SCC COURT FILE NO. 38795

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

B E T W E E N:

ROGER SOUTHWIND, FOR HIMSELF, AND ON BEHALF OF THE MEMBERS OF THE LAC SEUL BAND OF INDIANS, AND LAC SEUL FIRST NATION

APPELLANTS

-and-

HER MAJESTY THE QUEEN IN RIGHT OF CANADA and

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO and

HER MAJESTY THE QUEEN IN RIGHT OF MANITOBA

RESPONDENTS

-and-

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FACTUM OF THE INTERVENER ATIKAMEKSHENG ANISHNAWBEK FIRST NATION

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada)*

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PART I – OVERVIEW

1. Atikameksheng Anishnawbek First Nation, formally known as the Whitefish Lake Band (hereinafter "AAFN"), was the Appellant in *Whitefish Lake Band of Indian v Canada (Attorney General) ("Whitefish Lake"),*[1] a decision of the Ontario Court of Appeal which has been the subject of judicial interpretation in various cases and is relied upon in the trial and appellate decisions which precede the instant appeal.

PART II – QUESTIONS IN ISSUE

2. The question on appeal is: how should principles of equitable compensation, together with legal principles applicable to the Crown-Indigenous relationship, be applied to determine compensation owed to Indigenous groups where the Crown has breached its fiduciary duty, and in particular where it has permitted the unlawful use of reserve lands for a public purpose?

3. In its analysis of the principles of equitable compensation, the trial and appellate decisions in *Southwind* considered how the principles of equitable compensation were applied by the Ontario Court of Appeal in *Whitefish Lake Band of Indians v Canada (Attorney General)* ("*Whitefish Lake*"), and the subsequent analysis of *Whitefish Lake* by the Specific Claims Tribunal in *Huu-Ay-Aht First Nations v Canada (Minister of Indian Affairs and Northern Development)* ("*Huu-Ay-Aht*")[2] and *Beardy's and Okemasis Band No.96 v Canada (Minister of Indian Affairs and Northern Development)* ("*Beardy's"*).[3] The equitable compensation analysis in each of these decisions draws upon the analytical framework employed by the Federal Court in *Guerin v R* ("*Guerin Trial*").[4]

4. Beginning with *Whitefish Lake*, and continuing through *Huu-Ay-Aht*, *Beardy's*, and *Southwind*, there has been considerable confusion regarding the relevance of "realistic contingencies" in the assessment of equitable compensation.

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[1] *Whitefish Lake Band of Indian v Canada (Attorney General),* 2007 ONCA 744 [*Whitefish Lake*].
[2] *Huu-Ay-Aht First Nations v Canada (Minister of Indian Affairs and Northern Development)*, 2016 SCTC 14 [*Huu-Ay-Aht*].
[3] *Beardy's and Okemasis Band No. 96 v Canada (Minister of Indian Affairs and Northern Development)*, 2016 SCTC 15 [*Beardy's*].
[4] *Guerin v R*, [1982] 2 FC 385 [*Guerin Trial*], [Appellant's' Book of Authorities, Tab 1].

5. AAFN submits that:

i. Although the term "realistic contingencies" has an established technical meaning in personal injury jurisprudence, in the context of assessing equitable compensation for a breach of the Crown's fiduciary duty owed to a First Nation it is effectively a synonym for "reasonableness";

ii. The genesis of "realistic contingencies" in the equitable compensation jurisprudence is *Guerin,* which used the term to describe the process whereby, in the absence of actual data, historic losses are assessed objectively as the foregone income that would have reasonably been generated by an unlawfully converted or withheld asset had it been put to its highest and best use;

iii. In *Whitefish Lake* the Ontario Court of Appeal made a comment in *obiter* which has been argued to connect the term "realistic contingencies" to a new technical step in the assessment of equitable compensation, where the historic losses, once objectively assessed, must be then reduced by a rate derived from a detailed economic analysis of how a claimant First Nation utilized other assets that were not unlawfully converted or withheld by the Crown;

iv. Uncertainty as to the meaning and precedential effect of *Whitefish Lake* has led to inconsistent treatment of the role of "realistic contingencies" in the post-*Whitefish Lake* equitable compensation jurisprudence;

v. Assessing equitable compensation requires a two-stage analysis: 1) objectively assessing historical losses as foregone income that would reasonably have been generated by an unlawfully converted or withheld asset had it been put to its highest and best use, using actual data where the asset was, in fact, put to its highest and best use, or "realistic contingencies" where such actual data is not available; and 2) present valuing the historical losses arrived at in the stage one analysis;

PART III – ARGUMENT

i. "Realistic Contingencies" is Not A Term of Art in Equitable Compensation Jurisprudence

6. In Canadian jurisprudence, the term "realistic contingencies" arises almost exclusively in the context of tort law in relation to the assessment of damages in personal injury or fatal accident cases. It is a term of art in that context, with "realistic contingencies" being applied as a technical step required to calculate lost past income and future earning capacity.[5] By contrast, prior to *Whitefish Lake*, the only use of the term "realistic contingencies" in the equitable compensation jurisprudence was in *Guerin*, where the term is used to describe the inherent reasonableness standard in the assessment of equitable compensation where actual data is not available.

ii. "Realistic Contingencies" in *Guerin*

7. Paragraphs 227 and 228 of the *Guerin (Trial)* decision are the genesis of "realistic contingencies" in Canadian equitable compensation jurisprudence. In that analysis,[6] after reviewing four different approaches to valuing the historical losses put forward by the parties, Collier J. states:

> 227 I make this comment. None of these suggested approaches are completely unrealistic. The calculations, based on acceptance of all the plaintiffs' evidence as to damages, are, to my mind, relatively conservative.
>
> 228 But, as I have indicated, none of these approaches take into account a very realistic contingency: In 1988, or at a later rental review period, the golf club may decide, because of the obviously high rents in sight, to terminate the lease. The agreement gives it the right to do so.[7]

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[5] See, for example: *Trudel v Canamerican Auto Lease & Rental Ltd. (1975)*, 59 DLR (3d) 344 (ONSC); *Sirak v Noonward*, 2015 BCSC 274: *Williams v Nelson*, 2015 BCSC 1776; *Hinder v Yellow Cab Co.*, 2015 BCSC 2069; *Boechler v Edwards*, 2004 BCSC 301; *Stephen v Ogden*, [1996] MJ No. 435 (MBQB); *Macdonald v Joseph*, 2015 BCSC 1461; *Moodie v Greenaway Estate* (1997), 29 OTC 321 (Ont Ct Just.); *Hill v Ghaly*, [2000] NSJ No. 215 (NSSC); *Cumpf v Barbuta*, 2014 BCSC 1898*; Morel v Bryden*, 2006 NSSC 218; *Litt v Guo*, 2015 BCSC 2207; *Bhandal v Charlebois*, 2015 BCSC 2315.

[6] which was affirmed by this Honourable Court in *Guerin v R*, [1984] 2 SCR 335 [*Guerin SCC*].

[7] *Guerin Trial, supra* note 4 at paras 227-228*,* [Appellant's' Book of Authorities, Tab 1].

8. Ultimately, equitable compensation in *Guerin (Trial)* was globally assessed at $10,000,000. In arriving at this amount, Collier J. states:

> 240 I shall set out, however, for the parties, factors and contingencies I have had in mind. The list is not exhaustive:
>
> (a) The difficulty in determining when the 162 acres would have been developed, in what way, and at what monetary return. This, on the basis the present lease would never have been consummated.
>
> (b) The contingency that the area might not, even today, be satisfactorily developed, or providing a realistic economic return.
>
> (c) The astonishing increase in land values, inflation, and interest rates since 1958, and the fact no one could reasonably, in 1958, have envisaged that increase.
>
> (d) The counter-factor to (c) is that those same tremendous increases must be taken into account in any damage award.
>
> (e) The possibility the present lease will remain in effect until its expiry in 2033.
>
> (f) The very real contingency, in my view, the lease may be terminated at a future rental review period.
>
> (g) The moneys which the plaintiffs have received to date under the present lease, and what might be received in the future if the lease remains.
>
> (h) The value of the reversion of the improvements, whether at the end of pre-paid, 99-year residential leases, or at the end of the golf club lease.

9. The above demonstrates how "realistic contingencies" figured into the assessment of compensation. First, Collier J. concluded that the golf course lease rates that had been approved by the Musqueam Band at the time of the surrender were likely impossible to attain, or, had they been initially attained, unlikely to have been sustained at market rates for the lifetime of the lease.[8] He further concluded that highest and best use of the claim lands at the time they were surrendered in 1957 was for residential development.[9]

10. After considering objective market conditions and general rates of development with the full benefit of hindsight, Collier J.'s global assessment accounted for the "realistic contingencies" that a reasonable economic actor could have cancelled the golf course lease at a periodic renewal

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[8] *Ibid*.
[9] *Ibid*, at para 183.

period due to the sharp increase in rates, or, alternately, had the lands been developed as residential in accordance with their highest and best use, that there was considerable uncertainty as to when a reasonable economic actor would have considered it viable to develop the lands.

11. In *Guerin*, then, the equitable compensation analysis accounted for the "realistic contingencies" that were inherent to assessing the objective income earning potential of the unlawfully converted asset to determine the First Nation's annual loss accruing from the time of the surrender. This assessment was undertaken pursuant to several expert appraisal reports based on objective market data and with the full benefit of hindsight.

12. Notably, there is no analysis of or speculation in relation to how the Musqueam Band developed its other lands that were not unlawfully converted, nor is there any suggestion that the compensation owing should be reduced in proportion to the Musqueam Band's spending patterns pursuant to an argument the Band would likely have spent some of the income it would have earned from the development of the claim lands but for the Crown's unlawful conduct.

13. Put another way, Collier J. assessed losses in relation to the potential economic value of the lands, not the potential economic value of the lands as tempered or reduced by the likelihood of whether the Musqueam Band would have realized the highest and best use of the lands. We submit that to take the latter approach is contrary to the principles of equity as: i) it is entirely speculative considering that the Musqueam Band was deprived of the opportunity to develop the lands due to the Crown's unlawful conduct; and ii) that any such speculation would favour the interests of the defaulting fiduciary over those of the injured party.

14. Although Collier J.'s assessment of equitable compensation was overturned by the Federal Court of Appeal, it was ultimately restored by this Honourable Court in *Guerin v R ("Guerin SCC")*.

iii. "Realistic Contingencies" in *Luke v R*

15. Between *Guerin* and *Whitefish Lake*, *Luke v R* (sub. nom. "*Lower Kootenay*")[10] is the only reported decision which applies the principles of equitable compensation as enunciated in *Guerin*.

16. In this decision, Dubé J. considered the Lower Kootenay Indian Band's lost opportunity to lease reserve lands at market rents. In assessing equitable compensation, Dubé J. considered three expert reports, each of which provided an assessment of the claimant's losses by objectively assessing the annual income that would have been generated by the unlawfully withheld asset had it been put to its highest and best use during the claim period, with the full benefit of hindsight, as adjusted for the relevant market factors (or, "realistic contingencies" though that specific term is not used in Dubé J.'s reasons). Once the annual losses were determined, Dubé J. then present valued the annual losses suffered by the claimant First Nation. As stated at paragraph 273-274:

> 273 I am of the view that the Nilsen report reflects much more accurately the rentals that the plaintiffs lost for not being allowed to retake possession of their land in 1974. *Again, that report is based on credible statements from responsible public servants who were personally involved during the period in question. The Nilsen appraisal then makes appropriate deductions and comes up with a fair and realistic appraisal*. On the other hand, the Harck report rests on a very skimpy basis of comparables which cannot possibly sustain a valid projection over a period of eight years.
>
> 274 I will therefore grant judgment to the plaintiffs in the amount of $969,166 plus accrued interest from 1982 (at the appropriate bank rates) to the date of judgment and costs.

17. It is notable that although the court's assessment of equitable compensation in *Lower Kootenay* was valued and adjusted in the same objective manner as in *Guerin*, Dubé J.'s reasons do not use the term "realistic contingencies." AAFN submits that this omission supports our submission that "realistic contingencies" is not a term of art in the equitable compensation jurisprudence, but rather, is a descriptive term of convenience used to describe the factors that figure into the assessment of annual losses pursuant to the analytical framework set out in *Guerin*.

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[10] *Luke v R*, [1992] 2 CNLR 54, 1991 CarswellNat 226 (WL) [*Lower Kootenay*], [Book of Authorities, Tab 1].

iv. "Realistic Contingencies" in *Whitefish Lake*

18. The *Whitefish Lake* decision is the first time that the term "realistic contingencies" is mentioned in connection to a subjective analysis of the dissipation or spending patterns of a First Nation. As stated at paragraphs 101–104:

> 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.[11]

19. The Ontario Court of Appeal's comments in *Whitefish Lake* respecting "realistic contingencies" are *obiter dicta*. The court did not provide an assessment of equitable compensation owing to AAFN, concluding instead that the assessment of equitable compensation at trial was in error, and sending the matter back for a new trial to address deficiencies in the evidentiary record.

20. Nevertheless, the discussion of "realistic contingencies" in the passage above has caused significant fallout and confusion in its aftermath, particularly in cases where a claimant First Nation

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[11] *Whitefish Lake, supra* note 1 at paras 102 - 104.

has established an entitlement to equitable compensation arising from a breach of the Crown's fiduciary duty.

21. AAFN submits that this confusion is rooted in the fact that the Ontario Court of Appeal, while purporting to apply *Guerin*, fundamentally misapprehended the analytical framework for equitable compensation set out in that case.

22. As set out above, *Guerin* stands for the principle that a trier of fact must assess equitable compensation by determining the income that would have been generated by an unlawfully converted asset had it been put to its highest and best use. While equitable presumptions such as highest and best use and the full benefit of hindsight must guide this assessment, the result must ultimately be *reasonable*, which is accomplished by accounting for any "realistic contingencies" that would affect the income generating capacity *of the asset* in the determination of an annual historical loss.

23. Put another way, the *Guerin* framework requires the trier of fact to *objectively* assess the income generating potential *of the asset*.

24. Conversely, in *Whitefish Lake,* the Ontario Court of Appeal appears to suggest that objective assessment of the income generating potential of the asset *must then be reduced* based on the fact that the Claimant First Nation would have likely used ("dissipated" or "consumed) some of the income had it not been unlawfully deprived of the asset.

25. AAFN submits that these *obiter dicta* comments in *Whitefish Lake* fundamentally misinterpret the analytical framework in *Guerin* by purportedly adding an additional step to the analysis whereby an objectively assessed award of equitable compensation (which has already accounted for any relevant "realistic contingencies"), is further reduced as a matter of course.

26. AAFN submits that the analytical framework for equitable compensation suggested (but not applied) in *Whitefish Lake* is diametrically opposed to the fundamental principles of equitable compensation:

i. Equity favours the interests of the wronged party over those of the defaulting fiduciary.[12] Reducing an award of equitable compensation on the logic that *the injured party would have derived a benefit from the asset had they not been deprived of it due to the unlawful conduct of the defaulting fiduciary* exclusively favours the interests of the defaulting fiduciary; and

ii. An award of equitable compensation is intended to restore the injured party to the position it would have been in but for the breach.[13] The approach proposed in *Whitefish Lake* seeks to determine the award that would accomplish this objective, and then reduce it based on spending patterns. Not only does this fundamentally frustrate the very purpose of the exercise, it also has the perverse effect of *allowing the defaulting fiduciary to realize a compounding benefit from its unlawful conduct.*

27. This latter point is emphasized by reviewing the proceedings in *Huu-Ay-Aht* and *Beardy's*. In each of these cases, the Crown tendered expert evidence which established that a party with more income and assets can afford to save more.[14] The corollary of this principle is that a poorer party will spend (or consume, or dissipate) a higher percentage of its assets and income.

28. Of course, the claimant First Nations in each of these cases were poorer *because of the unlawful conduct of the Crown in issue,* which unlawful conduct in turn *causes* the claimants to consume or dissipate their assets at a higher rate. To then weaponize this reality to reduce the objectively assessed amount of equitable compensation that is owed to an injured party is, we submit, fundamentally repugnant to the very concept of equity.

v. "Realistic Contingencies" post-*Whitefish Lake*

29. Notwithstanding that the commentary in *Whitefish Lake* is *obiter dicta* and the fact that the Ontario Court of Appeal did not provide any actual assessment of equitable compensation in *Whitefish Lake*, its commentary suggesting that once assessed, an award of equitable compensation

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[12] *Ibid*, at para 102.
[13] *Ibid*, at para 48.
[14] *Huu-Ay-Aht*, *supra* note 2 at para 75; *Beardy's*, *supra* note 3 at para 52.

must be further reduced to account for "realistic contingencies" has been seized upon and argued by the Crown in each of the post-*Whitefish* cases.

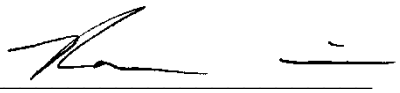
30. Ultimately, the results of these cases have been inconsistent. In *Beardy's*, the claimant argued that the question of consumption or dissipation was wholly irrelevant to the assessment of equitable compensation and the Specific Claims Tribunal agreed.[15] By contrast, in *Huu-Ay-Aht* consumption rates of the claimant's trust funds were factored in to the assessment of equitable compensation.[16]

vi. Assessing Equitable Compensation is a Two-Step Analysis and "Realistic Contingencies" Are Considered at Step One

31. In summary, AAFN submits that the assessment of equitable compensation is a two-step process: **Step 1:** Determine pecuniary damages as the income that would reasonably be expected to be produced by the unlawfully withheld or converted asset had it been put to its highest and best use for the entire claim period, as assessed objectively with the full benefit of hindsight and adjusted to account for any objective realistic contingencies. **Step 2:** Bring forward the historical losses using present valuation methodology.

32. AAFN further submits that the three-step analysis suggested by *Whitefish Lake* and argued by the Crown is *Beardy's*, *Huu-Ay-Aht*, and *Southwind* is contrary to *Guerin* and the fundamental principles of equity and should be consequently rejected expressly by this Honourable Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of November, 2020.



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[15] *Beardy's*, *supra* note 3 at paras 109 – 115.
[16] *Huu-Ay-Aht*, *supra* note 2 at paras 315 and 320.

PART VI – LIST OF AUTHORITIES

Cases	**Paragraph Referred to**
Beardy's & Okemasis Band #96 and #97 v Her Majesty the Queen in Right of Canada, 2016 SCTC 15.	3, 27, 28, 30, 32
Bhandal v Charlebois, 2015 BCSC 2315.	6
Boechler v Edwards, 2004 BCSC 301.	6
Cumpf v Barbuta, 2014 BCSC 1898.	6
Guerin v R, [1982] 2 FC 385.	3, 5 - 17, 21 - 23, 25, 32
Guerin v R, [1984] 2 SCR 335, 1984 CarswellNat 813 (WL).	7
Hill v Ghaly, [2000] NSJ No. 215 (NSSC).	6
Hinder v Yellow Cab Co., 2015 BCSC 2069.	6
Huu-Ay-Aht First Nations v Canada (Minister of Indian Affairs and Northern Development), 2016 SCTC 14.	3, 4, 27, 30, 32
Litt v Guo, 2015 BCSC 2207.	6
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Macdonald v Joseph, 2015 BCSC 1461.	6
Moodie v Greenaway Estate (1997), 29 OTC 321 (Ont Ct Just.).	6
Morel v Bryden, 2006 NSSC 218.	6
Sirak v Noonward, 2015 BCSC 274.	6
Southwind v Canada, 2017 FC 906.	6
Stephen v Ogden, [1996] MJ No. 435 (MBQB).	6
Trudel v Canamerican Auto Lease & Rental Ltd. (1975), 59 DLR (3d) 344 (ONSC).	6
Whitefish Lake Band of Indians v Canada (Attorney General), 2007 ONCA 744.	1, 3 - 6, 15, 18 – 20, 24 - 26, 29, 32
Williams v Nelson, 2015 BCSC 1776.	6