of the land to the Project, it would be improper to compensate the LSFN on this basis because there is no evidence that Ontario or Manitoba would have been willing to pay more than the expropriation value. On this view, any compensation in

excess of expropriation principles is not caused by the breach and does not represent an opportunity the LSFN lost.

[142] I cannot agree. The LSFN cannot provide evidence showing definitively what level of compensation Ontario, Manitoba, or Canada would have agreed to in 1929 had Canada made it clear that the Project would be delayed until the issue of compensation was resolved. The LSFN cannot prove what compensation *could* have been negotiated precisely because Canada failed to fulfill its fiduciary duty. Additional useful evidence that could inform the level of compensation that Ontario or Manitoba would have accepted could include the Kananaskis Falls Projects, the economic fundamentals of the Project, and the anticipated benefit that the provinces stood to receive from the Project. The LSFN did advance evidence at trial showing how cost-effective the Project was and the incredible economic advantages that it conferred on Ontario and Manitoba. The evidence shows that the parties were very motivated to finish this Project and realize its economic benefits. For example, in the 1930s, Canada spent over \$850,000 on a failed timber clearing project to advance the Project and resolve an impasse with Ontario.

[143] Thus, equitable compensation must reflect Canada's obligation to ensure the LSFN was compensated for the value of the land to the Project given the nature of the interest and the impact on the LSFN. The trial judge should have considered the Kananaskis Falls Projects and other evidence available at trial as relevant proxies for

what this premium was worth. The trial judge also had evidence at trial regarding agreements that were reached with another First Nation.

[144] After assessing the lost opportunity, the trial judge must determine whether the new total compensation award is sufficient to fulfill the deterrent function of equity (*Hodgkinson*, at p. 453). Deterrence has special importance in this case because deterring the Crown from breaching its fiduciary duty encourages it to act honourably and orients it towards the ongoing project of reconciliation. As this Court stated in *Williams Lake*, the just resolution of claims arising from the Crown's failure to honour its obligations is essential to reconciliation (para. 2). Given the facts of this case, including Canada's "inexplicable" conduct, the fact the land was never legally surrendered or taken, and the significant harm to the LSFN, the trial judge must seriously consider whether the total award will be an effective deterrent, thus reflecting the honour of the Crown and the goal of reconciliation.

[145] In conclusion, the assessment of the lost opportunity was flawed because it was based on an incorrect view of what the fiduciary duty required. By valuing the loss as the amount required under expropriation law, the trial judge failed to account for a fiduciary obligation to negotiate for compensation reflecting the LSFN's interest in the Reserve land, impact on the community, and the value of the land given its intended use as water storage for hydroelectricity generation. As a result, the assessment of the value of the flooded land must be reassessed. The trial judge's assessment of other losses were not challenged in this appeal. Similarly, I take no issue

with the manner in which the trial judge brought forward historic losses to present value.

#### IV. Conclusion

[146] A hypothetical flowage easement at \$1.29 an acre is not an appropriate measure of compensation in this case because it does not reflect the value of the land to the Project. The sole basis for this valuation is the conclusion that because the Project was a public work, and Canada could have expropriated the land, Canada was not expected to secure compensation for the LSFN reflecting the value of its land to the Project. I cannot agree. As I have explained, this approach is inconsistent with the unique nature of the Indigenous interest in reserve land and the devastating impact of the flooding on the LSFN. It does not reflect the honour of the Crown nor serve the overarching goal of reconciliation. The LSFN is entitled to equitable compensation for the lost opportunity to negotiate for an agreement reflecting the value of the land to the hydroelectricity generation Project.

[147] The award for equitable compensation must be returned for reassessment in accordance with these reasons. I would allow the appeal with costs to the Appellant throughout. I would set aside the judgment of the Court of Appeal and the trial judge's award of equitable damages and return that question to the trial court for reassessment.

The following are the reasons delivered by

CÔTÉ J. —

[148] Canada breached its fiduciary duty to Lac Seul First Nation (“LSFN”) when it unlawfully allowed the flooding of over 11,000 acres (or approximately 4575 hectares) of LSFN reserve lands for a hydroelectric project that was completed in 1929 (“Project”). The flooding had devastating effects on LSFN, including the complete deprivation of the use and benefit of a large part of its reserve. Canada did not obtain the right to flood the lands through either of the two routes established by the *Indian Act*, R.S.C. 1927, c. 98, as it read in 1929: it neither sought LSFN’s consent to surrender the lands, nor did it expropriate the lands.

[149] No party to this appeal questions this reality. Canada acknowledges its breach of fiduciary duty and its “inexplicable” historical treatment of the appellants, and rightly so. The question, then, is how to compensate for the harms caused by Canada’s breach in a manner that accords with settled equitable compensation principles. The appellants contest the basis upon which the trial judge calculated an aspect of the equitable compensation he awarded, namely the value attributed to the flooded lands (2017 FC 906, [2018] 4 C.N.L.R. 63). Canada submits that, to the extent that a financial award can accomplish it, the amount awarded by the trial judge for the fair market value of the flooded lands, in combination with the award for non-calculable losses, fairly and reasonably compensates the appellants for their losses.

[150] Both the majority judges and the dissenting judge at the Federal Court of Appeal were in complete agreement on two issues (2019 FCA 171, [2020] 1 F.C.R. 745). First, the Court of Appeal unanimously found that the trial judge correctly held that there was no basis to award compensation for loss of a revenue-sharing agreement and that the trial judge made no palpable and overriding error in concluding that the Lac Seul situation was not comparable to the other revenue-sharing situations on which the appellants relied. Second, with respect to the trial judge's conclusions on one-time compensation for the loss of the flooded lands, the Court of Appeal agreed that there was no error of law or palpable and overriding error in the trial judge's conclusion that, had Canada expropriated the flooded lands in 1929, it would not have paid more than the fair market value of \$1.29 per acre. The sole disagreement between the majority and the dissent concerned the appellants' second submission regarding the trial judge's conclusions on one-time compensation, namely that he had erred in distinguishing the Kananaskis Falls development project ("Kananaskis Project") from the Lac Seul situation.

[151] However, my colleagues in the majority go further than the Court of Appeal, seemingly undertaking a fresh equitable compensation analysis. The majority does not agree with the trial judge's assessment of equitable compensation, not because of any palpable and overriding error that he committed, but because his assessment does not accord with the majority's view that LSFN is entitled to equitable compensation for the lost opportunity to negotiate an agreement reflecting the value of

the lands for hydroelectric purposes specifically, as opposed to equitable compensation for the lost opportunity to negotiate generally.

[152] The value of the compensation that Canada should have negotiated for LSFN cannot be determined in an evidentiary or factual vacuum, and it is improper to fault a trier of fact regarding possible alternative findings based on a newly raised theory of the case. That is not the proper standard of appellate review. In my view, the majority of the Federal Court of Appeal was correct to find that there was no basis to interfere with the trial judge's equitable compensation assessment. As I will explain below, the trial judge assessed compensation for the value of the flooded lands in 1929 based on a thorough examination of the facts as established in the record. I find no reviewable error in the trial judge's analysis, and I would dismiss the appeal.

#### I. Standard of Review

[153] While the majority largely refrains from discussing the applicable standard of review, the parties took opposing positions concerning the proper standard for questions related to the trial judge's compensation assessment. Therefore, clear guidance on this point ought to be provided.

[154] Appellate review of an award of damages is to be conducted in accordance with the standards of review articulated in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. The appellants submit that the errors in this case relate to the failure of the courts below to correctly apply the legal principles they identified, and therefore

should be assessed on a correctness standard. The respondent submits that the issues raised by the appellants are matters of mixed fact and law and that there are no extricable questions of law to which the standard of correctness applies.

[155] Both parties rely on the same passage from *Whitefish Lake Band of Indians v. Canada (Attorney General)*, 2007 ONCA 744, 87 O.R. (3d) 321, at para. 28, although the respondent emphasizes the first sentence and the appellants focus on the second:

A trial judge's damages or compensation assessment is entitled to considerable deference on appeal. An appellate court should interfere with that assessment only if it is tainted by an error in principle, or is unreasonably high or low.

[156] A similar pronouncement was made by Justice Wilson in *Guerin v. The Queen*, [1984] 2 S.C.R. 335, at p. 363: “. . . 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’ . . . .”

[157] Thus, the question to be decided is whether the assessment is tainted by a reviewable error. The appellants attempt to get around this exacting standard by asserting that the courts below erred in “apprehending how the assessment of equitable compensation should be carried out”, which they suggest is an “extricable question of principle or pure law [that is] reviewable on a correctness standard” (A.F., at para. 72).



I disagree. Not only is the trial judge's determination that the appellants should have been compensated through a one-time payment in 1929 based on an expropriation model in accordance with the *Indian Act* not an extricable error, and thus not reviewable on a correctness standard, but the appellants have also not identified any particular findings of fact by the trial judge as constituting a palpable and overriding error.

[158] Under the standard of review for questions of mixed fact and law, “an appellate court’s role is not to reconsider the evidence globally and reach its own conclusions, but simply to ensure that the trial judge’s conclusions — including the trial judge’s legal inferences — are supported by the evidence” (*Modern Cleaning Concept Inc. v. Comité paritaire de l’entretien d’édifices publics de la région de Québec*, 2019 SCC 28, [2019] 2 S.C.R. 406, at para. 69). “The possibility of alternative findings based on different ascriptions of weight is . . . [not a] basis for overturning the findings of a fact-finder” (*Nelson (City) v. Mowatt*, 2017 SCC 8, [2017] 1 S.C.R. 138, at para. 38). Appellate intervention is not warranted “absent an error that is ‘plainly seen’ and has affected the result” (para. 38, quoting *Housen*, at para. 6).

[159] Even if an appellate court might have come to a different conclusion, it cannot overturn the trial judge’s discretionary decision unless a reviewable error has been made. As noted by Stratas J.A. in *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157, [2018] 2 F.C.R. 344:

Palpable and overriding error is often best defined by describing what it is not. If an appellate court had a free hand, it might weigh the evidence differently and come to a different result. It might be inclined to draw

different inferences or see different factual implications from the evidence. But these things, without more, do not rise to the level of palpable and overriding error. [para. 70]

[160] In my view, the trial judge made no reviewable errors. The majority of the Federal Court of Appeal properly applied the deferential standard of review, holding that there was no basis to interfere with the trial judge's factual findings. The alleged errors raised before this Court relate to questions of fact and mixed fact and law, and the appellants have not demonstrated that the trial judge made any palpable and overriding errors. The trial judge properly reviewed and assessed the voluminous quantities of evidence. His legal inferences are supported by the evidence. Therefore, the appellants have not established a basis for interfering with his valuation.

## II. The Trial Judge's Equitable Compensation Assessment

[161] The principles of equitable compensation, including the special importance of its deterrent effect in furthering the ongoing project of reconciliation between Canada and Indigenous peoples, are settled and not at issue in this appeal. It is the application of those principles that is at issue. Therefore, it is important to begin by outlining the trial judge's assessment. In his decision, the trial judge made it clear that the goal of equitable compensation is to restore what the plaintiff has lost due to a breach of fiduciary duty, the loss being an opportunity not realized because of the breach. The plaintiff's loss arising from the breach is to be assessed with the advantage of hindsight, not based on what may have been known at the date of the breach or what would have been reasonably foreseeable. In assessing the loss, courts must assume both

that the plaintiff would have made the most favourable use of the trust property at issue and that the defendant, had it not committed the breach, would have carried out its duties vis-à-vis the plaintiff in a lawful manner (Trial Reasons, at para. 285).

[162] The trial judge applied these settled principles, specifically looking back to when the breach occurred in 1929, and, with the benefit of hindsight and the evidentiary record, assessed what position the appellants would have been in but for the breach. Based on the evidence, the trial judge determined that, had Canada acted legally, it would have taken the reserve lands in 1929 through expropriation or surrender (para. 358).

[163] The trial judge noted the public importance of the Project and held that “[t]here is no reasonable likelihood that the project would have been shelved had the LSFN or Indian Affairs refused to have the land flooded” (paras. 292 and 327; see also C.A. Reasons, at paras. 23 and 50, per Gleason J.A., dissenting, but not on this point). Having found that the Project and the resulting flooding would have occurred when they did, the trial judge presumed that Canada would have acted lawfully if it had not breached its fiduciary duty and determined that Canada would have, and should have, either obtained a surrender of the reserve lands to be flooded as provided for in Treaty No. 3 (1873) and ss. 50 and 51 of the *Indian Act*, or expropriated the necessary lands in accordance with Treaty 3 and s. 48 of the *Indian Act*. In either case, Canada would have compensated the appellants for the flooded lands in 1929, the year of the dam’s

construction (Trial Reasons, at paras. 350-71). The parties accept this finding (C.A. Reasons, at para. 50).

[164] The evidence proffered at trial focused broadly on two concepts: a revenue- or benefit-sharing agreement and one-time compensation for the loss of the flooded lands. The trial judge rejected the revenue-sharing agreement as unprecedented and inconsistent with the historical approach taken in other instances of reserve land compensation, and found that there was no evidence that the parties would have been amenable to such an arrangement (paras. 351-57). The Federal Court of Appeal unanimously upheld this finding (paras. 57 and 106-7).

[165] Therefore, the trial judge concluded that Canada would have compensated the appellants through a one-time payment for the flooded lands and would not have secured an indefinite revenue-sharing agreement. In order to assess the quantum of the one-time compensation for the loss of the flooded lands, the trial judge reviewed all evidence proffered at trial on how to value the lands. He noted that the question of how the fair market value was to be assessed had been discussed by two experts: Duncan Bell, called jointly by Canada and Ontario, and Norris Wilson, called by the appellants. Both experts agreed that the fair market value had to be assessed on the basis of the highest and best use of the lands (D. Bell, *Appraisal Report: Lac Seul First Nation — Southwind Action*, February 28, 2014, at p. 78, reproduced in A.R. Supp., vol. CCXLI, at p. 168; N. Wilson, *Technical Review of an Appraisal Report by:*

*Charles Bell Real Estate Appraisals Ltd.*, May 16, 2016, at p. 2, reproduced in A.R. Supp., vol. CCXXXV, at p. 320).

[166] In his appraisal report, Mr. Bell stated that prior to 1934, the highest and best use of the Lac Seul reserve lands would have been for continued traditional uses by LSFN, and it would be expected that the majority of the flooded lands would have remained vacant and unimproved. Mr. Bell stated that when flooding of the reserve lands occurred in order to accommodate the development of a hydroelectric dam “the flooded lands had a greater utility as flooded land rather than their previous use” (p. 79). He estimated the value of the subject lands as at April 1, 1929, April 1, 1934, and April 1, 1943, in accordance with Canada and Ontario’s terms of reference. In Mr. Bell’s opinion, the overall effective price per acre of the reserve lands was \$1.29 in 1929, \$1.06 in 1934, and \$1.24 in 1943. In his testimony, Mr. Bell noted that he had valued the land as unflooded in each of the years for which he provided an estimated value because, if he had valued them differently once they were flooded, “[t]hat would be like somebody damaging your car and say, yes, I owe you a newer car but your car’s damaged now so I’m only going to pay you for the damaged car. So the valuations for traditional uses were simply just brought forward in those dates based on the market changes and the market evidence” (A.R. Supp., vol. XV, at p. 247).

[167] Mr. Wilson criticized Mr. Bell on three points: (1) a failure to correctly apply the principle of highest and best use; (2) the decision to apply the direct comparison approach; and (3) a failure to make findings and assumptions consistent

with the historical record. Mr. Wilson found that while Mr. Bell had acknowledged that the highest and best use of the lands had changed once it was flooded, all three of his valuations, for 1929, 1934, and 1943, were almost identical. From Mr. Wilson's perspective, either Mr. Bell had not made any attempt to analyze the impact of the hydroelectric project on the value of the reserve lands, or he had concluded that the project had no impact on the value of the lands. Regardless, Mr. Wilson submitted that Mr. Bell's highest and best use analysis was unsound. As the trial judge summarized:

. . . in his view, the flooded Reserve land formed part of a storage project that facilitated a hydroelectric system down the English and Winnipeg Rivers. He testified that the hydroelectric project at Ear Falls would affect the value of the land around the foreshore of Lac Seul, because the highest and best use of that land would change to the storage of water for the power project from traditional uses before it was flooded. [para. 377]

However, both in his report and his testimony, Mr. Wilson did not propose an alternative valuation.

[168] The trial judge found that Mr. Bell's method of valuation was "appropriate and proper in the circumstances" and adopted his conclusions (para. 380). He noted that "[t]his manner of proceeding may seem contrary to that advanced by Indian Affairs in the Kananaskis Falls development where, it will be recalled, the Department informed Calgary Power that the cost of the land must exceed its agricultural value as the 'value in the lands consists in their usefulness in connection with the development of power at Kananaskis Falls and in this connection they have a considerable value'" (para. 381, referring to A.R. Supp., vol. XLI, at p. 184). However, the trial judge

distinguished the Kananaskis Project on the basis that there was no ability to expropriate any reserve lands in that example, whereas there was in the instant case. Therefore, Calgary Power was in an entirely different position vis-à-vis the Stoney Indian Band than Canada vis-à-vis the LSFN reserve (paras. 382-83).

[169] In determining the price per acre, the trial judge rejected Canada's submission that \$1.00 per acre would be a more appropriate basis to calculate the amount payable. He held that "[w]hile \$1.29 is slightly more than may have been in the contemplation of [Manitoba and Ontario, the provinces with whom Canada was negotiating], I have no evidence that had Canada insisted, it would not have been accepted by the Provinces" (para. 384). The trial judge considered additional avoidable losses, finding calculable financial losses of \$14,582.16 in 1929 for a flowage easement over the reserve lands, \$34,917.33 in 1929 for timber dues, and \$1,750,000 in 2008 for community infrastructure (para. 443). In addition, the trial judge awarded \$16.2 million for non-calculable losses, namely loss of livelihood both on and off the reserve as well as loss of easy shore access, damage to boats, and overall damage to the aesthetic of the lake shore.

### III. The Appellants Were Fairly and Appropriately Compensated for Their Losses

[170] The appellants submit that the lower courts improperly applied the principles of equitable compensation and failed to compensate LSFN for what it actually lost. According to them, "[r]ather than compensating for those losses in light of the use to which the Lands have been put, the Courts re-wrote history and relied on

a fictional expropriation scenario to improperly approach LSFN's losses as if they were one-time lost expropriation funds" (para. 69). I cannot agree. Based on the evidence before him, the trial judge assessed the appellants' losses presuming the highest and best use and with the benefit of hindsight. The appellants have not identified or established any palpable and overriding errors.

A. *Defining and Valuing the Lost Opportunity*

[171] I am in agreement with the majority that equitable compensation in this case should be assessed on the basis of a negotiated surrender (paras. 118 and 121). This is not controversial. Canada agrees that the lost opportunity in this case includes the opportunity to negotiate a surrender. The Court of Appeal unanimously agreed, finding that "the Federal Court correctly identified the impact of the breaches of fiduciary duty committed by Canada as being *both* the deprivation of an opportunity to negotiate a surrender of the flooded land in 1929 and the deprivation in 1929 of the funds that ought to have been paid had Canada taken and exercised the right to flood the reserve land" (para. 59 (emphasis in original)).

[172] As a fiduciary, Canada was arguably required to pursue a negotiated surrender before proceeding to expropriation, as the former more closely aligns with the nature of the breach and probably would have been less detrimental to LSFN. However, it does not necessarily follow that the lost opportunity to negotiate a surrender of the lands to be flooded equates to a lost opportunity to negotiate a surrender of those lands *for hydroelectricity generation*. In my view, the majority's



characterization presupposes that the trial judge had the requisite factual basis to make such a finding. It is clear from the record that he did not.

[173] For the appellants to recover the value of a lost opportunity to negotiate a surrender for hydroelectric benefits specifically, they would have had to establish their entitlement through specific facts and evidence, including expert evidence, led at trial. They did not do so. As noted by the majority, the appellants' theory of compensation has changed during this litigation. At trial, the appellants' theory, and their expert valuation evidence, were focused on their revenue-sharing claims. They did not provide evidence regarding a one-time payment for the flooded lands for hydroelectric purposes, and chose to limit themselves to criticizing Canada's expert valuation. Therefore, the trial judge was correct to find that the argument that Canada could, and should, have paid more than fair market value for the lands was "nothing more than optimistic speculation" (para. 383).

[174] The value of the compensation that Canada should have negotiated for LSFN cannot be assessed in an evidentiary or factual vacuum. As I explain below, the trial judge determined the compensation for the flooded lands in 1929 based on a "meticulous examination of the facts" (*Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at pp. 413-14, quoting *National Westminster Bank plc v. Morgan*, [1985] 1 All E.R. 821 (H.L.), at p. 831). I find no palpable and overriding error.

B. *The Trial Judge's Findings Are Not Tainted by Error*

[175] The trial judge's findings regarding what would have actually happened in 1929 had Canada not breached its duty to the appellants are factual determinations, not legal ones. They were based entirely on the evidence before him, including a lengthy historical record and numerous expert reports. As I outline below, I am of the view that the trial judge made no palpable and overriding error in his compensation assessment, and therefore deference is owed to his determination that \$1.29 per acre in 1929 dollars was the proper compensation for the appellants' flooded lands.

(1) Kananaskis Project Example

[176] The majority takes issue with the trial judge's assessment and ultimate rejection of the evidence from the Kananaskis Project agreements. In the majority's view, that evidence was relevant to the assessment of loss in this case, and the factor used by the trial judge to distinguish this example is not material.

[177] First, it is important to identify what evidence was actually proffered on this point. There was minimal discussion of this example in the record. The extent of our knowledge is from the expert report addendum and testimony of Gwynneth C. D. Jones and a brief response to Ms. Jones' addendum in Dr. Betsey Baldwin's expert report. In her addendum, Ms. Jones discussed the process used to deal with the interests of the Stoney Indian Band in the course of the development of three hydroelectric power sites on the Bow River, including Kananaskis Falls. She outlined the specific instructions given by the Department of Indian Affairs to Calgary Power, the dam's proponent, to negotiate a resolution with

the Stoney Indian Band that resulted in a payment for the flooded lands in excess of their value as agricultural lands. In response to Ms. Jones' addendum, Dr. Baldwin identified that Ms. Jones did not provide any comparison with the Lac Seul situation. Dr. Baldwin's response noted two overarching differences: the hydro developments were differently situated in relation to the reserves and water-power in Ontario and Alberta was differently administered (B. Baldwin, *A History of the Lac Seul Storage Project, Flooding on the Lac Seul Indian Reserve No. 28, and Related Compensation to the Lac Seul Band, 1873 to 1943*, April 30, 2014, at p. 202, reproduced in A.R. Supp., vol. CCXXXIX, at p. 305).

[178] In her testimony, Ms. Jones summarized the differences between what happened at Lac Seul and what happened at Kananaskis Falls as follows:

Well the most salient difference of course is the extent to which the Indian people were consulted. And not just consulted, but were asked to give formal consent to the arrangements, to give consent to the taking of their reserve lands for the power sites, but also for the land to be flooded by the power site. The difference in the valuations of the land comments that it should be valued in terms of its value to the Stoney and also in terms of its value to the power site. In other words, that its value was intimately tied up with the fact that it was going to be part of what was necessary to generate revenue and power from these sites.

Of course, the issue of heavy annual payments which would be made, as well as this upfront payment. In other words, that the Stoney people were to be offered a toll or dues on the power that was generated by the private company as a result of their being — the private companies being able to flood Indian reserve land; that's a salient difference. And of course, just the difference in relationship of the Department of Indian Affairs and even the Water Power Branch in these cases.

(A.R. Supp., vol. V, at pp. 69-70)

[179] Additionally, Ms. Jones noted that in the Kananaskis Project, there was an agreement between the Department of the Interior and Calgary Power that the “company will have the power to acquire and take [lands] for the purposes of its undertaking, essentially, powers the same as those conferred by the *Railway Act* on railway companies” (A.R. Supp., vol. V, at p. 93), even though no formal expropriation occurred.

[180] While noting that there may be a basis upon which to distinguish this evidence as it relates to the valuation of the loss, the majority finds that “[t]he trial judge should have considered the Kananaskis Falls Projects and other evidence available at trial as relevant proxies for what [the] premium was worth” (para. 143).

[181] With respect, the majority’s analysis of this evidence seems to stray from the settled standards of appellate review and instead focuses on how the trial judge ought to have undertaken an assessment of the evidence. That is not this Court’s role. We must not reconsider the evidence globally and reach our own conclusions; our role is to ensure that there is no error in principle or overriding and palpable error in the trial judge’s conclusions.

[182] I am in agreement with the majority of the Court of Appeal that the limited evidence proffered at trial concerning the Kananaskis Project does not substantiate a finding that the trial judge made a palpable and overriding error in refusing to grant the appellants a sum in excess of the fair market value of \$1.29 per acre. The trial judge’s determination regarding the comparability of the Kananaskis Project and the Lac Seul

situation is a factual determination. Based on his review of the evidence and Ms. Jones' testimony, he found that the Kananaskis Project could be distinguished in at least one material respect: there was no ability to expropriate, and therefore "Calgary Power vis-à-vis the Stoney Indian Band [was] in an entirely different position than Canada was vis-à-vis LSFN Reserve" (para. 382).

[183] The record before us provides no evidence as to why Canada was not in a position to utilize its expropriation powers for the Kananaskis Project, and thus it is simply speculation to conclude that Canada's differing approach in that matter leads, *per se*, to the conclusion that it breached its duty towards the appellants in this case. It may be, as the majority of the Court of Appeal noted, "that the fact that the Kananaskis Project was located on the reserve led Indian Affairs to take the view that the Band's land had a fair market value much greater than its agricultural value, resulting in a payment of approximately \$93.85 per acre of reserve land" (para. 138). It may also be, as the majority in this Court identifies, that a fundamental difference between the two projects is that in the Kananaskis Project, the compensation included a one-time payment plus an annual water power rental payment.

[184] While my colleagues in the majority acknowledge that "[i]t is up to the trial judge to assess how the differences in the location of the dam, or the amount of land involved, or the nature of the impact on the First Nation, would impact the value of the land for flooding purposes" (para. 138), they insist that "[t]he trial judge should have considered the Kananaskis Falls Projects and other evidence available at trial as

relevant proxies for what [the] premium was worth” (para. 143). The majority’s reconsideration of evidence to reach its own conclusions is not a basis for overturning the fact-finder’s findings. While there may be a possibility of alternative findings based on differing ascriptions of weight, the trial judge’s finding that the Kananaskis Project was not a relevant proxy was supported by the limited evidence before him. The trial judge therefore cannot be said to have made a palpable and overriding error in distinguishing the Kananaskis Project.

(2) Impact on the Community and LSFN’s Perspective

[185] The majority further critiques the trial judge’s reasoning by noting that he ought to have given “appropriate weight to the evidence regarding the impact on the community and . . . LSFN’s perspective” (para. 140). These two points relate to profound losses not susceptible of mathematical calculation. I am of the view that the trial judge appropriately acknowledged and incorporated the impact on the community and LSFN’s perspective in his non-calculable loss analysis. I see no error here either.

[186] It is important to note that the trial judge’s valuation at \$1.29 per acre is not the total valuation of the lands. It is simply the value of the lands as agricultural lands, based on the accepted expert evidence. The trial judge subsequently valued other calculable and non-calculable losses in order to arrive at his final conclusion. The \$16.2 million he awarded as compensation for non-calculable losses was influenced by a number of factors:

1. The amount of the calculable losses;
2. That many of the non-quantifiable losses created in 1929 persisted over decades, and some are still continuing;
3. The failure to remove the timber from the foreshore created an eyesore and impacted the natural beauty of the Reserve land;
4. The failure to remove timber from the foreshore also created a very long-term water hazard effecting travel and fishing for members of the LSFN;
5. The flooding negatively affected hunting and trapping requiring members to travel further to engage in these pursuits and the number of animals were reduced for some period as a result of the flooding;
6. Although Canada supplied the materials to build the replacement houses, the LSFN members supplied their own labour;
7. The LSFN docks and other outbuildings were not replaced;
8. LSFN hay land, gardens and rice fields were destroyed;
9. The hunting and trapping grounds on the Reserve were negatively impacted;
10. Two LSFN communities were separated by water and one became an island, impacting the ease of movement of the people who lived there;
11. Canada failed to keep the LSFN informed and never consulted with the band on any of the flood related matters that affected it, creating uncertainty and, doubtless, some anxiety for the band; and
12. Canada failed to act in a prompt and effective manner to deal with compensation with the LSFN prior to the flooding and did not do so for many years after the flooding, despite being aware of the negative impact on the band members. [para. 512]

It is the total equitable compensation, not simply the \$1.29 per acre figure, which ensures that the appellants are compensated for the value of the lands given the nature of their interest and the impact on LSFN.

[187] When the compensation analysis is viewed in this way, it is clear that the trial judge's inclusion of a robust non-calculable loss analysis allowed him to meaningfully consider the impact of the flooding on LSFN, such as the negative impact on hunting and trapping, hayland, gardens, and rice fields, including off-reserve losses.

C. *Concluding Remarks*

[188] As outlined above, I have found that the trial judge's equitable compensation analysis does not contain any reviewable errors and that neither of the points raised by the majority provides any basis for interfering with his judgment. Nonetheless, some concluding remarks are in order.

[189] While I agree with the majority that the appellants' strategic decision to change their theory of compensation during this litigation is not a bar to addressing the merits of this appeal, a reconsideration of the merits must take place within the appropriate scope of appellate review and must take into account the evidence — or lack thereof — adduced at trial. In this case, the appellants' position, and hence their strategy at trial, was that compensation for their flooded lands ought to have included the value of a revenue-sharing agreement. The evidence introduced at trial was to this effect. The appellants were seemingly content with attacking Canada's expert valuation of their lands and did not introduce any expert evidence regarding the fair market value of the lands or any premium that ought to have been paid in relation to the use of the lands for hydroelectric purposes.



[190] Despite the appellants' focus on their revenue-sharing claims and the fact that their "loss of use" valuation expert was found not to be credible, the trial judge nevertheless undertook a thorough review of all of the evidence adduced by the parties, rejected Canada's submission that the value of the lands should be \$1.00 per acre, found that \$1.29 per acre was the proper compensation for the flooded reserve lands, and subsequently awarded over \$16 million in additional compensation for the non-calculable losses suffered by LSFN.

[191] I find that the majority's reasons seek to impose a greater obligation on a trial judge than the law demands. The trial judge had a daunting task. This trial lasted 56 days, and all but 2 of the 24 witnesses called were expert witnesses. He had to resolve a myriad of difficult factual questions by examining a voluminous factual record consisting of 8,347 documents entered as exhibits and thousands of pages of expert reports. The majority returns the award of equitable compensation for reassessment based on an alternative valuation methodology that is currently unsupported by the trial record. It is wrong to fault the trial judge for accepting the sole evidence proffered on the value of the flooded lands without pointing to any palpable and overriding error in his analysis. I could not say it better than Justice Wilson in *Guerin*: the trial judge "did the best he could".

[192] The appellants must bear the consequences of their tactical choice to advance a predominant theory of the case based on revenue-sharing claims. In retrospect, it may have been a more appropriate trial strategy for the appellants to

present, alongside their revenue-sharing claims, fulsome expert evidence on the value of the flooded reserve lands in the event that compensation was awarded as a one-time payment, including a premium based on the usefulness of the lands for hydroelectric purposes. The appellants are responsible for the ramifications of their trial strategy, even though they have changed tack on appeal.

[193] Returning the award of equitable compensation for reassessment, which will inevitably require additional discovery and historical and valuation expert evidence, would permit the appellants to repair the deficiencies in their case and forward their new theory of the case *de novo*. Absent any reviewable error, and I have found none, this is not the proper role of appellate intervention.

#### IV. Conclusion

[194] The trial judge reviewed, analyzed, and weighed the evidence before him. Based on the record, he was entitled to find that the argument that Canada could, and should, have paid more than fair market value for the reserve lands was “nothing more than optimistic speculation”. As the trial judge did not commit any errors in principle, his compensation assessment “is entitled to considerable deference on appeal” (*Whitefish*, at para. 28). I would accord the trial judge this considerable deference and would not disturb his findings and conclusions. I would therefore dismiss the appeal with costs throughout.

*Appeal allowed with costs throughout, CÔTÉ J. dissenting.*

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