Court File No. C44923

COURT OF APPEAL FOR ONTARIO

BETWEEN:

WHITEFISH LAKE BAND OF INDIANS

Appellant

-and-

THE ATTORNEY GENERAL OF CANADA

Respondent

FACTUM OF THE APPELLANT

PART I – IDENTITY OF APPELLANT, PRIOR COURT & RESULT

1. The Appellant, Whitefish Lake Band of Indians ("Whitefish"), appeals from the Superior Court Judgment of the Honourable Justice Blenus Wright dated January 24, 2006, in which the Respondent, the Attorney General of Canada (the "Crown"), was ordered to pay damages of $1,095,888.

PART II – OVERVIEW

2. This action arises from the Crown's admitted breach of its fiduciary duty owed to Whitefish in respect of the surrender and sale of pine timber rights on the Whitefish reserve. The surrender was made in 1886 at the Crown's request. The Crown then sold the timber rights as licence #68 (the "Licence"), without public auction or other competitive process, for a bonus

price of only $316, an amount representing 1% or less of the fair market value of the Licence at the time.

3. The improvident sale of the Licence quickly became a political scandal. The Crown, however, took no steps to investigate the matter or remedy its breach of fiduciary duty. Instead, it renewed the Licence annually and permitted the licensee to continue logging until the pine timber located on the Reserve was virtually exhausted.

4. It is submitted that the learned trial judge erred in his approach to quantifying Whitefish's damages. In particular, he erred in misapprehending both the nature of the Crown's fiduciary duty and the gravity of the breach; in failing to apply established Aboriginal and trust law principles to the quantification of damages; and in failing to give Whitefish the benefit of equitable presumptions concerning the highest and best use of the lost sale proceeds ("the Proceeds").

5. Specifically, the trial judge rejected Whitefish's position that the Court should presume that the highest and best use of the Proceeds was investment by the Crown in the band's trust account, where the monies would have earned compound rates of return from 1886 to the present. He instead found that the Proceeds would likely have been "dissipated" and again failed to presume that the monies, if spent, would have been used in the most advantageous way to deliver the highest economic returns. It is submitted that the learned trial judge also erred in failing to find that the Crown wrongfully withheld or misapplied a trust asset and in refusing to award compound interest as damages on this alternative basis.

6. Finally, it is submitted that the learned trial judge erred in his approach to determining the value of the Licence in 1886.

PART III – SUMMARY OF FACTS

A. Introduction

7. The facts and context of the Crown's breach of fiduciary duty are established entirely through historical documents, mostly obtained from government archives. Historical facts and documentary records were independently assembled by two professional historians: Fred Hosking, retained by Whitefish, and Joan Holmes, retained by the Crown. The reports of both were entered as exhibits at trial. [1, 2] Only Mr. Hosking testified.

8. This action began in 2002. In July 2004, the Honourable Justice Gans heard the Appellant's motion for partial summary judgment. The motion was resolved by minutes of settlement in which the parties agreed, among other things, that primary source historical documents were admissible for the truth of their contents, subject to weight. The Crown also abandoned its limitation, *laches*, and s. 35 *Trustee Act* defences.[3] Shortly before trial, the Crown admitted it had breached its fiduciary duty by "failing to obtain fair value" for the Licence.[4]

B. The Surrender of the Licence

9. On September 9, 1850, Chief Shawenakeshick signed the Robinson-Huron Treaty "Conveying Certain Lands to the Crown" (the "Treaty").[5] The signatory First Nations kept some lands as reservations. The Treaty states that:

> ...should the said Chiefs and their respective Tribes at any time desire to dispose of any part of such reservations, or of any mineral or other valuable productions thereon, the same will be sold or leased at their request by the Superintendent-

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[1] January 1995 Historical Report of Fred Hosking ("Hosking Report"), Exhibit Books pp. 1-68, *Appeal Book & Compendium, Vol. I, Tab 1, pp. 44-111.*
[2] March 3, 2005 Historical Report of Joan Holmes & Associates ("Holmes Report"), Exhibit Books pp. 934-64, *Appeal Book & Compendium, Vol. I, Tab 2, pp.112-144.*
[3] Order of Justice Gans, July 28, 2004, *Appeal Book & Compendium, Vol. I, Tab 3, pp. 145-150.*
[4] November 22, 2005 Letter from Dutton Brock to Torkin Manes, Exhibit Books pp. 965-66, *Appeal Book & Compendium, Vol. I, Tab 4, pp. 151-52.*
[5] 1850 Robinson Treaty, Exhibit Books pp. 241-48, *Appeal Book & Compendium, Vol. I, Tab 5, pp.153-160.*

> General of Indian Affairs ... ***for their sole benefit, and to the best advantage.*** (emphasis added)

10. The boundaries of the lands reserved for Whitefish under the Treaty (the "Reserve") were not surveyed until 1884.[6] In the meantime, in 1872, the Province of Ontario auctioned off timber rights in the area and issued timber licences which were later held to have encroached upon all of the Reserve.[7]

11. In early October, 1885, Honoré Robillard ("Robillard"), then an Ontario Conservative M.P.P., obtained a survey of the Reserve from the Crown.[8] Robillard was interested in the timber either in conjunction with or on behalf of Joseph Riopelle & Company ("Riopelle"), a well-known lumbering company.[9]

12. On October 22, 1885, Deputy Superintendent-General of Indian Affairs L. Vankoughnet ("Vankoughnet") wrote to the Prime Minister and Superintendent-General of Indian Affairs, Sir John A. Macdonald (the "Prime Minister"), "with reference to the letter of the 13th instant signed by Messrs. Joseph Riopelle & Company making application for the privilege of cutting timber on the Indian Reserve on Whitefish Lake". Vankoughnet summarized a surveyor's report of fire damage on the Reserve, and concluded that:

> the undersigned is not in a position to state at present whether there is more timber on the Reserve than the Indians will require for their own purposes. He respectfully recommends that the matter be referred to the local Indian Superintendent for Report.[10]

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[6] October 22, 1885 Memorandum from Vankoughnet to Macdonald, Exhibit Books pp. 316-17, *Appeal Book & Compendium, Vol. I, Tab 6, pp.161-63.*

[7] January 19, 1889 Reasons for Judgment of Justice Ferguson, Exhibit Books pp. 466-85, *Appeal Book & Compendium, Vol. I, Tab 7, pp. 164-84.*

[8] October 14, 1885 Memorandum from Department of Indian Affairs to Robillard, Exhibit Books p. 312, *Appeal Book & Compendium, Vol. I, Tab 8, pp. 185-86.*

[9] Hansard, April 23, 1889, Exhibit Books pp. 508-9; and August 5, 1891, Exhibit Books p. 525, *Appeal Book & Compendium, Vol. I, Tab 9, pp.187-89.*

[10] October 22, 1885 Memorandum from Vankoughnet to Macdonald, Exhibit Books pp. 316-17, *Appeal Book & Compendium, Vol. I, Tab 6, pp. 161-63.*

13. Vankoughnet then forwarded the report to James Phipps ("Phipps"), the Indian Agent responsible for Whitefish, and stated:

> I enclose herewith, for early report, copy of an application, dated the 13th instant, from Messrs. Joseph Riopelle & Co. of Ottawa, to obtain the privilege of cutting fallen, dead and green timber on the Indian reserve at Whitefish Lake.
>
> I have to request that you will report your views to the department on this matter; 1st, as to whether there is more timber fit for lumber than the Indians will require for their own purposes on the reserve, and, if so; 2nd, whether the Indians are likely to agree to the same being sold by the department for their benefit. 3rd. What bonus in such event should, in your opinion, be asked for the timber."[11]

14. On October 27, 1885, Phipps reported directly to the Prime Minister as follows:

> I beg respectfully to state that although I am not well acquainted with the Reserve in question, ***yet I am satisfied from what I have seen that it contains a large quantity of valuable Pine Timber fit for lumber***, much more than the Indians would be likely to require for their own purposes...
>
> ...As to the Bonus that should be asked for the timber my opinion of [unclear] without a more perfect knowledge of the quantity would be alone at guess work. ***I would suggest if the Indians are willing to surrender that an examination be made by an experienced lumberman although a large portion of the Reserve has been burned there still remains a large quantity of Pine, which if realised to the best advantage will be of great benefit to the Indians.***
>
> The Reserve being now easily reached by the Canadian Pacific Railway via Sudbury, ***the expenses of sending a competent man to make an examination of the timber would not be great.***[12] (emphasis added)

15. By letter to the Chief dated November 10, 1885, Phipps suggested it was in Whitefish's best interests to surrender its timber to the Crown.[13] On January 18, 1886, Phipps wrote to the Prime Minister to confirm that Whitefish was amenable to a surrender of its timber rights.[14]

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[11] Hansard, April 23, 1889, Exhibit Books p. 502, *Appeal Book & Compendium, Vol. I, Tab 10, p. 190.*
[12] October 27, 1885 Letter from Phipps to Macdonald, Exhibit Books pp. 319-22, *Appeal Book & Compendium, Vol. I, Tab 11, pp. 191-95.*
[13] November 10, 1885 Letter from Phipps to the Chief, Exhibit Books p. 325, *Appeal Book & Compendium, Vol. I, Tab 12, pp. 196-97.*

16. On January 25, 1886, the Prime Minister wrote to Vankoughnet:

> I think you had better instruct Phipps to go to the Island and see about getting the consent of the Indians to the Surrender that Mr. Robillard M.P.P. is interested in. It is so evidently in the interest of the Indians that the timber should be sold rather than be destroyed by fire or otherwise that the surrender should be pressed. If the answer is favourable please write Mr. Robillard who will be at Toronto attending the Provincial Legislature, to that effect.[15]

17. Approximately three months later, Robillard wrote to the Prime Minister about his application for the Licence. Robillard reminded the Prime Minister of his loss of a federal timber licence in Keewatin due to a jurisdictional dispute, and the amounts spent in preparing the Keewatin berth for harvest. Robillard submitted that:

> ... in view of the expenditures I have sustained etc. I should now have granted me (in lieu) of the limits in Keewatin a tract of timber territory known as the Whitefish Lake Indian Reserve as described in my [my] application the 13th day of October last.[16]

18. Phipps requested the surrender from Whitefish. In response to an inquiry from Whitefish as to how much the band might receive from a sale of its timber, Phipps advised the Chief, in a letter dated May 15, 1886, that he felt "assured a large sum will be obtained for it". [17]

19. On May 25, 1886, Robillard again wrote to the Prime Minister about the Licence. Because the Prime Minister was apparently expected to be away during the summer, Robillard

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[14] January 18, 1886 Letter from Phipps to Macdonald, Exhibit Books p. 332, *Appeal Book & Compendium, Vol. I, Tab 13, pp. 198-99.*

[15] January 25, 1886 Letter from Macdonald to Vankoughnet, Exhibit Books p. 333, *Appeal Book & Compendium, Vol. I, Tab 14, pp. 200-07.*

[16] April 28, 1886 Letter from Robillard to Macdonald, Exhibit Books pp. 340-44, *Appeal Book & Compendium, Vol. I, Tab15, pp. 201-09.*

[17] May 15, 1886 Letter from Phipps to Whitefish, Exhibit Books p. 370, *Appeal Book & Compendium, Vol. I, Tab 16, p. 208.*

suggested that the Prime Minister pre-authorize the issuance, in his absence, of the necessary Order-in-Council approving Whitefish's timber surrender.[18]

20. Around this time, the Crown received an inquiry from another party interested in purchasing Whitefish's timber rights. In his response of June 18, 1886, Vankoughnet indicated that the timber on the Reserve was not available as it had not yet been surrendered.[19]

21. On July 10, 1886, Vankoughnet wrote to Robillard "in compliance with the promise made you", to advise that Whitefish had surrendered the timber.[20] On July 12, 1886, Phipps wrote to the Prime Minister to report that Whitefish had surrendered its timber rights.[21]

22. Neither historian found a copy of the actual surrender, or an Order-in-Council approving the surrender.[22] However, the terms were subsequently read into Hansard:

> We, the undersigned chiefs and principal men of the band of Indians owning the tract of land known as the Whitefish Lake Indian Reserve ... acting on behalf of the whole people of our said band, ***do hereby release, surrender, quit claim and yield up unto Our Sovereign Lady the Queen,*** Her heirs and successors forever, all and singular ***the whole of the merchantable timber on the said reserve in trust, to be sold for the joint benefit of the said band*** on such terms and conditions and as to Her Majesty's Government of Canada shall seem proper; ten per cent of the bonus derivable from the sale of the said timber to be divided among the said band, ***the remainder of the proceeds to be invested for our sole joint benefit and for the benefit of our descendants in such manner as to the said Government of Canada shall seem to be most conducive to the interest of our said band.***[23] (emphasis added)

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[18] May 25, 1886 Letter from Robillard to Macdonald, Exhibit Books pp. 371-73, *Appeal Book & Compendium, Vol. I, Tab 17, pp. 210-13.*
[19] Holmes Report, Exhibit Books p. 955, *Appeal Book & Compendium, Vol. I, Tab 18, p. 214.*
[20] July 10, 1886 Letter from Vankoughnet to Robillard, Exhibit Books pp. 376-77, *Appeal Book & Compendium, Vol. I, Tab 19, pp. 215-17.*
[21] July 12, 1886 Letter from Phipps to Macdonald, Exhibit Books pp. 380-81, *Appeal Book & Compendium, Vol. I, Tab 20, pp. 218-220.*
[22] Examination-in-chief of Hosking, *Appeal Book & Compendium, Vol. I, Tab 21, p. 221 , lines 24-30 and pp.222-3, lines* 10-19.
[23] Hansard, April 23, 1889, Exhibit Books p. 379, *Appeal Book & Compendium, Vol. I, Tab 22, p.224.*

23. There are no documents which establish that the Crown knew when it sought and obtained the surrender that the Province of Ontario had issued licences for timber located on the Reserve. It is clear that the Crown was aware of this fact no later than July 10, 1886. The Crown took the position that the Province had improperly issued licences.[24]

24. On September 29, 1886, Vankoughnet wrote to Robillard to advise that the Prime Minister wanted to speak with him about his licence application before October 4, 1886.[25] Vankoughnet then wrote to Robillard's son to confirm that the senior Robillard was in New Brunswick until November 10, 1886.[26]

25. The Licence was sold to Robillard on October 14, 1886 for a bonus of $316 ($4 per square mile),[27] which sum was deposited into the Whitefish trust account (the "Trust Account").[28]

26. On March 11, 1887, the Licence was assigned to Alexander Barnet, reportedly for $43,000. On June 7, 1887, the Licence was assigned to J.H. Francis ("Francis"), reportedly for between $50,000 and $55,000. It was later assigned to Frank Jay Saxe on April 29, 1890.[29]

27. By 1886, the Province of Ontario had a long-established practice of selling timber licences by public auction.[30] The Crown too had employed this technique of obtaining fair market value, including the sale of a timber licence on a reserve near Sarnia, which auction was

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[24] Hansard, April 23, 1889 and September 3, 1886 Letter from Indian Affairs to Macdonald, Exhibit Books pp. 378 and 386-89, *Appeal Book & Compendium, Vol. I, Tab 23, pp. 225-30.*
[25] September 29, 1886 Letter from Vankoughnet to Robillard, Exhibit Books p. 392, *Appeal Book & Compendium, Vol. I, Tab 24, pp.231-2.*
[26] October 2, 1886 Letter from Vankoughnet to R.J. Robillard, Exhibit Books p. 393, *Appeal Book & Compendium, Vol. I, Tab 25, pp. 233-4.*
[27] Timber Licence #68, Exhibit Books pp. 592-93, *Appeal Book & Compendium, Vol. I, Tab 26, pp.235-36.*
[28] Department of Indian Affairs Annual Report for 1887, Exhibit Books pp. 423-24, *Appeal Book & Compendium, Vol. I, Tab 27, pp. 237-38.*
[29] Timber Licence #68, *Tab 26*; Article, *The Canada Lumberman*, February, 1888, and Article, *The Canada Lumberman*, June, 1891, Exhibit Books pp. 431 and 536, *Appeal Book & Compendium, Vol. I, Tab 28, pp. 239-240.*
[30] Hosking Report, *Tab 1*; Table of Timber Limits on Reserve, September 26, 1888, Exhibit Books pp. 7-11 and 458-62, *Appeal Book & Compendium, Vol. I, Tab 29, pp. 241-50.*

approved by Vankoughnet in 1886.[31] Nevertheless, the sale of the Licence to Robillard was not subjected to public auction or any other competitive process. There is no evidence that the Crown ever assessed the value of the timber located on the Reserve or even attempted to negotiate with Robillard the amount of the bonus.

C. The Ensuing Political Furor

28. On June 6, 1887, less than 8 months after the improvident sale of the Licence to Robillard and the day before the Licence was transferred to Francis, a lawyer and opposition Liberal M.P. named John Barron ("Barron") successfully moved in the House of Commons for access to all documents relating to the sale of the Licence to Robillard.[32]

29. By Statement of Claim issued December 19, 1887, the Province of Ontario (the "Province") sued the federal government, Francis and others (the "*Francis* case"). The Province alleged that Francis, between September and November, 1887, trespassed on provincial lands to cut pine "amounting to about 10,000 logs and 1,000 pieces of timber". It was alleged that the lands in the area were ceded to Ontario at Confederation. The Province took the position that, effectively, there was no Reserve, and Francis was cutting timber on berths for which Ontario sold licences in 1872.[33] Barron was counsel for the Province in the *Francis* case.

30. In February, 1888, the *Canada Lumberman* reported that:

> The timber rights were sold by the Dominion Government for $316 to Honoré Robillard, now M.P. for Ottawa who resold them shortly afterwards for about $55,000, to parties by whom lumbering operations are now being carried on.[34]

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[31] Hosking Report, *Tab 1*; Notice of Timber Auction, April 4, 1886, Exhibit Books pp. 44-48 and 339, *Appeal Book & Compendium, Vol. I, Tab 30, pp.251-56.*
[32] Hansard, June 6, 1887, Exhibit Books pp. 410-11, *Appeal Book & Compendium, Vol. II, Tab 31, pp. 257-58.*
[33] Statement of Claim, *Attorney General of Ontario* v. *Francis et al.*, Exhibit Books pp. 418-22, *Appeal Book & Compendium, Vol. II, Tab 32, pp. 259-63.*
[34] Article, *The Canada Lumberman*, February, 1888, *Tab 28 (see note 29).*

31. The *Francis* case was decided on January 19, 1889. The Court dismissed the Province's action, but reduced the size of the Reserve from 79 square miles to 68.25.[35]

32. On January 28, 1889, the *Toronto Globe* published an article entitled "Swindled Indians", in which it criticized the amount Robillard paid for the Licence and the lack of public auction.[36]

33. On February 2, 1889, Vankoughnet wrote to Edgar Dewdney, the new Superintendent-General of Indian Affairs, to defend the $316 bonus which Robillard paid for the Licence. He attempted to justify the low bonus on the basis of the fire damage reported by the surveyor, the Reserve boundary dispute between the Crown and the Province, and the large future annual dues the Licence was expected to generate since "the greater part of the timber remains yet to be cut on this limit".[37]

34. The controversy resurfaced in the House on April 23, 1889. Barron alleged that Robillard profited improperly, earning as much as $50,000 from the flip of the Licence. Robillard responded: "I got nothing at all. I had no interest in it more than the hon. gentleman himself."[38]

35. On March 18, 1890, Barron again raised the matter in the House, to state that he could prove that Robillard sold his half interest in the Licence for $15,000 and that the Licence was later re-sold for $55,000.[39]

36. In June, 1891 the *Canada Lumberman* reported that Robillard sold his half interest in the Licence for $15,500, and that Riopelle later sold his interest for $27,500.[40]

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[35] Reasons for Judgment of Justice Ferguson, January 19, 1889, *Tab 7 (see note 7)*.
[36] Article, *Toronto Globe*, January 28, 1889, Exhibit Books pp. 486-87, *Appeal Book & Compendium, Vol. II, Tab 33, pp. 264-65*.
[37] February 2, 1889 Letter from Vankoughnet to Dewdney, Exhibit Books pp. 493-98, *Appeal Book & Compendium, Vol. II, Tab 34, pp. 266-72*.
[38] Hansard, April 23, 1889, Exhibit Books p. 504, *Appeal Book & Compendium, Vol. II, Tab 35, p. 273*.
[39] Hansard, March 18, 1890, Exhibit Books pp. 523-24, *Appeal Book & Compendium, Vol. II, Tab 36, pp. 274-75*.

37. In the House of Commons debates of August 5, 1891, Barron challenged Robillard with Phipps' October 27, 1885 letter. Robillard responded, in part, by saying:

> Mr. Speaker, last year, when a similar charge was made against me, I rose in my place and made a statement in reply to it ... I said I had made something from the grant of Mr. Riopelle, who is a Liberal living in this city. As for what I made it is nobody's business: it is my private business.[41]

38. During the same debate, M.P. Sir Richard Cartwright said the Licence had been sold for $55,000 and that it had recently been re-sold for $60,000.[42]

39. At trial, the Crown questioned Barron's parliamentary attacks by suggesting that since Barron had acted for one of the Province's licensees who had purchased timber rights over parts of the Reserve, he was motivated to inflate the value of the timber with a view to increasing his client's potential compensation from the Province. However, Barron also represented the Province in the *Francis* case. In 1891, the Province paid $45,658.11 to reimburse provincial licensees for the loss of their logging rights on the Reserve lands.[43]

40. Historical harvest records confirm the amount of pine timber logged on the Reserve during this period: by 1889, approximately 4.5 million board feet of timber had been logged; by 1901, approximately 50 million board feet were harvested, generating about $50,000 in timber dues.[44]

41. By 1889, the Crown had won the *Francis* lawsuit and knew it had undisputed jurisdiction over the Reserve lands. The Crown also knew by this time that Phipps was right in 1886 when he told his superiors that, despite earlier reports of fire damage, there was a large amount of

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[40] Article, *The Canada Lumberman,* June, 1891, *Tab 28 (see note 29).*
[41] Hansard, August 5, 1891, Exhibit Books p. 527, *Appeal Book & Compendium, Vol. II, Tab 37, p. 276.*
[42] Hansard, August 5, 1891, Exhibit Books p. 549, *Appeal Book & Compendium, Vol. II, Tab 38, p. 277.*
[43] Cross-examination of Hosking and Hosking Report, *Appeal Book & Compendium, Vol. II, Tab 39, pp. 278(line 10)-79 (line 10) and p. 280,.*
[44] Arbex Forest Resource Consultants Opinion on Fair Value ("Arbex Report"), April, 2005, Exhibit Books pp. 75-87, *Appeal Book & Compendium, Vol. II, Tab 40,pp. 281-93, in particular pp. 287-89.*

valuable timber on the Reserve. And yet the Crown did nothing to investigate Robillard's inconsistent statements, determine the actual price paid for each re-sale of the Licence, or have the timber value independently assessed. It did not reconvey or restore the timber rights to Whitefish. Instead, the Crown renewed the Licence annually until the pine timber was virtually exhausted in 1903.[45]

42. In describing the Crown's breach of its fiduciary duty, the trial judge found that the Crown had "simply failed to perform" its duty to obtain fair value for the Licence.

D. Whitefish's Socioeconomic Circumstances

43. Arthur Petahtegoose, an Elder, gave oral history evidence at trial. He described how confinement to the Reserve was a significant sacrifice of his people's culture, tradition and identity, made in exchange for perceived benefits arising from the Treaty and in particular the belief that the Treaty represented the Crown's solemn promise that Whitefish "would never be in a position of want". He also described the impact of European contact on Whitefish's way of life, including the shift from hunting, fishing and gathering to reliance on trade; the increased need for modern implements such as metal tools, cooking pots, agricultural tools, and clothing like rubber boots; the introduction of devastating disease, and the corresponding need for and reliance on European medicine; illiteracy and general unfamiliarity with the English language; and a lack of exposure to or explanation of the concept of "money".[46]

44. The encroachment of the railway and white trappers in the mid-1880s led one observer to note that the members of Whitefish were "in a worse position than they were before".[47] In 1885,

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[45] *Ibid.* at p. 287.
[46] Examination-in-Chief of Petahtegoose, *Appeal Book & Compendium, Vol. II, Tab 41, pp. 294 (lines 5-25), 295-98, 299 (line 14)-300 (line 30), 301 (lines 19-30), 302-9.*
[47] December 7, 1885 Letter from Crean to Vankoughnet, Exhibit Books pp. 330-31, *Appeal Book & Compendium, Vol. II, Tab 42, pp. 310-12.*

Phipps wrote to the Prime Minister to seek money for 25 Whitefish members "in distress for want of provisions."[48]

E. Expert Evidence On Damages

45. Bruce Byford of Arbex Forest Resource Consultants Ltd. prepared a report and testified on behalf of Whitefish. He is a Registered Professional Forester with 26 years experience conducting timber inventories.[49]

46. Mr. Byford's valuation relied largely on the Crown's own timber harvest records, which showed the actual volume and quality of timber present on the Reserve in 1886.[50] Mr. Byford stated that using actual harvest records for appraisal purposes is common in the industry. Harvest records are the most reliable indicator of timber volume in a geographic area: the "smoking gun" evidence.[51] Mr. Byford concluded that the bonuses reportedly paid by Barnet and Francis for the Licence, in the range of $43,000 to $55,000, were a reasonable estimate of its fair value in 1886. He stated that the Licence was likely worth around $50,000.[52]

47. Mr. Byford also testified that, in his opinion, the comparison method of valuation is unreliable. It does not adequately account for differences in the type, quantity and quality of timber on each berth based on, especially in the Sudbury region, changes over short geographical distances in topography, soil depths and conditions, sizes of bodies of water, microclimates, prevailing winds, tree disease, fire damage and man-made disturbances.[53]

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[48] February 4, 1885 Letter from Phipps to Macdonald, Exhibit Books p. 298, *Appeal Book & Compendium, Vol. II, Tab 43, pp. 313-14.*
[49] Arbex Report *Tab 40*; Examination-in-Chief of Byford, *Appeal Book & Compendium, Vol. II, Tab 44, pp.315 (lines 7-29) and 316 (lines 10-14).*
[50] Examination-in-Chief of Byford, *Appeal Book & Compendium, Vol. II, Tab 45, pp. 317-21.*
[51] *Ibid.p. 321 (line 16)* and *Appeal Book & Compendium, Vol. II, Tab 46, pp. 322 (line 15)-323 (line 5).*
[52] Arbex Report, *Tab 40, pp. 283 and 292*; Examination-in-Chief of Byford, *Appeal Book & Compendium, Vol. II, Tab 47, pp.* 324 (line 15)-325(line 17).
[53] Examination-in-Chief of Byford, *Appeal Book & Compendium, Vol. II, Tab 48, pp. 326-41.*

48. The Crown relied upon Robert Sandy of PricewaterhouseCoopers, a C.A. and C.B.V., with expertise in investigative accounting and corporate valuations.[54] Mr. Sandy concluded that the 1886 value of the Licence was $12,600 – $19,400.[55] He reached his conclusion by comparing 9 timber sales near Whitefish between 1881 and 1885. In cross-examination he admitted he had no details from these sales but price: nothing about the type or density of timber, soil conditions, topography, microclimatic conditions, damage by fire or insect infestation, etc.[56] He also agreed that using 'comparables' to value the Licence is like valuing a car, using average car prices, without knowing if the car is a Honda Civic or a Lamborghini.[57]

49. Mr. Sandy considered irrelevant the sales of other timber licences in Ontario which were not geographically proximate to the Reserve.[58] Accordingly, he did not consider the per square mile bonuses received, for example, by other First Nations in the amounts of $603.12, $996.30 and, in one case, $5,125.[59]

50. The trial judge accepted Mr. Sandy's comparison approach in principle, but adjusted the bonus to $400 per square mile (the highest figure on Mr. Sandy's chart) to reflect the Crown's failure to investigate and remedy its breach. He valued the Licence in 1886 at $31,600.

51. Both parties relied on expert witnesses to help the Court assess damages as of the date of trial. Whitefish called Iseo Pasquali, a C.A., and C.B.V. at Deloitte & Touche LLP ("Deloitte"), and the Practice Leader of the firm's Canadian valuation group.[60] Deloitte prepared detailed

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[54] PricewaterhouseCoopers Report, November 18, 2005, Exhibit Books pp. 219-33, *Appeal Book & Compendium, Vol. II, Tab 49, p. 342-57.*
[55] Examination-in-Chief of Sandy, *Appeal Book & Compendium, Vol. II, Tab 50, p. 358 (line 23-8).*
[56] Cross-Examination of Sandy, *Appeal Book & Compendium, Vol. II, Tab 51, pp. 359-369.*
[57] Cross-Examination of Sandy, *Appeal Book & Compendium, Vol. II, Tab 52, p. 370 (line 21-4).*
[58] Examination-in-Chief of Sandy, Cross-Examination of Sandy, *Appeal Book & Compendium, Vol. II, Tab 53, pp. 371(lines 12-17), 372(lines 16-30) and 373(lines 4-21).*
[59] Hosking Report, Exhibit Books p. 46, *Appeal Book & Compendium, Vol. II, Tab 54, pp. 374.*
[60] August 23, 2005 Deloitte Report and Examination-in-Chief of Pasquali, Exhibit Books pp. 94-99, *Appeal Book & Compendium, Vol. II, Tab 55, pp. 375-383 (lines 13-28).*

calculations of the compound interest rates actually paid by the Crown on the monies in Whitefish's Trust Account, and then applied these rates to a range of assumed 1886 Licence values.[61]

52. Mr. Pasquali testified that compound interest is the best measure of the time value of money: it captures opportunity cost, erosion of purchasing power (inflation), and risk. The Consumer Price Index ("CPI") alone captures inflation, but not opportunity cost or risk.[62]

53. Mr. Pasquali also explained that money used to purchase productive or capital assets such as tools, farming or cooking implements has a "compounding" effect because those assets yield ongoing benefits in terms of efficiency and productivity, effectively earning returns on returns. Although the trial judge admitted the evidence over the Crown's objection, he commented that:

> ...if they had gotten the money that they have gotten, they probably would have spent it, at least some of it. How much, nobody knows. So, therefore, what part is – like what lost opportunity did they lose? And nobody can come into this courtroom and tell me anything on that topic. It is total speculation.[63]

54. Paul Della Penna testified for the Crown. He is a partner in Eckler Partners Ltd., an actuary firm. He prepared four models to calculate the 2005 value of $1.00 in 1887, using the CPI, simple interest, a combination of CPI and simple interest, and compound interest.[64] According to Mr. Della Penna, actuaries perform interest calculations "...in almost everything

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[61] Examination-in-Chief of Pasquali, *Appeal Book & Compendium, Vol. II, Tab 56, pp.384 (lines4-16) and 385(line25)-86 (line 11)*; Deloitte Report, *Tab 55, p. 376*; Deloitte letter August 27, 2004 updated to November 25, 2005, Exhibit Books pp. 1301-05, *Appeal Book & Compendium, Vol. II, Tab 56, pp. 387-91.*

[62] Examination-in-Chief of Pasquali, *Appeal Book & Compendium, Vol. II, Tab 57, pp.392-99.*

[63] Examination-in-Chief of Pasquali, *Appeal Book & Compendium, Vol. II, Tab 58, pp.400-5.*

[64] November 7, 2005 Eckler Partners Ltd. Report, Exhibit Books pp. 213-16, *Appeal Book & Compendium, Vol. II, Tab 59, pp.406-9.*

they do. In nearly all cases, it is a matter of applying compound interest", except where the law requires otherwise.[65]

55. Arthur J. Hosios, an economics professor at the University of Toronto, also testified for the Crown. He prepared a damage quantification model that assumed compound returns as an alternative to Deloitte's calculations. His approach was based on a hypothetical U.K. and Canadian bond market investment portfolio,[66] which would yield lower returns than those actually earned in the Whitefish Trust Account. Professor Hosios did not take into account fees or charges that would be incurred in his model, which fees, he acknowledged, would not be incurred in the Trust Account model.[67] He also agreed that the Trust Accounts would minimize risk, yet also afford a better rate of return than his model free market portfolio.[68]

56. A table setting out the 2005 value of one 1886 dollar based on the economic modelling of all three experts is found at Tab 64 of the Appeal Book and Compendium.[69]

57. The trial judge accepted the Crown's submission that the fair market value of the Licence in 1886 should be adjusted for increases in the CPI from 1886 to 1992, with simple interest at a level annual rate of 5% payable from 1992 to 2005. Applying the model proposed by the Crown, and a multiplier of 34.68, the trial judge awarded damages of $1,095,888. [70]

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[65] *Ibid.* at p. 407; Cross-Examination of Della Penna, *Appeal Book & Compendium, Vol. II, Tab 60, pp.410 (line 30)-412 (line 17).*
[66] November 2, 2005 AJH Consulting Report, Exhibit Books pp. 103-20, *Appeal Book & Compendium, Vol. II, Tab 61, pp.413-30* .
[67] Cross-Examination of Hosios, *Appeal Book & Compendium, Vol. II, Tab 62, pp. 431(line 10) -432(line 4).*
[68] Cross-Examination of Hosios, *Appeal Book & Compendium, Vol. II, Tab 63, pp. 433 (line 20) - 434 (line 23).*
[69] Appellant's summary chart of compound and simple interest calculations presented by experts at trial, *Appeal Book & Compendium, Vol. II, Tab 64, pp.435-40.*
[70] Reasons for Judgment, *Tab D, pp.17-22*; Eckler Report, *Tab 59, p. 409.*

PART IV – STATEMENT OF ISSUES, LAW & AUTHORITIES

A. The Aboriginal Law Context and Damages for Breach of Trust

58. Whitefish surrendered its timber rights in accordance with the Treaty. The Supreme Court of Canada has held that Aboriginal treaties are unique and solemn agreements attracting special principles of interpretation. The integrity and honour of the Crown is central to the analysis.[71] A treaty represents an exchange of solemn promises, and is "sacred" in nature.[72]

59. The concept of the "honour of the Crown" in Aboriginal law was explained by the Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests)* as follows:

> The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolutions of claims and the implementation of treaties, the Crown must act honourably . . . The honour of the Crown gives rise to different duties in different circumstances. Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty: *Wewaykam Indian Band v. Canada* . . .[73]

60. The Supreme Court has also stated that in its dealings with Aboriginal peoples, the honour of the Crown must always be assumed: no appearance of "sharp dealing" will be sanctioned.[74]

61. The right of Aboriginal peoples to occupy and possess lands, ultimate title to which rests in the Crown, is not beneficial ownership. It is a *sui generis* interest, which upon surrender gives rise to a distinct fiduciary obligation on the Crown to deal with the land for the benefit of the surrendering First Nation. Surrender does not create a true trust, although the obligation is

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[71] *R. v. Badger* (1996), 133 D.L.R. (4th) 324 at para. 41 (S.C.C.); *R. v. Marshall* (1999), 177 D.L.R. (4th) 513 at paras. 49, 78 (S.C.C.).
[72] *R. v. Badger, ibid* at paras. 41, 76.
[73] *Haida Nation v. British Columbia (Minister of Forests)* (2004), 245 D.L.R. (4th) 33 at paras. 17-18 (S.C.C.); *Wewaykum Indian Band v. Canada* (2003), 220 D.L.R. (4th) 1 at para. 80 (S.C.C.).
[74] *R. v. Badger, supra* note 71 at para. 41.

"trust- like" in character. In the 1984 decision of *Guerin et al. v. The Queen*, Dickson J. for the majority stated:

> As would be the case with a trust, the Crown must hold surrendered land for the use and benefit of the surrendering band. The obligation is thus subject to principles very similar to those which govern the law of trusts concerning, for example, the measure of damages for breach . . . I repeat, the fiduciary obligation which is owed to the Indians by the Crown is *sui generis*. Given the unique character both of the Indians' interest in land and of their historical relationship with the Crown, the fact that this is so should occasion no surprise.[75]

62. The fiduciary duty owed by the Crown to Aboriginal peoples has been incorporated into Canada's constitution by s. 35(1) of the *Constitution Act, 1982*, which recognizes and affirms the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada.[76]

63. Both the Treaty and the *Indian Act* prohibited First Nations from dealing directly with third parties on the sale of reserve lands and natural resources. The Supreme Court of Canada has held that these prohibitions were intended to protect Aboriginals from exploitative bargains:

> The purpose of the surrender requirement is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited. This is made clear in the Royal Proclamation itself, which prefaces the provision making the Crown an intermediary with a declaration that "great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interest, and to the great Dissatisfaction of the said Indians."[77]

64. The Crown's fiduciary obligation in the surrender of Aboriginal lands continues post-surrender so long as the Crown maintains control of the surrendered rights. The failure to rectify a breach of fiduciary duty, including reconveying surrendered lands to the Band, can be a further

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[75] *Guerin v. The Queen* (1984), 13 D.L.R. (4th) 321 at 342-43 (S.C.C.). *See also Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* (1995), 130 D.L.R. (4th) 193 at para. 13 (S.C.C.).
[76] *R. v. Sparrow* (1990), 70 D.L.R. (4th) 385 at 409 (S.C.C.).
[77] *Guerin, supra* note 75 at 340.

breach of the Crown's fiduciary obligations.[78] S. 55 of the *Indian Act, 1886* provided that a timber licence was only valid for one year.[79] Accordingly, the Crown continued to control the timber rights on reserves post-surrender.

65. Pursuant to ss. 70 and 71 of the *Indian Act, 1886*, the proceeds of sale of reserve lands or timber rights were deposited into accounts which were maintained and controlled by the Crown for the benefit of First Nations. The Crown determined how trust monies would be invested and disbursed. Although the Crown's discretion is not limited, s. 70 of the *Indian Act, 1886* makes specific reference to expenditures for construction or repair of roads and contributions to schools.[80]

66. In *Guerin*, the Supreme Court applied trust principles in awarding damages for the Crown's breach of fiduciary duty. In that case, the Crown leased surrendered lands to a third party on terms less favourable than those authorized by the band. The Court held that the band should be compensated for its lost opportunity to develop its lands in the most advantageous way and at the most advantageous time, with damages assessed as of the date of trial. It was not necessary for the band to prove that it would have developed the land had it not been surrendered. On the issue of equitable presumption, Wilson J. held:

> In this respect also the principles applicable to determine damages for breach of trust are to be contrasted with the principles applicable to determine damages for breach of contract. In contract it would have been necessary for the band to prove that it would have developed the land; in equity a presumption is made to that effect . . .[81]

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[78] *Semiahmoo Indian Band v. Canada* (1997), 148 D.L.R. (4th) 523 at 543, 547, 555 (Fed. C.A.); *Blueberry River, supra* note 75 at para. 20-22,118.
[79] *The Indian Act,* 43 V. 1886, c.28, s. 55.
[80] *The Indian Act, ibid* at ss.70, 71.
[81] *Guerin, supra* note 75 at 366-67.

67. *Guerin* was followed by the Federal Court of Appeal in *Semiahmoo Indian Band v. Canada*, where the Court stated:

> It is well settled that the proper approach to equitable damages for breach of fiduciary duty is restitutionary. . . Applying this approach to the case at bar, equitable damages should be calculated based on the presumption that the Band would have used the land in the most advantageous way during the period it was improperly held by the Crown. [82]

68. Damages for breach of trust are treated differently than damages arising from a mere breach of fiduciary duty. In *Canson Enterprises Ltd. v. Boughton & Co.*, La Forest J., for the majority, held:

> The appellants urged us to accept the manner of calculating compensation adopted by the courts in trust cases or situations akin to a trust, and they relied in particular on the *Guerin* case, *supra*. I think the courts below were perfectly right to reject that proposition. There is a sharp divide between a situation where a person has *control* of property which in the view of the Court *belongs* to another, and one where a person is under a fiduciary duty to perform an obligation where equity's concern is simply that the duty be performed honestly and in accordance with the undertaking the fiduciary has taken on ... [83]

69. McLachlin J., for the minority in *Canson* (but concurring in the result), did not accept the "sharp divide" between breach of trust and the breach of other types of fiduciary duty, but nonetheless found that the measure of compensation should be restitutionary or trust-like in both cases. In a breach of fiduciary duty, compensation is an equitable monetary remedy where by analogy with restitution, the Court attempts to restore to the beneficiary what has been lost as a result of the breach – i.e. the plaintiff's lost opportunity. Equitable damages are awarded with the full benefit of hindsight.[84]

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[82] *Semiahmoo, supra* note 78 at 563. In *Semiahmoo*, the Federal Court of Appeal ordered a reference on damages to determine how much the Crown should have to pay, as at the date of trial, as damages for the band's loss of use of the lands. It directed the trial division judge to deduct from the band's losses the amount it was initially paid for the lands, plus compound interest. In effect, the band was presumed to have made the highest and best use of the sale proceeds – an inquiry into actual use was not necessary or required. *Semiahmoo, supra* note 78 at 564-66.
[83] *Canson Enterprises Ltd. et. al. v. Boughton & Co. et. al.* (1991), 85 D.L.R. (4th) 129 at 146 (S.C.C.).
[84] *Ibid.* at 163.

70. Under the law of trusts, presumptions are generally made against the trustee who has acted wrongfully. In *Oosterhoff on Trusts*, the author states:

> The presumptions include the following: (a) that securities wrongfully withheld from the beneficiary would have been sold by the beneficiary at the highest price obtainable; (b) that trust funds will be put to their most profitable use; (c) that no inference favourable to the trustee will be drawn when the facts are capable of two interpretations, one favouring the trustee and the other the beneficiary; and (d) that a fiduciary must account on the basis less favourable to her or him.[85]

In addition, the usual principles of foreseeability, causation, and remoteness do not apply in calculating damages for breach of trust.[86]

71. It is respectfully submitted that the trial judge erred in failing to assess the obligation of the Crown, and the Crown's breach of its fiduciary duty, in accordance with the principles established by the Supreme Court. In particular, he failed to recognize the *sui generis* "trust-like" nature of the Crown's fiduciary duty and the full significance of the Crown's failure to remedy its breach post-surrender. Most importantly, he erred in failing to consider and apply the equitable presumptions of highest and best use of the trust asset. As a result, for the reasons set out below, Whitefish has not been fairly or adequately compensated for the Crown's breach.

B. Compound Interest as Equitable Damages for Breach of Trust

72. Compound interest is awarded in equity either to compensate a beneficiary, or to require a trustee to account to the beneficiary for the actual or notional use of trust monies wrongfully withheld. In both situations, the courts grant compound interest based on a "highest and best use" presumption which operates in favour of the beneficiary and against the trustee. As a practical matter, it is often difficult to ascertain what the beneficiary has lost by virtue of the trustee's breach, or to determine what use the trustee made of the funds for the purpose of an

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[85] A.H. Oosterhoff, Robert Chambers, Mitchell McInnes & Lionel Smith, *Oosterhoff On Trusts: Text, Commentary and Materials*, 6th ed. (Toronto: Thomson Carswell, 2004) at 1047.
[86] *Semiahmoo, supra* note 78 at 563. *Guerin, supra* note 75 at 365.

accounting. Compound interest awarded as damages or in lieu of an accounting, on the presumption of highest and best use, prevents the wrongdoer from taking advantage of the uncertainty created by his own misconduct.

(i) *Compound Interest as Equitable Compensation*

73. Compound interest is awarded in circumstances where the trustee had an obligation to invest the trust monies which the trustee no longer controls by virtue of his breach of trust.[87] The courts have also held that where a beneficiary has been deprived of the use of trust funds, it is appropriate to award compound interest. Lord Denning, in *Wallersteiner v. Moir (No. 2)*, stated:

> [I]n equity interest is awarded whenever a wrongdoer deprives a company of money which it needs for use in its business... On general principles I think it should be presumed that the company (had it not been deprived of the money) would have made the most beneficial use open to it... Alternatively, it should be presumed that the wrongdoer made the most beneficial use of it. But, whichever it is, in order to give adequate compensation, the money should be replaced at interest with yearly rests, i.e. compound interest.[88]

Wallersteiner was followed by the Ontario Court of Appeal in *Brock v. Cole*, and was cited with approval by the Supreme Court of Canada in *Air Canada v. Ontario (Liquor Control Board)*. Iacobucci J. indicated that, in his view, an award of compound interest might well have been justified on the facts in *Air Canada*, although the court declined to interfere with the discretion of the trial judge who had properly directed himself on the applicable principles of law.[89]

74. In *Bank of America Canada v. Mutual Trust Co.*, the Supreme Court of Canada explained the rationale for an award of compound interest. It held that compound interest rather than simple interest is a better measure of the value of possessing money for a period of time, as it

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[87] *Harrison v. Mathieson* (1916), 30 D.L.R. 150 at 158-59 (Ont. S.C.); *Nilsson Livestock Ltd. v. MacDonald*, [1995] A.J. No. 583 at paras. 3-5 (Q.B.) (QL).
[88] *Wallersteiner v. Moir (No. 2)*, [1975] 1 All. E.R. 849 at 856 (C.A.).
[89] *Brock v. Cole* (1983), 142 D.L.R. (3d) 461 at 467 (Ont. C.A.); *Air Canada v. Ontario (Liquor Control Board)* (1997), 148 D.L.R. (4th) 193 at paras. 85-86 (S.C.C.).

compensates for lost opportunity, inflation, and risk. It is available at common law and in equity.[90]

75. It is respectfully submitted that the trial judge erred in failing to award Whitefish compound interest as compensatory damages arising out of the Crown's failure to obtain fair market value for the Licence. The actual terms of the surrender required the Crown to "invest" the proceeds from the sale of the timber rights for the "sole joint benefit" of the members of Whitefish and their descendants. Under ss. 70 and 71 of the *Indian Act, 1886*, sale proceeds were deposited into band accounts where they were "invested" and managed by the Crown.[91] If the Crown had not breached its fiduciary duty, Whitefish would have realized the full market value of it timber rights and the Proceeds would have been deposited into the Trust Account and invested for the sole benefit of Whitefish, as contemplated by both the surrender and the *Indian Act, 1886*.

76. It is submitted that the trial judge misapprehended the theory of Whitefish's damage claim. Whitefish did not say the Proceeds would have accumulated in its Trust Account in perpetuity. Whitefish argued it was entitled to damages quantified using trust principles, and to the benefit of the presumptions created and imposed in equity. Equity presumes the highest and best use of the asset lost as a result of the trustee's breach. In this case, full equitable compensation is achieved by applying the presumption of highest and best use and awarding Whitefish damages equal to the amount of money which it would have earned through investment of the Proceeds in the Trust Account from 1886 to the date of trial.

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[90] *Bank of America Canada v. Mutual Trust Co.* (2002), 211 D.L.R. (4th) 385 at paras. 21, 41 (S.C.C.).
[91] *The Indian Act, supra* note 79 at s.55.

77. The trial judge found that the Proceeds would likely not have sat in the Whitefish Trust Account earning compound interest indefinitely. He considered potential disbursements from the account as "dissipation" – a depletion devoid of economic value. In doing so, he effectively applied a reverse presumption of "lowest and worst use". Even if it was open to the trial judge to assume that the Proceeds would have been spent, he was still compelled to consider and apply the presumption imposed by equity – i.e. that the Proceeds would have been expended to achieve the "highest and best" economic return reasonably available.

78. It is further submitted that the evidentiary burden rested with the Crown to rebut the presumption of highest and best use, particularly on the facts of this case. The Crown, as trustee, controlled whether and how the monies in Whitefish's Trust Account were spent. The Crown adduced no evidence of how Aboriginal trust monies were typically spent in the late 19th century, no evidence of government policies regarding Aboriginal trust account management, oversight and expenditures, and no evidence of the long-term economic impact of typical expenditures. Thus, the Crown provided no evidentiary foundation on which the Court below could base a departure from the equitable presumption of highest and best use.

79. Whitefish led evidence at trial concerning how the Proceeds might have been productively spent. The trial judge referred to this evidence as "total speculation". It is submitted that in cases such as this the assessment of lost opportunity is often speculative, which is precisely why equity imposes on the wrongdoer the presumption of highest and best use.

80. Accordingly, it is submitted that Whitefish ought to receive equitable damages equal to the amount of money which it would have earned on the Proceeds if these monies had been deposited into the Trust Account and invested as contemplated by the surrender and s. 70 of the *Indian Act, 1886*.

(ii) *Compound Interest as Equitable Damages for Wrongful Withholding of Trust Property*

81. Compound interest may also be awarded against a trustee or fiduciary who has wrongfully misapplied, withheld or retained trust funds as part of an actual or notional accounting. A finding of fraud or deceit is not required. The court will presume that the wrongdoer made the most beneficial use of the monies.[92]

82. The trial judge found that the Crown "simply failed to perform its duty" in failing to obtain fair value for the Licence. He also found that the Crown did not wrongfully convert trust funds, such that compound interest as equitable damages was not available. It is respectfully submitted that the trial judge erred in minimizing the gravity of the Crown's breach of its fiduciary duty, and in failing to find that the conduct of the Crown taken as whole constituted a wrongful withholding or misapplication of trust property. This is not a case of mere inadvertence or a "technical" breach of trust. The uncontroverted facts in the historical record demonstrate that the Crown's breach was wilful, egregious, and unconscionable.

83. When it sold the Licence to Robillard, the Crown knew the Reserve held a large quantity of valuable pine timber, knew it had an obligation to attempt to obtain the best possible price for the Licence, and was familiar with the practice of holding public auctions to sell timber berths. Instead of holding a public auction, or otherwise exposing the timber rights to a competitive sale process, the Crown sold the Licence privately for a mere $316, a tiny fraction of its true value. There was no arm's length bargaining or negotiation with Robillard, who was treated by the Crown as presumptively entitled to purchase the Licence. The Licence was sold by the Conservative federal government to an Ontario Conservative M.P.P. who would soon after be

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[92] *Claiborne Industries Ltd. v. National Bank of Canada* (1989), 59 D.L.R. (4th) 533 at 576 (Ont. C.A.); *Brock v. Cole, supra* note 89 at 467,469; *Wallersteiner, supra* note 88 at 856; *Peppiat v, Nicol*, [2001] O.J. No. 2584 at paras. 68 - 71 (C.A.) (QL).

elected to the House of Commons. At a minimum, the sale had the appearance of cronyism or "sharp dealing" by the Crown.

84. Even if the Crown can somehow rationalize its initial breach of fiduciary duty, there is no excuse for its subsequent failure to investigate the allegations of impropriety or to own up to the breach. The sale of the Licence became a political scandal. By 1889, while the "furor" continued, the value of the Licence was readily apparent to everyone: Francis had already logged approximately 4.5 million board feet of lumber from the Reserve and the Crown defended the sale by estimating significant future annual dues.

85. The honour of the Crown compelled both timely investigation and restitution to protect the interests of a profoundly vulnerable beneficiary. The Crown maintained control of the timber rights through s. 55 of the *Indian Act, 1886*. It could have refused to renew the Licence after the first year of logging – or at any time thereafter – and either reconvey the timber rights to Whitefish or put the Licence up for auction. Alternatively, the Crown could have appraised the timber rights and made full restitution to Whitefish. It did neither, and instead let the licencee log the timber berth to its full limit. Ultimately, 50 million board feet were harvested from the Reserve.

86. The Crown did not, strictly speaking, misapply trust monies; instead it transferred timber rights, a "trust-like" asset, to a third party for virtually nothing. If the Crown had gratuitously paid monies out of the Whitefish Trust Account to Robillard, it would have "misapplied' trust funds irrespective of whether it received a financial benefit. The fact that the asset was a property right, not cash, does not alter the fundamental character of the Crown's breach.

87. Moreover, the Crown did receive a benefit when it failed to investigate public accusations of misfeasance and take steps to remedy its breach. The Crown avoided making

financial recompense to Whitefish in lieu of restoring the timber rights to the band. It avoided potential legal challenges from Robillard or the subsequent licencees had the Licence been cancelled and re-sold at fair market value. The Crown also avoided paying a political price: if the breach had been acknowledged and remedied, the Crown might appear to have admitted the "swindling" for which it stood publicly accused.

88. It is submitted that on any fair and reasonable construction of the evidence, the Crown misapplied or wrongfully withheld a trust asset. The Crown should have accounted to Whitefish and, at a minimum, paid the fair market value of the Licence into Whitefish's Trust Account by no later than 1889. The Court should presume, in accordance with well-established trust principles, that the Crown as wrongdoer would have made the highest and best use of the monies it saved by not making restitution and by failing to account – i.e. it would have earned compound interest.

C. Interest Against the Crown

89. At trial, the Crown asserted that the Court had no jurisdiction to award interest (compound or otherwise) prior to February 1, 1992 pursuant to s. 36 of the *Federal Court Act* and s. 31 of the *Crown Liability and Proceedings Act.*[93] S. 36 of the *Federal Court Act* stated that interest could not be awarded against the Crown unless provided by statute or contract.[94] When the *Crown Liability and Proceedings Act* was introduced in 1992, the laws of the province where the cause of action arose determined a plaintiff's entitlement to interest from February, 1992 forward.

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[93] *Crown Liability and Proceedings Act*, R.S.C, 1985, c. C-50, ss. 31, 36.
[94] *Federal Court Act*, R.S.C., 1985, c. F-7, s.36.

90. The case law unequivocally establishes that interest, whether simple or compound, can be awarded *qua* damages at common law and in equity.[95] It is submitted that s. 36 of the *Federal Court Act* and s. 31 of *Crown Liability and Proceedings Act* cannot bar an award of equitable damages for breach of trust, calculated as of the date of trial, where a court has applied the presumption of highest and best use to compensate a trust beneficiary for his or her loss of opportunity to use a trust asset, or to require a breaching trustee to account for a wrongful withholding of trust property.

91. It is further submitted, in any event, that even where a contract or statute does not expressly oblige the Crown to pay interest, in appropriate circumstances the court can find an implied entitlement to interest.[96] It is submitted that the terms of the surrender, taken together with the investment provision in s. 70 of the *Indian Act, 1886*, implicitly contemplated investment at compound rates of return. Accordingly, even if compound interest is available only as interest, and not as equitable damages, the Crown should still be liable to pay such interest from 1886 forward.

D. The Trial Judge erred in failing to find the value of the Licence was between $43,000 – $55,000

92. It is respectfully submitted that the learned trial judge erred in failing to find the Licence was worth between $43,000 and $55,000. He rejected contemporaneous Hansard and newspaper reports concerning the prices paid on the various resale "flips" of the Licence as being inherently unreliable. It is submitted that the trial judge erred in giving these reports no weight whatsoever and then, by extension, dismissing outright the expert evidence of Mr. Byford.

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[95] *Lewis v. Todd* (1980), 115 D.L.R. (3d) 257 at 273, 274 (S.C.C.); *Brock v. Cole, supra* note 89 at 466-67; *Calmont Leasing Ltd. v. Kredl*, [1993] A.J. No. 569 at paras. 110-12 (QB), varied on other grounds [1995] A.J. No. 475 (C.A.) (QL); *Bank of America, supra* note 90 at paras. 50, 51, 52, 55; *Toronto Industrial Leaseholds Ltd. v. Posesorski* (1995), 119 D.L.R. (4th) 193 at 221 (Ont. C.A.).

[96] *Nova Scotia Government and General Employees Union v. Nova Scotia (Public Services)* (2004), 238 D.L.R. (4th) 410 at paras. 32, 33, 34, 36 (N.S.C.A.).

93. Mr. Byford was the only forester to give evidence at trial. He was able to reasonably estimate the value of the Licence based on the uncontradicted and unchallenged harvest records, which described the actual quality of pine timber present on the Reserve and which set out the actual quantity of timber harvested during the relevant period. His estimate of a value for the Licence of $43,000 to $55,000 is consistent with the prices alleged to have been paid on the re-sale of the Licence and ought to have been considered as meaningful corroboration of the contemporaneous newspaper and House of Commons reports.

94. It is further submitted that the Court ought to have assessed the value of the Licence with the full benefit of hindsight as required under trust principles. The trial judge erred in giving no weight or insufficient weight to the evidence adduced by Whitefish as to the actual value of the timber ultimately logged in determining the value of the Licence.

95. Mr. Sandy, the accountant and business valuator called by the Crown, relied only on the comparison approach to value the Licence. It is submitted that the trial judge erred in accepting the comparison approach in this case, as there was no evidence upon which Mr. Sandy could base an expert opinion as to "comparison". The historical record is silent as to the quality, quantity, and ease of access to trees in the timber berths used for comparison. And since Mr. Sandy is not an expert in forestry, he could not give an opinion that geographic proximity alone made the sales of other timber berths "comparable". Mr. Byford, the only qualified expert to address this issue, testified that geographic proximity alone was an unreliable indicator of comparability.

PART V – RELIEF REQUESTED

96. Whitefish asks this Court to substitute its decision for that of the trial judge by settling the value of the Licence in 1886 at $50,000 and awarding equitable damages based on the compound rates of return earned in the Whitefish Trust Account from 1886 to the date of trial. In the alternative, Whitefish seeks equitable damages in such amount which in this Court's discretion fairly and adequately compensates Whitefish for the Crown's breach of its fiduciary duty. In the further alternative, Whitefish requests a new trial.

97. Whitefish also asks for its costs of this Appeal on a substantial indemnity basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14th day of June 2006.

TORKIN MANES COHEN ARBUS LLP
Barristers & Solicitors
151 Yonge Street, Suite 1500
Toronto, Ontario M5C 2W7

Valerie Edwards (23028D)
David Butt (29407W)
John Rowinski (45512T)

Tel: (416) 863-1188
Fax: (416) 863-0305

Solicitors for the Appellant

R. AARON DETLOR (40420W)
Barrister and Solicitor
P.O. Box 39
Naughton, Ontario P0M 2M0

Tel: (416) 961-5132
Fax: (416) 961-7718

Solicitor for the Appellant

Court File No. C44923

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

WHITEFISH LAKE BAND OF INDIANS

Appellant

-and-

THE ATTORNEY GENERAL OF CANADA

Respondent

CERTIFICATE

I estimate that 4.5 hours will be needed for my oral argument of the appeal, not including reply.

An order under 61.09(2) (original record and exhibits) is not required.

DATED AT TORONTO, ONTARIO this 14th day of June 2006.

TORKIN MANES COHEN ARBUS LLP
Barristers & Solicitors
151 Yonge Street, Suite 1500
Toronto, Ontario M5C 2W7

Valerie Edwards (23028D)
David Butt (29407W)
John Rowinski (45512T)
Tel: (416) 863-1188
Fax: (416) 863-0305

R. AARON DETLOR (40420W)
Barrister and Solicitor
P.O. Box 39
Naughton, Ontario P0M 2M0

Tel: (416) 961-5132
Fax: (416) 961-7718

Solicitors for the Appellant

SCHEDULE A

LIST OF AUTHORITIES

CASELAW

1. *R. v. Badger* (1996), 133 D.L.R. (4th) 324 (S.C.C.).
2. *R. v. Marshall* (1999), 177 D.L.R. (4th) 513 (S.C.C.).
3. *Haida Nation v. British Columbia (Minister of Forests)* (2004), 245 D.L.R. (4th) 33 (S.C.C.).
4. *Wewaykum Indian Band v. Canada* (2003), 220 D.L.R. (4th) 1 (S.C.C.).
5. *Guerin v. The Queen* (1984), 13 D.L.R. (4th) 321 (S.C.C.).
6. *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* (1995), 130 D.L.R. (4th) 193 (S.C.C.).
7. *R. v. Sparrow* (1990), 70 D.L.R. (4th) 385 (S.C.C.).
8. *Semiahmoo Indian Band v. Canada* (1997), 148 D.L.R. (4th) 523 (Fed. C.A.).
9. *Canson Enterprises Ltd. et. al. v. Boughton & Co. et. al.* (1991), 85 D.L.R. (4th) 129 (S.C.C.).
10. *Harrison v. Mathieson* (1916), 30 D.L.R. 150 (Ont. S.C.).
11. *Nilsson Livestock Ltd. v. MacDonald*, [1995] A.J. No. 583 at paras. 3-5 (Q.B.) (QL).
12. *Wallersteiner v. Moir (No. 2)*, [1975] 1 All. E.R. 849 (C.A.).
13. *Brock v. Cole* (1983), 142 D.L.R. (3d) 461 (Ont. C.A.).
14. *Air Canada v. Ontario (Liquor Control Board)* (1997), 148 D.L.R. (4th) 193 (S.C.C.).
15. *Bank of America Canada v. Mutual Trust Co.* (2002), 211 D.L.R. (4th) 385 (S.C.C.).
16. *Claiborne Industries Ltd. v. National Bank of Canada* (1989), 59 D.L.R. (4th) 533 (Ont. C.A.).
17. *Peppiat v, Nicol*, [2001] O.J. No. 2584 (C.A.) (QL).
18. *Lewis v. Todd* (1980), 115 D.L.R. (3d) 257 (S.C.C.).
19. *Calmont Leasing Ltd. v. Kredl*, [1993] A.J. No. 569 (QB).

20. *Toronto Industrial Leaseholds Ltd. v. Posesorski* (1995), 119 D.L.R. (4th) 193 (Ont. C.A.).

21. *Nova Scotia Government and General Employees Union v. Nova Scotia (Public Services)* (2004), 238 D.L.R. (4th) 410 (N.S.C.A.).

OTHER AUTHORITIES

22. A.H. Oosterhoff, Robert Chambers, Mitchell McInnes & Lionel Smith, *Oosterhoff On Trusts: Text, Commentary and Materials*, 6th ed. (Toronto: Thomson Carswell, 2004).

SCHEDULE B

TEXT OF STATUTES, REGULATIONS & BY-LAWS

1. *The Indian Act,* 43 V. 1886, c.28, ss. 55, 70, 71.

55. No license shall be so granted for a longer period than twelve months from the date thereof: and if, in consequence of any incorrectness of survey or other error, or cause whatsoever, a license is found to comprise land included in a license of a prior date, or land not being reserve, or ungranted Indian lands, the license granted shall be void in so far as it comprises such land, and the holder or proprietor of the license so rendered void shall have no claim upon the Crown for indemnity or compensation by reason of such avoidance. 43 V., c. 28, s. 57.

70. The Governor in Council may, subject to the provisions of this Act, direct how, and in what manner, and by whom, the moneys arising from sales of Indian lands, and from the property held or to be held in trust for the Indians, or from any timber on Indian lands or reserves, or from any other source, for the benefit of Indians, (with the exception of any sum not exceeding ten per cent. of the proceeds of any lands, timber or property, which is agreed at the time of the surrender to be paid to the members of the band interested therein,) shall be invested, from time to time, and how the payments or assistance to which the Indians are entitled shall be made or given, -- and may provide for the general management of such moneys, and direct what percentage or proportion thereof shall be set apart, from time to time, to cover the cost of and incidental to the management of reserves, lands, property and moneys under the provisions of this Act, and for the construction or repair of roads passing through such reserves or lands, and by way of contribution to schools attended by such Indians. 43 V., c. 28, s. 70.

71. The proceeds arising from the sale or lease of any Indian lands, or from the timber, hay, stone, minerals or other valuables thereon, or on a reserve, shall be paid to the Minister of Finance and Receiver General to the credit of the Indian fund. 43 V., c. 28, s. 71.

2. *Crown Liability and Proceedings Act*, R.S.C, 1985, c. C-50, ss. 31, 31.1

INTEREST

Prejudgment interest, cause of action within province

31. (1) Except as otherwise provided in any other Act of Parliament and subject to subsection (2), the laws relating to prejudgment interest in proceedings between subject and subject that are in force in a province apply to any proceedings against the Crown in any court in respect of any cause of action arising in that province.

Prejudgment interest, cause of action outside province

(2) A person who is entitled to an order for the payment of money in respect of a cause of action against the Crown arising outside any province or in respect of causes of action against the Crown arising in more than one province is entitled to claim and have included in the order an award of interest thereon at such rate as the court considers reasonable in the circumstances, calculated

(*a*) where the order is made on a liquidated claim, from the date or dates the cause of action or causes of action arose to the date of the order; or

(*b*) where the order is made on an unliquidated claim, from the date the person entitled gave notice in writing of the claim to the Crown to the date of the order.

Special damages and pre-trial pecuniary losses

(3) When an order referred to in subsection (2) includes an amount for, in the Province of Quebec, pre-trial pecuniary loss or, in any other province, special damages, the interest shall be calculated under that subsection on the balance of the amount as totalled at the end of each six month period following the notice in writing referred to in paragraph (2)(*b*) and at the date of the order.

Exceptions

(4) Interest shall not be awarded under subsection (2)

(*a*) on exemplary or punitive damages;

(*b*) on interest accruing under this section;

(*c*) on an award of costs in the proceeding;

(*d*) on that part of the order that represents pecuniary loss arising after the date of the order and that is identified by a finding of the court;

(*e*) where the order is made on consent, except by consent of the

Crown; or

(*f*) where interest is payable by a right other than under this section.

Judicial discretion

(5) A court may, where it considers it just to do so, having regard to changes in market interest rates, the conduct of the proceedings or any other relevant consideration, disallow interest or allow interest for a period other than that provided for in subsection (2) in respect of the whole or any part of the amount on which interest is payable under this section.

Application

(6) This section applies in respect of the payment of money under judgment delivered on or after the day on which this section comes into force, but no interest shall be awarded for a period before that day.

Canadian maritime law

(7) This section does not apply in respect of any case in which a claim for relief is made or a remedy is sought under or by virtue of Canadian maritime law within the meaning of the *Federal Courts Act*.

R.S., 1985, c. C-50, s. 31; 1990, c. 8, s. 31; 2001, c. 4, s. 51; 2002, c. 8, s. 182.

Judgment interest, causes of action within province

31.1 (1) Except as otherwise provided in any other Act of Parliament and subject to subsection (2), the laws relating to interest on judgments in causes of action between subject and subject that are in force in a province apply to judgments against the Crown in respect of any cause of action arising in that province.

Judgment interest, causes of action outside or in more than one province

(2) A judgment against the Crown in respect of a cause of action outside any province or in respect of causes of action arising in more than one province shall bear interest at such rate as the Court considers reasonable in the circumstances, calculated from the time of the giving of the judgment.

1990, c. 8, s. 31; 2001, c. 4, s. 52(E).

3. *Federal Court Act*, R.S.C., 1985, c. F-7, s.36.

> **36.** In adjudicating on any claim against the Crown, the Court shall not allow interest on any sum of money that the Court considers to be due to the claimant, in the absence of any contract stipulating for payment of that interest or of a statute providing in such a case for the payment of interest by the Crown. R.S., c. 10(2nd Supp.), s. 35.