Court of Appeal File No. C44923

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

WHITEFISH LAKE BAND OF INDIANS

Appellant (Plaintiff)

and

THE ATTORNEY GENERAL OF CANADA

Respondent (Defendant)

and

LAC SEUL FIRST NATION

Intervener

FACTUM OF THE INTERVENER, LAC SEUL FIRST NATION

JOSEPH ELIOT MAGNET
57 Louis Pasteur
Suite 357
Ottawa, Ontario
K1N 6N5

Tel: (613) 562-5800 (x3315)
Facsimile: (613) 562-5124
Email: jmagnet@uottawa.ca

Solicitor for the Intervener,
Lac Seul First Nation

TO: **THE REGISTRAR OF THE COURT OF APPEAL**
Osgoode Hall
130 Queen St. West
Toronto, Ontario
M5H 2N5

AND TO: **R. Aaron Detlor**
Barrister and Solicitor
PO Box 39
Naughton, ON P0M 2M0

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

AND TO: **Torkin Manes Cohen Arbus LLP**
Barristers & Solicitors
151 Yonge St. Suite 1500
Toronto, Ontario
M5C 2W7

Valerie Edwards
David Butt
John Rowinski
Tel.: (416) 964-9664
Fax: (416) 964-8305

Solicitors for the Plaintiff (Appellant),
Whitefish Lake Band of Indians

AND TO: **S. Wayne Morris**
Barrister and Solicitor
Dutton Brock LLP
438 University Ave. Suite 1700
Toronto, Ontario
M5R 1B3

Tel.: (416) 593-4411
Fax: (416) 593-5922
Solicitor for the Defendant (Respondent),
Attorney General of Canada

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FACTUM OF LAC SEUL FIRST NATION

PART I – FACTS

The Intervention

1. The Trial Judge considered two issues: first, what was the fair value of the timber in 1886; second, how to bring forward to present day values the historic 1886 value of the timber.

Opinion of Wright J, para 7

2. Lac Seul First Nation [LSFN] sought intervener status on the second question – how to bring historic values forward.

3. Justice Rouleau granted intervener status to LSFN because "the perspective [LSFN] brings may assist the court in understanding the broader

impact that the court's decision in this case may have". Justice Rouleau continued:

> Although this case involves the loss of use of money and whether the Crown can be required to pay interest or some equivalent compensation, the court's decision could have a broader impact. The court may well pronounce itself on the underlying theory and proper approach to be taken in all breach of fiduciary cases involving loss of use claims advanced by a First Nation against the Crown, without regard to whether the loss of use claim relates to money, land or some other asset.
>
> *Whitefish Lake Band of Indians v. Canada*, Ont. C.A., Aug 1, 2006 (*per* Rouleau, J.A. at paras. 6-7)

4. LSFN adopts the Appellant's statement of facts.

PART II – ISSUES

5. Intervener will address how to bring forward to present day values the $31,600 that WLFN should have received in 1886 when Canada sold the Band's timber for $316 in breach of Canada's fiduciary duty.

6. While a live issue here, Intervener takes no position as to whether WLFN should have received $31,600 as fair value in 1886, or some other amount.

PART III – LAW AND ARGUMENT

Fiduciary Relationships

7. Fiduciary relationships are found across a wide spectrum of modern economy and society. They are made necessary by human interdependency.

8. The essence of fiduciary relationships is trust and confidence placed by the beneficiary in the fiduciary to act selflessly in the beneficiary's best interest.

9. Fiduciary remedies “facilitate the fiduciary concept’s fundamental purpose of maintaining the integrity of socially and economically valuable, or necessary, relationships of high trust and confidence...”

> Leonard I. Rotman, *Fiduciary Law* (2005), p. 693

Fiduciary Remedies

10. Fiduciary remedies are designed to hold fiduciaries to a higher standard of conduct than what is required by contract and tort. The reason is that contract and tort remedies intend compensation for losses caused. By contrast, fiduciary remedies intend “to deter fiduciaries from engaging in misconduct.”

> Leonard I. Rotman, *Fiduciary Law* (2005), p. 708
>
> *Canson Enterprises v. Broughton*, [1991] 3 S.C.R. 534, para 3: “equity is concerned, not only to compensate the plaintiff, but to enforce the trust which is at its heart.”

11. A principal remedy for breach of fiduciary duty is equitable compensation. Equitable compensation differs from common law damages in four respects:

i. Equitable compensation assesses damages at the time of trial, not at the time of breach of fiduciary duty;

> *Guerin v. Canada*, [1984] 2 S.C.R. 335, 361-362: “The lost opportunity to develop the land for a period of up to seventy-five years in duration is to be compensated as at the date of trial notwithstanding that market values may have increased since the date of breach.”
>
> *Canson Enterprises v. Broughton*, [1991] 3 S.C.R. 534, para 24: “the losses are to be assessed as at the time of trial, using the full benefit of hindsight”

ii. Equitable compensation assesses damages using hindsight;

> *Canson Enterprises v. Broughton*, [1991] 3 S.C.R. 534, para 27: Equitable compensation restores “what has been lost as a result of the breach; i.e., the plaintiff's lost opportunity. The plaintiff's actual loss as a

> consequence of the breach is to be assessed with the full benefit of hindsight."

iii. Equitable compensation presumes that the plaintiff would have made the most economically advantageous use of his assets during the time they were withheld;

> *Guerin v. Canada*, [1984] 2 S.C.R. 335, 362 (Wilson J.)
>
> *McNeil v. Fultz* (1906), 38 S.C.R. 198, 205, *per* Duff J.: "as a trustee wrongfully withholding property … he is liable to make reparation for the loss suffered by the trust … and (every presumption being made against him as a wrongdoer), that loss must be calculated on the assumption that the securities would have been sold at the best price obtainable."
>
> *Semiahmoo Indian Band v. Canada*, [1998] 1 F.C. 3, para 112: "equitable damages should be calculated based on the presumption that the Band would have used the land in the most advantageous way during the period that it was improperly held by the Crown."
>
> Rotman, *Fiduciary Law*, p. 733: "beneficiaries who have been wrongfully deprived of assets by a breach of fiduciary duty will be presumed to have put those assets to their most advantageous use had they retained possession of them."

iv. Equitable compensation restores the plaintiff's lost asset, and also restores the plaintiff's lost opportunity to use the asset.

> *Guerin v. Canada*, [1984] 2 S.C.R. 335, 362: "The Band was thereby deprived of its land and any use to which it might have wanted to put it."
>
> *Canson Enterprises v. Boughton*, [1991] 3 S.C.R. 534, para 27 "compensation is an equitable monetary remedy which …attempts to restore to the plaintiff what has been lost as a result of the breach, i.e. the plaintiff's lost opportunity."

12. These four innovations in the fiduciary remedy are intended to advance the fiduciary concept. They drain off temptation for the fiduciary to profit from their management of beneficiary's assets, because the sanctions for violation of fiduciary duty are severe.

13. “Successful deterrence generally requires the expected sanction to equal or exceed the gain from wrongdoing.” The requirement to restore the plaintiff’s lost opportunity to use his asset and the presumption that the asset will be used in the most economically advantageous way warn fiduciaries that breach of duty will be costly.

> Rotman, *Fiduciary Law*, p 695

14. These remedial features are essential to the fiduciary concept “insofar as allowing fiduciaries to retain profits from breaches of their duties is antagonistic to maintaining the integrity of relationships of high trust and confidence.”

> Rotman, *Fiduciary Law*, p. 736

15. At the same time, fiduciary remedies must be proportionate and fair.

> equity is not so rigid as to be susceptible to being used as a vehicle for punishing defendants with harsh damage awards out of all proportion to their actual behaviour … In other words, the courts should look to the harm suffered from the breach of the given duty, and apply the appropriate remedy
>
> *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, para 81 (LaForest J.)

Application to this Case

16. The Trial Judge found that the plaintiff should have received $31,600 for its timber in 1886. Unless this Court disturbs that finding, the plaintiff’s lost asset is $31,600.

17. The Trial Judge valued the plaintiff’s lost asset in 1992. This is why, at para. 30 of his reasons, he applied a multiplier of 34.68.

18. The multiplier of 34.68 comes from an expert report prepared for the Crown. The expert, Paul Della Penna, calculated the change in purchasing power of $1 in 1887. Della Penna calculated that $1 in 1887 would purchase

$34.68 in 1992 (he added simple interest at 5% from 1992 to 2005 to reach $34.68).

Appeal Book, vol. II, tab 59

19. By using a carry forward factor of 34.68, the Trial Judge valued the plaintiff's lost asset in 1992. He did not value it at the time of trial in 2005 or judgment in 2006. This was error.

20. By using a carry forward factor of 34.68, the Trial Judge measured the plaintiff's loss from June 30, 1887. He did not measure it from the time the timber license was actually sold – Oct 14, 1886. This was a second error.

21. The Trial Judge awarded the plaintiff nothing for the Band's lost opportunity to use its $31,600 from 1886 to 1992. This was a third error.

22. During examination of the plaintiff's expert, the Trial Judge stated:

> if they had gotten the money … they probably would have spent it, at least some of it. How much, nobody knows. So therefore, what part is – like what opportunity did they lose? And nobody can come into this courtroom and tell me anything on that topic. It is total speculation.
>
> Appeal Book, Vol. II, tab 58, pp. 400-5

23. In his reasons, the Trial Judge stated:

> ¶ 28 The plaintiff's position … assumes that the fair value would have been deposited in the plaintiff's trust account and remain there without any expenditure from 1886 to 2005 earning compound interest.
>
> ¶ 29 The plaintiff's position is highly improbable. <u>It is more probable that the fair value amount would have been deposited in the trust account, and on the principle of "first in, first out" would likely have dissipated within a reasonable time period.</u> The plaintiff's position of "first in and never out" is not realistic; (emphasis added).

24. The principles of equitable compensation required the Trial Judge to restore the plaintiff's lost opportunity to use its asset, and in so doing to presume

that the plaintiff would have made the most economically advantageous use of its $31,600 during the time the Crown withheld it. The remedy had to be appropriate, proportionate and fair. It was not open to the trial judge to award zero for the plaintiff's lost opportunity to use its $31,600, or to assume that the plaintiff would "dissipate" its $31,600 "within a reasonable time".

25. Sec. 71 of the *Indian Act*, R.S.C. 1886, c. 43 required proceeds from the sale of timber on a reserve to be paid to the Receiver General to the credit of the Indian fund.

26. Sec. 70 of the 1886 *Indian Act* gave the Governor in Council power to "direct how, and in what manner, and by whom, the moneys arising from sales of … timber on Indian lands … shall be invested from time to time".

27. The presumption that the plaintiff would make the most economically advantageous use of its asset is rebuttable. Evidence could have overcome it. As the Trial Judge stated, there was no evidence on this point.

28. The Crown led no evidence as to how the Crown managed and invested the Indian fund.

29. Whether any funds would have been "dissipated" from the plaintiff's $31,600 – and if so, how much – are issues that, in the Trial Judge's words, were "total speculation".

30. The Supreme Court of Canada warned that "mere 'speculation' on the part of the defendant will not suffice" to defeat the presumption. The Supreme Court reminded defendants of their onus to prove, not speculate, that a presumed

economically advantageous use open to an innocent victim is impossible or unreasonable.

Hodgkinson v. Simms, [1994] 3 S.C.R. 377, para 76

31. Assuming funds would accumulate interest year after year in an account is an appropriate, proportionate and fair use of the presumption.

32. Without evidence to overcome the presumption, the Trial Judge erred by speculating that the plaintiff's $31,600 would have "dissipated".

More on the Supreme Court's Cases

33. Professor Waters reviewed *Guerin, Canson* and *Hodgkinson*. He concluded that the gist of the Supreme Court of Canada's approach is that "evidentiary difficulties concerning the extent of the loss will be resolved against the defendant who wrongfully created those difficulties".

Waters, *Law of Trusts in Canada* (3d 2005), p. 1224

34. To the extent there are evidentiary difficulties about issues central to resolution of this appeal the principle Professor Waters distilled from the Supreme Court's jurisprudence governs.

35. This Court does not know very much about what would or could happen to moneys invested in the Indian fund. How the plaintiff's $31,600 would or could be invested and managed by those responsible for the Indian fund is an issue central to resolution of this appeal.

36. The principle distilled from the Supreme Court's cases assists this Court to choose among the possibilities for what would have happened to the plaintiff's $31,600 when it was deposited in the Indian fund in 1886 as required by the

Indian Act. It is not impossible that the money would have stayed in the fund earning interest year after year. It is not unreasonable for the money to have been invested and managed in that way. That this is economically the most advantageous use is a possible and reasonable presumption to make against the defendant. It is in accord with evidence before the Court that the plaintiff led.

37. The defendant, Canada, bears an onus to exclude the possibility that leaving the $31,600 in the fund earning interest year after year could not have happened.

38. The Defendant, Canada, bears an onus to show that this presumed use of the plaintiff's asset has "no particular nexus" to "the wrong complained of and the fiduciary relationship".

Hodgkinson v. Simms, [1994] 3 S.C.R. 377, para 82

39. The defendant, Canada, did not satisfy its onus to show that when the plaintiff's $31,600 was deposited in the Indian fund as required, it could not have stayed there earning interest year after year. Nor does such a presumed course of events offend against "a common sense view of causation."

Canson Enterprises v. Broughton, [1991] 3 S.C.R. 534, para 27

40. This is sufficient reason for presuming that the plaintiff's $31,600 would have rested in the Indian fund collecting interest year after year.

Applying the Presumption furthers the Purpose of Fiduciary Remedies

41. Presuming that the plaintiff's $31,600 would have stayed in the Indian fund collecting interest year after year furthers the underlying purpose highlighted by

the Supreme Court of Canada: it serves "the need to put special pressure on those in positions of trust and power over others in situations of vulnerability ...".

42. The Supreme Court said that in cases where

> the wrong complained of goes to the heart of the duty of loyalty that lies at the core of the fiduciary principle … [t]he remedy of disgorgement, adopted in effect if not in name by the Court of Appeal, is simply insufficient to guard against the type of abusive behavior engaged in by the respondent in this case. The law of fiduciary duties has always contained within it an element of deterrence.
>
> *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, para 93

Mischaracterization

43. The Trial Judge stated at para 30:

> The plaintiff's position that compound interest should be paid is not in accord with the law. Until February 1, 1992, there was no legal obligation on the Crown to pay any interest.

44. This is a fourth error – a characterization error. The Trial Judge mischaracterized the plaintiff's *lost opportunity* to use its asset ($31,600) in the most advantageous way as *pre-judgment interest*.

45. The plaintiff's lost opportunity to use its asset in the most advantageous way is not payment of pre-judgment interest. The defendant's expert, Paul Della Penna, was asked to model several scenarios as to the opportunities available to the plaintiff to use its asset. All involved growing the $31,600 by the addition of various amounts of simple and compound interest.

46. Had Mr. Della Penna modeled the lost opportunity to grow the asset by investing in stocks or business assets, confusion of the *lost opportunity* to grow the asset with *pre-judgment interest* could not have occurred.

47. The mischaracterization of the plaintiff's *lost opportunity* to grow its asset as payment of *pre-judgment interest* is error requiring correction in this case.

PART IV – ORDER REQUESTED

48. Intervener requests the following order:

> In the absence of agreement between the parties, a reference is ordered before a master to decide the quantum of damages. The master is directed to assume that the damages on October 14, 1886 are $31,600 (*or other value specified by this Court*).
>
> The master is directed to bring the damages specified forward by multiplying them by an amount that represents the purchasing power that $1 in 1886 would have on January 24, 2006.
>
> The master is directed to add to the damages brought forward an amount for the plaintiff's lost opportunity to use its asset. The master is directed to determine the plaintiff's lost opportunity by assuming that that $31,600 (*or other value specified by this Court*) was invested in a fund on Oct 14, 1886, earned interest each year at the rate of 5% and that the principal and interest remained in the fund until January 24, 2006.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of September, 2006.

_____

Joseph Eliot Magnet

SCHEDULE A
LIST OF AUTHORITIES

CASELAW

1. ***Whitefish Lake Band of Indians v. Canada***, Ont. C.A., Aug 1, 2006 (Rouleau J.A.)

2. ***Whitefish Lake Band of Indians v. Canada*** [2006] O.J. No.245 (Wright J.)

3. ***Canson Enterprises v. Broughton***, [1991] 3 S.C.R. 534

4. ***Guerin v. Canada***, [1984] 2 S.C.R. 335

5. ***McNeil v. Fultz*** (1906), 38 S.C.R. 198

6. ***Semiahmoo Indian Band v. Canada***, [1998] 1 F.C. 3

7. ***Hodgkinson v. Simms***, [1994] 3 S.C.R. 377

BOOKS

8. Leonard I. Rotman, ***Fiduciary Law*** (2005), pp. 693, 695, 708, 733, 736

9. Donovan W. M. Waters, ***Law of Trusts in Canada*** (3d 2005)

SCHEDULE B
STATUTES

1. ***Indian Act***, R.S.C. 1886, c. 43, secs. 70-71

WHITEFISH LAKE BAND OF INDIANS – and – **ATTORNEY GENERAL OF CANADA**

PLAINTIFF (APPELLANT) DEFENDANT (RESPONDENT)

Court of Appeal File No. C44923

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FACTUM OF THE INTERVENER LAC SEUL FIRST NATION

Name, address and telephone number of solicitor or party

JOSEPH ELIOT MAGNET
57 Louis Pasteur
Suite 357
Ottawa, Ontario
K1N 6N5

Telephone: (613) 562-5800 (3315)
Facsimile: (613) 562-5124
Email: jmagnet@uottawa.ca

Solicitor for the Intervener
Lac Seul First Nation