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DECISION IN THE TSILHQOT'IN NATION ABORIGINAL TITLE AND RIGHTS CLAIM - *TSILHQOT'IN NATION V. BRITISH COLUMBIA*, 2077 BCSC 1700

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The BC Supreme Court has delivered a landmark decision involving aboriginal rights and title. The decision follows a 339 day trial in which the Tsilhqot'in Nation sought, among other things, a declaration of Aboriginal title over 141,769 hectares and a trapline in BC's central interior region.

In its 473 page decision, which contains a considerable amount of discussion of Tsilhqot'in history and ethnography, the Court found that the Tsilhqot'in people are a distinct Aboriginal group who have occupied the claim area for over 200 years. However, the Court was unable on the evidence put forward to grant a declaration of Tsilhqot'in Aboriginal title over the whole of the claim area, offering instead a non-binding opinion that Tsilhqot'in Aboriginal title does exist in certain specific tracts of land inside and outside the claim area.

Other findings of significance were as follows:

- Aboriginal title land is not "Crown land" as defined by provincial forestry legislation. The provincial *Forest Act* does not apply to Aboriginal title land. The jurisdiction to legislate with respect to Aboriginal title land lies with the Federal government pursuant to s. 91(24) of the *Constitution Act, 1967.*
- The Province has no jurisdiction to extinguish Aboriginal title and such title has not been extinguished.
- Tsilhqot'in people have an Aboriginal right to hunt and trap birds and animals throughout the claim area for the purposes of securing animals for work and transportation, food, clothing, shelter, mats, blankets and crafts, as well as for spiritual, ceremonial, and cultural uses. This right is inclusive of a right to capture and use horses for transportation and work.
- Tsilhqot'in people have an Aboriginal right to trade in skins and pelts as a means of securing a moderate livelihood.
- These rights have been continuous since before contact, which the Court determined was 1793.
- Land use planning and forestry activities have unjustifiably infringed Tsilhqot'in Aboriginal title and Aboriginal rights.

In coming to these and other conclusions, the Court relied in part on oral tradition evidence, which the Court said was of assistance in the construction of a reasonably reliable historical record of the actual use of some portions of the claim area. The Court wrote: "If the oral history or oral tradition evidence is sufficient standing on its own to reach a conclusion of fact, I will not hesitate to make that finding. If it cannot be made in that manner, I will seek corroboration from the anthropological, archeological and historical records. I understand my task is to be fair and to try to avoid an ethnocentric view of the evidence."

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The Court concluded with a lengthy discussion on reconciliation, offering the view that after a trial of this scope and duration, it would be tragic if reconciliation with Tsilhqot'in people were postponed through seemingly endless appeals. It also recognized that the Court, confined by the issues raised in the pleadings and the jurisprudence on Aboriginal rights and title, is ill-equipped to effect a reconciliation of apparently competing interests. Such reconciliation, it said, must be reserved for a consensual treaty negotiation process.

COMPOUND INTEREST AGAINST THE CROWN: *WHITEFISH LAKE BAND OF INDIANS V. CANADA (ATTORNEY GENERAL)*, NOVEMBER 1, 2007

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The Crown's immunity from paying interest (before 1992) on damages awarded against it does not preclude compound interest as an element of equitable compensation. This was a central holding of the Court of Appeal for Ontario in *Whitefish Lake Band of Indians v. The Attorney General of Canada*, 2007 ONCA 744. This decision could see a dramatic increase in the amount of compensation awarded against the Crown in future cases involving breaches of its fiduciary duty.

The Crown admitted to having breached its fiduciary duty to the Whitefish Lake Band of Indians, through the Crown's improvident sale of surrendered timber rights in 1886 for well below market value. The effect of the Crown's breach was to deprive Whitefish 120 years ago of some $31,600. Under the terms of the surrender agreement, 90% of those funds were to have been invested by the Crown for Whitefish's benefit. The issue on appeal was what is the proper assessment of compensation for that breach.

The trial judge assessed Whitefish's compensation by awarding a principal amount of $31,600 adjusted for inflation between 1886 and 1992, and simple interest on that adjusted amount from 1992. The total was $1,095,888 plus costs. The trial judge refused to award equitable compensation for loss of use of money, and in so doing took into account that the Crown had not profited from its breach of duty, and that the Crown has no legal obligation to pay prejudgment interest until 1992.

The Court of Appeal held that the trial judge erred in principle by failing to award equitable compensation for the loss of Whitefish's opportunity to invest the funds, and to have use of the investment income. In so doing it emphasized that an award of equitable compensation that includes compound interest differs fundamentally from prejudgment interest on a damages award. The former involves an assessment, not a calculation, of what likely would have happened if the Crown had acted as it should have and had not breached its fiduciary duty, and is assessed at the date of trial, not at the date of injury or breach. The latter, by contrast, is a straight linear calculation which is added to a successful party's claim, and which does not form part of the court's assessment of an appropriate damages award.

In other words, compound interest is not appropriate as interest on a damages award, but is appropriate as part of an assessment of equitable compensation.

Ultimately, the Court of Appeal found that the trial judge's award did not fairly compensate Whitefish for the money the Crown failed to obtain, invest, and hold for Whitefish and its members. The evidence was that the Crown 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". Rather than fixing the amount itself, the Court of Appeal ordered a new trial to have the amount determined in line with its decision. This includes the principle that an award for equitable compensation which includes compound interest, in order to be "fair and proportionate", may have to take into account certain contingencies such as the fact that over the years the band would have spent at least some of the interest earned on its capital investment, and perhaps even some of the capital itself.

In summary, two important principles emerge from *Whitefish*. First, 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. Secondly, entitlement to equitable compensation does not require the Crown to have profited from its breach or to have intentionally conducted itself wrongfully. These principles may well apply to non-aboriginal cases as well.

The practical result for Whitefish and its members is that a relatively small amount of money in 1886, compounded over 120 years of compound interest, may result in an award of tens of millions, representing a huge increase over the amount ordered at trial, even after all contingencies are accounted for.

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