

Huu-ay-aht First Nations v. Her Majesty the Queen in Right of Canada 2016 SCTC 14

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On December 16, 2016, the Specific Claims Tribunal awarded the Huu-ay-aht First Nation (“HFN”) \$13.88 million, marking the Tribunal’s first decision on compensation. The case concerns Canada’s issuance of long-term logging license on HFN’s reserve lands.

Background

The decision follows the Tribunal’s finding in December 2014 that Canada had breached its fiduciary duties with respect to the sale of timber surrendered by HFN in 1938 to the federal Crown.¹ In the years following, the Crown failed to sell the timber according to the conditions of surrender, costing HFN years’ worth of timber revenues. Although the Parties agreed on the historical dollar amounts of foregone timber revenues that were owed to HFN, they disagreed on the amount of compensation owed to HFN.

Issue

At issue before the Tribunal was whether the remedy of equitable compensation entitled HFN to compensation for foregone revenues that HFN would have spent on consumption.² The issue significantly impacted HFN’s compensation sum as the First Nation would have spent an estimated 85% of timber revenues on consumption due to pervasive poverty in the community. Experts on both sides presented unique compensation models to estimate the present day value of HFN’s loss.

Canada’s Position

Canada and its expert argued that consumption could not form a part of equitable compensation because consumption yielded only short-term benefits. This did not comply with the purpose of equitable compensation to restore HFN to the position it would have been in absent the breach.³

¹ See *Huu-Ay-Aht First Nations v Her Majesty the Queen in Right of Canada*, 2014 SCTC 7.

² *Huu-ay-aht First Nations v Her Majesty the Queen in Right of Canada*, 2016 SCTC 14 at para 306 [*Huu-ay-aht Compensation Decision*].

³ *Ibid* at para 154.

Canada claimed that compensable spending should be limited to investments that would generate future value that would be available to HFN in the present day.⁴

Canada relied on *Whitefish Lake Band of Indians v. Canada* as a blueprint for assessing equitable compensation.⁵ Canada argued that HFN's spending history was a "realistic contingency" that restricted compensation for revenues spent on consumption.⁶

Canada took issue with HFN's aggregation of individual preferences to characterize group behavior, claiming that only the losses of the HFN as a *collective*, and not those of individual band members, were compensable.⁷

HFN's Position

HFN and its expert argued that HFN was entitled to compensation for the First Nation's lost opportunity to consume. HFN pointed out that although consumption yielded a short-term benefit, it could have had a significant impact on the welfare of the band.⁸

HFN disagreed with Canada's interpretation of *Whitefish*, claiming that the question of compensation for lost opportunity to consume was not put before the Court in *Whitefish*.⁹ Further, no other case law limited equitable compensation to opportunities with only long-term benefit.¹⁰

In response to Canada's contention with aggregating individual preferences, HFN pointed out that the First Nation has no legal identity distinct from its members and the losses of the HFN collective were innately connected to the losses of HFN's membership.¹¹

HFN also emphasized evidence of the band's historically responsible spending patterns and the safeguards that would have likely ensured that HFN would have used revenues for the benefit of the band at the historical period in question. HFN further argued that, in any case, it was entitled

⁴ *Ibid* at para 97.

⁵ *Whitefish Lake Band of Indians v Canada (Attorney General)*, 2007 ONCA 744.

⁶ *Huu-ay-aht Compensation Decision*, *supra* note 2 at para 265.

⁷ *Ibid* at para 118.

⁸ *Ibid* at para 306.

⁹ *Ibid* at para 187.

¹⁰ *Ibid* at para 190.

¹¹ *Ibid* at para 156.

to the presumption that it would have made the most advantageous use of the funds in the absence of evidence to the contrary.¹²

Analysis

In considering both models, the Tribunal determined that equitable compensation allowed for and, in this case, required compensation for foregone revenues that HFN would have spent on consumption for various reasons.

Principles of Equitable Compensation

In its analysis, the Tribunal identified the main purpose of equitable compensation: to restore the plaintiff's lost opportunity. Justice Whalen emphasized the flexible, discretionary and evidence-based nature of an equitable remedy.¹³ This remedy entitles the wrong party to the equitable presumptions of most advantageous use and most favourable accounting. Justice Whalen also reiterated the importance of Canada's fiduciary duty to HFN in assessing an equitable remedy.¹⁴

The Whitefish decision does not restrict equitable compensation for consumption

The Tribunal disagreed with Canada's conclusion that *Whitefish* established a rule against equitable compensation for consumption.¹⁵ In Justice Whalen's view, Justice Laskin was primarily concerned with the insufficient evidence to support the trial judge's conclusions. Justice Whalen concluded that the ratio from *Whitefish* provided that an award cannot rely on speculation when it offends an equitable presumption favouring the beneficiary.¹⁶

It would be unfair not to recognize consumption as part of overall loss of opportunity

The Tribunal also emphasized the significance of HFN's lost opportunity to consume. Justice Whalen noted that although consumption yields short-term benefits, it has a long-term impact on the sustenance and well-being of the Band as a collective.¹⁷ Moreover, the Tribunal observed that HFN's main purpose in profiting from timber sales was to meet the needs of the band. Evidence showed that the HFN chiefs and council were very concerned for the welfare of the

¹² *Ibid* at paras 158 and 203.

¹³ *Ibid* at header.

¹⁴ *Ibid* at paras 253 and 256.

¹⁵ *Ibid* at para 311.

¹⁶ *Ibid* at para 263.

¹⁷ *Ibid* at 315.

Band and that the band “was motivated to sell its timber precisely to address its subsistence level of poverty brought on by a poor economy and bad years of fishing.”¹⁸

Further, the Tribunal found that in this case, there was sufficient evidence to establish HFN’s spending patterns and that the evidence supported a history of careful and transparent decision-making.¹⁹

Given that the very purpose of equitable compensation is to restore the wronged party’s lost opportunity, the Tribunal concluded that “it would be very unfair not to recognize consumption as an important element of the overall loss of opportunity.”²⁰

Failure to compensate for consumption could disadvantage the poor

The Tribunal noted that failing to recognize lost opportunities to spend on consumption could also disadvantage poorer First Nations. Failing to recognize foregone consumption for impoverished First Nations while recognizing the investments and savings of wealthier First Nations would reduce liability for the trustee where the band was poor.²¹ Accordingly, a trustee might not exercise the same degree of care for poorer parties. Such a result would not only be unfair, it would also violate equitable compensation’s policy objectives of deterrence and enforcement.²²

Bearing these reasons in mind, the Tribunal concluded that a fair remedy for HFN should include the opportunity to make all spending decisions but for the breach.²³

Compound interest may be applied in an equitable remedy

The Tribunal also contemplated whether compound interest or merely simple interest should be applied in calculating HFN’s compensation. Noting that the Supreme Court of Canada has recognized compound interest as a measure of opportunity cost and a generally superior method of dealing with the impact of time on money,²⁴ the Tribunal appeared to conclude that compound interest formed a part of equitable compensation.²⁵

¹⁸ *Ibid* at para 312.

¹⁹ *Ibid* at para 291.

²⁰ *Ibid* at para 313.

²¹ *Ibid* at para 316.

²² *Ibid* at para 317.

²³ *Ibid* at para 315.

²⁴ *Ibid* at para 252.

²⁵ *Ibid* at para 317.

Why This Case Matters

This decision recognizes that consumption can have a long-term value and that foregone consumption can represent a significant loss of opportunity. Accordingly, under an equitable remedy, a wronged party should be compensated for the lost opportunity to spend on consumption. If the decision stands, it will provide grounds for more substantial compensation for First Nations. This decision also provides compelling grounds to argue for the application of compound interest in equitable remedies in future cases.