Federal Court of Appeal  Cour d'appel fédérale

Date: 20190610

Docket: A-337-17

Citation: 2019 FCA 171

CORAM: **NADON J.A.**
WEBB J.A.
GLEASON J.A.

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 and

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO and

HER MAJESTY THE QUEEN IN RIGHT OF MANITOBA

Respondents

Heard at Ottawa, Ontario, on October 23, 2018.

Judgment delivered at Ottawa, Ontario, on June 10, 2019.

REASONS FOR JUDGMENT BY:	NADON J.A.
CONCURRED IN BY:	WEBB J.A.
DISSENTING REASONS BY:	GLEASON J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20190610

Docket: A-337-17

Citation: 2019 FCA 171

CORAM: **NADON J.A.**
WEBB J.A.
GLEASON J.A.

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 and

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO and

HER MAJESTY THE QUEEN IN RIGHT OF MANITOBA

Respondents

REASONS FOR JUDGMENT

GLEASON J.A. (Dissenting)

[1] This is an appeal from the judgment of the Federal Court in *Southwind v. Canada*, 2017 FC 906 (*per* Zinn J.), awarding the appellants $30 million in equitable compensation for breach of fiduciary duty committed by Her Majesty the Queen in right of Canada (Canada) in connection with flooding of a substantial part of the Lac Seul First Nation reserve.

[2] The appellants contend that the Federal Court erred in the assessment of a portion of the equitable compensation awarded, namely the value attributed by the Federal Court to the flooded land. Appropriate compensation for this item, in their view, should not have been premised on the fair market value of the flooded lands based on their use at the time they were flooded, but rather ought to have included the value of a revenue-sharing agreement they say Canada should have negotiated on the Lac Seul First Nation's behalf. In the alternative, the appellants submit that value of the flooded reserve land should be calculated in a greater amount than that fixed by the Federal Court to take into account the value of the flooded lands in connection with downstream hydroelectric electricity generation.

[3] I agree in part with the appellants' alternate submission. Thus, for the following reasons, I would allow this appeal, with costs.

I. Background

[4] It is useful to commence by reviewing the relevant background.

[5] In the 1920s, members of the Lac Seul First Nation became aware of plans to build a dam, outside their reserve at Ear Falls, to support downstream hydroelectric development to generate power for the City of Winnipeg. It was contemplated that the dam would raise the level of Lac Seul and flood the reserve lands surrounding the lake. Members of the First Nation repeatedly raised concerns with Canada about the damage that raising the level of Lac Seul might cause. Canada acknowledged these concerns, which were also borne out in studies that had been undertaken regarding the likely impact of the dam. A Department of Indian Affairs official "assured the Chief [that the] Department would look into the matter, and protect [the First Nation's] interests as far as possible": FC Reasons at para. 137. However, Canada did not seek the Lac Seul First Nation's consent to surrender the land; nor did it take (or expropriate) the land. As a result, the land at issue remained, and to this day remains, part of the reserve, having been neither taken by nor surrendered to Canada.

[6] The dam was built in 1929 without the requisite approval under the *Navigable Waters' Protection Act*, R.S.C. 1927, c. 140. Ten hydroelectric generating stations were later built downstream. The water level in Lac Seul gradually rose following construction of the dam and by 1936 reached the level anticipated before construction. The water now covers 11,304 acres, which represents approximately 17 percent of the Lac Seul First Nation reserve.

[7] Although Canada and Her Majesty the Queen in right of Manitoba and Ontario (Manitoba and Ontario, respectively) entered into agreements concerning compensation for losses resulting from the dam generally, there was no specific agreement about the amount of compensation that would be paid to the Lac Seul First Nation.

[8] Canada ultimately reached a settlement with Ontario in 1943, some 14 years after the dam was built and the water began to rise. Canada did not consult with the Lac Seul First Nation before entering into settlement negotiations or before agreeing to the settlement. Nor did Canada advise the First Nation of the terms of the settlement reached. After making certain deductions, Canada put settlement funds of $50,263 into the Lac Seul First Nation's trust account. Canada did not inform the First Nation of the settlement in 1943, though it appears that members of the First Nation later became aware that some compensation had been paid.

[9] As a result of the construction of the dam at Ear Falls and resulting flooding, nearly one-fifth of the Lac Seul reserve was rendered unusable. Timber was lost, graves were desecrated and homes, gardens and fields were destroyed. In addition, portions of the reserve were severed from one another. Many years later, partly at its expense, the First Nation built a bridge connecting the two communities.

[10] In 1985, the Lac Seul First Nation filed a specific claim with Canada for the losses associated with the flooding, and the appellants initiated this action in the Federal Court in 1991. In their action, the appellants sought equitable compensation, punitive damages and a declaration that their equitable interests in the flooded lands had not been encumbered or extinguished.

[11] In terms of the relevant legal background, representatives of the Lac Seul First Nation adhered to Treaty 3 on June 9, 1874. Treaty 3, which had been signed the previous year, provided that Canada would:

> […] 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 such reserves, whether for farming or other purposes, shall in no wise exceed in all one square mile for each family of five, or in that proportion for larger or smaller families […].

[12] The land set aside for the Lac Seul First Nation under the terms of the Treaty 3 was a "reserve" within the meaning of paragraph 2(*j*) of the *Indian Act*, R.S.C. 1927, c. 98 (the *Indian Act*).

[13] As it read in 1929, the *Indian Act* set out two means by which land could be removed from a reserve. Section 48 contemplated land being taken for a public purpose with the Governor in Council's consent:

(1) No portion of any reserve shall be taken for the purpose of any railway, 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.	(1) Nulle partie d'une réserve ne peut être expropriée pour les besoins d'un chemin de fer, d'une route, d'un ouvrage public ou d'un ouvrage destiné à quelque utilité publique sans le consentement du gouverneur en son conseil, mais toute compagnie ou autorité municipale ou locale possédant le pouvoir conféré par une loi, soit fédérale soit provinciale, d'exproprier ou utiliser des terrains ou quelque intérêt dans des terres, sans le consentement du propriétaire, peut, avec le consentement du gouverneur en son conseil comme susdit, et subordonnément aux termes et conditions imposés par ce consentement, exercer ce pouvoir conféré par une loi à l'égard de toute réserve ou partie d'une réserve.

(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.	(2) En ce cas, une indemnité doit être versée aux Indiens de la bande, et l'exercice de ce pouvoir et l'expropriation des terres ou l'acquisition d'un intérêt dans ces terres, ainsi que la fixation et le versement de l'indemnité doivent, à moins de dispositions contraires dans l'arrêté en conseil qui fait preuve du consentement du gouverneur en son conseil, être régis par les prescriptions applicables à des procédures similaires prises par cette compagnie, ou cette autorité municipale ou locale dans des cas ordinaires.
[…]	[…]
(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.	(4) La somme adjugée dans chaque cas est versée au ministre des Finances pour l'usage de la bande d'Indiens au profit de laquelle la réserve est affectée, et au profit de tout Indien qui y a fait des améliorations, ou lésé.

[14] Sections 50 and 51 of the *Indian Act* provided for land to be surrendered and forfeited to Canada with a band's consent, as well as that of the Governor in Council:

50(1) Except as in this Part otherwise provided, no reserve or portion of a reserve shall be sold, alienated or leased until it has been released or surrendered to the Crown for the purposes of this Part; but the Superintendent General may lease for the benefit of any Indian, upon his application for that purpose, the land to which he is entitled without such land being released or surrendered, and may, without surrender, dispose to the best advantage, in the interests of the Indians, of wild grass and dead or fallen timber.	50(1) Sauf dispositions contraires de la présente Partie, nulle réserve ou portion de réserve ne peut être vendue, aliénée ni affermée, avant d'avoir été cédée ou rétrocédée à la Couronne pour les objets de la présente Partie; mais le surintendant général peut donner à bail, au profit de quelque Indien, sur sa demande, la terre à laquelle celui-ci a droit, sans cession ni abandon, et il peut, sans qu'il y ait eu abandon, disposer de la manière la plus avantageuse possible pour les Indiens des graminées sauvages et du bois mort sur pied ou du chablis.

[…]

51(1) Except as in this Part otherwise provided, no release or surrender of a reserve or a portion of a reserve, held for the use of the Indians of any and, or of any individual Indian, shall be valid or binding, unless the release or surrender shall be assented to by a majority of the male members of the band of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose, according to the rules of the band, and held in the presence of the Superintendent General, or of any officer duly authorized to attend such council, by the Governor in Council or by the Superintendent General.

(2) No Indian shall be entitled to vote or be present at such council, unless he habitually resides on or near, and is interested in the reserve in question.

(3) The fact that such release or surrender has been assented to by the band at such council or meeting shall be certified on oath by the Superintendent General, or by the office authorized by him to attend such council or meeting, and by some of the chiefs or principal men present thereat and entitled to vote, before any person having authority to take affidavits and having jurisdiction within the place where the oath is administered.

(4) When such assent has been so certified, as aforesaid, such release or surrender shall be submitted to the Governor in Council for acceptance or refusal.

[…]

51(1) Sauf dispositions contraires de la présente Partie, nulle cession ou rétrocession d'une réserve ou d'une partie de réserve à l'usage d'une bande, ou d'un Indien en particulier, n'est valide ni obligatoire, à moins que la cession ou rétrocession ne soit ratifiée par la majorité des hommes de la bande qui ont vingt et un ans révolus, et ce à une assemblée ou à un conseil de la bande convoqué pour en délibérer conformément aux usages de la bande, et tenu en présence du surintendant général, ou d'un fonctionnaire régulièrement autorisé par le gouverneur en son conseil ou par le surintendant général à y assister.

(2) Nul Indien ne peut voter ni assister à ce conseil, à moins de résider habituellement dans ou près la réserve en question, ou d'y avoir un intérêt.

(3) Le fait que la cession ou rétrocession a été consentie par la bande, à ce conseil ou à cette assemblée, doit être attesté sous serment par le surintendant général ou par le fonctionnaire qu'il a autorisé à assister à ce conseil ou à cette assemblée, et par l'un des chefs ou des anciens qui y a assisté et y a droit de vote, devant toute personne autorisée à faire prêter serment et ayant juridiction dans l'endroit où le serment est prêté.

(4) Après que ce consentement a été ainsi attesté, comme susdit, la cession ou rétrocession est soumise au gouverneur en son conseil, pour qu'il l'accepte ou la refuse.

[15] Treaty 3 contains provisions that, at least on their face, resemble sections 48 and 51 of the *Indian Act*. It provides 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" and "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."

[16] Thus, under the *Indian Act*, the Lac Seul First Nation's reserve land could be surrendered, with the band's agreement and the Governor in Council's consent, or taken by Canada for a public purpose with the requisite approval of the Governor in Council.

II. Federal Court's Reasons

[17] With this background in mind, I turn now to review the portions of the Federal Court's Reasons that are germane to this appeal.

[18] After reviewing the evidence given over the course of the multi-week trial, the Federal Court set out its analysis. It is noteworthy that no party to this appeal questions much of the analysis in the Federal Court's lengthy and carefully articulated Reasons. Rather, as noted, the appellants principally contest the basis upon which the Federal Court calculated an aspect of the equitable compensation awarded.

[19] The Federal Court began its analysis by holding that Canada owed the Lac Seul First Nation a fiduciary duty in respect of the land reserved for its benefit under Treaty 3. The Federal Court found that several specific obligations flowed from Canada's fiduciary duty: "1. a duty of loyalty and good faith to the [Lac Seul First Nation] in the discharge of its mandate as trustee of the Reserve lands; 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 interest of the [Lac Seul First Nation]; and 4. a duty to protect and preserve the band's proprietary interest in the Reserve from exploitation": Reasons at para. 226. The Federal Court found that Canada breached each of these obligations and rejected Canada's equitable defence of laches.

[20] The Federal Court noted that Canada accepted that equitable compensation would be the appropriate remedy if the Court held that Canada owed the Lac Seul First Nation a fiduciary duty, found that Canada breached its duty and concluded that Canada could not successfully raise an equitable defence.

[21] The Federal Court accordingly moved to next set out the principles governing equitable compensation, drawing on the Supreme Court of Canada's decisions in *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, 131 N.R. 321 (cited to S.C.R.) (*Canson*) and *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, 171 N.R. 245 (cited to S.C.R.) (*Hodgkinson*), noting that equitable compensation aims "'to restore to the [beneficiary] what has been lost as a result of the breach, i.e. the [beneficiary's] lost opportunity'" and to deter wrongdoing by fiduciaries. The Federal Court further noted that the loss for which equity provides compensation is any that is factually caused by the breach, even if not foreseeable at the time of the breach. The Federal

Court also underscored that, in assessing compensation, a court of equity aims to put the beneficiary in the position she or he would have been in had the fiduciary not breached and presumes that, in the non-breach scenario, the fiduciary would have both acted lawfully and put what the beneficiary lost to its most advantageous use.

[22] The Federal Court considered how these principles have been applied by the Ontario Court of Appeal in *Whitefish Lake Band of Indians v. Canada (Attorney General)*, 2007 ONCA 744 at para. 69, 287 D.L.R. (4th) 480 (*Whitefish Lake*) and the Specific Claims Tribunal in *Huu-Ay-Aht First Nations v. Canada*, 2016 SCTC 14 and *Beardy's & Okemasis Band #96 and #97 v. Canada*, 2016 SCTC 15. These decisions draw on the analytical method employed by the Federal Court in *Guerin v. The Queen*, [1982] 2 F.C. 385, 2 C.N.L.R. 83 (T.D.) (*Guerin FC*) (which, though reversed by this Court, was ultimately upheld by the Supreme Court). That method emphasizes the need for a court of equity (or the Specific Claims Tribunal in applying equitable principles) to take into account contingencies (i.e. possible, but not necessarily certain, events) in assessing compensation.

[23] The Federal Court held that the dam at Ear Falls was a public work, that it was certain that the Ear Falls dam would have been built and that the land would have been flooded. It thus concluded that it need not take into account a contingency that the dam might not have been built.

[24] The Federal Court next noted that Canada must be presumed to act lawfully and therefore concluded that, had Canada done so, it would either have secured the land's surrender as

provided for in Treaty 3 and section 51 of the *Indian Act* or taken the land as provided for in Treaty 3 and section 48 of the *Indian Act*. The Federal Court found Canada would, in either case, have compensated the Lac Seul First Nation for the flooded land in 1929, the year of the dam's construction.

[25] The Federal Court rejected the argument that Canada would have negotiated a revenue-sharing agreement on the Lac Seul First Nation's behalf. In the Federal Court's view, such an agreement would have been unprecedented, would not have been considered by Canada, Manitoba or Ontario and was not consistent with the approach taken to compensating the other landowners on Lac Seul whose lands were also flooded by the dam. Acknowledging that Canada had previously required the negotiation of arrangements providing for ongoing payments for water power and riparian rights to the Stoney Indian Band, the Federal Court distinguished the situation involving that band because the hydroelectric generating stations were located on the Stoney Indian Band's reserve, not downstream, as was the case for the Lac Seul First Nation. The Federal Court likewise gave no weight to precedent of the *Treaty between Canada and the United States of America relating to Cooperative Development of the Water Resources of The Columbia River Basin* (the Columbia River Treaty), which was signed on January 17, 1961, long after the Ear Falls dam was built, and which involved a much more complex, international agreement. The Federal Court thus determined that if Canada had acted in accordance with its fiduciary duties to the Lac Seul First Nation, it would not have negotiated a revenue-sharing agreement.

[26] The Federal Court found that Canada would instead have obtained a flowage easement over the flooded lands of the First Nation, which was the common approach in similar cases and would have represented the least invasive method of acquiring the right to flood the lands. However, according to the Court, the amount that ought to have been paid for the easement was identical to that which would have been payable had the land been purchased outright because "[t]he land was to be swallowed up and unavailable to the band for eternity. […] it was as close to an outright sale of the land as one can have and was to be compensated accordingly": Reasons at para. 359.

[27] The Federal Court then moved to assess the compensation that Canada was required to pay. It began by assessing compensation for the land, itself, which the Court concluded should be fixed at $1.29 per acre in 1929 dollars (approximately $14,500 for the 11,304 acres flooded). This was the value of the land as agricultural land, based on the expert evidence the Federal Court accepted. The Federal Court rejected the contention that the increased value of the flooded land as part of a reservoir in support of downstream hydroelectric development was to be taken into account, pointing out that the value "attributable to the project" was to be excluded under both the *Expropriation Act*, R.S.C. 1985, c. E-21 and the *Expropriation Act*, R.S.O. 1990, c. E.26.

[28] In so concluding, the Federal Court seemingly applied current expropriation law as opposed to that in force in 1929. It also determined there was no basis for concluding that a premium beyond the value of the land as agricultural land would have been negotiated even though such a premium had previously been paid for land acquired in connection with the

Kananaskis Falls development project. The Federal Court reasoned that the two projects were different in at least one material respect in that Calgary Power had no ability to expropriate the lands of the Stoney Indian Band used for the Kananaskis Falls development project and it was therefore in an "entirely different position" than Canada was vis-à-vis the Lac Seul First Nation: Reasons at para. 382.

[29] The Federal Court thus concluded that Canada would have paid $1.29 per acre for the flooded lands and stated that "the suggestion that Canada could and should have paid more than this for the land, amounts to nothing more than optimistic speculation": Reasons at para. 383.

[30] The Federal Court then turned to value other calculable losses, concluding that the Lac Seul First Nation lost timber which could have been sold for approximately $35,000 in 1929 and that it had to spend $1.75 million in 2008 to build a bridge between the parts of the reserve separated as a result of the flooding.

[31] The Federal Court acknowledged that Canada received $72,539 in compensation from Ontario in 1943 and deposited $50,263 in Lac Seul First Nation's trust account, the remainder being deducted to satisfy claims made by Ontario and the Keewatin Lumber Company. Both of these deductions, in the Federal Court's view, were improper as the Lac Seul First Nation was not responsible for either claim.

[32] Based on expert evidence concerning the interest that would have been paid on the funds had they been deposited in an Indian Trust Account maintained by Canada and upon concluding

that no further deduction needed to be made for consumption by the members of the Lac Seul First Nation, the Federal Court determined that the present value of the compensation owed for calculable losses was $15 million, from which it deducted $1.1 million (the present value of the compensation Canada deposited in the Lac Seul First Nation's trust account in 1943).

[33] To this, the Federal Court added $16.1 million as compensation for non-calculable losses for a total award of $30 million. The Federal Court considered a range of non-calculable losses, including the loss of livelihood on and off the reserve, as well as the loss of easy shore access and of natural beauty. The amount of non-calculable losses awarded was influenced by the following factors enumerated by the Federal Court at paragraph 512 of its Reasons:

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 [Lac Seul First Nation];
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 [Lac Seul First Nation] members supplied their own labour;
7. The [Lac Seul First Nation] docks and other outbuildings were not replaced;
8. [Lac Seul First Nation] hay land, gardens and rice fields were destroyed;
9. The hunting and trapping grounds on the Reserve were negatively impacted;

> 10. Two [Lac Seul First Nation] 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 [Lac Seul First Nation] 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 [Lac Seul First Nation] 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.

[34] The Federal Court dismissed the appellants' claim for punitive damages, but awarded them their costs.

III. The Issues

[35] I turn now to outline the issues in this appeal.

[36] The appellants raise several interconnected arguments. In support of their primary contention that the Federal Court ought to have included in its award compensation for the loss of a revenue-sharing agreement, the appellants first argue that the Federal Court incorrectly defined Canada's breach of fiduciary duty by failing to recognize that the breach consisted in permitting the unauthorized use of reserve lands. They compare the situation to that in *Guerin FC*, where the Crown had entered into an unauthorized lease and say that, as in *Guerin FC*, they are owed compensation for the highest and best use of the flooded lands, assessed as of the date of trial. In their view, this should lead to compensation for the value of a lost revenue-sharing agreement, akin to the one the First Nation more recently negotiated with Ontario Power Generation in respect of one of the downstream generating stations.

[37] Closely tied to the foregoing point, the appellants contend that the Federal Court's analysis is premised on an impoverished understanding of the nature of the fiduciary duties owed to the Lac Seul First Nation by Canada in that the Federal Court improperly allowed Canada to benefit from a retrospective expropriation of the flooded lands. They also submit that the Federal Court improperly considered the First Nation's lack of bargaining power in 1929, noting that Canada's fiduciary obligations prevent it from placing any reliance on this fact as it was obliged to achieve the best possible result for the First Nation.

[38] The appellants further argue that the Federal Court incorrectly determined what likely would have happened in 1929, had Canada not breached its fiduciary duties to the Lac Seul First Nation, submitting that the evidence led at trial does not support the conclusion that Canada would have expropriated the flooded lands. They contend that, as opposed to only considering what Canada would have paid had it expropriated the lands, the Federal Court should also have considered what sort of agreement Canada ought to have made in the context of a willing surrender. They claim that such an agreement would have involved a revenue-sharing agreement. The appellants say that the Federal Court incorrectly discounted the precedent from the Stoney Indian Band and erred in distinguishing it.

[39] In the alternative, even if the Federal Court were right not to award the value of a revenue-sharing agreement, the appellants submit that the Federal Court was incorrect in its approach to setting compensation for the flooded land. They make two arguments in this regard.

[40] They first say that the Federal Court erred in applying current expropriation law to determine how compensation would be calculated and that under 1929 expropriation law such compensation would reflect the possibility that the Lac Seul First Nation's land adjoining Lac Seul could be used to expand the lake's capacity as a reservoir in support of downstream hydroelectric development. This would, according to the appellants, give the land a far greater value than the $1.29 per acre found by the Federal Court.

[41] The appellants secondly say that the Federal Court erred in distinguishing the Stoney Indian Band situation, where, in addition to entering into an agreement providing for annual payments for water power and riparian rights, Calgary Power also paid a premium to the Band for the land acquired. The appellants contend that the Federal Court erred in distinguishing the Stoney Indian Band situation on the basis that Calgary Power lacked the ability to expropriate the land as in that case, like the situation of the Lac Seul First Nation, Canada could have expropriated the land in question under section 48 of the *Indian Act*.

[42] While these were the only arguments advanced orally by the appellants, they raised other arguments in their memorandum of fact and law. They there contended that the Federal Court exceeded its jurisdiction in granting an easement or, alternatively, failed to afford the appellants procedural fairness by granting the easement without soliciting the parties' submissions. However, they abandoned these arguments during the hearing.

[43] In addition, in their memorandum of fact and law, the appellants submitted that the Federal Court erred in taking into account off-reserve losses of livelihood and that the award is

insufficient to deter Canada from breaching its fiduciary duties. They finally say that the Federal Court erred in relying on the appropriation provisions in Treaty 3 in the absence of any historical evidence from or reliance by the parties on the Treaty.

[44] Canada, for its part, says that the Federal Court correctly identified the principles of equitable compensation and committed no palpable and overriding error in applying them. In Canada's view, the Federal Court made no palpable and overriding error in rejecting the appellants' claim that the compensation they are due should reflect the value of an agreement Canada should have negotiated on their behalf to share in a portion of the revenue generated by downstream hydroelectric generating stations. Moreover, according to Canada, the Federal Court's approach to assessing compensation for the flooded land is consistent with the common law of expropriation as it stood in 1929, and the Federal Court did not err in distinguishing the Stoney Indian Band situation. Canada adds that the Federal Court did not err in its treatment of Treaty 3, could take into account losses of livelihood off-reserve in its assessment of equitable compensation and that the overall award is sufficient to deter future wrongdoing.

[45] Ontario and Manitoba were third parties in the action before the Federal Court. The Federal Court dismissed Canada's third party claim and Canada did not appeal that aspect of the Federal Court's judgment. Accordingly, Manitoba did not participate in this appeal. Ontario did, but only to argue that the Federal Court did not grant an easement. As this has been conceded by the appellants, Ontario's submissions are not relevant to the disposition of this appeal.

IV. Analysis

[46] The appellants and Canada agree on a wider set of issues than they had before the Federal Court. It is therefore useful to commence by summarizing the points on which the parties agree so as to focus the analysis on the areas of disagreement.

[47] The parties agree that Canada owed the Lac Seul First Nation a fiduciary duty by reason of the discretionary control it assumed over the reserve land. They are correct in this assertion: see *Guerin v. The Queen*, [1984] 2 S.C.R. 335 at p. 385, 55 N.R. 161 (*per* Dickson J. (as he then was)); *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245 at para. 86 (*Wewaykum*); *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623 at para. 51.

[48] They also agree that Canada breached that duty by failing to meet the standard of care expected of a fiduciary. This standard is that of a person of ordinary prudence in managing their own affairs. Once again, this reflects a correct interpretation of the applicable equitable principles: see *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344 at para. 104, 190 N.R. 89; *Wewaykum* at para. 94; *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, [2018] 1 S.C.R. 83 at paras. 46, 48 (*Williams Lake*).

[49] The parties further agree that the Federal Court properly exercised its discretion as a court of equity to award a remedy and appropriately selected the remedy of equitable compensation, a remedy that has previously been awarded and one that was open to the Federal Court: see,

Canson at p. 589; *Wewaykum* at para. 107; see also *Federal Courts Act*, R.S.C. 1985, c. F-7, ss. 2(1), 4, 17(1) (defining "relief" as encompassing "every species of relief" including "by way of […] payment of money"; establishing the Federal Court as, among other things, a court of equity; and granting the Federal Court concurrent original jurisdiction in an action in which relief is claimed against Canada).

[50] The parties also accept the Federal Court's finding that the Ear Falls dam would have been built by the summer of 1929 and that the land would have flooded thereafter. They also agree that the dam was a public work and that prior to the dam's construction and the resulting flooding, Canada, had it acted in compliance with its fiduciary duties, could have obtained the right to flood the land through either of the two routes established by the *Indian Act* as it read in 1929: (1) taking for public purposes authorized by order-in-council made under section 48 of the *Indian Act* or (2) surrender with the band's approval authorized by order-in-council made under section 51.

[51] Implicit in the Federal Court's reasoning on this point is that Treaty 3 would not have impeded Canada from taking reserve land for public purposes without securing the Lac Seul First Nation's consent. Though they did not press the point at the hearing, as noted, the appellants argued in their memorandum of fact and law that the Federal Court compromised trial fairness by interpreting Treaty 3 without the parties having made submissions on the issue. As Canada rightly points out, both it and the appellants referred to Treaty 3 in their pleadings, putting its interpretation squarely in issue before the Federal Court. The appellants therefore cannot now claim to have been surprised that the Federal Court addressed the interpretation of Treaty 3 in its

Reasons: see *Heron Bay Investments Ltd. v. Canada*, 2010 FCA 203 at paras. 22-24, 405 N.R. 73.

[52] The appellants also submit that the Federal Court erred in interpreting Treaty 3 in the absence of historical evidence. Although historical evidence is often necessary for treaty interpretation as was noted in *R. v. Sioui*, [1990] 1 S.C.R. 1025 at p. 1045, 109 N.R. 22; *R. v. Marshall*, [1999] 3 S.C.R. 456 at para. 11, 246 N.R. 83 and *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9, [2009] 1 S.C.R. 222 at paras. 54-55, the parties' choice not to lead such evidence cannot prevent the Federal Court from interpreting Treaty 3 to the extent the Court needed to do so to resolve the issues before it. Moreover, the appellants do not allege any specific error that the Federal Court made in its interpretation. There is thus no basis for this Court to disturb the Federal Court's conclusions on Treaty 3.

[53] Having reviewed the points on which the parties agree (and having dealt with the appellants' arguments regarding Treaty 3), I turn now to the points on which the parties disagree. The appellants and Canada principally part ways on the Federal Court's application of the principles governing equitable compensation.

[54] Delineation of the relevant equitable principles is reviewable on a standard of correctness: see, by analogy, *Heritage Capital Corp. v. Equitable Trust Co.*, 2016 SCC 19, [2016] 1 S.C.R. 306 at para. 24 (correctness applies to the "interpretation [… of] the common law"). Their application to the facts, absent an extricable error of principle, is reviewable on a standard of palpable and overriding error: see, by analogy, *Rivett v. Monsanto Canada Inc.*,

2010 FCA 207, [2012] 1 F.C.R. 473 at paras. 22-23 (commenting that appellate review of an award of damages is to be done in accordance with the standards of review identified in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 and adding that such an approach is equally applicable to review of an accounting of profits, an equitable remedy).

[55] Palpable and overriding errors are significant errors. As this Court explained in a passage in *Canada v. South Yukon Forest Corporation*, 2012 FCA 165 at para. 46, 431 N.R. 286 that the Supreme Court quoted with approval in *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352 at para. 38, "[p]alpable and overriding error is a highly deferential standard of review […] 'Palpable' means an error that is obvious. 'Overriding' means an error that goes to the very core of the outcome […]".

[56] I turn now to the errors that the appellants allege.

A. *Did the Federal Court commit a reviewable error in declining to award compensation for the failure to negotiate a revenue-sharing agreement?*

[57] Contrary to what the appellants submit, I see no error having been committed by the Federal Court in declining to award compensation for loss of a revenue-sharing agreement. The Federal Court did not commit any error in principle in reaching this conclusion and it correctly outlined the principles applicable to equitable compensation. Similarly, it made no palpable and overriding error of fact or of mixed fact and law in concluding that the Lac Seul situation was fundamentally different from those situations relied on by the appellants where agreements providing for ongoing payments had been negotiated.

[58] Turning first to the equitable precepts, as the Federal Court explained, equitable compensation is a form of monetary relief assessed according to equitable principles and with the benefit of several equitable presumptions. For the purposes of this appeal, suffice it to say that a court of equity can order equitable compensation for any losses factually caused by the breach of fiduciary duty, including losses that were not foreseeable at the date of breach, but that have become known by the date of judgment: *Canson* at pp. 547-551, 555. Equity's objective is not only to put the beneficiary in "as good a position as he or she would have been [in] had the breach not occurred": *Hogkinson* at pp. 440, 443, but also to deter wrongdoing by fiduciaries: *Canson* at pp. 543-544, 547. A fiduciary is presumed to act in accordance with the law: see *Whitefish Lake* at para. 69. As a result, a fiduciary shown to have breached its duty cannot reduce the compensation it is meant to pay by claiming that it would have acted unlawfully in the non-breach scenario. Likewise, a fiduciary is presumed to have put that which the beneficiary lost to its most advantageous use between the date of breach and the date of judgment: *Canson* at p. 545; *Semiahmoo Indian Band v. Canada*, [1998] 1 F.C. 3 at paras. 109-115, 148 D.L.R. (4th) 523 (C.A.) (*Semiahmoo*)*; Whitefish Lake* at para. 49.

[59] Contrary to what the appellants submit, the Federal Court did not ignore these principles, but rather faithfully applied them in its consideration of whether the appellants were entitled to compensation for the loss of a revenue sharing agreement. The loss suffered in this case is different from that suffered in *Guerin FC*, relied on by the appellants, as here, unlike in *Guerin FC*, Canada had the right to take the flooded land in 1929 because the land was to be used for a public purpose. Thus, 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.

[60] In my view, the appellants' invocation of the principle that equitable compensation is assessed with the "full benefit of hindsight" is misplaced. Equity gives a beneficiary the full benefit of hindsight by allowing the beneficiary to recover for losses that may not have been foreseeable at the time of the breach, but become known by the date of judgment: *Canson* at p. 555. However, the losses must nevertheless still flow from the breach: *Canson* at pp. 551, 555-556; *Semiahmoo* at para. 112. Likewise, the presumption of most advantageous use does not support the appellants' position. That presumption only applies to what the beneficiary has actually lost as a result of the breach of fiduciary duty.

[61] For the appellants to recover the value of a revenue-sharing agreement, they must be able to establish that it forms part of what the Lac Seul First Nation lost as a result of Canada's breach: see *Canson* at p. 551 ("equitable compensation must be limited to loss flowing from the [fiduciary's] acts in relation to the interest he undertook to protect"). The Federal Court found that there was no evidence supporting the view that the Lac Seul First Nation lost the opportunity to share in the revenue from downstream hydroelectric generation for two main reasons.

[62] First, none of the others whose lands were flooded as a result of the Ear Falls dam were offered such an agreement and they were not compensated in lieu for the value of such an agreement. Second, the situations that the appellants were able to point to where agreements providing for ongoing payments were entered into were different. The Columbia River Treaty

was negotiated much later and was a much more complex, international agreement: Reasons at para. 349. In the situation of the Stoney Indian Band, the hydroelectric stations were built at least partly on reserve land: Reasons at para. 346. There was ample factual basis in the record before the Federal Court to support its conclusions that these situations were distinguishable from the Lac Seul First Nation's circumstances. The Federal Court therefore cannot be said to have made a palpable and overriding error in distinguishing them.

[63] I accordingly do not believe that there is any basis to interfere with the Federal Court's conclusion that Canada would have compensated the appellants in a one-time payment for the flooded land and would not have secured an indefinite revenue-sharing agreement.

B. *Did the Federal Court err in its assessment of the quantum of the one-time compensation for the loss of the flooded land?*

[64] I turn now to the appellants' alternate position, namely, that the Federal Court erred in using the figure of $1.29 per acre as forming the basis for compensation for the flooded land in a one-time payment. It will be recalled that the appellants make two arguments in support of this contention. They first submit that the Federal Court erred in using current as opposed to 1929 expropriation law, which they claim would lead to a different result. Second, the appellants say that the Federal Court erred in distinguishing the Kananaskis Falls situation as a relevant precedent for determining that Canada would not have negotiated a premium for the land, based on its intended use as a reservoir in support of downstream hydroelectric generating stations. I disagree with the first of these arguments but do accept the second.

[65] Turning to the first argument, I agree with the appellants that had Canada taken (or expropriated) the land, compensation would have been determined in accordance with the common law as it stood in 1929. In the taking scenario, subsection 48(2) of the *Indian Act* did not specify the method by which compensation was to be assessed when the federal Crown was the taker: see *Kruger v. The Queen*, [1986] 1 F.C. 3 at pp. 39-40, 17 D.LR. (4th) 591 (C.A.) (*per* Urie J.A., concurring). Thus, reference would have been made to the background common law to determine the compensation due to the Lac Seul First Nation.

[66] I agree with the appellants that, to the extent that the Federal Court used the law as it stood in 2017 as its point of reference, it erred. Given its finding that compensation would have been paid in 1929, the question for the Federal Court was rather how such compensation would have been determined at that time. However, I disagree with the appellants that had the Federal Court followed the law as it stood in 1929, it would have reached a different conclusion.

[67] In 1929, the leading cases on compensation for expropriation were the decisions of the Judicial Committee of the Privy Council, then Canada's final court of appeal, in *Cedars Rapids Manufacturing and Power Company v. Lacoste*, [1914] A.C. 569, 16 D.L.R. 168 (cited to A.C.) (*Cedars Rapids*) and *Fraser v. City of Fraserville*, [1917] A.C. 187, 34 D.L.R. 211 (cited to A.C.) (*Fraser*). The appellants also referred to *Lacoste v. Cedars Rapids Manufacturing and Power Co.*, [1928] 2 D.L.R. 1 (P.C.), which reaffirms the principles in *Cedars Rapids*, and *Re Ontario and Minnesota Power and Town of Fort Frances* (1916), 28 D.L.R. 30 at p. 38, 35 O.L.R. 459 (S.C.(A.D.)), which likewise refers to *Cedars Rapids*, but does not elaborate on its teachings.

[68] In *Cedars Rapids* at p. 576, Lord Dunedin gave the reasons of the Board, noting that the "law of Canada as regards the principles upon which compensation for land taken is to be awarded is the same as the law of England, and it has been explained […] nowhere with greater precision than in the case of *In re Lucas and Chesterfield Gas and Water Board*, where Vaughan Williams and Fletcher Moulton L.JJ. deal with the whole subject exhaustively and accurately". As he went on to explain, the two central propositions that govern this area are that:

> "(1) The value to be paid for is the value to the owner as it existed at the date of the taking, not the value to the taker. (2) The value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined.
>
> Where, therefore, the element of value over and above the bare value of the ground itself […] consists in adaptability for a certain undertaking […] the value is not a proportional part of the assumed value of the whole undertaking, but is merely the price, enhanced above the bare value of the ground which possible intended undertakers would give. That price must be tested by the imaginary market which would have ruled had the land been exposed for sale before any undertakers had secured the powers, or acquired the other subjects which make the undertaking as a whole a realized possibility."

[69] In *Fraser* at p. 194, Lord Buckmaster, giving the reasons of the Board, elaborated on the second proposition, writing that "the value to be ascertained is the value to the seller of the property in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for which the property is compulsorily acquired, the question of what is the scheme being a question of fact for the arbitrator in each case".

[70] The second proposition referred to in *Cedars Rapids* and *Fraser* arguably could point in opposite directions. On the one hand, the value of the land includes that attributable to "existing advantages" and "possibilities" of the land, among them its "special adaptability" to certain uses,

yet, on the other hand, the value excludes any value imputable to the scheme for which the land is being expropriated. Where the land's special adaptability can be realized *only* through the scheme, it is arguably not clear whether the value attributable to that adaptability is included and if so, to what extent.

[71] The cases referred to by the Judicial Committee shed further light on this issue. As noted, in *Cedars Rapids* and *Fraser*, the Judicial Committee referred to *In re Lucas and Chesterfield Gas and Water Board*, [1909] 1 K.B. 16 (C.A.) (*Lucas*) as stating the general principles of this area of law. In *Fraser*, reference was also made to *Sidney v. North Eastern Railway Co.*, [1914] 3 K.B. 629 (D.C.) (*Sidney*), in which judgment was rendered a few months after *Cedars Rapids*.

[72] In *Lucas*, three Lord Justices of Appeal wrote separately. Vaughan Williams L.J. explained that "special adaptability [is] an element which the probability of purchasers requiring the land for such purposes gives to the land compulsorily taken such purposes.", to the extent that it has value before the land is taken and before the probability is realized by those for whose benefit the land was taken: *Lucas* at pp. 27-28. Buckley L.J. agreed: *Lucas* at pp. 36-37.

[73] Fletcher Moulton L.J. took a more categorical view, explaining in *Lucas* at p. 31:

> […] where the special value exists only for the particular purchaser who has obtained powers of compulsory purchase it cannot be taken into consideration in fixing the price, because to do otherwise would be to allow the existence of the scheme to enhance the value of the lands to be purchased under it. But when the special value exists also for other possible purchasers, so that there is […] a market […] in which that special value goes towards fixing the market price, the owner is entitled to have this element of value taken into consideration […].

[74] In his concurring reasons in *Sidney*, Rowlatt J. elaborated on Fletcher Moulton L.J.'s approach, explaining that "[t]he value to the owner is not confined to the value of the land to the owner for his own purposes; it includes the value which the requirements of other persons for other purposes give to it as a marketable commodity, provided that the existence of the scheme for which it is taken is not allowed to add to the value.": *Sidney* at p. 636. The problem, as Rowlatt J. explains, is when one of the other purposes "seems at first sight to infringe the principle that value due to the scheme is to be excluded": *Sidney* at p. 636. The land's "special adaptability for the purposes of the particular scheme may be taken into consideration where it can be said that there might have been other competitors for it for that purpose, and to the extent that the competition of such possible purchasers with each other and with the promoter would raise the possible price that might have been obtained in the market": *Sidney* at p. 636. But, in the absence of the power to expropriate, where the promoter has no competitors, "the owner need not sell to [the promoter]": *Sidney* at p. 637. The promoter would therefore "need to make higher and yet higher offers", which the promoter would do because of "the value [of the land] to him for his scheme": *Sidney* at p. 637. Since the existence of the scheme is not to be taken into account, the premium the promoter would have paid is excluded from the compensation.

[75] In his concurring reasons, Shearman J. "agree[d] entirely" with Rowlatt J.: *Sidney* at p. 638. For his part, Avory J., while not expressly endorsing Rowlatt J.'s reasons, concluded that the arbitrator was entitled to take the possibility of competition among potential buyers with different intended uses for the land into account: *Sidney* at p. 635.

[76] Canadian courts followed *Sidney*. The Supreme Court of Canada cited Rowlatt J.'s concurring reasons in *Sidney* with approval in *The King v. Hearn* (1917), 55 S.C.R. 562 at p. 567 (*per* Idington J.), writing that it "agree[s] with the observations of Rowlatt J. […] from his judgment in the case of *Sidney* […] at page 637 […] bearing upon the exclusion from consideration of the market value, the advantages to be derived from the construction of the work in question for the promotion of which expropriation is made" and *La Cité de Montréal v. Maucotel*, [1928] S.C.R. 384 at p. 394, in which Rinfret J. (as he then was) put the point in these terms:

> [TRANSLATION] To assess the indemnity on the basis that the alley has a certain value for the City of Montréal because it is specially adapted to the use that the City wants to make of it would be contrary to the principle set out in *Fraser* […] and would grant an indemnity for any [advantage] due to the carrying out of the scheme for which the property is compulsorily acquired. It is no longer necessary to discuss the reasons that led to the adoption of this principle. Those reasons are clearly set out by Rowlatt J. in *Sidney* […]. (footnotes omitted)

[77] This Court's predecessor, the Exchequer Court, which had jurisdiction in expropriation matters involving Canada under the *Exchequer Court Act*, R.S.C. 1927, c. 34 and the *Expropriation Act*, R.S.C. 1927, c. 64 at the time, likewise cited Rowlatt J.'s reasons in *Sidney* with approval in *Raymond v. The King* (1916), 16 Ex. C.R. 1, 29 D.L.R. 574 at p. 584, aff'd (1918) 59 S.C.R. 682, 49 D.L.R. 689 and *The King v. Quebec Gas Co.* (1917), 17 Ex. C.R. 386, 42 D.L.R. 61 at p. 75, aff'd (1918) 59 S.C.R. 677, 49 D.L.R. 692.

[78] Given the Federal Court's factual finding that compensation would have been paid in 1929, compensation would have been calculated in accordance with the teachings expounded in *Sidney*. Thus, to the degree that the Lac Seul First Nation's land was specially adaptable to being

flooded to expand Lac Seul's capacity as a reservoir in support of downstream hydroelectric development, as the appellants argue, that possibility could only be realized through the construction of the dam, which is the "scheme" for which Canada would have taken the land or secured its surrender. There is no suggestion that there existed a market for the land for other purchasers who might have wanted to use the land as part of a reservoir. The value attributable to that possibility must therefore be excluded from the compensation.

[79] As such, the Federal Court's finding that Canada would not have paid more than $1.29 per acre for the flooded land had it expropriated the land in 1929 is not tainted by legal error. And, the appellants have failed to demonstrate that the Federal Court's finding on this point amounts to palpable and overriding error. Having heard Duncan Bell's evidence concerning land value, as well as Norris Wilson's evidence on the purported limitations of Mr. Bell's evidence, the Federal Court was entitled to accept Mr. Bell's evidence and award compensation for the flooded land at $1.29 per acre.

[80] Thus, the Federal Court did not err in its application of the relevant expropriation law principles.

[81] I turn now to the second error alleged by the appellants, namely that the Federal Court erred in discounting the possibility of a negotiated surrender of the Lac Seul First Nation's land and in distinguishing the Kananaskis Falls situation where Calgary Power both entered into an agreement providing for ongoing payments for water power and riparian rights *and* paid a premium for the land that was flooded.

[82] According to the analytical method developed in *Guerin FC*, particularly at pp. 441-442, the assessment of equitable compensation requires that a court take into account realistic contingencies, i.e. 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.

[83] As the Federal Court acknowledges, one of the contingencies in the instant case is that, rather than using its power to take Lac Seul First Nation's land in 1929, Canada would instead have initiated negotiations with Lac Seul First Nation, seeking a voluntary surrender.

[84] In these circumstances, 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. Although the amount Canada would have had to pay had it expropriated the land would undoubtedly have influenced its position in negotiations with Lac Seul First Nation, the Federal Court was nonetheless required to assess whether the loss of the opportunity to negotiate a surrender might be compensable, either because a higher price might have been achieved or because loss of the opportunity to negotiate might be compensable *per se*.

[85] I note that, as the appellants argued at the hearing, the Hudson's Bay Company (HBC) may have received more than $1.29 per acre for its nearly 13 acres of land on the north shore of Lac Seul that were flooded by reason of the dam. Ontario informed the HBC of the plan to build the dam and the flooding that would result. On behalf of itself, Manitoba and Canada, Ontario

initiated negotiations with the HBC as to the amount of compensation for the destruction of the HBC's buildings and flooding of its lands. Ontario estimated the value of the buildings at $5,475, but this was disputed by the HBC, which estimated their value at $10,850. After lengthy negotiations, Ontario agreed to pay $7,000 as compensation for both the buildings and the land. Ontario also transferred additional land to the HBC, which may have been additional compensation for the flooding. Ontario may thus have agreed to compensation in excess of the estimated value of the HBC's buildings, suggesting that it perhaps put a value on the HBC's land greater than $1.29 per acre.

[86] I would add that Ontario's approach to dealing with the HBC is in striking contrast to Canada's posture towards the Lac Seul First Nation. None of Ontario, Manitoba or Canada owed a fiduciary duty to the HBC. Yet Ontario informed the HBC of plans to build the dam and the resulting flooding, initiated negotiations with the HBC concerning compensation, and, once it was agreed to, promptly paid that compensation. Canada afforded none of this to the Lac Seul First Nation.

[87] The Federal Court did not refer to any of the evidence regarding the amounts paid to the HBC nor to any other evidence that would have allowed it to categorically discount the possibility that, in negotiations with Lac Seul First Nation, Canada might have been willing to pay a premium over the amount it would have been required to pay had it expropriated the Lac Seul First Nation's land.

[88] As noted, the appellants relied in part on the Kananaskis Falls precedent, where Canada required Calgary Power, that dam's proponent, to negotiate a resolution with the Stoney Indian Band that resulted in that Band's receiving a payment for flooded lands well in excess of their value as agricultural lands.

[89] The Federal Court distinguished the Stoney Indian Band precedent by concluding that there was no power to expropriate in that case, unlike the situation of the Lac Seul First Nation. The Federal Court's reasoning on this point is set out at paragraphs 381-382 of its Reasons, which it is useful to reproduce in their entirety. The Federal Court there wrote:

> 381. This manner of proceeding [i.e. concluding that the amount that would have been paid had the land been expropriated is the same as Canada would have agreed to in a negotiated surrender] 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."
>
> 382. But the Lac Seul Storage Project and the Kananaskis Falls development were considerably different in at least one material respect. Indian Affairs had a legal opinion that Calgary Power had no ability to expropriate any Reserve lands. This put Calgary Power vis-à-vis the Stoney Indian Band in an entirely different position than Canada was vis-à-vis LSFN Reserve. There was no expropriation by Calgary Power and thus the principle stated above did not apply.

[90] The appellants contend that the Federal Court made a legal error in drawing this distinction as in the cases of both Kananaskis Falls and the Ear Falls dams Canada had the power to expropriate the flooded reserve lands under section 48 of the *Indian Act* with the consent of the Governor in Council because the Kananaskis Falls development, as much as the dam at Ear Falls, was a work undertaken for a public purpose. I agree with this assertion.

[91] It may well be that Calgary Power lacked the power to expropriate the land needed for the Kananaskis Falls development. But, as a legal matter, Canada had the power to expropriate. Instead of exercising this power, Canada insisted that Calgary Power purchase the land and required that Calgary Power negotiate an agreement with the Stoney Indian Band that resulted in that Band's receiving far more than the land's agricultural value. Canada therefore behaved very differently in the two situations despite possessing the identical power to expropriate.

[92] The Federal Court therefore erred in the basis upon which it distinguished the Kananaskis Falls precedent. Contrary to the views of my colleagues, whose Reasons I have read in draft, I am of the view that the Federal Court's error is legal as opposed to factual in nature. The Federal Court misapprehended the nature of Canada's power to expropriate the Stoney Indian Band's lands flooded by the Kananaskis Falls dam. This is a legal error.

[93] The issue therefore becomes whether this legal error necessitates intervention by this Court. In my view, it does, because I cannot definitively say that the legal error is without consequence. Indeed, my colleagues appear to accept that this is so and in their draft Reasons, note that they "[…] can only speculate, that the fact that Kananaskis Project was located on reserve led Indian Affairs to take the view that the Band's land had a fair market value much greater than its agricultural value […]" (at para. 138 of the majority Reasons).

[94] If there is no basis for distinguishing the Kananaskis Falls development precedent, other than the erroneous one relied on by the Federal Court, the appellants may well be correct in asserting that compensation should be awarded for a surrender price in excess of $1.29 per acre.

Alternatively, this loss may be a real one that was suffered, but may be non-calculable; if so, the Lac Seul First Nation's loss of the opportunity to negotiate and loss of the possibility of its securing a surrender price greater than $1.29 per acre should have formed part of the non-calculable losses for which the Federal Court awarded compensation.

[95] Determining whether there is a basis for distinguishing the Kananaskis Falls development other than the erroneous one relied upon by the Federal Court requires consideration of the extensive and nuanced historical record that was put before the Federal Court in a lengthy trial. As this Court has repeatedly explained, such consideration is not something that this Court should do on appeal: *Canada v. Brokenhead First Nation*, 2011 FCA 148 at para. 52, 419 N.R. 289; *Kelly v. Canada*, 2013 FCA 171 at para. 71, 446 N.R. 339; *Pfizer Canada Inc. v. Teva Canada Ltd.*, 2016 FCA 161 at para. 157, 483 N.R. 275.

[96] Thus, I would return this issue to the Federal Court for reconsideration.

[97] Because the heads of compensation awarded by the Federal Court are intertwined, it seems to me that the wisest course would be to set aside the award in its entirety so that the Federal Court could make any adjustments that might be necessary following its reconsideration of whether, in the contingency where Canada sought a negotiated surrender, it might have agreed to a surrender price in excess of $1.29 per acre and, alternatively, whether the loss of the opportunity to negotiate constituted a non-calculable loss for which Lac Seul First Nation must be compensated. I would accordingly set aside the award in its entirety and remit the assessment

of equitable compensation to the Federal Court for redetermination in accordance with these Reasons.

C. *Do any of the other arguments made by the appellants disclose a reviewable error?*

[98] Before concluding, I must consider the additional arguments made by the appellants in their memorandum of fact and law.

[99] As noted, the appellants there objected to the Federal Court's taking into account off-reserve losses in its assessment of equitable compensation. The Federal Court found that such livelihood losses occurred: Reasons at paras. 375, 438. Since they undoubtedly formed part of what was lost as a result of Canada's breach of its fiduciary duty, there is no reason in principle that would prevent the Federal Court from taking these losses into account in assessing equitable compensation. The appellants have not established that the Federal Court fell into palpable and overriding error in including off-reserve losses in the $16.1 million in non-calculable losses for which it awarded compensation, and, indeed, the inclusion of compensation for such losses would seem to be to the Lac Seul First Nation's benefit. Thus, this argument is without merit.

[100] In their memorandum, the appellants also suggest that the Federal Court failed to take into account the need for an award of equitable compensation to deter future wrongdoing, which, as noted, forms part of the basis for awards of equitable compensation: see *Canson* at pp. 543, 547; *Whitefish Lake* at para. 57. The Federal Court referred to this aspect of equitable compensation in paragraphs 239 and 245 of its Reasons and, in rejecting the appellants' claim for punitive damages (which they did not pursue before this Court), concluded that the award of $30

million in equitable compensation is sufficient to deter wrongdoing: Reasons at paras. 524-525. I see no error in this conclusion.

[101] Thus, neither of the foregoing two arguments provides any basis for interfering with the Federal Court's judgment.

V. Proposed Disposition

[102] In light of the foregoing, I would allow this appeal with costs payable by Canada to the appellants, set aside the Federal Court's award of compensation in paragraph 2 of the Federal Court's judgment and remit the assessment of equitable compensation to the Federal Court for redetermination in accordance with these Reasons.

"Mary J.L. Gleason"
J.A.

NADON J.A.

[103] I have read, in draft, the reasons of my colleague Gleason J.A. pursuant to which she proposes that we allow the appeal with costs and return the matter to the Federal Court (Zinn J.) (the trial Judge) for reassessment of the damages.

[104] In my respectful opinion, there is no basis for us to interfere with the trial Judge's decision. Accordingly, I would dismiss the appeal with costs.

[105] I am in complete agreement with the reasons Gleason J.A. gives for disposing of the appeal except in regard to one issue. Consequently, before turning to that issue, I will set out the issues in respect of which we are in agreement.

[106] In her reasons, Gleason J.A. deals mainly with two issues. First, commencing at paragraph 57, she discusses whether the trial Judge erred in refusing to grant compensation to the appellants because of Canada's failure to negotiate a revenue-sharing agreement. In her view, the trial Judge correctly held that there was no basis to award compensation for loss of a revenue-sharing agreement. Further, Gleason J.A. finds that the trial Judge made no palpable and overriding error in concluding that the Lac Seul situation was not comparable to the other situations relied on by the appellants.

[107] I agree entirely with Gleason J.A.'s reasons in dismissing the appellants' submissions on that first issue.

[108] Second, commencing at paragraph 64 of her reasons, my colleague addresses the trial Judge's conclusions on the one-time compensation for the loss of the flooded land. With regard to the appellants' first argument on this issue, *i.e.* that the trial Judge made an error in using current, as opposed to 1929 expropriation law, Gleason J.A. concludes that the trial Judge did not err. More particularly, she is of the view that the trial judge's determination, that had Canada expropriated the flooded land in 1929, it would not have paid more than the fair market value of $1.29 per acre, does not result from either an error of law or from a palpable and overriding error. Again, I agree completely with Gleason J.A.'s reasons in so concluding.

[109] I now turn to the point on which I disagree with my colleague, which pertains to the appellants' second submission concerning the second issue. The appellants say, and Gleason J.A. agrees with the appellants' submission, that the trial Judge erred in distinguishing the Kananaskis Falls development project (the Kananaskis Project) from the Lac Seul situation.

[110] For ease of reference, I have reproduced that part of the trial Judge's reasons (at paragraphs 381 and 382) where he disposes of this issue:

> 381. This manner of proceeding [i.e. concluding that the amount that would have been paid had the land been expropriated is the same as Canada would have agreed to in a negotiated surrender] 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."
>
> 382. But the Lac Seul Storage Project and the Kananaskis Falls development were considerably different in at least one material respect. Indian Affairs had a legal opinion that Calgary Power had no ability to expropriate any Reserve lands. This put Calgary Power vis-à-vis the Stoney Indian Band in an entirely different position than Canada was vis-à-vis LSFN Reserve. There was no expropriation by Calgary Power and thus the principle stated above did not apply.

[111] In Gleason J.A.'s view, the trial Judge erred in drawing an erroneous distinction between the two situations. More particularly, she concludes that Canada was entitled to expropriate in both situations. Thus, in her view, the trial Judge erred in finding that in the Kananaskis Project, there was no right to expropriate.

[112] Consequently, Gleason J.A. would return the matter to the trial judge so as to allow him to reassess the award of damages. In her opinion, failing the existence of another basis to distinguish the Kananaskis Project from the Lac Seul situation, the appellants may well be entitled to obtain compensation for their flooded land in excess of its fair market value of $1.29 per acre.

[113] As pointed out by Gleason J.A., at paragraphs 54 and 55 of her reasons, the applicable standard of review for equitable principles is correctness, whereas the application of such principles to the facts is reviewable on a standard of palpable and overriding error. Factual conclusions made by the trial Judge are also reviewable on the standard of palpable and overriding error. To interfere, such an error must be obvious, and go to the very core of the outcome. The trial Judge's determination of the comparability of the Kananaskis Project and the Lac Seul situation is a factual determination, not a legal one. It was based entirely on the historical record before him.

[114] While the trial Judge may have distinguished the Kananaskis Project from the Lac Seul situation on an incorrect basis, this error alone does not constitute an error going to the core of the outcome: it is not overriding. On the record before us, the trial Judge's conclusion that the

two situations were different is sound. Thus for the reasons that follow, his determination that $1.29 per acre was the proper compensation for the appellants' flooded land should not be disturbed.

[115] In determining this question, it will be useful to examine the Kananaskis Project in more detail in order to attempt to understand why compensation in Kananaskis differed from compensation in the Lac Seul situation. In his reasons, the trial Judge, at paragraphs 339 to 342, discusses the Kananaskis Project of 1914. In so doing, he relies on the supplementary expert report dated February 28, 2014 of historian Gwynneth C.D. Jones (the Jones Report) who discusses the matter at pages 8 to 14 of her report to which I now turn. The following summary of the Kananaskis Project is taken from the Jones Report.

[116] The Kananaskis Project resulted from an application made on January 12, 1910 by Calgary Power (the Company) pursuant to section 35 of the *Dominion Lands Act, 1908,* S.C. 1908, c. 20 (the Dominion Lands Act) to develop a hydroelectric power site on the Bow River near Calgary, Alberta. The land needed for the works for the development of the hydroelectric power site was situated on the Stoney Indian Band (the Band) reserve, but most of the lands to be flooded were outside the reserve.

[117] It appears that, at the time of its application, the Company had expropriation rights, akin to those granted to railway companies under the *Railway Act*, R.S.C. 1906, c. 37 (the Railway Act), including the taking of Indian lands. However, in May 1911, the *Indian Act*, R.S.C. 1906, c. 81 (the Indian Act) was amended to provide, at paragraph 46 thereof, that no taking of Indian

lands could occur unless consent of the Governor in Council was obtained and that any authority, Dominion or provincial, whose statutory powers entitled it to take lands without the owner's consent, could exercise its statutory powers with the consent of the Governor in Council with respect to any reserve or portion thereof.

[118] The amendment further provided that compensation to Indians for the taking of their land "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." Further, subsection 46(2) of the Act provided that in the case of arbitration to adjudicate compensation to the Indians, the Superintendent General was to appoint an arbitrator on behalf of the Band and to act for the Band "in any matter relating to the settlement of such compensation".

[119] Surveys of the land to be taken were conducted in the summer of 1911.

[120] In October of 1912, an agreement was entered into between the Company and the Department of the Interior setting out the terms and conditions relevant to the development of the Kananaskis Project.

[121] One of the clauses of the aforesaid agreement required the Company to comply with any terms and conditions imposed by the Department of Indian Affairs (Indian Affairs) and approved by the Governor in Council. It was also provided in the agreement that the Company would have

the power to acquire and take, for the purpose of its project, lands located on the Band's reserve deemed necessary by the Minister of the Interior.

[122] It was also provided in the agreement that, for the purpose of acquiring and taking the lands situated on the reserve, the Company would have all the powers granted by the Railway Act to railway companies, as provided in section 35 of the Dominion Lands Act.

[123] Indian Affairs, following consultation by the Department of the Interior, provided its consent to the expropriation of the lands required by the Company on the condition, however, that the Company would fully compensate the Band for its interest in the "water power", and in so providing made reference to the Horseshoe Falls Project where the Band received a payment of $1,500 per year for water power at Horseshoe Falls.

[124] Indian Affairs advised the Indian agent for the Band that it would be preferable if the Band consented but that its consent was not required under the applicable statutes.

[125] By 1913, the Plant was constructed on the reserve. In May 1914, an agreement was reached between the Company and the Band whereby the Band would receive an advance payment of 5 years water power rental ($7,500) and a payment of $9,000 ($95.92 per acre) for approximately 93.85 acres of reserve lands.

[126] The agreement, however, was reached with some difficulty. It will be useful to explain what occurred prior to its conclusion.

[127] Prior to the conclusion of the agreement, the Company and the Band had refused each other's terms of agreement and, as a result, the Company indicated that it would proceed to arbitration in respect of a proposal to lease the land sought, which led the Band to respond that it would not submit to an award that imposed a lease upon them. This state of affairs led the Indian agent for the Band to report that it was likely that the Band would take steps to damage the Company's property. Hence, the Indian agent contacted the Royal North-West Mounted Police but, in the event, no damage appears to have been caused to the Company's property.

[128] In October 1913, Indian Affairs sought a legal opinion from the Department of Justice (Justice) regarding the Company's power to expropriate an easement under the Railway Act. Justice advised Indian Affairs that the Company could not expropriate for an easement.

[129] Following receipt of Justice's opinion, Indian Affairs informed the Company that unless it concluded an agreement with the Band by Christmas, *i.e.* by the time the Band's members returned from their fall hunt, Indian Affairs would not be responsible for what could happen.

[130] In mid-December 1913, Indian Affairs contacted the independent land valuator retained to value the reserve land required for the project, and informed him that although the land had no agricultural value, its value, by reason of its connection to the development of power at Kananaskis Falls, was considerable.

[131] The independent valuator responded to Indian Affairs by pointing out that "[t]he Falls, without land on which to erect [the] plant, would be useless…" (Jones Report at p. 13). Hence,

he valued the "total site" at $67,000 and increased his estimate of the fair market value of the land required by the Company from $5 to $7 per acre, *i.e.* its agricultural value, to $320 to $360 per acre, without the rental of riparian rights, or $60 to $90 per acre with a $1,500 annual rental payment.

[132] Indian Affairs submitted this valuation to the Company in January 1914, pointing out that the required land had considerable fair market value because of its usefulness in the development of power at Kananaskis Falls.

[133] Because the negotiations between the Band and the Company and the possible arbitration of the dispute were not making any progress in the spring of 1914, the situation on the reserve became tense, so much so that the Inspector of Indian agencies on the Prairies, upon returning from a meeting with the Band, advised Indian Affairs that it should make arrangements for immediate police protection for the men working on the project on the reserve land. The Inspector of Indian agencies also advised Indian Affairs that the view on the reserve was that the Band's rights were being neglected in favour of those of the Company.

[134] In May 1914, the Inspector of Indian agencies and three of the Band's chiefs came to Ottawa to pursue negotiations. On May 20, 1914, as aforesaid, an agreement was concluded between the Band and the Company which provided "for the payment of $16,500 to the Stoney Band which included payment of five years' water power rental, purchase by the Company of about 95 acres of Reserve land plus an easement for a power line, gravel, "any other claims", and

a $1,500 annual water power rental payment payable in 1919 “during the currency of the lease”” (Jones Report at p. 14).

[135] This completes the summary of the events that led to the conclusion of the agreement between the Band and the Company in respect of the Kananaskis Project.

[136] Although the trial Judge concluded, and we support his conclusion, that on his understanding of the law of expropriation, the appellants were only entitled to $1.29 per acre of flooded land, the appellants say, relying on Canada’s approach with respect to the Kananaskis Project, that they are entitled to a premium on the fair market value of the flooded land. They say that because Canada required that the land at issue in the Kananaskis Project be compensated in excess of its agricultural value, the same result should have been pursued by Canada with regard to the Lac Seul development. I cannot agree.

[137] First, as Gleason J.A. explains in her reasons, at paragraphs 28 and 29, the trial Judge was correct, on his understanding of the law of expropriation, to conclude that Canada would not have paid more than its fair market value of $1.29 per acre had it expropriated the land at issue at the relevant time.

[138] Second, based on our limited knowledge of the Kananaskis Project (the extent of our knowledge is the Jones Report), which I have summarized above, it is not possible for us to determine the legal basis upon which Canada relied to insist on a premium for the land at issue in the Kananaskis Project. What is clear, however, is that the land required for the Kananaskis

Project was situated on the reserve and that most of the flooded land was outside of the reserve. It may well be, but we cannot be certain, and thus we can only speculate, 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.

[139] In my opinion, the evidence concerning the Kananaskis Project, as it appears in the record before us, is not sufficient for us to conclude that the trial Judge erred in refusing to grant the appellants a sum in excess of its fair market value of $1.29 per acre. Further, for reasons which are not apparent from the record, Canada was not prepared to use its expropriation power with regard to the Kananaskis Project. The fact that Canada took a different approach in the present matter does not, *per se*, lead to the conclusion that Canada breached its duty towards the appellants herein. In other words, it is my view that the evidence does not support the appellants' proposition that Canada had a duty in the present matter to insist on a payment over and above the fair market value of the flooded land.

[140] I also wish to point out that the appellants' position, and hence their strategy at trial, was that they should have been a party to a revenue-sharing agreement. Consequently, they did not introduce any expert evidence regarding the fair market value of the flooded land or any premium that should have been paid in relation to that land. The appellants contented themselves with attacking Canada's expert valuation of their land.

[141] For these reasons, I would not disturb the trial Judge's findings and conclusions regarding the fair market value of the flooded land situated on the appellants' reserve. I would therefore dismiss the appeal with costs.

"M. Nadon"
J.A.

"I agree.
Wyman W. Webb J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-337-17
STYLE OF CAUSE:	ROGER SOUTHWIND, FOR HIMSELF, AND ON BEHALF OF THE MEMBERS OF THE LAC SEUL BAND OF INDIANS, AND LAC SEUL FIRST NATION v. HER MAJESTY THE QUEEN IN RIGHT OF CANADA, and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, and HER MAJESTY THE QUEEN IN RIGHT OF MANITOBA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	OCTOBER 23, 2018
REASONS FOR JUDGMENT BY:	NADON J.A.
CONCURRED IN BY:	WEBB J.A.
DISSENTING REASONS BY:	GLEASON J.A.
DATED:	JUNE 10, 2019

APPEARANCES:

William J. Major Yana Sobiski Marie-France Major	FOR THE APPELLANTS
Michael Roach Sarah Sherhols	FOR THE RESPONDENT (HER MAJESTY THE QUEEN IN RIGHT OF CANADA)
Leonard F. Marsello Dona Salmon	FOR THE RESPONDENT (HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO)

SOLICITORS OF RECORD:

Major Sobiski Moffatt LLP Barristers and Solicitors Kenora, Ontario	FOR THE APPELLANTS
Nathalie G. Drouin Deputy Attorney General of Canada	FOR THE RESPONDENTS