“Equitable Compensation” for a Breach of the Crown’s Fiduciary Duty Towards First Nations

The Crown has a fiduciary relationship with Indigenous Peoples. What remedy do Indigenous Peoples have when the Crown breaches its fiduciary duty? The Supreme Court of Canada recently addressed this question in *Southwind v Canada*, which involved a breach that occurred nearly 100 years ago.

In February 1928, the Governments of Canada, Ontario, and Manitoba entered into an agreement to dam Lac Seul in order to generate electricity for the growing city of Winnipeg.[1] The governments planned to raise the water level of Lac Seul by ten feet, which they knew would cause “very considerable” damage to the Lac Seul First Nation (LSFN), whose Reserve was — and still is — located on the southeastern shore of the lake.[2] When the dam was built, “[a]lmost one-fifth of [LSFN’s] best land was flooded and … [LSFN’s] members were deprived of their livelihood, robbed of their natural resources, and driven out of their homes.”[3] LSFN was not consulted on either the project itself,[4] or on the adequacy of the $50,000 compensation package that Canada and Ontario paid into the LSFN’s trust account in 1943.[5]

As a general rule, the Crown owes a fiduciary duty towards an Indigenous group when it “assumes discretionary control over a specific Aboriginal interest.”[6] The Crown breached its duty in the Lac Seul dam project.[7] In this case, the remedy for the breach was “equitable compensation,” which the trial judge calculated according to what the Crown would have owed the LSFN under the laws of expropriation in 1929, when the breach occurred.[8] Mr Southwind, who was acting on behalf of the members of the LSFN, disagreed with this calculation and argued that the trial judge failed to consider the doctrine of equitable compensation in light of the constitutional principles of the honour of the Crown and reconciliation.[9]

On July 16th, 2021, the Supreme Court ruled on Mr Southwind’s appeal. This article will examine the Supreme Court’s decision on the appropriate legal remedy for a breach of the Crown’s fiduciary duty towards Indigenous Peoples.

The Nature of the Crown’s Fiduciary Duty Towards Indigenous Peoples

There was no question in this case that the Crown had breached its fiduciary duty to the LSFN; the Crown conceded this.[10] However, “the specific nature of the Crown’s fiduciary duty … especially over reserve land, informs how equitable compensation must be assessed,”[11] and so the Court began with an overview of the duty itself.

The fiduciary relationship between the Crown and Indigenous Peoples is *sui generis* in

nature,[12] which means that it is unique and distinct from other legal relationships normally found in the common law tradition. As the Court stated in *Southwind*, this *sui generis* relationship is rooted in two principles of Aboriginal Law: (1) the honour of the Crown; and (2) the goal of reconciliation.[13]

The honour of the Crown is a constitutional principle that underpins Aboriginal Law,[14] the branch of Canadian constitutional law that deals with the rights of the Indigenous Peoples of Canada[15] and their relationship with the Crown.[16] It imposes a duty upon the Crown to act honourably towards Indigenous Peoples and to take their interests into account when it makes decisions that may impact them.[17]

For the Court, the principle or goal of reconciliation has two aspects. On the one hand, it seeks to reconcile "Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship."[18] On the other hand, it seeks to make consistent two seemingly inconsistent realities: prior occupation of the land we now call Canada by Indigenous Peoples and the Crown's assertion of sovereignty over that land.[19]

The second aspect of this principle is especially pertinent to the Crown's control over reserve lands because "the Indigenous interest in land *did not flow from the Crown*; it pre-existed the Crown's assertion of sovereignty."[20] Further, Indigenous Peoples' unique relationships with their land, and especially reserve land, heightens the importance of their interest in reserve land and by extension, the fiduciary duty.[21] In *Southwind*, the Court concluded that the Crown's fiduciary duty "imposes the following obligations on the Crown:"[22]

- "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."[23]
- "[I]n the context of a surrender of reserve land … [the obligation to] protect against improvident bargains, manage the process to advance the best interests of the First Nation, and ensure that it consents to the surrender."[24]
- "In an expropriation, the obligation to ensure consent is replaced by an obligation to minimally impair the protected interest."[25]

The Principles of Equitable Compensation for Breach of the Crown's Fiduciary Duty

To quote the Court in *Southwind*:

> *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 … [and w]hen it is possible to restore the plaintiff's assets in specie, accounting for the profits and constructive trust are often appropriate.[26]*

"*In specie*" means that the actual assets would be returned — for example, in this case, the assets *in specie* would be the flooded land.

In cases where returning the actual assets is not possible, such as this one, equitable compensation is the appropriate remedy.[27] While both parties agreed on "[t]he basic principles of equitable compensation … [they] disagree[d] about their application to the Crown's fiduciary duty in relation to land held for the benefit of Indigenous Peoples." [28]

The doctrine of equitable compensation has two objectives: (1) to remedy the loss suffered by "restor[ing] the actual value of the thing lost through the fiduciary's breach" (the "lost opportunity"),[29] and (2) to enforce the trust which forms the heart of the fiduciary relationship by deterring future wrongdoing.[30]

To be eligible for equitable compensation, the plaintiff must show that the fiduciary's breach —in this case the Crown's breach — caused their lost opportunity.[31] Here, the Court clarified that the test for causation is the low-threshold "but for" test: but for the fiduciary's breach, would the plaintiff have suffered the loss?[32]

The Court further explained that a fiduciary cannot limit their liability by arguing that the loss suffered by the plaintiff was unforeseeable.[33] The doctrine of equitable compensation aims to "compensate … the plaintiff for the lost opportunity caused by the breach, regardless of whether that opportunity could have been foreseen at the time of the breach."[34] Equitable compensation, the Court continued, will "[look] at what actually happened to values in later years," even if it causes an "unexpected windfall" to the plaintiff.[35] This is because equitable compensation "look[s] to the policy behind compensation for breach of fiduciary duty and determine[s] what remedies will best further that policy."[36] The dual purpose of remedying the loss suffered and deterring future wrongdoing therefore drive the calculation of equitable compensation, and foreseeability is not relevant. In the context of a fiduciary breach, equitable compensation "should not be limited by foreseeability, unless it is necessary to reach a just and fair result."[37]

To inform its assessment in *Southwind*, the Court set out several presumptions and requirements that apply to equitable compensation:

- The presumption that "the plaintiff would have made the most favourable use of the trust property,"[38] although "[t]he most favourable use must be realistic."[39]
- "The focus is always on whether the plaintiff's lost opportunity was caused in fact by the fiduciary's breach."[40]
- The presumption of legality — that parties would have complied with the law — which "prevents breaching fiduciaries from reducing compensation by arguing that they would not have complied with the law."[41]
- In a case of failure to disclose material facts, the breaching fiduciary cannot argue "that the outcome would be the same regardless of whether

the facts were disclosed."[42]

How to Calculate Equitable Compensation for the Crown's Breach of its Fiduciary Duty Towards Indigenous Peoples

The Court disagreed with the trial judge's decision to calculate equitable compensation based on the amount required under the expropriation laws that existed at the time of the breach.[43] It was incorrect, the Court said, to presume that Canada would have failed to reach an agreement with the LSFN and would have proceeded directly to expropriation. In this regard, the trial judge erred by "focus[ing] on what Canada would *likely have done* instead of what Canada *ought to have done* as a fiduciary."[44]

Following the first step in assessing equitable compensation the Court "determine[d] what the fiduciary would have been expected to do had it not breached its obligations."[45] In this case, although Canada had the legal discretion to expropriate lands[46] or take up lands for public works,[47] this did not preclude it or excuse it from carrying out its fiduciary duties.[48] Rather, Canada was expected to represent the interests of the Indigenous Peoples to whom it was a fiduciary while at the same time considering the broader public interest.[49] Before resorting to expropriation laws, "Canada ought to have first attempted to negotiate a surrender" of the land in accordance with its fiduciary obligations.[50]

The Court then provided guidance on how to calculate the value of LSFN's lost opportunity caused by this breach. In the Court's view, this calculation must be based on what Canada *ought* to have done: namely, "to negotiate in order to obtain the best compensation based upon the value of the land to the Project."[51] In *Southwind*, this meant considering the value of the land in light of its anticipated use for hydroelectricity generation.[52]

Finally, the Court confirmed that the calculation must consider whether the "award is sufficient to fulfill the deterrent function of equity."[53] Deterring the Crown from breaching its fiduciary duty to Indigenous Peoples is "especially important," the Court said, because it encourages the Crown to act honourably and with a view towards reconciliation.[54] The award should therefore be such that it acts as a meaningful deterrent and thereby reflects "the honour of the Crown and the goal of reconciliation."[55]

Conclusion

The outcome of the Supreme Court's judgment in *Southwind* is that the case goes back to the trial court, which must now reassess the equitable compensation award to the LSFN based on the Supreme Court's guidance.[56] Above all, the Supreme Court's decision reaffirms that the Crown's fiduciary duty towards Indigenous Peoples is alive and well, especially as it relates to reserve lands. It confirms the Crown's obligations that arise from its fiduciary duties in relation to reserve lands, and frames equitable compensation in a way that upholds the honour of the Crown and the objective of reconciliation. As the Court recently held in *Desautel*, "the honour of the Crown looks back" to the Crown's assertion of sovereignty over Indigenous Peoples and "also looks forward to reconciliation between the Crown and Aboriginal peoples in an ongoing, mutually respectful long-term

relationship."[57]

[1] See *Southwind v Canada*, 2021 SCC 28 at para 1 . See also paras 17-20.

[2] *Ibid* at paras 2-3. See also paras 14-16.

[3] *Ibid* at para 2 (internal quotations removed). See also paras 27-28.

[4] *Ibid* at para 4. See also paras 20-26.

[5] *Ibid* at paras 29-30.

[6] *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 (CanLII) at para 73(1).

[7] See *Southwind*, *supra* note 1 at paras 37-42, 87-89 and 94.

[8] *Ibid*.

[9] *Ibid* at para 49.

[10] *Ibid* at para 54.

[11] *Ibid*.

[12] *Ibid* at para 60.

[13] *Ibid* at para 55.

[14] *Ibid*.

[15] See *Constitution Act, 1982*, s 35, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 at s 35.

[16] See Thomas McMorrow, "Upholding the Honour of the Crown" (2018) 35 Windsor YB Access to Justice 311 at 313.

[17] See *Southwind*, supra note 1 at para 55.

[18] *Ibid*.

[19] *Ibid*.

[20] *Ibid* at para 56 (emphasis in original).

[21] *Ibid* at para 62.

[22] *Ibid* at para 64.

[23] *Ibid*.

[24] *Ibid*.

[25] *Ibid*.

[26] *Ibid* at para 68.

[27] *Ibid*.

[28] *Ibid* at para 65.

[29] *Ibid* at para 69. See also paras 67 ("Equitable compensation … is a loss-based remedy; the purpose is to *make up* the plaintiff's loss") and 68 (when it is not possible to restore the plaintiff's assets *in specie*, "equitable compensation is the preferred remedy").

[30] *Ibid* at paras 66, 71-72.

[31] *Ibid* at para 70.

[32] *Ibid* at para 75.

[33] *Ibid* at paras 66, 74 and 77.

[34] *Ibid* at 74.

[35] *Ibid* at 76.

[36] *Ibid* at para 73.

[37] *Ibid* at para 76 (citing *Hodgkinson v Simms*, 1994 2 SCR 377 at 443).

[38] *Ibid* at para 79.

[39] *Ibid* at para 80.

[40] *Ibid*.

[41] *Ibid* at para 81.

[42] *Ibid* at para 82.

[43] *Ibid* at para 89.

[44] *Ibid*. See also para 111.

[45] *Ibid* at para 93.

[46] *Ibid* at para 94.

[47] *Ibid* at para 96.

[48] *Ibid* at paras 94 and 96-97.

[49] *Ibid* at paras 101-03.

[50] Ibid at paras 112-14.

[51] *Ibid* at para 118. See also paras 121-22, 127 and 129.

[52] *Ibid* at para 127. While Justice Côté agreed with the majority that Canada ought to have negotiated a surrender, she did not agree that the lost opportunity includes an "opportunity to negotiate a surrender of those lands *for hydroelectricity generation*" (para 172, emphasis in original) because there was insufficient evidence to make that finding of fact. Justice Côté disagreed with the majority's decision to reconsider evidence to reach its own conclusions because doing so overreaches the appellate standard of review for mixed fact and law, which is reasonableness, not correctness (see paras 170, 174-75, 181, 184 and 188).

[53] *Ibid* at para 144.

[54] *Ibid*.

[55] *Ibid*.

[56] *Ibid* at para 147.

[57] *R v Desautel*, 2021 SCC 17 at para 30.