

\$30 MILLION AWARDED TO LAC SEUL FIRST NATION AS EQUITABLE COMPENSATION FOR HISTORICAL WRONGS

25 January 2018

Southwind v. Canada^[1] provides clarity on how Indigenous communities may be compensated for historical breaches of the Crown's fiduciary duty. This case synthesizes and applies the principles developed by the Specific Claims Tribunal in *Beardy's*^[2] and *Huu-Ay-Aht*^[3], the latter discussed by Gowling WLG in our article [Special Claims Tribunal recognises compensability of consumptive goods](#).

Justice Zinn set the tone of his 190 page decision with the following opening quotation:

"If it had been a white settlement, no person would have dared to flood the property, without paying compensation before flooding took place." - H. J. Bury, Department of Indian Affairs, March 16, 1937

Background:

The Lac Seul First Nation ("the LSFN") reside in northwestern Ontario in Treaty 3 territory. Their reserve is on the shore of Lac Seul, which was flooded in 1936 as a result of an intergovernmental hydroelectricity project. The dam was built in 1929 on Ear Falls, 80km from the reserve. By 1936 the water levels reached their maximum height - a full 10 feet higher than its pre-dam normal level. The effect devastated the LSFN. The rising water levels flooded one-third of LSFN members' homes and gardens, ruined wild rice and hay harvests, and unearthed plots at the local cemetery.

Following the flooding, the plight of the LSFN was raised to the Department of Indian Affairs for years before a settlement of \$50,263 was finally paid in 1943. This amount was viewed as "too little and too late" by the LSFN who were awarded \$30 million on October 12, 2017.

Equitable Compensation: Applying *Canson* and Interpreting *Whitefish*

The principles of equitable compensation presume the most favourable accounting. As the Supreme Court explained in *Canson*^[4], this remedy best understood in the context of trust law, which imposes an obligation on a trustee to restore to the estate the assets that were deprived. Equitable compensation is applied to assess a plaintiff's loss based on what would have happened "but for" the fiduciary's breach. The assessment is made at the time of trial with the benefit of hindsight rather than at the time of the breach.

Southwind represents the first judicial synthesis of the *Canson* principles as they have been applied in the context of First Nation claims of historical breaches of the Crown's fiduciary duties. This decision is an example of how to calculate an award of equitable compensation. Justice Zinn outlines these principles at paragraph 285:

1. The goal of equitable compensation is to restore what the plaintiff has lost due to the breach;
2. What the plaintiff lost is an opportunity that was not realized because of the breach;
3. The plaintiff's loss arising from the breach is to be assessed with the advantage of hindsight and is not to be assessed based on what may have been known at the date of breach or have been reasonably foreseeable;
4. The losses are to be determined based on a common sense view of causation, which is to say that the lost opportunity must have been caused by the breach;
5. The Court must assume that the plaintiff would have made the most favourable use of the trust property - the plaintiff's best opportunity - and the loss must be assessed accordingly; and
6. When considering what would have happened had the defendant not breached its duty to the plaintiff, the Court must assume that the defendant would have carried out its duties vis-à-vis the plaintiff, in a lawful manner.

In calculating the award of \$30 million, Zinn J. weighed three different economic calculations made by the LSFN, Canada and Ontario. The decision brings clarity to the muddy waters brought on by the Ontario Court of Appeal in *Whitefish*.^[5] Justice Zinn adopts the Lazar-Prisman model of creating a multiplier based on the historic Indian Trust Fund Rates as the best way to bring forward a historic loss for equitable compensation purposes. He also confirms that consumption, per the Hosios' model of compensation, should be included.

For those litigating historical claims against the Crown before the Specific Claims Tribunal, Southwind will have real impact and is a decision that will be increasingly relevant to the reconciliation process, including the compensation of past wrongs.

[1] Southwind v. Canada, 2017 FC 906 ["Southwind"]

[2] Beardy's & Okemasis Band #96 and #97, 2016 SCTC 15. See also: Southwind at paras 278-287.

[3] Huu-Ay-Aht First Nations v Her Majesty the Queen in Right of Canada, 2016 SCTC 14. See also: Southwind at paras 258-277.

[4] Canson Enterprises Ltd v Boughton & Co, [1991] 3 SCR 534, 1991 CanLII 52.

[5] Whitefish Lake Band of Indians v Canada (Attorney General), 2007 ONCA 744. See: Southwind at paras 250-257, 460-467.

NOT LEGAL ADVICE. Information made available on this website in any form is for information purposes only. It is not, and should not be taken as, legal advice. You should not rely on, or take or fail to take any action based upon this information. Never disregard professional legal advice or delay in seeking legal advice because of something you have read on this website. Gowling WLG professionals will be pleased to discuss resolutions to specific legal concerns you may have.

Related [Indigenous Law](#)

Author

Kaisha Thompson

Associate - [Ottawa](#)

 Email

kaisha.thompson@gowlingwlg.com

 Phone

+1 613-786-0130

 vCard

Kaisha Thompson