A Watershed Decision: Supreme Court Rules that Compensation for Flooded Reserve Land is Insufficient

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Introduction

The Supreme Court of Canada ("SCC") recently released its decision in *Southwind v Canada*, 2021.[1] In an 8-1 ruling, the SCC held that $30 million in compensation to the Lac Seul First Nation ("LSFN") for the federal government's flooding of its Reserve land was insufficient, and ordered the case back to trial for re-assessment.[2]

The decision was a majority decision with Justice Cote dissenting. The case considers the application of the principles of equitable compensation within the context of Canada's fiduciary duty to Indigenous Peoples. In this case, the SCC established a framework on how to equitably compensate Indigenous communities for the unauthorized operation of hydroelectricity projects on Reserve land without consent.[3]

Brief Overview

LSFN's traditional territory is located in northwestern Ontario. LSFN has the Lac Seul Indian Reserve No. 28 on the southeastern shore of Lac Seul in northern Ontario, which encompasses three communities — Kejick Bay, Whitefish Bay, and Frenchman's Head.[4] In 1875, LSFN chose Lac Seul as its Reserve site under Treaty 3 because of the "resources along the shoreline and the social, cultural, and spiritual importance of the area".[5]

By 1911, the federal government identified Lac Seul as a potential reservoir for hydroelectricity generation to provide more power to Winnipeg ("Project").[6] LSFN first

[1] *Southwind v Canada*, 2021 SCC 28.
[2] *Ibid* at paras 146-147.
[3] *Ibid* at paras 130-145.
[4] *Ibid* at para 15.
[5] *Ibid* at para 16.
[6] *Ibid* at para 17.

became aware of the Project in 1915, during a Manitoba-commissioned hydrographic fieldwork survey of the area. Accordingly, LSFN wrote to the federal government outlining their concerns, and were advised that there was *no intention to raise the water levels of Lac Seul*.[7] However, despite the lack of consent, a negotiated surrender, or an expropriation of LSFN's Reserve land in accordance with the *Indian Act*, the Project was completed in June 1929 and the waters of Lac Seul began to rise in 1934.[8]

In 1943, Canada and Ontario entered into a settlement agreement worth $50,263 without consulting LSFN. By contrast, compensation negotiations were offered to non-Indigenous groups, including the Anglican Church Missionary Society, the Hudson's Bay Company, and the Canadian National Railway.[9] In 2006, LSFN entered into an agreement with Ontario Power Generation that included $11.2 million in compensation, but excluded flooding damages that originated in the 1930s.[10]

A total of 11,304 acres (approximately 17 percent of the Reserve) were flooded, resulting in (1) the destruction of LSFN's wild rice fields, gardens, and haylands for livestock, (2) impacts on LSFN's fishing, homes, campsites, shoreline infrastructure, and graves, and (3) the geographic/physical separation of the Kejick Bay community from other LSFN communities.[11]

LSFN filed a civil claim against Canada in Federal Court in 1991 for breach of fiduciary duty and obligations under the *Indian Act* and Treaty 3. This resulted in a 54-day trial in 2016.[12] Based on the value of LSFN's Reserve land in the 1920s (without accounting for the added value of the Project), the Federal Court ordered the federal government to pay $30 million in compensation. LSFN appealed the decision to the Federal Court of Appeal, which also agreed with the compensation valuation.

The Decision

The SCC concluded that "[a] hypothetical flowage easement at $1.29 an acre is not an appropriate measure of compensation […] because it does not reflect the value of the land *to the Project*" (emphasis added).[13] The SCC therefore quashed the valuation of $30 million in compensation, which was premised on: (1) the Project being a public work, (2)

[7] *Ibid* at para 18.
[8] *Ibid* at paras 24, 27 and 33.
[9] *Ibid* at paras 30-31.
[10] *Ibid* at para 34.
[11] *Ibid* at para 33.
[12] *Ibid* at 35.
[13] *Ibid* at para 146

Canada *could* have expropriated the land, and (3) Canada was therefore *not expected to compensate based on the value of the land to the Project*.[14]

The SCC explained that this method of evaluation (1) "is inconsistent with the unique nature of the Indigenous interest in reserve land and the devastating impact of the flooding on the LSFN", and (2) "does not reflect the honour of the Crown nor serve the overarching goal of reconciliation".[15] The LSFN is therefore "entitled to equitable compensation *for the lost opportunity to negotiate for an agreement reflecting the value of the land to the hydroelectricity generation Project*" (emphasis added).[16]

The judgement of the Court of Appeal and trial judge's award for equitable damages was set aside and returned to the trial court for reassessment.[17]

Breach of Fiduciary Duty

The SCC found that Canada breached its fiduciary duty to negotiate for the best possible compensation that (1) reflected the harm of flooding to LSFN, and (2) the value of the land for its anticipated use — hydroelectricity generation.[18] Had Canada pursued a negotiated surrender, Canada would have had an obligation to "advance the best interests of the LSFN and protect it from an improvident bargain".[19]

Moreover, although the SCC held that Canada's breach of fiduciary duty *could* be characterized as 'ongoing', the central inquiry remains: "what is the measure of the plaintiff's lost opportunity in light of the breach?"[20] Nonetheless, the SCC states that in order for compensation to be *equitable*, Canada must (1) be deterred from similar conduct in the future, (2) meet the fundamental goal of reconciliation, and (3) uphold the honour of the Crown.[21]

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[14] *Ibid*.
[15] *Ibid*.
[16] *Ibid*.
[17] *Ibid* at para 147.
[18] *Ibid* at para 114.
[19] *Ibid*.
[20] *Ibid* at paras 126-127.
[21] *Ibid* at 128.

Equitable Compensation Principles and Valuation of Lost Opportunity

Given that Canada had entered negotiation agreements with non-Indigenous parties (to whom no fiduciary duty was owed), Canada conceded that the lost opportunity in this case was the opportunity for LSFN to negotiate a surrender of its Reserve land under section 51 of the *Indian Act*.[22]

Based on the principles of equitable compensation, the SCC held that "Canada should [therefore] 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" (emphasis added).[23] For that reason, "[e]quity can *presume* that the LSFN would have consented to a negotiated settlement at the best [possible] price" (i.e. a negotiated surrender of flooded land based on its value to hydroelectricity generation).[24]

The SCC held that the lost opportunity valuation had been flawed because it was based on "an incorrect view of what the fiduciary duty required".[25] The trial judge valued the loss as the amount required under expropriation law, rather than within the context of the Crown's fiduciary obligation to negotiate for compensation reflecting (1) LSFN's interest in the Reserve land, (2) impact on the community, and (3) the value of the land for its intended use for hydroelectricity generation.[26]

Significance of this Decision

This decision has significant implications on negotiations with Indigenous Peoples to develop public purpose projects on Reserve lands.

First, this case serves as a reminder that Canada owes a fiduciary duty to Indigenous Peoples. Canada must negotiate with Indigenous best interests at the forefront when planning public purpose developments on Reserve lands.

Second, this is the first time the SCC has recognized that the valuation of Reserve land must be based on its projected public purpose use (in this case, flooding for hydroelectricity generation), rather than on expropriation principles. This precedent could introduce a paradigm shift in how rights to use and occupy reserve land are negotiated with Indigenous Peoples.

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[22] *Ibid* at 121.
[23] *Ibid* at 122.
[24] *Ibid* at paras 122 and 129.
[25] *Ibid* at para 145.
[26] *Ibid*.

Third, by setting a precedent and deterring the Crown from providing insufficient compensation to Indigenous Peoples in the future, this case demonstrates progress in Canada's goal towards reconciliation with its Indigenous Peoples.

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