CITATION: Whitefish Lake Band of Indians v. Canada (Attorney General),
2007 ONCA 744
DATE: 20071101
DOCKET: C44923

COURT OF APPEAL FOR ONTARIO

LASKIN, GILLESE and ROULEAU JJ.A.

BETWEEN:

WHITEFISH LAKE BAND OF INDIANS

Plaintiff (Appellant)
Respondent by Cross-Appeal

and

THE ATTORNEY GENERAL OF CANADA

Defendant (Respondent)
Appellant by Cross-Appeal

and

LAC SEUL FIRST NATION, LAWRYNOWICZ & ASSOCIATES, SNUNEYMUXW FIRST NATION, SNAW-NAW-AS FIRST NATION, MALAHAT FIRST NATION, SONGHEES FIRST NATION, SCI' ANEW FIRST NATION, T' SOU-KE FIRST NATION, PROPHET RIVER FIRST NATION, DOIG RIVER FIRST NATION, FORT NELSON FIRST NATION, WEST MOBERLY FIRST NATION, HALFWAY RIVER FIRST NATION, SAULTEAU FIRST NATION, and WILLIAMS TREATIES FIRST NATION

Intervenors

Valerie A. Edwards, John Rowinski, and Aaron Detlor for the appellant

S. Wayne Morris and Jennifer Roy for the respondent

Joseph E. Magnet for the intervenor, Lac Seul First Nation

Robert J.M. Janes, Allisun Taylor Rana, Christopher G. Devlin, Jefferey R.W. Rath and Murray Browne for the intervenors, Lawrynowicz & Associates, Snuneymuxw First Nation, Snaw-Naw-As First Nation, Malahat First Nation, Songhees First Nation, Sci'Anew First Nation, T' Sou-Ke First Nation, Prophet River First Nation, Doig River First Nation, Fort Nelson First Nation, West Moberly First Nation, Halfway River First Nation, and Saulteau First Nation

Peter W. Hutchins, David Kalmakoff, Julie Corry, and Jameela Jeeroburkhan for the intervenor, Williams Treaties First Nation

Heard: January 8 and 9, 2007

On appeal from the judgment of Justice Blenus Wright of the Superior Court of Justice dated January 24, 2006, with reasons reported at [2006] 3 C.N.L.R. 384.

LASKIN J.A.:

A. OVERVIEW

[1] The Crown breached its fiduciary duty to the Whitefish Lake Band of Indians 120 years ago. The issue on this appeal is whether the trial judge erred in his assessment of compensation for that breach. The facts of this case are straightforward. Its resolution is not.

[2] Whitefish occupies a reserve near Sudbury. In 1886 Whitefish surrendered the timber rights on its reserve to the Crown, which then sold these rights for $316. In 2002, Whitefish sued the Crown for damages for an improvident sale. Shortly before the trial, the Crown admitted that it breached its fiduciary duty by failing to obtain a fair value for Whitefish's timber rights.

[3] The trial judge, Blenus Wright J., was then asked to assess Whitefish's compensation for the Crown's admitted breach. To do so, he had to determine two

issues: first, what was the fair value of the timber rights in 1886; and second, how is that fair value to be assessed in 2005, the date of trial.

[4] On the first issue, the trial judge valued Whitefish's timbers right in 1886 at $31,600. He did so by choosing the highest price paid for comparable timber at a public auction. On the second issue, the trial judge assessed Whitefish's compensation at $1,095,888. In doing so he took into account that the Crown had not profited from its breach of duty and that it had no legal obligation to pay prejudgment interest until 1992. He adjusted the fair value of the timber rights for inflation between 1886 and 1992, and awarded simple interest on that adjusted amount from 1992 to 2005.

[5] Whitefish appeals the trial judge's valuation on the first issue and the Crown cross-appeals. Whitefish contends that the trial judge erred by failing to accept reliable evidence from its own expert, who placed the value of the timber rights in 1886 at $50,000. The Crown contends that the trial judge erred by failing to use a weighted average of the valuations of its expert, which would have produced a figure of $16,000.

[6] On the second issue, Whitefish, supported by the intervenors, contends that the trial judge erred in three related ways. First, it says that the trial judge erred by failing to compensate it in equity for its lost opportunity to have the $31,600 invested for its benefit, and to have the use of the investment income; second, it says that the trial judge erred in law by holding that he could not include compound interest as an element of equitable compensation; and, third, it says that the trial judge's finding that the sale proceeds would have been "dissipated" is contrary to the terms of the surrender, the provisions of the *Indian Act*, R.S.C. 1886, c. 43, and the principles of equitable compensation, and is unsupported by the evidence. Whitefish claims that an award that fairly compensates it for the Crown's breach of fiduciary duty would be in the range of $23 million. The Crown contends that the trial judge's use of inflation and simple prejudgment interest achieved a "fair, equitable and proportionate award" of compensation in an historical claim.

[7] On the first issue, I would not give effect either to Whitefish's appeal or the Crown's cross-appeal. The trial judge did not err in principle in valuing the timber rights in 1886 at $31,600 and I would defer to his valuation. On the second issue, however, I agree with Whitefish's three arguments. I would allow the appeal on this issue and set aside the trial judge's award. Because the record is insufficient, this court cannot substitute its own award for that of the trial judge. I would order a new hearing to determine the equitable compensation to which Whitefish is entitled.

B. BACKGROUND FACTS

[8] Whitefish established the facts and the context for its claim through historical documents. Most of these documents came from government archives. They were assembled by two historians, one from each side.

a) The Robinson-Huron Treaty and the Whitefish Reserve

[9] In 1850, Whitefish signed the Robinson-Huron Treaty, ceding all its land to the Crown, except for the Whitefish Lake Indian Reserve. This reserve is located in northern Ontario, approximately 19 kilometres west of the city of Sudbury, and in 1886 comprised seventy-nine square miles.[1] Today the Whitefish First Nation has 800 members; 350 live on the reserve.

[10] Importantly for this appeal, the Treaty provided that should the "Chiefs and their respective Tribes" wish to dispose of any part of their reserve, or of any valuable "production" on it, the Superintendent-General of Indian Affairs would sell or lease it at their request "for their sole benefit, and to the best advantage".

b) Whitefish's Surrender of its Timber Rights

[11] Although a series of forest fires had swept through the Sudbury District in 1872, by October 27, 1885, James Phipps, the Indian Agent responsible for Whitefish, reported to Sir John A. MacDonald, the Prime Minister and Superintendent-General of Indian Affairs, that "there still remains a large quantity of Pine [on] the Whitefish reserve." Phipps added that "if [the timber was] realized to the best advantage [it] will be of great benefit to the Indians."

[12] The government then took steps to encourage Whitefish to surrender its timber rights to the Crown. In November 1885, Phipps wrote to the Chief suggesting that it was in Whitefish's best interest to do so. In January 1886, the Prime Minister instructed his staff to secure the surrender of the timber rights. In his view it was in the band's interest that the timber be sold before it was destroyed by fire. In July 1886, Phipps wrote to the Prime Minister to report that Whitefish had surrendered its timber rights.

[13] The surrender document stipulated that Whitefish had surrendered "the whole of the merchantable timber" on terms that "ten per cent of the bonus derivable from the sale of the said timber [is] to be divided among the said band, the remainder of the proceeds

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[1] It now comprises about sixty-eight square miles.

[are] 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." [Emphasis added.] Thus, by the terms of the surrender, the Crown agreed to distribute ten per cent of the sale proceeds to members of the band and to invest the remaining ninety per cent for the benefit of present and future band members.

c) The Crown's Sale of the Timber Rights

[14] In the fall of 1885, two men, Honoré Robillard, a Conservative member of the Ontario Provincial Legislature, and Joseph Riopelle, head of a well-known lumbering firm, expressed an interest in acquiring a licence to cut timber on the Whitefish reserve. In October 1885, Riopelle applied for a timber licence. Later correspondence from the Department of Indian Affairs regarding the timber licence was addressed to Robillard and answered by him. In this correspondence, Riopelle was referred to as Robillard's partner.

[15] The Prime Minister decided that the timber rights should be sold to Robillard. On October 14, 1886 the government sold the licence to Robillard for a "bonus" of $316 or $4 per square mile. The money was deposited into the Whitefish trust account maintained by the government. The government did not hold a public auction or any other competitive process. At the time $4 per square mile was the standard rate the federal government charged for timber licences, whether for reserve land or Crown land.

d) The Furor Over the Sale to Robillard

[16] Within a year of the sale to Robillard, the licence was assigned twice – first to Alexander Barnet, reportedly for $43,000, and then to J.H. Francis, reportedly for between $50,000 to $55,000.

[17] These reported prices triggered a political furor. In June 1887, soon after the licence was assigned to Francis, John Barron, an opposition Liberal member of Parliament, raised concerns in the House of Commons about the sale of the licence to Robillard. In February 1888, a periodical, *The Canada Lumberman*, reported that Robillard had resold the timber rights for $55,000. In January 1889, *The Toronto Globe* published an article entitled "Swindled Indians", which criticized the amount Robillard had paid for the licence and the lack of a public auction.

[18] In April 1889, the controversy resurfaced in the House of Commons. Barron claimed that Robillard had profited improperly, earning as much as $50,000 from the flip of the licence. Robillard, however, denied that he had received anything. Finally, in June

1891, *The Canada Lumberman* wrote that Robillard had sold his half interest in the licence for $15,500 and that Riopelle had later sold his half interest for $27,500.

[19] The Crown did not investigate the sale prices to Barnet and Francis. Instead, it renewed the licence annually until, by 1903, the timber on the reserve was virtually exhausted.

e) This Action: Pre-Trial Matters

[20] In 2004, Whitefish brought a motion in this action for partial summary judgment. The motion was resolved by minutes of settlement signed by both sides. Two important terms of the minutes of settlement were: first, the Crown agreed to abandon any limitation, laches, or s. 35 of the *Trustee Act*[2] defences; and second, the Crown admitted that in principle it owed a fiduciary duty to Whitefish and Whitefish acknowledged that "the scope and nature of that fiduciary obligation" was to be determined by the trial judge. The Crown's admission was grounded in the case law. Because it assumed discretionary control over Whitefish's timber rights, it had a fiduciary obligation to act in the band's best interest when dealing with those rights. See *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 at paras. 17-18; *Wewaykum Indian Band v. Canada*, [2004] 4 S.C.R. 245 at para. 79.

[21] The action was scheduled for trial in late November 2005. Less than a week before trial, in a letter sent by his lawyer to Whitefish, the Attorney General of Canada admitted that in 1886 the Crown had breached its fiduciary duty by failing to obtain fair value for the timber licence.

C. ANALYSIS

First Issue: Did the trial judge err in determining that the fair value of Whitefish's timber rights in 1886 was $31,600?

[22] Both Whitefish and the Crown relied on expert evidence to value Whitefish's timber rights in 1886. Each asks us to prefer the opinion of its expert over the finding of the trial judge. I decline to do so. There is no basis to interfere with the finding of the trial judge.

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[2] R.S.O. 1990, c. T.23. Under s. 35 the court may relieve a trustee from personal liability for a "technical" breach of trust.

[23] Whitefish produced the opinion evidence of Bruce Byford, an experienced professional forester. Byford looked at the Crown's historical timber harvest records. He concluded that the "bonuses" of $43,000 and $55,000 reportedly paid by Barnet and Francis for the timber licence represented a reasonable estimate of its fair value in 1886. He said that the licence was likely worth about $50,000.

[24] The Crown produced the opinion evidence of Robert Sandy, a valuation expert with PriceWaterhouseCoopers. Sandy concluded that the value of the timber licence in 1886 fell between $12,600 and $19,400. He reached that conclusion by comparing nine timber sales near Whitefish between 1881 and 1886. These timber sales ranged from a bonus of $0.45 per square mile to a bonus of $400 per square mile. He then calculated the weighted average of all nine sales – $159.22 per square mile – to arrive at his fair value figure of $12,600 (79 X $159.22). He calculated the weighted average of the five sales that took place in 1885 – $245.54 – to arrive at his fair value figure of $19,400 (79 X $245.54).

[25] The trial judge rejected Byford's opinion evidence. In his view, Byford was merely trying to support the prices allegedly paid by Barnet and Francis. Yet these prices were "unreliable".

[26] The trial judge accepted the comparison methodology used by Sandy as "relevant and persuasive". However, he did not agree with Sandy that the prices obtained in the comparable sales should be averaged to determine the fair value of Whitefish's timber rights. Instead, the trial judge chose the highest comparable sale price – $400 per square mile – which yielded a fair value for Whitefish's timber rights of $31,600 (79 X $400). The trial judge justified his use of the highest comparable sale price on two grounds: the government failed to examine how much timber was on the Whitefish reserve, and the government failed to investigate whether Robillard had paid too little for the licence.

[27] Whitefish submits that the trial judge erred by rejecting its expert opinion evidence. The Crown submits that the trial judge erred by choosing the highest comparable price instead of an average of the sale prices. I do not accept either submission.

[28] A trial judge's damages or compensation assessment is entitled to considerable deference on appeal. An appellate court should interfere with that assessment only if it is tainted by an error in principle, or is unreasonably high or low. See *Guerin v. The Queen*, [1984] 2 S.C.R. 335 at 391, Dickson J. and at 363, Wilson J., aff'g [1982] 2 C.N.L.R. 83 (Fed. T.D.); *Woelk v. Halvorson*, [1980] 2 S.C.R. 430 at 435-6.

[29] Neither Whitefish nor the Crown has established a basis for interfering with the trial judge's valuation of $31,600. The trial judge's valuation turns on three points: his

rejection of Byford's opinion; his acceptance of Sandy's methodology; and, his use of the highest comparable sale price instead of an average of comparable sales.

[30] The trial judge properly rejected Byford's opinion. Byford relied on the reported prices paid by Barnet and Francis, which appeared in the press and in Hansard, but were never verified. Whitefish's own historian, Fred Hosking, acknowledged that the assertions made by Barron in the House of Commons, and repeated in *The Canada Lumberman* and *The Toronto Globe*, were "inherently unreliable".

[31] Sandy's methodology of using comparable sale prices to value Whitefish's timber rights was far more reliable. Whitefish contends, however, that the absence of information on the quality, quantity, and ease of access of the timber in the comparable sales undermined the reliability of Sandy's approach. That information would no doubt have been helpful, but even without it, several factors, all noted by the trial judge, supported the reliability of Sandy's use of comparable sales:

- The sales of each of the comparables took place at a competitive public auction;
- Each sale was of a timber berth near the Whitefish reserve;
- Prospective purchasers had adequate information about the timber in advance of each auction;
- Each sale took place in a time period close to the date of the sale of Whitefish's timber rights to Robillard; and
- The sale price of each comparable was recorded in the public record.

[32] In my view, the trial judge was justified in rejecting Sandy's weighted average figure and instead using the highest comparable sale price. The Crown had a fiduciary obligation to sell Whitefish's timber rights at fair value, or in the words of the Treaty, to "the best advantage". Consistent with that obligation it should have investigated whether it had obtained fair value once reports surfaced about the later sales to Barnet and Francis. The Crown's failure to undertake more than a perfunctory investigation by itself supported the trial judge's use of the highest comparable figure. I would not give effect to the appeal or the cross-appeal on the first issue.

Second Issue: Did the trial judge err in his assessment of Whitefish's compensation?

a) The trial judge's award and the parties' positions on appeal

[33] At trial, Whitefish sought equitable compensation for the loss of its opportunity to invest the fair value of its timber rights. It contended that the court should presume the sale proceeds would have been invested in the Whitefish trust account maintained by the government, where it would have earned compound interest. It relied on an expert's report, which, based on an 1886 valuation of $31,600 for its timber rights, assessed the band's compensation in 2005 at approximately $23 million. The Crown contended that Whitefish would be fairly compensated by awarding it in 2005 the amount of money it should have been paid in 1886 adjusted for inflation.

[34] The trial judge substantially accepted the Crown's contention. He adjusted the figure of $31,600 for increases in the Consumer Price Index between 1887 and 1992. In 1992, amendments to the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 obligated the Crown to pay prejudgment interest on money that it owed in accordance with provincial legislation. The trial judge therefore took the 1992 inflation adjusted figure and on that amount allowed simple prejudgment interest of five per cent per year to the date of trial. The total compensation he awarded equalled $1,095,888 plus costs.

[35] The trial judge rejected Whitefish's claim for unrealized investment income for three reasons. First, he rejected Whitefish's position that the $31,600 would have been deposited in the trust account and remained there. In his view, that position was "highly improbable" and "not realistic". Instead he found it likely that the $31,600 would have been deposited in the trust account and then "dissipated" within a reasonable time.

[36] Second, the trial judge concluded that the payment of compound interest before 1992 was precluded by the Crown's historical immunity from paying interest.

[37] Third, the trial judge concluded that compound interest in equity was not available because the Crown did not wrongly convert trust funds for its own use and did not benefit from any breach of its duty. In the trial judge's words, "it simply failed to perform its duty".

[38] In this court, Whitefish submits that each of the three reasons the trial judge gave for denying it equitable compensation reflects an error in principle. Whitefish acknowledges that the court should award an amount that is "fair and proportionate", but says that, as a starting point, it should use the amount generated by investing $31,600 in the trust account at compound rates of interest. That starting point, Whitefish argues, gives effect to the provisions of the *Indian Act*, the Treaty and the surrender, to the government's practice, and to equity's presumption that the money Whitefish should

have been paid would have been put to the most profitable use. If this court agrees that the trial judge committed a reviewable error, Whitefish asks us to fix the compensation to which it is entitled, rather than send its claim back for a new trial or an assessment.

[39] The Crown submits that the trial judge's approach and his award were fair and proportionate. However, if this court disagrees, like Whitefish, the Crown asks us to fix compensation rather than order a new hearing.

b) My approach

[40] For reasons that I will elaborate on, I agree that Whitefish is entitled to equitable compensation for the Crown's breach of fiduciary duty. It is entitled to be put in the position it would have been in but for the Crown's breach. Had the Crown fulfilled its fiduciary duty, it would have invested ninety per cent of the $31,600 in the Whitefish trust account. That money would have earned investment income, which would have been available for Whitefish and its members.

[41] The trial judge's award does not fairly compensate Whitefish for the money the Crown failed to obtain, invest, and hold for Whitefish and its members. It does not do so because it is tainted by the three errors Whitefish alleges. That the Crown did not profit from its breach does not preclude taking compound interest into account as an element of equitable compensation. That the Crown was not obliged to pay prejudgment interest similarly does not preclude an award of compound interest as an element of equitable compensation. And a finding that any money invested would soon have been "dissipated" is both unsupported by the record before the trial judge and contrary to the principles governing equitable compensation. Because the trial judge's award is tainted by these three errors in principle, it cannot stand.

[42] Ordinarily, the appropriate remedy is a new hearing or a reference on compensation. Neither side, however, want a new hearing, and both have urged us to fix compensation doing the best we can with the available evidence.

[43] If the evidentiary record and the expert reports provided an adequate footing to fix an appropriate award, I would attempt what the parties have asked us to do. However, the record is either silent or inadequate on so many considerations relevant to a "fair and proportionate" award, that to do justice to both parties a new hearing is required.

[44] We do, however, have sufficient evidence on some matters. For example, as a starting point, I think we can assume that the Crown would have complied with the terms of the surrender by distributing ten per cent of the $31,600 to the members of the band and investing ninety per cent in the Whitefish trust account. Also, the record does show

that at least since 1969, money in band trust accounts earned compound interest at rates prescribed by successive Orders-in-Council.

[45] Beyond that, the record is meagre, conflicting, or non-existent. For example, we do not know definitively whether money in the account earned compound interest for the entire 120 year period, or only for part of that period. Also, as we only have account records for four years, we do not know how much money remained in the account over that period, how much was spent annually, and what it was spent on.

[46] Because the record is unsatisfactory, I would order a new hearing limited to determining the award of equitable compensation Whitefish was entitled to in 2005 for the Crown's failure to obtain $31,600 for Whitefish's timber rights in 1886. In the last section of these reasons, I will set out some of the matters the parties may wish to address at the new hearing.

c) Whitefish is entitled to equitable compensation for its lost opportunity to invest the fair value of its timber rights and receive the investment income

[47] Whitefish submits that it is entitled to equitable compensation for the Crown's breach of fiduciary duty. Whitefish further submits that an award of equitable compensation should recognize its lost opportunity to have the fair value of its timber rights invested for its benefit, and to receive the investment income for its use and the use of its members. It contends that the trial judge erred in principle by failing to award any compensation for this lost opportunity caused by the Crown's breach of fiduciary duty.

[48] Equitable compensation is equity's "counterpart" to common law damages. Its quantum is "determined by analogy with the principles of trust law": see *Guerin* at 390, Dickson J. Its aim is compensatory. Its object is to restore the plaintiff to the position that the plaintiff would have been in had the fiduciary not breached its duty. See *Canson Enterprises Ltd. v. Boughton Co.*, [1991] 3 S.C.R. 534 at 578-579; *Guerin* cited to C.N.L.R. at 121. See also Oosterhoff *et al.*, *Oosterhoff on Trusts*, 6th ed. (Scarborough, Ont.: Carswell, 2004) at 1044, 1047; Donovan W.M. Waters, ed., *Waters' Law of Trusts in Canada*, 3rd ed. (Toronto, Ont.: Carswell, 2005) at 1215-1217; Peter D. Maddaugh and John D. McCamus, *The Law of Restitution*, looseleaf (Aurora, Ont.: Canada Law Book, 2004) at 5-50 – 5-56.

[49] Equitable compensation and common law damages differ in three important ways bearing on this appeal: first, while the purpose of equitable compensation is to put the plaintiff in the position it would have been in but for the breach, the purpose of common law damages is to restore the plaintiff to its original position; second, equitable compensation is assessed at the date of trial while common law damages are assessed at

the date of the breach; and third, equity presumes that the trust funds will be invested in the most profitable way or put to the most advantageous use. See Oosterhoff, *supra*.

[50] Here, as I have said, Whitefish submits that an award of equitable compensation should recognize its lost opportunity to have invested the asset it was deprived of – the fair value of its timber rights – and to receive the income on that investment. It contends that the trial judge erred in principle by failing to award any compensation for this lost investment opportunity, and therefore did not restore it to the position it would have been in if the Crown had fulfilled its fiduciary duty. I agree.

[51] In my view, this is an appropriate case to award equitable compensation. Modern jurisprudence of the Supreme Court of Canada has emphasized that remedies for breaches of fiduciary duty should be flexible. Not every breach of fiduciary duty attracts the remedy of equitable compensation: see *Canson* at 574-575. The remedy chosen should be the most appropriate one on the facts of the case. In considering the appropriate remedy, the court should look at the harm suffered from the breach: see *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377. Or, in the words of Binnie J. in *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142 at para. 26, the remedy must meet "underlying policy objectives."

[52] In my view, there are two compelling, and indeed, unanswerable justifications for awarding Whitefish equitable compensation, measured by its lost opportunity to have the fair value of its timber rights invested by the government and to receive the investment income. The first is the Supreme Court of Canada's holding in *Canson* that a fiduciary's discretionary control of a beneficiary's property attracts an award of equitable compensation. The second is the Supreme Court of Canada's affirmation of an award of equitable compensation in *Guerin* on facts similar to those in the present case.

[53] Under *Canson*, when a fiduciary who has discretionary control of a beneficiary's property breaches its duty to the beneficiary, an award of equitable compensation is justified. Thus, here, the Crown's breach of fiduciary duty when it had discretionary control over the sale of Whitefish's timber rights and the sale proceeds rightfully attracts an award of equitable compensation. Moreover, the appropriateness of equitable compensation is reinforced by two related considerations: the nature of the fiduciary duty that was breached, and the nexus between the breach and the loss.

[54] In his majority judgment in *Canson* at 578, La Forest J. drew a distinction – a "sharp divide" – between two classes of fiduciary duties. In one class are cases where the property in question belongs to the beneficiary but is controlled by the fiduciary. In the other class are cases where the fiduciary is merely required to perform its duty honestly and in accordance with its undertaking. La Forest J. stressed that these two classes of cases engage different policy objectives. Only in the first class of cases where the

fiduciary controls the property of the beneficiary and equity's concern is to compensate for what the property would be worth, should equity use its well recognized flexibility to achieve a different and fairer result.

[55] Whitefish can legitimately claim the benefit of equity's remedial flexibility because the Crown directed the sale of the band's timber rights and had discretionary control over the sale proceeds. Both the *Indian Act*, 1886 and the Treaty prohibited Whitefish from selling its timber rights directly to a third party. The Crown was interposed between Whitefish and the purchaser (Robillard) for the historical purpose of preventing the band from being exploited.

[56] Thus, once it agreed to sell its timber rights, Whitefish surrendered those rights to the Crown. Under the Treaty, the Crown was obliged to sell these rights to "the best advantage". The Crown sold the rights to Robillard and received the sale proceeds. Section 70 of the *Indian Act*, 1886 and the surrender similarly obliged the Crown to invest the proceeds for the benefit of the band members and their descendants. The Crown met this obligation by depositing the proceeds in a trust account, which it maintained and controlled for the benefit of Whitefish. Unquestionably, the Crown had discretionary control over the sale of Whitefish's timber rights and the proceeds received from that sale.

[57] The Crown's fiduciary duty to our Aboriginal people is of overarching importance in this country. One way of recognizing its importance is to award equitable compensation for its breach. The remedy of equitable compensation best furthers the objectives of enforcement and deterrence. It signals the emphasis the court places on the Crown's ongoing obligation to honour its fiduciary duty and the need to deter future breaches.

[58] The nexus between the Crown's breach and Whitefish's loss also supports an award of equitable compensation. In some breach of fiduciary duty cases – *Canson* is an example – equitable compensation will not be warranted because there is no direct connection between the breach and the loss. In this case, however, the Crown's discretionary control over the sale and the sale proceeds led directly to the Whitefish's loss. Equitable compensation is thus the appropriate remedy.

[59] The second justification for an award of equitable compensation is the Supreme Court of Canada's decision in *Guerin*. In *Guerin*, the most directly applicable case, the Supreme Court of Canada affirmed the trial judge's application of trust principles in awarding an Aboriginal band equitable compensation for the Crown's breach of fiduciary duty. The facts giving rise to the Crown's breach were straightforward. The Crown leased surrendered reserve land to a golf club on terms less favourable than those

authorized by the band. The trial judge, Collier J., then had to decide the band's compensation for the Crown's breach.

[60] He concluded that the band should be compensated for its lost opportunity to develop the surrendered land in the most advantageous way, which in his view was as a residential subdivision. His award of $10 million was upheld by the Supreme Court of Canada. In his majority decision at 386, Dickson J. said that although the Crown was not a trustee, its fiduciary duty to the Aboriginal people was "trust-like". Thus, compensation for a breach of its duty should be measured by principles similar to those that govern the law of trusts. And, in her concurring reasons, at 361-3, Wilson J. endorsed the compensatory nature of the remedy given by the trial judge – the lost opportunity for residential development because of the Crown's breach.

[61] *Guerin* concerned land and *Whitefish* concerns timber rights. But, in substance, Whitefish's claim in this case is no different from the band's claim in *Guerin*. Each band sought equitable compensation measured by the lost opportunity to use its asset because of the Crown's breach of fiduciary duty. In *Guerin*, the lost opportunity was the opportunity to develop its land. In *Whitefish*, the lost opportunity was the opportunity to sell its timber rights at market value, to have the proceeds of the sale invested by the government in an interest bearing trust account, and to receive the investment income. Equitable compensation was awarded to the band in *Guerin*. It should be awarded to Whitefish in this case as well.

[62] In failing to apply the principles from *Canson* and *Guerin*, the trial judge committed a fundamental and reviewable error. Even so, the Crown argues, we should not disturb the trial judge's award for two reasons: first, even in equity, the Crown cannot be liable for compound interest; and, second, the trial judge's finding of "dissipation" is reasonable. Therefore, the Crown submits, the trial judge's award of approximately $1 million is a generous award for the Crown's breach. I will deal with these two issues raised by the Crown.

d) Equitable compensation for the Crown's breach can include the payment of compound interest

[63] Whitefish argues that its lost opportunity was the opportunity to have the $31,600 invested in the trust account maintained by the government for its benefit. It submits that investment would have earned compound interest at rates prescribed by successive Orders-in-Council. Whitefish says that at least as a starting point, the accumulated amount of capital and interest is the equitable compensation to which it is entitled. In other words, Whitefish is not seeking merely the money that it should have had in 1886, which is substantially what the trial judge awarded. Instead, it claims the amount that the

money, if invested at compound rates of interest, would have generated with the passage of time.

[64] Of course, both compound interest and simple interest account for the time value of money. The difference between the two is this: compound interest is interest on the accumulated principal and interest; simple interest is interest on the principal alone. See *Bank of Montreal v. Mutual Trust*, [2002] 2 S.C.R. 601 at paras. 23-24.

[65] The Crown argues that an award of equitable compensation cannot include compound interest. It makes two points in support of its position. First, it says Whitefish is not entitled to compound interest in equity because, as the trial judge found, the Crown did not deliberately breach its fiduciary duty and it did not profit from its breach.

[66] Second, the Crown says Whitefish's lost opportunity was the loss of use of the money ($31,600) in 1886. Ordinarily, a plaintiff is compensated for loss of use of money by an award of prejudgment interest on that money. However, because of the Crown's common law and historic immunity from paying interest, such an award – whether simple interest or compound interest – was not available against the Crown until 1992. Therefore, by law, the trial judge was limited to awarding Whitefish compensation equivalent to what $31,600 was worth in 2005.

[67] I will first discuss why I accept – with qualifications – Whitefish's position. I will then address the Crown's contrary arguments.

(i) Whitefish's compensation is determined by asking what likely would have happened if the Crown had not breached its duty

[68] To compensate Whitefish for its lost opportunity, the key question the court must answer is what likely would have happened if the Crown had acted as it should have and had not breached its fiduciary duty.[3] The answer lies partly in the obligations imposed on the Crown by statute and the surrender, in the way the Crown managed money derived from the sale of reserve land or timber rights on reserve land, and in the principles of equitable compensation.

[69] The Crown's statutory and surrender obligations dictate the starting point for fixing Whitefish's compensation. Both obligated the Crown to invest ninety per cent of the $31,600 for the benefit of Whitefish and its members. The court should presume that the Crown would have honoured its legal obligations.

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[3] In *Guerin* cited to C.N.L.R. at 121, the trial judge asked the same questions. As I have said, the Supreme Court of Canada approved his approach.

[70] Under s. 70 of the *Indian Act*, 1886 the Crown was required to invest at least ninety per cent of any money obtained from the sale of timber on an Indian reserve.[4] "How and in what manner" it invested the money was within its discretion:

> 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 the 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. [Emphasis added.]

[71] The surrender document reiterated the Crown's statutory obligation: ten per cent of the bonus from the sale of Whitefish's timber was to be divided among band members; the remainder was to be invested for the benefit of the members and their descendants.

[72] The Crown's practice in managing Indian money also dictates where it likely would have invested the money obtained from the sale of Whitefish's timber rights. It was the Crown's practice to invest the proceeds of sale of timber rights on reserve land in a trust account it maintained and controlled for the band's benefit. That is what the Crown did with the $316 it received from the sale of Whitefish's timber rights to Robillard. Contemporaneous banking records produced at trial show that the Department of Indian Affairs maintained a Whitefish Lake Indians account, which was divided

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[4] The express reference to investment in s. 70 of the *Indian Act* was eliminated when the statute was substantially revised in 1951: see S.C. 1951, c. 29. However, the Crown's investment obligation under the surrender was never altered.

between capital and interest.[5] The record for the fiscal year ending June 30, 1887 shows $316 in Whitefish's capital account. Undoubtedly, if the Crown had obtained $31,600 from the sale of Whitefish's timber rights – as the trial judge found it should have – that amount, or more likely ninety per cent of that amount, would have been deposited in Whitefish's capital account.

[73] To give effect to what likely would have happened, I think it fair to assume that money in the Whitefish account would have earned interest at rates prescribed by successive Orders-in-Council and compounded for some, if not all, of the 120 year period. The evidence to support this assumption comes from the Manual for the Administration of Band Moneys, prepared by the federal government's Indian Moneys Directorate and produced as an exhibit at trial.

[74] The Manual shows that the Crown used the market yields of long-term Government of Canada bonds as a basis for the interest it paid. Appendix B to the Manual sets out the interest rates paid on Indian capital and revenue accounts from Confederation to the present. These rates were, and continue to be, fixed periodically by Order-in-Council.

[75] Significantly, Appendix B also addresses how interest was calculated. Appendix B states that from April 1, 1969 to March 31, 1980 interest on money in band capital and revenue accounts was compounded annually "and the resulting interest was credited to the Band Revenue Account in the beginning of the fiscal year". From April 1, 1980 forward, interest was compounded semi-annually.

[76] However, the position that Whitefish urges on us must be qualified in two ways. These qualifications are among the reasons why a new hearing is necessary.

[77] The first qualification concerns whether the Crown paid compound interest on money in band trust accounts between 1886 and 1969. The Manual itself does not address how interest was calculated before April 1, 1969. However, two pieces of evidence do, and they are in conflict. One piece of evidence appears in the report of David Cornfield of Deloitte & Touche LLP, the expert retained by Whitefish to value its loss. Cornfield's report states that interest on band accounts has been compounded since Confederation:

> Appendix B of the Manual did not specify how interest was calculated prior to April 1, 1969, but indicated that the annual interest rate was fixed by the Order-in-Council over this period. However, based on a facsimile received and

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[5] The interest account is now called the revenue account.

> discussions held with representative of the Department of Indian and Northern Affairs, it has been indicated to us that interest on Band Accounts has been calculated on a compound basis since Confederation.

[78] Although the Crown did not dispute this part of Cornfield's report, the records in evidence for the Whitefish trust account do not seem to support his statement. The Crown filed in evidence the Whitefish account records for only four fiscal years: the years ending June 30 of 1887, 1888, 1889, and 1890. As I have said, the records show that the $316 derived from the sale of Whitefish's timber rights went into the capital account. But, while the records explicitly show entries for "Interest on invested capital", they show no entries for "Interest on invested interest". The records also do not show that the "Interest on invested capital" was put into the capital account to earn interest. Whether the Crown paid or should have paid compound interest on band accounts for some or all of the period 1886 – 1969 is a matter that should be clarified at the new hearing.

[79] The second qualification concerns whether the annual interest that would have been earned on the invested sale proceeds of Whitefish's timber rights would have stayed in the account to be compounded or would have been paid out to the band and its members. I will return to this question when I deal with the trial judge's finding of "dissipation". Here, I observe only that we cannot tell what likely would have happened over time because neither side filed Whitefish account records for the period 1891 – 2005. This too is a matter that should be clarified at a new hearing.

[80] Subject to these two qualifications, however, I think it fair to conclude that if the Crown had fulfilled its fiduciary duty in 1886, it would have received $31,600 for the sale of Whitefish's timber rights; it would have deposited ninety per cent of that amount ($28,440) in Whitefish's capital account; it would have paid interest on whatever money was in Whitefish's account at rates stipulated by successive Orders-in-Council; and at least it would have compounded the interest annually between April 1, 1969 and March 31, 1980, and semi-annually afterwards.

[81] This likely scenario is also consistent with the principles of trust law, which, according to *Guerin*, govern Whitefish's claim in equity. It establishes a framework for restoring Whitefish to the position it would have been in but for the Crown's breach of fiduciary duty. It results in an assessment of Whitefish's compensation at the date of trial, not at the date of breach.

[82] Whitefish also argues this scenario is consistent with equity's presumption that the proceeds of sale of Whitefish's timber rights would have been invested in the most profitable way or put to their most advantageous use. This presumption, however, does

not come into play because we know what the Crown would have done with the fair value of these rights. It would have invested ninety per cent in the trust account it maintained for the band and distributed the rest to the band members. And that is all Whitefish asks for. Thus, we need not address the issue that confronted the Federal Court of Appeal in *Ermineskin Indian Band and Nation v. Canada*, [2007] 3 F.C.R. 245. There the band argued that the Crown had a duty to invest its money – oil and gas royalties – as a common law trustee would do, in income earning property. The majority of the court rejected the band's argument.

(ii) An award of equitable compensation that includes compound interest is not barred by the nature of the Crown's breach or the Crown's historic immunity from paying interest

[83] I turn now to the Crown's two submissions on why, even in equity, the court cannot award compound interest. First, the Crown submits that compound interest is not available in equity because, as the trial judge found, it did not deliberately breach its fiduciary duty, convert Whitefish's money for its own use, or profit from its breach. Second, the Crown submits that compound interest cannot be awarded as an element of equitable compensation because of the Crown's historic immunity from paying interest.

[84] On the first issue, Whitefish challenges the findings of the trial judge and asks us to substitute a finding that the Crown's breach was "wilful, egregious and unconscionable". I see no basis to do so. The trial judge's findings are entitled to deference, and on the record before him, were reasonable.

[85] Nonetheless, I do not think that the trial judge's findings assist the Crown in avoiding an award of compound interest as an element of equitable compensation. Entitlement to equitable compensation does not require the Crown to have profited from its breach or to have intentionally conducted itself wrongfully. Equity is engaged because the Crown had discretionary control over the sale of Whitefish's property and over the sale proceeds, which it was required to invest for the band's benefit. See *Canson* at 573-574. The nature of the Crown's breach of duty does not afford a defence to an award of equitable compensation that includes compound interest, if compound interest is required to restore Whitefish to the position it would have been in the Crown had fulfilled its duty.

[86] The Crown's second submission on why the court cannot award compound interest as an element of equitable compensation rests on its historic immunity from paying interest. At common law, absent a statutory or contractual requirement to do so, the Crown was not obligated to pay interest on money that it owed: see *The King v.*

Carroll, [1948] S.C.R. 126. In 1971, this common law principle was codified in s. 35 of the *Federal Court Act*, R.S., c. 10 (2nd Supp.):

> 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.

[87] In 1992, however, amendments to the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 eliminated the Crown's immunity from paying interest. Section 31(1) of that act allows for prejudgment interest on money owed by the Crown in accordance with provincial legislation:

> 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.

Section 31(6) stipulates that the section allowing for prejudgment interest is not retroactive. In his award for compensation, the trial judge relied on the Crown's immunity from paying prejudgment interest before 1992. For the period from 1992 to the date of trial, the trial judge awarded prejudgment interest under s. 128 of the *Courts of Justice Act*, R.S.O. 1990, c. C-43.

[88] Whitefish submits that this immunity does not prevent the court from awarding compound interest as an element of equitable compensation. The Crown submits that Whitefish cannot avoid the Crown's immunity by re-characterizing its claim as one for equitable compensation. In effect, the Crown says that the court cannot do indirectly what it is prohibited from doing directly.

[89] I agree with Whitefish's submission and would hold that the Crown's common law and statutory immunity from paying interest does not preclude the inclusion of compound interest as an element of an award of equitable compensation. An award of equitable compensation that includes compound interest differs fundamentally from prejudgment interest on a damages award. Although the case law on this issue is limited, my holding is supported in both this court and the Federal Court trial division. Further, I disagree with the Crown's argument that this holding is contrary to *Guerin* and this

court's decision in *Gorecki v. Canada (Attorney General)* (2006), 265 D.L.R. (4th) 206 (C.A.). *Guerin* supports my position and *Gorecki* is distinguishable.

[90] Equitable compensation differs from prejudgment interest. In equity, compensation is assessed, not calculated, and it is assessed at the date of trial, not the date of injury or breach. In an appropriate case, compound interest may form part of that assessment. The assessment does not necessarily involve a mathematical calculation. But to give effect to equity's objective of putting the beneficiary in the position it would have been in but for the fiduciary's breach of duty, equity's assessment may take compound interest into account. For example, in this case an award that takes compound interest in account may be needed to fairly compensate Whitefish for its lost opportunity caused by the Crown's improvident sale of the band's timber rights.

[91] By contrast, prejudgment interest – under, for example, the *Courts of Justice Act* – is a straight, linear calculation. It is added to a successful party's claim, virtually as of right, at a rate specified in advance and calculated from the date of injury or breach to the date of judgment. Prejudgment interest does not form part of the court's assessment of an appropriate damages award. In short, a claim for compound interest as an element of equitable compensation is not a claim for prejudgment interest, and therefore is not barred by the Crown's pre-1992 immunity.

[92] Implicitly, if not explicitly, the decision of this court in *Brock v. Cole* (1983), 40 O.R. (2d) 97 endorses the distinction between compound interest as an element of equitable compensation and prejudgment interest on a damages award. There, at 102, the court held that the provisions of the *Judicature Act*, R.S.O. 1980, c. 223 (the predecessor to the *Courts of Justice Act*), which gave a right to prejudgment interest but excluded compound interest, did not oust "the well-recognized principles of equity, to award interest including compound interest in those cases where it is just and appropriate to do so."

[93] Admittedly, there is scant direct authority on this issue. Two Federal Court trial judgments, however, take the same position. In *Lower Kootenay Indian Band v. Canada* (1991), 42 F.T.R. 241, Dubé J. held that the Crown breached its fiduciary duty by failing to lease surrendered reserve land at market rents. In awarding the band compensation for the Crown's breach, the trial judge accepted the estimate of one of the band's experts, at para. 264, which "assumed that the difference between the market rent (net of deductions) and the rent received under the lease could have been invested and have accumulated compound interest." In the trial judge's view (at para. 268) this estimate "reflects much more accurately the rentals that the plaintiff lost" and was a "fair and realistic appraisal."

[94] In *Roberts v. Canada* (1995), 99 F.T.R. 1 (T.D.), aff'd in the result [2002] 4 S.C.R. 245, Teitelbaum J. held that the band's claim for equitable compensation because of the Crown's alleged breach of fiduciary duty was barred by the relevant limitation statute or by laches and acquiescence and, even if it was not, the Crown had satisfied its duty to the bands. Nonetheless, he addressed the question of compensation to provide for the possibility that the band had established a breach of fiduciary duty. In so doing, Teitelbaum J. approved Dubé J.'s approach in *Lower Kootenay*. In fixing compensation he said at para. 645: "I would like to make it clear that I am including compound interest in the valuations to reflect the investment return component of the amounts in issue. It is not considered as part of an award of prejudgment interest."

[95] The Crown notes that on the question of compensation neither of these trial decisions has been approved by an appellate court. More germane, the Crown argues, they are contrary to *Guerin* and to this court's judgment in *Gorecki*. I disagree.

[96] In *Guerin*, at (1981), 127 D.L.R. (3d) 170, after Collier J. ordered compensation, the plaintiff brought a motion for prejudgment interest on the amount that he had awarded. He refused to allow prejudgment interest, holding that s. 35 of the *Federal Court Act* or the common law barred the claim. The Supreme Court agreed. In her concurring reasons at 364, Wilson J. expressly approved Collier J.'s denial of prejudgment interest.

[97] However, the trial judge's ruling in *Guerin* does not assist the Crown. Collier J. had already awarded the band equitable compensation assessed at the date of trial. To award prejudgment interest on that amount would have violated s. 35 of the *Federal Court Act*, and as important, would have amounted to overcompensation. Indeed, if anything, the court's ruling in *Guerin* affirms the distinction between an assessment of compensation in equity and an award of prejudgment interest.

[98] In the case before us, Whitefish seeks only what was granted in *Guerin*, an award of equitable compensation assessed at the date of trial. Unlike the plaintiff in *Guerin*, Whitefish does not ask for prejudgment interest on that award. Thus, the ruling in *Guerin* relied on by the Crown does not apply to this case.

[99] In *Gorecki*, this court disallowed the plaintiff's claim for interest on his wrongfully withheld CPP disability benefits because the *Canada Pension Plan*, R.S.C. 1985, c. C-8 constituted a complete statutory scheme that did not provide for the payment of interest. In my view, *Gorecki* does not assist the Crown in the present case for three reasons. First, the panel in *Gorecki* recognized at para. 15 that an entitlement to interest could be based on an equitable principle; it ultimately held, however, that it was "plain and obvious" the Crown was not a fiduciary because the relationship between it and Gorecki arose from the terms of the legislation. Second, here, unlike in *Gorecki*, the

Crown was obliged to invest Whitefish's money (by the terms of the Treaty, *Indian Act*, and surrender). And third, unlike in this case, the legislation that precluded Gorecki's claim was a comprehensive and specific scheme that did not allow for interest.

[100] I would hold that the Crown's common law and statutory immunity from paying interest up to 1992 (except in limited cases, which do not apply here), does not preclude compound interest as an element of equitable compensation.

e) The trial judge's finding that the $31,600 would have been "dissipated" within a reasonable time is unsupportable

[101] The trial judge concluded that Whitefish's claim was not justified because the band unreasonably assumed the fair value of its timber rights would have been deposited in the trust account and remained there earning compound interest until 2005. In his view, at para. 29, "on the principle of 'first in, first out'", the money "would likely have dissipated within a reasonable time". The Crown made the same point in this court. It contended that Whitefish's claim fails to take into account "the virtual certainty" the bonus payment would not have sat untouched in the band's account for 120 years.

[102] I disagree. The trial judge's holding, echoed by the Crown, is unsupportable because it is contrary to one of equity's presumptions, is entirely speculative, and is inconsistent with the terms of the surrender. In the absence of evidence to the contrary – and there is virtually none – equity presumes that the defaulting fiduciary must account to the beneficiary on a basis most favourable to the beneficiary. The trial judge's finding presumes exactly the opposite – that the Crown will account to Whitefish on a basis most favourable to the Crown. See *Oosterhoff, supra* at 1047.

[103] However, this does not mean that Whitefish is entitled to 120 years of accumulated capital and interest. That too is unsupportable. Instead, I would adopt the approach used by Collier J. in *Guerin*, which was later approved by the Supreme Court of Canada, and discount Whitefish's award to reflect realistic contingencies.

[104] Unfortunately, we have an unsatisfactory record on which to make an informed judgment about Whitefish's annual expenditures, either out of its revenue account or its capital account. This unsatisfactory evidentiary record is a principal reason why a new hearing is needed to determine a fair and proportionate award of equitable compensation. For example, we have very little evidence about Whitefish's annual spending habits – how much capital it spent, how much interest it spent, and what it used the money for. We have no expert evidence on the effect of expenditures on Whitefish's claim. The Crown, which presumably had annual records of Whitefish's capital and revenue accounts, chose to file in evidence only the records for four fiscal years ending June 30 in 1887, 1888, 1889, and 1890. No records were filed for the years 1891 to 2005.

[105] The lack of a proper record means that the parties' factual arguments on the trial judge's findings of dissipation are grounded not on an evidentiary basis but on speculative assumptions. For example, the Crown asks us to assume that Whitefish would have immediately spent the interest on an investment of $31,600. The records for 1887 to 1890 do show that each year Whitefish spent most or all of the money in its interest account. But the amounts in the account were small. $31,600 (or, ninety per cent of $31,600) would obviously have generated a significantly larger amount of interest. Rather than assuming that all of this interest would be spent, it is just as plausible to assume that Whitefish's annual need for money for expenses remained modest, and therefore some of the interest remained in the account to be reinvested.

[106] The Crown also asks us to assume that Whitefish would have "consumed" the $31,600 it should have received, which I take to mean that it would have spent the money on items of ordinary daily use that had no income-earning potential or gave no long-term benefits to the band and its members. Yet, it is just as plausible to assume that Whitefish would have used some of the money to purchase farm equipment, build roads or bridges on the reserve, or construct houses and schools. These expenditures for capital assets may require using compound interest as a proxy to fairly value Whitefish's equitable compensation. Lord Denning made this point in a commercial context in *Wallersteiner v. Moir (No. 2)*, [1975] 1 All E.R. 849 at 856 (C.A.):

> In addition, in equity interest is awarded whenever a wrongdoer deprives a company of money which it needs for its use in business. It is plain that the company should be compensated for the loss thereby occasioned to it. Mere replacement of the money – years later – is by no means adequate compensation, especially in days of inflation. The company should be compensated by an award of interest. … But the question arises: should it be simple interest or compound interest? 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 [Citation omitted.] It may be that the company would have used it in its own trading operations; or that it would have used it to help its subsidiaries. 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 replace at interest with yearly rests, i.e. compound interest.

All these factual uncertainties need to be addressed at a new hearing with a proper evidentiary record.

[107] Equally important, the Crown's assumption that Whitefish would soon have "dissipated" the $31,600 is inconsistent with the Crown's obligation under the surrender. That obligation was to invest the fair value of the timber rights not only for band members but also for their descendants. The surrender took a long term view of the investment. It contemplated that at least some of the accumulated money would remain in the trust account to benefit future generations of band members.

[108] The expert reports, too, do not assist the Crown's position. All of the expert reports, including the two reports tendered by the Crown, assumed that the fair value of Whitefish's timber rights would be deposited in the trust account and stay there.

[109] I conclude this section of the reasons with three observations. First, I consider the trial judge's finding and the Crown's position on "dissipation" unsupported by the evidence and contrary to both the principles of equitable compensation and the terms of the surrender.

[110] Second, however, in fixing Whitefish's award of equitable compensation, I think it quite appropriate to take into account that over the years the band would have spent at least some of the interest earned on its capital investment of $28,440,[6] and perhaps even some of the capital itself. This is one of the realistic contingencies that must be accounted for if the award is to be "fair and proportionate", as Whitefish concedes it must be. The amount urged on us by Whitefish – approximately $23 million – will inevitably have to be discounted to reflect these contingencies.

[111] Again, *Guerin* is instructive. There, the trial judge held that the most profitable use of the band's surrendered land was as a residential subdivision. But in determining the appropriate award of equitable compensation, the trial judge did not assume that the subdivision would have been developed in the most profitable way possible. Instead, he discounted the award to reflect realistic contingencies that the subdivision would have faced. For example, at paras. 127-128, he took into consideration the likely contingency that the residential subdivision would take about ten years longer to become "well on the road to full development" than the valuation experts assumed in their calculations. Although he did not quantify these contingencies, he took them into account globally in assessing the band's compensation. The Supreme Court of Canada approved his approach.

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[6] Ninety per cent of $31,600.

[112] Third, the lack of a proper evidentiary record to evaluate the realistic contingencies that would affect Whitefish's award of equitable compensation prevents this court from doing what the trial judge in *Guerin* was able to do. Although the parties have asked us to fix Whitefish's compensation, fairness to both sides requires that this be done at a new hearing.

[113] Here, I will do no more than list some of the evidence that might be useful and some of the considerations that might be taken into account in fixing a "fair and proportionate" award at the new hearing.

f) Some considerations relevant to a "fair and proportionate" award

[114] The considerations I have in mind fall into two categories: deficiencies in the factual record and expert evidence. I set out these considerations without in anyway attempting to bind the trial judge at the new hearing.

(i) Deficiencies in the factual record

[115] The two main deficiencies in the factual record before us concern Whitefish's annual spending patterns and the federal government's practice of paying interest on band trust accounts.

[116] If Whitefish is to be restored to the position it likely would have been in but for the Crown's breach, then the question whether Whitefish would have spent the money it ought to have received and the question how it would have spent that money need to be addressed – not by speculation but on a proper evidentiary record. Four years of account records is an unsatisfactory base on which to make a fair assessment of what likely would have happened over a 120 year period.

[117] What is needed is evidence either from the Whitefish trust account records or elsewhere showing Whitefish's annual spending patterns over the period. For example, annually, how much of the interest in the interest account did it spend and on what? Annually, how much interest remained in the interest account and was it reinvested? Annually, was interest paid on the interest account, and if not, why not? Annually, how much money did Whitefish spend out of the capital account and on what? It seems to me that the answers to these, and no doubt other related questions, will assist in fixing an appropriate award of equitable compensation.

[118] Also, the Crown should clarify whether money in band trust accounts earned simple interest or compound interest over the period 1886 to 1969, and whether interest was calculated annually or semi-annually.

(ii) Expert evidence

[119] Both sides relied on expert valuation evidence to quantify Whitefish's appropriate compensation. Whitefish tendered the report of the financial advisory group at Deloitte & Touche LLP, prepared by David Cornfield. As Cornfield was not available for the trial, his colleague, Iseo Pasquali, testified for Whitefish.

[120] The Crown tendered two expert reports: the report of the well-known actuarial firm, Eckler Partners Ltd., prepared by Paul Della Penna, and the report of AJH Consulting, prepared by two economics professors, Arthur Hosios and Lawrence Smith. Both Della Penna and Hosios testified for the Crown. I will briefly summarize the expert evidence and my concerns with it. I will refer to the three reports by the names of the three expert witnesses: Pasquali, Della Penna, and Hosios.

[121] Each expert took a range of base figures for the fair value of Whitefish's timber rights in 1886. Each expert assumed that neither the initial investment in the trust account in 1886 nor the accrued interest would be spent to the date of trial. And each expert assumed that the Crown would not charge management fees for administering the trust account.

[122] Pasquali calculated total simple interest and total compound interest on these base figures from October 1, 1886 to the date of trial. He used the rates of interest in the Manual, which were prescribed by successive Orders-in-Council. His valuations for initial investments of $31,600 and $25,000, each earning compound interest, were $23,480,380 and $18,576,250. Neither Pasquali nor the two Crown experts calculated interest on a base figure of ninety per cent of $31,600 ($28,440), which is what the surrender called for.

[123] Della Penna did three separate sets of calculations. First, using consumer price index data from Statistics Canada, he calculated amounts reflecting the change in purchasing power of $1 from June 30, 1887 to February 1, 1992[7] with the addition of simple interest at five per cent from February 1, 1992 to the date of trial; and he calculated amounts reflecting the change in purchasing power of $1 from June 30, 1887 to the date of trial. For a base figure of $31,600 his calculations produced valuations of $1,095,888 and $844,036. The trial judge accepted this approach and awarded Whitefish Della Penna's figure of $1,095,888.

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[7] The amendments to the *Crown Proceedings and Liability Act* requiring the Crown to pay prejudgment interest came into force on February 1, 1992.

[124] Second, Della Penna calculated total simple interest at annual interest rates of three, four, five, and six per cent. Third, he did the same calculations at the same rates, but this time using compound interest. Della Penna's calculations show the price sensitivity of even small changes in the figures. For an initial investment of $31,600 simple interest rates of three, four, five, and six per cent annually generated $143,780, $181,384, $218,672, and $256,276 at the date of trial. Compound interest at the same rates generated $1,046,592, $3,286,400, $10,205,852, and $31,356,048.

[125] Hosios' calculations were based on a hypothetical portfolio consisting of long-term government securities invested using a "laddering investment strategy". Under this strategy, equal portions of the base figure are invested in government bonds with different maturity terms up to a maximum of fifteen years. Using a base figure of $31,600 this strategy generated a trial date valuation of $13,243,876.

[126] Of the three experts, only Pasquali used the interest rates prescribed by Order-in-Council. I think that he was right to do so because these are the rates that would have been applied to any money in Whitefish's account that came from the sale of its timber rights.

[127] In his evidence at trial, Hosios suggested that interest rates set out in the Manual and paid by the Crown exceeded the market rates on government bonds. Therefore, in his view, the Crown was subsidizing Whitefish. Hosios speculated that if the prescribed rates were applied to $31,600 and compounded, the resulting amount would have been so large the Crown would have eliminated the subsidy. No evidence was led to support this speculation. On this record, therefore, I discount it entirely. The interest rates in the Manual were prescribed by Order-in-Council and applied not just to the money in the Whitefish account but to the money in every other band account. Therefore, I think that Pasquali was correct in using these interest rates.

[128] However, Pasquali's calculations, like those of Della Penna and Hosios, suffer from the same problem: they are based on the unrealistic assumption that the initial capital investment, and the interest earned on that capital investment, would have remained untouched in the Whitefish trust account for 120 years. In saying this, I intend no criticism of the experts. Undoubtedly, they were asked to do these calculations using a set of assumptions given to them by their respective clients.

[129] Assuming that the parties produce better evidence of Whitefish's annual spending patterns and of the government's practice of paying interest on band trust accounts, the experts can appropriately revise their calculations to take account of the realistic contingencies affecting a fair award of equitable compensation for Whitefish.

D. CONCLUSION

[130] There are two issues on this appeal: first, did the trial judge err in his determination of the fair value of Whitefish's timber rights in 1886; second, did the trial judge err in his assessment of Whitefish's compensation, and if so, what is a "fair and proportionate" assessment?

[131] On the first issue, Whitefish appealed and the Crown cross-appealed from the trial judge's finding that the fair value of Whitefish's timber rights in 1886 was $31,600. In my view, the trial judge's finding is reasonable and is not tainted by any error in principle. Therefore, I would not give effect to the appeal or to the cross-appeal on this issue.

[132] On the second issue, Whitefish appealed the trial judge's finding that it was entitled to compensation in the amount of $1,095,888. I would allow the appeal on this issue. In my view, the trial judge erred in principle by failing to award Whitefish equitable compensation for its lost investment opportunity caused by the Crown's breach of fiduciary duty. Whitefish is entitled to compensation measured by the amount the fair value of its timber rights would have earned in the Whitefish trust account maintained by the government for its benefit, but discounted to reflect realistic contingencies. Because the deficiencies in the record prevent this court from assessing Whitefish's compensation, I would order a new hearing on this issue.

[133] The parties have settled the costs of the appeal and I therefore make no order for costs.

RELEASED: NOV 01 2007
"JL"

"John Laskin J.A."
"I agree E.E. Gillese J.A."
"I agree Paul S. Rouleau J.A."