"REFLECTIONS ON WHITEFISH APPEAL"

Prepared by Christopher Devlin

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INTRODUCTION

The question raised in the appeal of *Whitefish Lake Band of Indians v. Canada*,[1] 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 issues on appeal engage the Crown's duty to Aboriginal people. In light of "great Frauds and Abuses" committed in the "purchasing of Lands of the Indians," the Royal Proclamation of 1763 required that lands reserved to the Indian could only be sold to the Crown. This established the *sui generis* relationship between the Crown and Aboriginal peoples. Canada should not be able to escape the full consequences of a breach of that unique duty simply due to the passage of time.

Whitefish is not about interest *per se* i.e. the "cost of money."[2] It is 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.

I had the privilege of representing, along with four other counsel, a group of BC First Nations who intervened in the *Whitefish* appeal. I attended the appeal hearing in early January of this year. Unfortunately, judgment has not yet been delivered. It could be any day. Accordingly, this paper reviews the history of the litigation and the hearing of the appeal. Also discussed is an example of the significance of the *Whitefish* appeal on specific claim, and some final comments on whether the proposed reforms to the Specific Claims process are adequate to address the issues raised in *Whitefish*.

[1] [2006] 3 C.N.L.R. 384 (S.C.C.), hereinafter "*Whitefish*"
[2] "Interest" - an amount that is calculated on an outstanding balance and that accrues over time

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I. THE *WHITEFISH* LITIGATION AND APPEAL HEARING

A. SUMMARY OF FACTS

In 1886, the Whitefish Lake Indian band ("Whitefish") agreed to dispose of the timber on its reservation, by way of surrendering the timber rights to the Crown.

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.

B. THE LITIGATION

In 2002, Whitefish sued Canada for breach of fiduciary duty to obtain a fair value for the timber rights in 1886, which Whitefish claimed were $50,000.

Whitefish claimed that it was entitled to the presumption that the band would have put the money to the highest and best use, which likely would have been in its band trust account with Indian Affairs, which paid compound interest at a rate fixed by law. Whitefish claimed the present value of the timber rights at just over $37 million.

In 2005, Canada admitted that it breached its fiduciary duty in 1886. However, Canada maintained that the actual fair value in 1886 was in the range of $12,600 to $19,400. Canada further argued no equitable compensation is owed because the Crown did not wrongly convert trust funds for its own use, nor did it obtain any benefit from the breach. Canada relied also on Crown immunity not to pay interest until 1992 and then to pay only simple interest.

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As Canada had admitted liability, the only questions at trial were (ii) to determine the fair value of the timber rights and (ii) to translate that fair value in 1886 dollars to 2005 dollars.

C. THE JUDGMENT AT TRIAL

Mr. Justice Wright of the Ontario Superior Court gave judgment on January 24, 2006.

He held that the correct valuation of the timber rights in 1886 was $31,600.

He held that Whitefish would have "dissipated" or wasted the monies it received from the sale of the timber rights.

He also accepted that there was no obligation on the Crown to pay interest until February 1992, when statutory reform required the Crown to pay simple interest on pre-judgment amounts.

He therefore awarded simple pre-judgment interest from 1992 to 2005 on the $31,600. This award accounted for inflation, but not for loss of use of the trust asset. The total award granted was just under $1.1 million (in contrast with the $37 million claimed).

D. THE APPEAL

Whitefish appealed Justice Wright's decision to the Ontario Court of Appeal. The appeal was heard by Justices Laskin, Gillese and Rouleau on January 8th and 9th this year in Toronto.

Whitefish appealed both the valuation of the timber rights in 1886 and the translation of that valuation to 2005 dollars. Canada also made a cross appeal that the valuation should have been only $16,000. However, the valuation of the timber rights in 1886 is quite fact-specific to this

case, and of interest only to those who would wish to explore the different methodologies used by the experts in this case to arrive at their conclusions. It appeared clear at the hearing of the appeal – from statement of all counsel and questions from the judges - that the 1886 valuation would not likely be changed.

What is unquestionably of interest to all First Nations with historic grievances with Canada is the availability of equitable compensation to provide restitution for breach of fiduciary duty by the Crown. It was this key issue that seemed to catch the judges' attention at the hearing.

(i) Interest vs. Damage Awards

It is important to understand the difference between interest and equitable compensation. The common law had a broad abhorrence of "interest" which had its roots in the Christian prohibition on usury. There was a general bar on awards of interest on damage awards and awards of interest against the Crown.

It is also important to know that the term "interest" is not well-defined in our legal system: it has no single definition that is applicable in all situations.

By contrast, the treatment of a damages award, both at common law and at equity, is quite different. The essential principle is that damages are not *calculated* but *assessed*. In other words, the courts do not arrive at damage awards by minutely calculating and summing up every component of the damages but instead apply the appropriate principles and consider the relevant factors in arriving at a global assessment of damages.

While both common law and equitable damages are assessed rather than calculated, different timeframes are used in each case. Historically at common law, one assessed the damages as at

the time the injury was suffered. As a result, that assessment had no regard for the passage of time to the date of judgment. The common law bar on award of interest then operated to prevent a *calculation* of interest from the time of injury to the time of judgment (what we now call pre-judgment interest).

By contrast, an award of equitable compensation was designed to make the plaintiff whole as of the date of judgment – it is restitutionary. With equitable compensation, the court considers not only the value of what was lost at the time of the deprivation, but also the effect of the passage of time on the magnitude of the loss. Thus, equitable compensation, for example, takes into consideration increases in land values, the changes in use of an asset over time and potentially forgone profits.

Equitable damage awards may include an award for lost profits or unrealized investment income that could have been earned absent the deprivation of property. It is important to note that where such an award is made, it is not necessary to award true interest on the damage award itself as the loss of use has already been compensated for in damages. Indeed, interest *per se* would be improper as it would effectively amount to double compensation.

(ii) Significance of Crown-Aboriginal Context

In the context of Aboriginal lands, it must be remembered that the Crown's fiduciary relationship with Aboriginal people serves to protect Aboriginal people from exploitation by non-Aboriginal third parties. The Supreme Court of Canada noted in *Guerin v. R.*[3] that since the time of the *Royal Proclamation of 1763*, the Crown has interposed itself between Aboriginal people and settlers in transactions involving Aboriginal interests – particularly interests related to Aboriginal lands - so as to prevent the Indians from being exploited.

[3] [1985] 1 C.N.L.R. 120 (S.C.C.) hereinafter "*Guerin*"

The historical context for the *sui generis* Crown-Aboriginal relationship is another compelling reason not to restrict equitable compensation to cases only where the Crown has retained an asset or has profited as a result of a breach of its fiduciary duty to a First Nation. As acknowledged by the Supreme Court of Canada in *Wewaykum v. Canada,*[4] the Crown consciously assumed its fiduciary obligations towards First Nations in exchange for an invaluable benefit: the ability to settle and build what is now Canada without conflict with the original occupants of this territory.

Where the Crown permits a third party to take a benefit from First Nation lands without adequate compensation, as in the *Whitefish* case, the Crown has violated a fiduciary obligation of overarching national importance and has acted contrary to the essential purpose of the fiduciary duty at issue. As such, the breach is very serious and should attract full restitution, including compensation for the lost time value of the asset.

(iii) Position Taken by B.C. Interveners

The BC Interveners focused on the *sui generis* nature of the relationship between the Crown and First Nations, particularly when the Crown has control over an asset that it holds on behalf of a First Nation.

The B.C. Interveners submitted that in order to better reflect the general law of equitable compensation and the special Aboriginal context, the following test should apply to determine whether there should be equitable compensation, including an award for unrealized investment income:

[4] [2003] 1 C.N.L.R. 341 (S.C.C.) hereinafter "*Wewaykum*"

> Where an Aboriginal claimant demonstrates that a fiduciary relationship exists between itself and the Crown in respect of the subject matter of a claim, a breach of duty by the Crown in respect of that subject matter will attract equitable remedies designed to achieve full compensation, including equitable compensation for loss of use over time. Exceptions to this general rule might be appropriate if the Crown can show that the breach was unrelated to the purpose of the fiduciary relationship or that another equitable factor should limit compensation.

If the First Nation satisfies this test, the court would then have to assess the appropriate amount to be awarded as equitable compensation, including the appropriate amount for loss of use. Compound interest may be an appropriate method or measurement tool for the court to use when assessing the equitable compensation due to the First Nation.

(iv) At the Hearing Itself – January 8 and 9, 2007

During the oral submissions, the judges' questions focused broadly on the following themes:

- whether there is a substantive difference for this case between trust law and fiduciary law;
- whether a fiduciary has to obtain a benefit from the breach before equitable compensation is available, or was the mere control of the asset by the fiduciary sufficient to attract equitable compensation;
- whether the significant *sui generis* relationship between Canada to Whitefish overcomes the fact that Canada did not receive any benefit from the breach of its fiduciary duty;
- whether compound interest accounted both for inflation and a rate of return;
- whether, when faced with two sustainable approaches, the Court is obliged to choose the one which impairs the Indian interest as little as possible;

- whether Whitefish was entitled to a presumption that the money received would have been put to the "highest and best use" i.e. productive use or whether the Court could account for the dissipation of that money over time
- whether equitable compensation was purely compound interest, or could it be a lesser, "global" assessment;
- whether the compound interest available to Whitefish in its band trust account with Indian Affairs is the best measure of equitable compensation, even though it is not the "highest and best use";

Very little time was spent on the Crown immunity issue at the hearing of the appeal. Once the judges became concerned about the equitable issues at play, they appeared to regard compound interest as merely one way to measure equitable compensation, rather than as interest *qua* interest.

Anticipating the outcome of any case is pure speculation at best. The appeal began with the bench questioning the positions taken by counsel for Whitefish rather aggressively, and ended with similarly aggressive questioning of the positions taken by counsel for Canada.

What is clear is that all three judges understood the legal principles at stake, and realized that this is simply not another trusts or equity case – this appeal is informed by, and must fit within, the principles established by the Supreme Court of Canada respecting the *sui generis* relationship between Canada and First Nations.

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II. SIGNIFICANCE OF WHITEFISH

The BC Treaty First Nations' intervention in the appeal was important because it emphasized to the Ontario Court of Appeal that this case is not only about historic timber or resource claims but has broader implications for First Nations seeking return of lands wrongfully taken.

If the *Whitefish* decision of Justice Wright is upheld, Canada may use this case to justify, or even reduce, its informal policy for calculating interest on all outstanding liabilities to First Nations, including Specific Claims. [5]

However, given that significant liability, if the lower court decision is overturned, it is fair to expect that Canada would seek leave to appeal to the Supreme Court of Canada. The amount of money at stake for the Crown is simply enormous.

At the hearing in Toronto, one DoJ official commented that this is a tremendously important case to Canada. On the facts alone in this appeal there is a spread from $1 million to $34 million. But on other cases, the spread is from $10 million to $150 million or more. If the appeal succeeds, Canada's contingent liability for historical grievances from First Nations will be astronomically expensive.

This may be illustrated by the specific claims brought by seven Treaty 8 First Nations in British Columbia for annuity arrears.[6] Under the terms of Treaty No. 8, a gratuity of $32 was to be paid to each chief, $22 to each headman, and $12 is paid to each band member upon adhesion to

[5] That formula is the "80-20" policy – the formula applies the Consumer Price Index to 80% of all outstanding compensation and the Band Trust Account to 20% of the total. The Consumer Price Index is vastly lower than even the compound interest available for Band Trust Accounts.
[6] In the interests of disclosure and context for these comments, I am counsel for two of the Treaty 8 First Nations involved in the annuity arrears claims.

Treaty. Each subsequent year in perpetuity, annuities are paid calculated on a per capita basis of $5.00 per band member. Seven of the B.C. Treaty 8 First Nations claim that Canada took the benefit of Treaty No. 8 in 1899, but did not pay the First Nations gratuities and annuities until each of them adhered after 1899 (Doig River and Blueberry First Nations in 1900, Fort Nelson First Nation in 1910, Prophet River First Nation in 1911 and Saulteau, Halfway River and West Moberly First Nations in 1914). The First Nations claim that they are owned arrears for certain gratuities and annuities not paid from 1899 to the time of adhesion.[7]

If Whitefish succeeds on its appeal, Canada's potential liability in the Treaty 8 annuity arrears claim for the cost of $5.00 not provided in the early 1900's will be significant; likewise, if the appeal is dismissed, the claim for annuity arrears of $5.00 per year may become almost pointless to pursue given the costs involved.

III. PROPOSED REFORMS TO SPECIFIC CLAIMS PROCESS

Litigation is not always the way to proceed with historic grievances with Canada. First Nations can be faced with significant limitation and evidentiary problems if they pursue their claims in the courts. Not surprisingly, many chose to file specific claims with Canada as an alternative to litigation. However, as we all know, that process is far from perfect.

On June 12, 2007, the Prime Minister announced Canada's new Specific Claim Policy "Justice At Last – Specific Claims Action Plan" to address the backlog of specific claims. The action plan states: "Over the summer of 2007, discussions will take place between federal officials and First Nation leaders as work to implement these changes proceeds. Discussions will focus on transforming the Indian Specific Claims Commission and on shaping the legislation intended for introduction in Fall 2007."

[7] The Minister has rejected the specific claims, and there is now an inquiry before the Indian Claims Commission.

As of the date of writing this paper,[8] draft legislation to implement the action plan had not yet been introduced in the House of Commons. Consequently, this paper only comments on the action plan.

The announced "action plan" has four planks:

- creation of an independent tribunal to bring greater fairness to the process
- more transparent arrangements for financial compensation through dedicated funding for settlements
- practical measures to ensure faster processing on smaller claims and more flexibility for extremely large claims
- refocusing the work of the current Commission to make better use of its services in dispute resolutions once the new tribunal is in place

However, the independent tribunal will not be allowed to address claims valued at over $150 million, land or resources, punitive damages, cultural and spiritual losses, or non-financial compensation. The action plan states: "Decisions of the tribunal would not address claims valued at over $150 million, land or resources, punitive damages, cultural and spiritual losses, or non-financial compensation."

The only reason given is "flexibility." There appears to be no principled reason why an independent tribunal which develops the necessary historical and legal expertise should not be allowed to consider claims of $151 million or more, but can consider claims of $150 million or less. It is an arbitrary number.

[8] October 19, 2007

It is also a misleading one. The B.C. Treaty 8 Annuity Arrears claim illustrates this. The facts are relatively straightforward. Canada never paid all the gratuities and the annuity arrears to the B.C. First Nations which adhered to the Treaty after 1899. If that gives rise to a breach of a lawful obligation, then Canada's own policy respecting settling specific claims according to legal principles would apply. Assuming Whitefish prevails on its appeal, then compound interest would be an available tool to measure equitable compensation (a recognized legal principle) owed to the Treaty 8 First Nations for those gratuities and annuity arrears. What should it matter whether the application of the legal principle results in an amount below or above $150 million?

Whatever the propose legislation ends up being, it does not seem appropriate to use merely the amount of the value of the claim as a threshold issue for the independent tribunal's jurisdiction. This is particularly so in the case of historic specific claims that stretch back a century or two. If the arithmetic used to calculate the appropriate compensation according to legal principles results in a figure higher than $150 million, it seems unjust to rob the independent tribunal of jurisdiction over the claim.

IV. CONCLUSION

As stated above, *Whitefish* is a critical case for all specific claims involving the valuation of historic damages for the loss of use of funds by First Nations. Simply put, the result in *Whitefish* will either make such claims meaningful to First Nations, or almost worthless to pursue.

There is little doubt the Ontario Court of Appeal decision may effect Canada's specific claims policy. There should be even less doubt that the Supreme Court of Canada may yet have something to say about this too.