

By letter dated November 22, 2005, counsel for the defendant advised counsel for the plaintiff that the defendant admits a breach of its fiduciary duty in the following statement:

I am instructed to advise you that the Attorney General of Canada admits that, in October 1886, the Crown was in breach of its fiduciary duty by failing to obtain fair value for timber licence #68. Specifically, it is admitted that whereas a 'bonus payment' of \$316.00 was paid for the said licence, the actual fair value of the licence as of October, 1886, was in the range of \$12,600.00 to \$19,400.00.

This case has two main issues:

1. What was the fair value of the timber in 1886?
2. How is the fair value in 1886 dollars to be translated into 2005 dollars?

Fair Value in 1886

The plaintiff submits that the fair value of the timber in 1886 was most likely in the range of \$50,000.

The defendant submits that the fair value was in a range of \$12,600 to \$19,400 and suggests that the mid point of that range at \$16,000 is fair to both parties.

To arrive at its range of \$50,000, the plaintiff relies on subsequent private sales and the evidence of Mr. Byford, a Registered Professional Forester.

The original timber licence was sold in October 1886, to Conservative M.P.P., Mr. Honoré Robillard for \$316, which was \$4 per square mile for 79 square miles of timber. According to Mr. Hosking, the plaintiff's historical expert, four dollars per square mile was then the standard rate being charged by the Dominion in respect of timber licences, whether for Reserve land or Federal Crown land. In addition, Robillard or any subsequent licensee would be obliged to pay ground rent and timber dues. No timber operations were commenced.

The licence was transferred to Alexander Barnet on March 11, 1887. The June 1891 edition of The Canada Lumberman reported that the transfer was made for \$43,000.

On June 7, 1887, the licence was transferred to J.H. Francis, reportedly for between \$50,000 and \$55,000.

The evidence respecting the prices alleged to have been achieved in the Barnet and Francis transactions, comes from the following three sources:

- (a) the allegations made by Liberal MP John Barron in the House of Commons;

- (b) an article in The Canada Lumberman publication;
- (c) an article in The Globe newspaper.

In cross-examination, Mr. Hosking agreed that the assertions of Mr. Barron that may have been repeated in The Canada Lumberman and likely repeated in the Globe, were “inherently unreliable”. There are no official documents that confirm the amounts paid for the licence transfers to Barnet and to Francis.

In his report, Mr. Byford concluded that the fair value of the timber in 1886 was between \$43,000 and \$55,000 and most likely toward the upper end of that range. He reached his conclusion by considering the amount of timber harvested in the 15 years after 1886, and the Crown stumpage fees, or dues, paid pursuant to the licence.

I am not persuaded that Mr. Byford’s evidence of what transpired with respect to timber operations in the 15 years subsequent to 1886 is the best evidence upon which to determine the fair value of the timber licence in 1886. Mr. Byford was simply attempting to find some way to support the alleged prices paid by Barnet and Francis for the transfer of the licence, which amounts were unreliable.

In its statement of claim, at paragraph 17, the plaintiff pleads, “... the Crown knew or ought to have known that the fair market value would best be achieved through a sale by public auction”

The defendant relied on the report of Robert Sandy of Price Waterhouse Coopers. He is a chartered accountant specializing in valuations. For his conclusion as to fair value, Mr. Sandy used the Government of Ontario timber auction results for the years 1881-1885. The following is Table 1 of his report:

TABLE 1

Timber Licence/Limits Granted Near the Whitefish Lake Indian Reserve 1881 – 1885					
Year	Limit/Licence #	Location (Township/Area)	Size (Sq. Miles)	Total Bonus Paid (\$)	Bonus per Square mile (\$/sq. mile)
Government of Ontario Transactions					
1881 – 1882	44	Burwash	36.00	\$3,060.00	\$85.00
1881 – 1882	36	Tilton	36.00	\$16.20	\$0.45
1882 – 1883	61	Broder	36.00	\$3,600.00	\$100.00
1882 – 1883	85	Denison	36.00	\$2,160.00	\$60.00
1885	28	Graham	19.25	\$1,925.00	\$100.00
1885	22	Dowling	36.00	\$9,000.00	\$250.00
1885	23	Dowling	36.00	\$7,200.00	\$200.00
1885	21	Fairbank	36.00	\$7,560.00	\$210.00

1885	Balfour	36.00	\$14,400.00	\$400.00
------	---------	-------	-------------	----------

Mr. Sandy used the weighted average of all transactions of \$159.22 to arrive at his fair value figure of \$12,600. He used the weighted average of all 1885 transactions of \$245.54 to arrive at his fair value figure of \$19,400. He noted that the high bonus transaction closest to Valuation Date of October 1886 was \$400.

I find that the transactions listed in Table 1 of the Sandy report are relevant and persuasive because:

- (a) they were achieved at a competitive public auction;
- (b) they relate to timber berths which were all in a close geographic proximity to the Reserve;
- (c) they were all in a time frame very close to that of the impugned transaction;
- (d) the prices recorded are reliable evidence and are part of the public record;
- (e) all of the berths referred to in Table 1 had been subject to a timber cruise, which information was available to the perspective purchasers (ie. they were informed purchasers); and
- (f) general considerations such as: profitability of the timber trade, market trends, the presence of the railway, the impact of "micro climates", the general awareness of fire damage in the area, concerns over jurisdictional issues, etc. are all factored into the arms length auction prices achieved in those transactions.

However, I do not agree with Mr. Sandy's averaging of the auction results.

On October 27, 1885, Indian agent Phipps reported to Prime Minister Macdonald, suggesting that an examination be done by an experienced lumberman to determine the appropriate price to be paid for the timber. In part, Phipps reported:

As to the Bonus that should be asked for the timber my opinion of [*unclear*] without a more perfect knowledge of the quantity would be alone at guess work. I would suggest if the Indians are willing to surrender that an examination be made by an experienced lumberman although a large portion of the Reserve has been burned there still remains a large quantity of Pine, which if realised to the best advantage will be of great benefit to the Indians.

No examination of the amount of timber was performed. When the political furor arose between 1887 and 1890 over how little Robillard paid for the timber rights in light of the alleged amounts paid in subsequent transfers, the Government took no steps to

investigate the problem or to consider whether there was a breach of its fiduciary duties to the plaintiff which required rectification.

Because of these failures of the Government, I find that the fair value of the timber in 1886 should be based on the highest price paid at a public auction in 1885, which was \$400 per square mile of timber.

Therefore, I find that the fair value of the timber in October 1886 was 79 square miles times \$400 per square mile of timber, which amounts to \$31,600.

Fair Value in 2005 Dollars

The plaintiff submits that its fair value of \$50,000 in 1886 is presently worth \$37,152,391, based on compound interest at the rate which the Crown pays on the plaintiff's trust account. The plaintiff submits that the appropriate range is \$27,000,000 to \$40,000,000.

The plaintiff's position is unreasonable. It 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.

The plaintiff's position is highly improbable. 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. The plaintiff's position of "first in and never out" is not realistic.

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. The restriction upon awarding interest against the Crown was eliminated when s.31 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c.C-50, as amended by S.C. 1992, c.8, s.3, came into force. Since that time the Crown pays simple prejudgment interest pursuant to relevant provincial legislation which in Ontario is the *Courts of Justice Act*, R.S.O. 1990, c.43.

The plaintiff submits that the court should exercise its discretion and allow compound interest on an equitable basis on the fair value from 1886. In support of its submission the plaintiff characterizes the Crown's conduct as, "... a serious, ongoing and fraudulent breach of trust carried out deliberately for an ulterior motive." I do not agree.

I prefer the defendant's submission that, "... the Crown did not wrongly convert trust funds for its own use, and did not benefit from any breach of its duty. Rather, it simply failed to perform its duty."

In my view, the appropriate interest to allow is simple prejudgment interest from February 1, 1992 to November 2005, with the application of a multiplier of 34.68.

Conclusion

There will be judgment for the plaintiff in the amount of \$31,600 x 34.68, which amounts to \$1,095,888, plus costs.

If the parties are unable to agree on the amount of the costs, they may provide me with written submissions by February 15, 2006.

Blenus Wright J.

Released: January 24, 2006

cc

COURT FILE NO.: 02-CV-237453CM3
DATE: 20060124

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

WHITEFISH BAND OF INDIANS

Plaintiff

- and -

ATTORNEY GENERAL OF CANADA

Defendant

REASONS FOR JUDGMENT

BLENUS WRIGHT J.

Released: January 24, 2006

cc