

WHITEFISH LAKE Summary

Dear Chiefs and Councillors,

I am pleased to report on today's decision by the Ontario Court of Appeal in *Whitefish Lake Band of Indians v. Canada*, 2007 OCA 744. The **Court of Appeal has overturned the trial decision**. Please find the full text of the judgment attached for your reference.

As you may recall, the question raised in the appeal of *Whitefish*, is whether the Crown can avoid making full redress to an Indian Band for a historic wrong it indisputably committed, notwithstanding the passage of time. The appeal was about the compensation that equity awards when a fiduciary has breach its duty and the award must account for losses arising from the breach over time. In this case, Canada admitted that it breached its fiduciary duty to the Whitefish Lake Band which surrendered the timber rights to its reserve in 1886. The Crown sold the timber rights to 76 acres of the reserve for \$316. The purchaser was a Member of Parliament, who flipped the timber rights for \$43,000 in 1887. The following year, the timber rights were flipped again for \$50,000 to \$55,000. The trial judge assessed that the value of the timber rights in 1886 was \$31, 600. The main issue for the appeal was how to bring that value forward to account for inflation and loss of use over time.

Justice Laskin, writing for the Court of Appeal held as follows, at paragraph 132:

"I would allow the appeal on this issue. In my view, the trial judge erred in principle by failing to award Whitefish equitable compensation for its lost investment opportunity caused by the Crown's breach of fiduciary duty. Whitefish is entitled to compensation measured by the amount the fair value of its timber rights would have earned in the Whitefish trust account maintained by the government for its benefit, but discounted to reflect realistic contingencies. Because the deficiencies in the record prevent this court from assessing Whitefish's compensation, I would order a new hearing on this issue."

The Court of Appeal picked up on our main argument as interveners in paragraph 57: "The Crown's fiduciary duty to our Aboriginal people is of overarching importance in this country. One way of recognizing its importance is to award equitable compensation for its breach. The remedy of equitable compensation best furthers the objectives of enforcement and deterrence. It signals the emphasis the court places on the Crown's ongoing obligation to honour its fiduciary duty and the need to deter future breaches." It also picked up on another of our main points, which is that the assessment of damages for breach of fiduciary duty occurs at the time of trial, not at the time of breach: paragraph 81.

The Court of Appeal ordered the new hearing because the evidence was meagre at best in terms of what would have happened to the money over time in Whitefish's trust account held by Indian Affairs. There were only 4 years of account records submitted at trial, which could not be

stretched out over a period of 120 years. There was conflicting evidence whether Indian Affairs paid compound interest on band accounts between 1886 and 1969. The Court was also left with some doubt as to how Whitefish might have used some of the money over time and what discount should be applied to the equitable compensation to address “realistic contingencies.”

I expect that Canada will appeal this decision to the Supreme Court of Canada. Too much money is at stake for Canada to live with the conclusions of the Court of Appeal. If and when Canada does file its Leave to Appeal application, I will advise.

Please feel welcome to contact me to discuss the *Whitefish* decision and its impact on your specific claims.

Christopher Devlin
Mobile 250.415.9470
christopher@devlingailus.com

DEVLIN GAILUS
Barristers & Solicitors
556 Herald Street
Victoria, B.C. V8W 1S6
Telephone 250.361.9469
Facsimile 250.361.9429

CONFIDENTIALITY NOTICE: The contents of this electronic mail message are confidential and strictly reserved for the use of its intended recipients. This message may contain information protected by solicitor-client privilege. If you receive this message in error, please notify the sender immediately and delete the original message as well as copies. Any disclosure, copying, distributing or reliance on the contents of the information is strictly prohibited. Thank you.