EQUITABLE COMPENSATION AS A TOOL FOR RECONCILIATION: REMEDYING BREACH OF FIDUCIARY DUTY FOR INDIGENOUS PEOPLES

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I ABSTRACT

The doctrine of equitable compensation is often used to remunerate First Nations in claims of breach of fiduciary duty. While this has been the practice for years, the doctrine of equitable compensation remains unclear in its application to Aboriginal law, and lacks certainty as a tool to determine quantum of damages. As such, and given the Western liberalist context of the Canadian justice system, this article asks the following question: Can equitable compensation truly serve as a vehicle for remedying breach of fiduciary duty to Indigenous peoples? By critically analyzing the relevant case law around breach of fiduciary duty owed to First Nations, and identifying gaps in applying Indigenous legal concepts to Western legal practices, this article determines that equitable compensation is an inadequate tool to remunerate First Nations for their loss. This article also offers possible solutions to supplement the current legal system to incorporate Indigenous legal principles until full Indigenous self-governance is a reality.

II INTRODUCTION

Canada's relationship with Indigenous peoples[1] is historically strained. This is a result of Canada's colonialist past, residual systemic racism, and intergenerational trauma.[2] However, since the implementation of the *Constitution Act, 1982*, Canadian law has moved toward recognizing the rights of Indigenous peoples as distinct from the rights of non-Indigenous peoples. Significantly, the *Constitution Act, 1982* includes section 35, which promises, "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."[3] Over the years following its implementation, this language has been interpreted to mean that the Crown has special and unique responsibilities in its relationship with Indigenous peoples, including a fiduciary duty.[4]

In the First Nations context, a fiduciary duty will arise when the Canadian government holds discretionary control over a specific Aboriginal interest.[5] Where a court finds that the Crown has breached its fiduciary duty toward a First Nation, oftentimes the remedy is a monetary amount, decided using the doctrine of equitable compensation. The doctrine of equitable compensation is meant to put the injured party in the position they would have been in had it not been for the breach.[6] In this way, a First Nation is theoretically remunerated for what the government had deprived.

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1. Note: This article uses the terms "Aboriginal," "First Nation," and "Indigenous" in distinct ways. "Aboriginal" is used specifically in the context of Aboriginal law, the area of law determining Canada's relationship with Indigenous peoples. "Indigenous" is used generally to refer to Canada's First Nation, Métis, and Inuit peoples. "First Nation" is used to loosely describe Indigenous peoples who do not identify as Inuit or Métis, as a means of narrowing down the scope of this article.

2. *R v Ipeelee*, 2012 SCC 13 at para 60 [*Ipeelee*].

3. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 35(1) [*Constitution Act, 1982*].

4. *Manitoba Métis Federation Inc v Canada (AG)*, 2013 SCC 14 at paras 46–59 [*Manitoba Métis Federation*].

5. *Ibid* at para 49.

6. *Whitefish Lake Band of Indians v Canada (AG)*, 2007 ONCA 744 at para 48 [*Whitefish Lake Band of Indians*].

As the doctrine of equitable compensation has developed in the context of First Nations, the following question must be asked: How "equitable" is it, truly? Equitable compensation exists within a Western liberalist legal system.[7] As a result, it is subject to all the flaws of adversarial justice, including lengthy litigation or negotiation processes, where a First Nation has to fight for what they are owed. This litigation also lacks the influence of Indigenous law and legal history as a tool for reconciliation.[8] Compensation for breach of fiduciary duty and reconciliation are inalienable, yet the Canadian legal system has failed in effectively marrying compensatory tools to reconciliatory goals. Using the theoretical framework of Indigenous legal theory (to be defined below), this article asks the following question: Can equitable compensation truly serve as a vehicle for remedying breach of fiduciary duty to Indigenous peoples?

This question will be answered using a qualitative methodology; that is, "the subjective dimension of knowledge creation, dissemination, and utilization."[9] In doing so, this article engages in an exploratory study of the existing research around equitable compensation and fiduciary duty in the context of First Nations, as well as a deeper discussion and critique of the relevant jurisprudence using a "case analysis" method.[10] As part of this methodology, a critical analysis of the law as it stands through the theoretical framework of Indigenous legal theory will be conducted.

This article starts by engaging in a short literature review of the theoretical framework, Indigenous legal theory. A review of the principles of fiduciary duty in treaty cases will be followed by an examination of the development of the law of equitable compensation in the First Nations context.[11] An analysis of the foregoing evidence will assess whether equitable compensation can ever remedy a breach of fiduciary duty where the claimant is Indigenous and propose possible changes to the system emphasizing Indigenous legal practices.

III INDIGENOUS LEGAL THEORY: LITERATURE REVIEW

This article uses the theoretical lens of Indigenous legal theory (ILT) to analyze equitable compensation as a means of assessing damages to First Nations plaintiffs. There is a distinct gap in the existing research in applying the theoretical framework of ILT to the context of fiduciary duty litigation. Of course, this area of the law has deep implications on the lives of Indigenous peoples. Respect and recognition of Indigenous perspectives is essential to achieving

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7. Canada is a "liberal democracy." As a part of Canadian law, equitable compensation is inherently influenced by Western legal principles. "Concepts of rights, freedom and autonomy are so all-pervasive it can be said that the political morality of liberalism supplies the language of everyday legal discourse." Gordon Christie, "Law, Theory and Aboriginal Peoples" (2003) 2 Indigenous LJ 67 at 72.

8. The use of Indigenous laws is one of the Truth and Reconciliation Commission Calls to Action. Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015) at 50 [*TRC: Calls to Action*].

9. William N Dunn, "Qualitative Methodology" (1983) 4 Research in Progress 590 at 591.

10. *Ibid* at 592.

11. Note: This paper is based on Canadian law as of April 2018.

meaningful justice. Using ILT facilitates an exploration of what an Indigenous imagining of "equitable compensation" might look like in comparison to the current model.[12]

Indigenous legal theory asserts that Western liberalist law is a form of "colonial law"[13] imposed on Indigenous peoples through practices of colonization. The fundamental nature of Indigenous law versus liberal law is at odds. One of the central tenets of liberalism is the concept of pursuit of the individual good, which is inherently subjective.[14] Proponents of liberalism believe that this cultivates a sense of freedom for every individual, making liberalism appealing for democratic countries.[15] However, liberalism has historically been problematic in its application to racial minorities. Many scholars view a necessary function of liberalism to be a "raceless ideal"[16] where, in order for liberalist principles to be effective, they need to rely on the assumption that all members of society start with equal privilege. Obviously, this is not the reality in the majority of countries, particularly those that thrive on the image of multiculturalism.

In comparison, Indigenous rights are more often collective or community rights.[17] In her PhD dissertation, Tracey Lindberg writes, "in the Cree context, law was not man made. Laws are natural and a reflection of the environments and territories that we as Indigenous citizens came from. These laws are not man made and are derived from an authentic and Original source."[18] If Canadian laws are meant to protect Western-European interests, then they are not designed to represent the interests of Indigenous people. There is also an array of intersectional issues with more nuanced obstacles, such as those faced by female Indigenous peoples, Indigenous peoples who are also members of the LGBTQ+ community, Indigenous peoples with disabilities, and more. Though these are pressing and fascinating areas of study, for the purpose of the limited scope of this article, issues of intersectionality will not be addressed.

In order for reconciliation to be a realistic goal, the government will be required to recognize Indigenous law as an important legal tradition.[19] According to Val Napoleon and Hadley Friedland, Indigenous law has always revolved around "oral histories, narratives and stories,"[20] which have the potential to fit into the common law framework. Unfortunately, the current asymmetrical power relationship between Canada and Indigenous peoples creates a roadblock to mutual recognition. As Napoleon and Friedland write, "for respectful and useful

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12. This article is not intended to establish an "Indigenous imagining" of equitable compensation. As a non-Indigenous scholar, I do not feel I am in a position to make this proposal. What I propose is a model that incorporates principles from both Western and Indigenous legal practices as an interim solution until self-governance can be fully realized. I would certainly be an interesting area of research to look into what a self-governed model would look like.

13. Christie, *supra* note 7 at 68.

14. *Ibid* at 74.

15. *Ibid* at 70.

16. Charles W Mills, "Rawls on Race/Race on Rawls" (2009) 47 Southern Journal of Philosophy 161 at 170.

17. Christie, *supra* note 7 at 72.

18. Tracey Lindberg, *Critical Indigenous Legal Theory* (LLD dissertation, University of Ottawa, 2007) [unpublished] at 18.

19. Kirsten Anker, "Reconciliation and Translation: Indigenous Legal Traditions and Canada's Truth and Reconciliation Commission" (2016) 33:2 Windsor YB Access Just 15 at 16.

20. Val Napoleon & Hadley Friedland, "An Inside Job: Engaging with Indigenous Legal Traditions through Stories" (2016) 61 McGill LJ 725 at 728.

engagement to occur, the law in Indigenous legal traditions must be treated substantively as law to be debated, applied, interpreted, argued, analyzed, criticized, and changed."[21] It is impossible for Indigenous law to be realized as long as it is treated as subordinate to the dominant structure of Western liberalist law.

Indigenous legal theory views recognition as a key to reconciliation. In discussing the nature of restorative justice processes (such as the Truth and Reconciliation Commission, or TRC), Kirsten Anker writes,

> [t]he space of engagement is thus potentially an uncomfortable one, with 'our' grounds always unsettled and called into question. In this view, it is not enough for the TRC, for example, to strive simply for 'relational,' rather than 'cheap,' reconciliation, without also opening up the idea of reconciliation itself to engagement with Indigenous languages and traditions.[22]

Indigenous legal theory is understandably wary of lip service toward Indigenous traditions, given the history marked with unfulfilled promises, sparking important reconciliatory mechanisms such as the TRC. Indigenous models of self-governance cannot be successful if they are modeled on the Canadian government and therefore created in the image of colonial law. For reconciliation to be achieved, it must be an inherently restorative process. Much like the doctrine of equitable compensation, it must be deeply focused on restoring the party to the position it would have been in had it not been for the breach—in this case, the act of colonization.

IV WESTERN PRINCIPLES OF FIDUCIARY DUTY IN THE FIRST NATIONS CONTEXT

Generally speaking, "[w]here the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty."[23] More specifically, in the First Nations context, a fiduciary duty "may arise as a result of the Crown [assuming] discretionary control over specific Aboriginal interests."[24] Thus, a fiduciary duty will not arise in every circumstance involving a First Nation; it requires that a specific Indigenous interest be engaged.

Treaties are a sort of contract under s 18(1) of the *Indian Act* used to determine use and possession of land.[25] In treaty relationships, a fiduciary duty will often arise because the First Nation has surrendered land to the Crown, and the Crown has agreed to manage the land and resources for the benefit of the First Nation.[26] There are a number of circumstances where the Crown may breach its fiduciary duty, such as selling land or resources for below market value,

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21. *Ibid* at 739.

22. Anker, *supra* note 19 at 17.

23. *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73 at para 18, citing *Wewaykum Indian Band v Canada*, 2002 SCC 79 at para 79 [*Haida Nation*].

24. *Manitoba Métis Federation, supra* note 4 at para 49, citing *Haida Nation, supra* note 23 at para 18.

25. *Indian Act,* RSC 1985, c I-5, s 18(1).

26. *Ibid*.

failing to pay out royalties to the First Nation, breaching treaty land entitlement agreements, causing environmental damage, and many more.

It is also possible to argue that many of these treaties constitute a breach of fiduciary duty in and of themselves. As of the late eighteenth century, the main purpose of treaty making was "for the Crown to take possession of Indigenous land."[27] Today, there continues to be ongoing conflict, where claimants dispute the legitimacy of treaties, insisting that they involved trickery and coercion on the part of the Crown. The uncertainty surrounding many treaties has also caused disagreement regarding what land belongs to whom and how rights are to be dealt with in this modern era.[28]

Treaties have continued to be formed between Canada and First Nations. Between 1973 and 2008, Canada has entered into twenty-two treaties with First Nations, mainly as a means of addressing claims of Indigenous peoples against the Crown.[29] These treaties have not provided a solution to the inherent power imbalance between the Crown and First Nations. Without structurally based solutions, there cannot be meaningful, systemic change to the persistent problems faced by Indigenous peoples, particularly in the context of fiduciary duty.

V EQUITABLE COMPENSATION IN THE FIRST NATIONS CONTEXT: THE DEVELOPMENT OF THE LAW

The intention of the doctrine of equitable compensation is to put the injured party back in the position they would have been in had it not been for the breach.[30] The leading cases developing equitable compensation in the First Nations context are *Whitefish Lake Band of Indians, Beardy's & Okemasis, Huu-Ay-Aht First Nations*,[31] and most recently, *Southwind v Canada*, all of which are summarized below.[32] Each of these cases has demonstrated the potential equitable compensation has to influence Canadian/Indigenous relations. However, this body of jurisprudence also demonstrates the limitations of the Western liberal legal system, specifically regarding equitable compensation in representing the interests of Indigenous peoples.

A. *Whitefish lake band of indians v canada (ag)*

The facts of this case can be summarized as follows: Whitefish Lake Band of Indians ("Whitefish Lake") surrendered its timber rights to the Crown 120 years prior to this decision.

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27. Brian Egan & Jessica Place, "Minding the Gaps: Property, Geography and Indigenous Peoples in Canada" (2013) 44 Geoforum 129 at 132.

28. *Ibid* at 133.

29. Robert Maciel & Timothy EM Vine, "Redistribution and Recognition: Assessing Alternative Frameworks for Aboriginal Policy in Canada" (2002) 3:4 International Indigenous Policy Journal 1 at 1.

30. *Whitefish Lake Band of Indians, supra* note 6 at para 48.

31. *Southwind v Canada,* 2017 FC 906 at para 249 [*Southwind*] citing *Whitefish Lake Band of Indians, supra* note 6, *Re Beardy's & Okemasis Band No 96 and Canada (Minister of Indian Affairs and Northern Development),* 2016 SCTC 15 [*Beardy's & Okemasis*], *Re Huu-Ay-Aht First Nations and Canada (Minister of Indian Affairs and Northern Development)*, 2016 SCTC 14 [*Huu-Ay-Aht First Nations*].

32. *Southwind, supra* note 31.

The Crown proceeded to sell those rights to a third party at below market value. Prior to trial, the Crown admitted to having breached its fiduciary duty to the First Nation, rendering the issue of whether or not there was a fiduciary duty a non-issue for the court. Thus, the main question in dispute was the compensation owed to the First Nation for the breach of fiduciary duty.[33]

The court of appeal agreed with the trial judge's valuation of Whitefish Lake's timber rights at $31,600.00 based on the evidence. Justice Laskin determined that "had the Crown fulfilled its fiduciary duty, it would have invested 90 per cent of the $31,600 in the Whitefish trust account. That money would have earned investment income, which would have been available for Whitefish and its members."[34] The court further decided that the amount was also subject to compound interest under the doctrine of equitable compensation. Since the invested money would have been collecting compound interest in a trust account, the calculation of equitable compensation should also include accumulated compound interest.[35] In other words, a First Nation is entitled to compensation for its lost opportunity, which includes the opportunity to invest the money to which it is entitled at the rate it was entitled.

It is also significant that the court determined that consumption could not be considered toward the award of equitable compensation. That is to say, the Crown is not in a position to presume that because many First Nations were and are impoverished, they would have spent that money quickly on addressing immediate needs.[36] In this case, the Crown had argued that the result of higher consumption should be minimizing on the amount of compound interest accumulated on the smaller remainder that would have been invested. Justice Laskin writes, "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."[37] However, equitable compensation must also reflect "realistic contingencies," where the court takes into account how some of the money would have been spent.[38]

There were too many deficiencies in the evidence in this case for the court to render a quantum for the equitable compensation owed. As a result, the case had to be returned for a new hearing with more evidence.[39] However, this remains a significant case in Canadian law. The Ontario Court of Appeal made it clear that, when in doubt, the court should err on the side of a more favourable decision for the injured First Nation. In this area of law, this decision was precedential and ultimately informed the decisions in both *Beardy's & Okemasis* and *Huu-Ay-Aht First Nation*.

Nonetheless, this decision has grown out of a Western liberalist legal system and relies on well-established Western liberalist legal principles. While Justice Laskin attempts to develop equitable compensation to meet the needs of a specific group of people with nuanced interests, he fails in doing so. At no point does this decision focus on any of the aforementioned Indigenous legal principles, including the impact of the breach on collective/communal rights

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33. *Whitefish Lake Band of Indians*, *supra* note 6 at paras 1–2.

34. *Ibid* at para 40.

35. *Ibid* at para 41.

36. *Ibid* at paras 101–102.

37. *Ibid* at para 102.

38. *Ibid* at para 103.

39. *Ibid* at para 132.

or how a compensation framework should reflect those interests. Nor does the decision emphasize the significance of different legal techniques, such as oral narratives, and how they can and should be incorporated.[40] This is, and always will be, a problem in the application of the doctrine of equitable compensation where the injured party is a First Nation.

B. *Beardy's & okemasis band no 96 and no 97 v canada (minister of indian affairs and northern development)*

This case was decided at the Specific Claims Tribunal. The central issue of this case was the Crown's failure to make annuity payments to the First Nation under Treaty 6, following the North-West Rebellion.[41] The Crown claimed that band members' participation in the North-West Rebellion was contrary to the terms of Treaty 6 and that, therefore, withholding annuity payments was appropriate. The total annuities withheld amounted to $4,750.00.[42] Ultimately, the tribunal found "[t]he government seized on the Rebellion to justify measures designed to bring the Cree under its control. The purpose was to destroy their tribal system, restrain individual mobility, and strengthen the controlling hand of local officials."[43] Thus, there was a breach of fiduciary duty, and the Crown breached its legal obligation to pay the First Nation treaty annuities.[44]

The Crown and the First Nation agreed that a breach of fiduciary duty should be calculated based on the principles of equitable compensation, but disagreed on the application of those principles. Chairperson Slade, citing *Guerin v R,* described "realistic contingencies" as "contingencies that affect the potential for realization of compensation based on the full application of factors governing the assessment of equitable compensation, in particular the presumption of most advantageous use."[45]

Importantly, the quantum of equitable compensation in this case was decided in a subsequent decision.[46] The two parties disagreed significantly on the "realistic contingencies" that would have affected the amount of annuities that would be subject to equitable compensation.[47] Chairperson Slade again assessed the expert evidence of a number of witnesses relating to how equitable compensation should be calculated. Ultimately, Chairperson Slade decided that equitable compensation should be $4.5 million. This decision was based on applying compound interest to the amount of lost annuities.[48]

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40. Napoleon & Friedland, *supra* note 20 at 728.

41. *Beardy's & Okemasis*, *supra* note 31 at para 2.

42. *Ibid* at para 261.

43. *Ibid* at para 432.

44. *Ibid* at para 438.

45. *Ibid* at para 12.

46. *Ibid* at para 2.

47. *Ibid* at para 12.

48. *Ibid* at para 120.

C. *Huu-ay-aht First Nations v Canada (Minister of Indian Affairs and Northern Development)*

In 1938, Huu-Ay-Aht First Nation (HFN) conditionally surrendered its timber rights in order for the Crown to sell them in the best interests of the First Nation. Canada put the timber licence up for tender and accepted a bid in 1942. No harvesting commenced until 1948. In the meantime, HFN was petitioning Canada to cancel the licence to protect HFN interests. Canada refused, and timber harvesting continued until the 1970s.[49] The Specific Claims Tribunal found that Canada had breached its fiduciary duty by not acting in the best interests of the First Nation. The main issue here was how to calculate equitable compensation for such a breach. Specifically, "whether foregone revenues hypothesized to be spent on consumption merit compensation under the remedy of equitable compensation."[50]

After hearing the testimony from a number of experts on calculating equitable compensation, HFN felt that the methods of calculation proposed "(1) underestimated the Claimant's likely investment and savings; and, (2) hypothesized elevated levels of consumption that Canada would not likely have approved."[51] This demonstrates an evident lack of clarity regarding how equitable compensation should be applied. What is even more telling is the Crown and First Nation could not agree upon the nature of hindsight, which had supposedly been decided in previous cases:

> The Parties agreed that using hindsight to achieve restorative compensation involves consideration of evidence of what likely would have happened absent the breach of fiduciary duty, and that this can be done through the construction of a hypothetical history. *They disagreed, however, on whether hindsight and assessment at trial meant all losses should be taken into account* (the Claimant's position), *or only foregone savings and income-generating investments that were not likely to have been consumed or lost between the hypothesized time of receipt and the date of judicial assessment*.[52]

After years of litigation concentrating on the doctrine of equitable compensation, there remains much uncertainty about how the doctrine itself is actually applied in practice. The experts called by both the Crown and HFN contradicted each other in their interpretations of the case *Whitefish Lake Band of Indians,* causing greater confusion in the application of equitable compensation.[53] This is especially peculiar given the factual similarities of *Whitefish Lake Band of Indians* and *Huu-Ay-Aht First Nations* (both being based on the sale of timber rights).

Both parties attempted to interpret and closely follow the reasoning provided by Justice Laskin in *Whitefish Lake Band of Indians*.[54] This task proved particularly difficult in terms of accurately identifying "realistic contingencies" and consumption patterns. This attempt to build off existing case law contributed to a long and arduous process. In the end, Justice

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49. *Huu-Ay-Aht First Nations, supra* note 31 at para 12.

50. *Ibid* at para 306.

51. *Ibid* at para 144.

52. *Ibid* at para 157 [emphasis added].

53. *Ibid* at para 260.

54. *Ibid* at para 274.

Whalen accepted that HFN would have deposited any money they would have received into trust accounts.[55] Justice Whalen also acknowledged that he had the benefit of hindsight, where he had access to specific knowledge of HFN's spending patterns to take into account "realistic contingencies."[56] He also recognized that consumption must be factored into the overall loss of opportunity of a First Nation.[57] This is a significant clarification, as Justice Whalen identified that HFN would have spent the money on consumption had it not been for the breach as a result of the Crown causing their poverty.[58] Thus, consumption cannot be held against a First Nation, as it would be unethical. Taking into account all of these considerations, HFN was awarded nearly $14 million in damages.[59]

D. *Southwind v Canada*

In October 2017, the Federal Court of Canada decided *Southwind v Canada*. This decision is important because it has taken the principles built by the existing body of jurisprudence and pushed them to their limit. As of the time this article is being written, an application for appeal has been filed for this case. Whichever way the Federal Court of Appeal decides on this matter could fundamentally change the way that courts assess equitable compensation.

This case is lengthy and complicated. At trial, twenty-four witnesses were called. As stated by counsel for Lac Seul First Nation (LSFN), "the main issue is whether Canada was obliged as the band's fiduciary to obtain a royalty or a rental or some other form of return on the investment that Canada forced the band to make in this project by taking its land."[60] The Crown disputes that there was a breach of fiduciary duty at all.

The facts are as follows: LSFN has a reserve near Red Lake, Ontario, established by treaty.[61] In 1929, a dam was built to support gold mining in Red Lake. As part of the project, the government created a reservoir at LSFN, flooding the reserve so badly it was divided from its neighbouring communities by water.[62] This caused irreparable damage to many of the houses, crops, quality of life of members, and the reserve land itself, much of which is still under water.[63] As part of this project, the Crown was responsible for clearing timber from the foreshore. Only a small amount of timber was actually cut, causing a loss in both timber and potential earnings for the people inhabiting LSFN.[64] Had the Crown cleared the timber, LSFN would have received more money in timber dues, and the timber would have been preserved for harvesting purposes.

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55. *Ibid* at para 279.
56. *Ibid* at para 291.
57. *Ibid* at para 313.
58. *Ibid* at para 319.
59. *Ibid* at para 324.
60. *Southwind, supra* note 31 at para 9.
61. *Ibid* at paras 104–105.
62. *Ibid* at para 218.
63. *Ibid* at para 5.
64. *Ibid* at para 218.

LSFN was not consulted or kept apprised of what was happening in regards to building this dam and what the impacts would be on their land.[65] Water levels began to rise in 1929 and finally reached their maximum height in 1936. "One-quarter to one-third of the houses of the LSFN had to be moved or replaced due to the flooding, but this was not undertaken until 1935, when the water had already affected the housing."[66]

Based on the facts and the relevant case law, Justice Zinn decided that the Crown had breached its fiduciary duty to LSFN. The Crown agreed that should it be found to have breached its fiduciary duty to LSFN the damages should be determined by equitable compensation.[67] Thus, Justice Zinn faced the involved and complicated task of determining how equitable compensation should be determined. He looked at the leading cases of equitable compensation in both the non-Indigenous context (*Canson Enterprises Ltd v Boughton & Co,* [1991] 3 SCR 534, SCJ No 91, and *Hodgkinson v Simms,* [1994] 3 SCR 377, SCJ No 84),[68] as well as the Indigenous context (*Whitefish Lake Band of Indians, Beardy's & Okemasis,* and *Huu-Ay-Aht,* as summarized above).[69] Importantly, Justice Zinn identified six main principles in applying the doctrine of equitable compensation to First Nations based on this jurisprudence:

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 the 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.[70]

Next, Justice Zinn identified two of the most challenging aspects of this case: determining what position LSFN would have been in in 1929, but for the breach, and how to measure what

65. *Ibid* at para 136.
66. *Ibid* at para 218.
67. *Ibid* at para 228.
68. *Ibid* at para 232.
69. *Ibid* at para 249.
70. *Ibid* at para 285.

was lost in modern terms.[71] Justice Zinn summarized the calculable losses as "$14,582.16 in 1929 for the flowage easement over its Reserve lands; $34,917.33 in 1929 for timber dues; and $1,750,000.00 for community infrastructure."[72] He then proceeded to identify damages caused that were not calculable, including "loss of livelihood both on and off-Reserve; and loss of easy shore access, damage to boats, and overall damage to the aesthetic of the lake shore due to the failure to remove the timber prior to flooding."[73] Additional damages would need to amount to an assessment of all of this loss.

Although these numbers can be laid out clearly in a retrospective context, the greater challenge is to calculate what this amounts to in modern valuations. After assessing the expert evidence presented to the court on valuations, Justice Zinn determined that Canada owed $14,981,868.10 just in calculable damages.[74]

What Justice Zinn decided next was a major departure from the previous jurisprudence. He went on to determine that LSFN's equitable damages amounted to $30,000,000.00. In his 160-page decision, Justice Zinn chose to devote only one paragraph to this determination, listing his twelve reasons for more than doubling the amount owed in calculable damages. The factors he considered in arriving at that figure included the following:

1. The amount of calculable losses;
2. That many of the non-quantifiable losses created in 1929 persisted over decades, and some are still continuing;
3. The failure to remove the timber from the foreshore created an eyesore and impacted the natural beauty of the Reserve land;
4. The failure to remove timber from the foreshore also created a very long-term water hazard affecting travel and fishing for members of LSFN;
5. The flooding negatively affected hunting and trapping, requiring members to travel further to engage in these pursuits and the number of animals were reduced for some period as a result of the flooding;
6. Although Canada supplied the materials to build the replacement houses, the LSFN members supplied their own labour;
7. The LSFN docks and other outbuildings were not replaced;
8. LSFN hay land, gardens and rice fields were destroyed;
9. The hunting and trapping grounds on the Reserve were negatively impacted;
10. Two LSFN communities were separated by water and one became an island, impacting the ease of movement of the people who lived there;
11. Canada failed to keep the LSFN informed and never consulted with the band on any of the flood related matters that affected it, creating uncertainty and, doubtless, some anxiety for the band; and
12. Canada failed to act in a prompt and effective manner to deal with compensation with the LSFN prior to the flooding and did not do so for

71. *Ibid* at para 287.

72. *Ibid* at para 443.

73. *Ibid* at para 444.

74. *Ibid* at para 508. Canada was credited $1,133,997.70 for compensation previously paid to LSFN.

> many years after the flooding, despite being aware of the negative impact on the band members.[75]

The court further determined that it was not necessary to consider punitive damages separately, as the quantum in equity was a global sum, and consideration of punitive damages had been considered therein.

Southwind is an example of the courts pushing the doctrine of equitable compensation as far as it will go to financially remunerate First Nations for the damages they have incurred. However, therein lies the problem: based on the current Western liberalist legal model, all a court can do is provide monetary compensation. The court is not required to make decisions that will contribute to holistically restoring the loss a First Nation has sustained. This is illustrative of the problems built into a Western liberalist legal system, making equitable compensation an ineffective vehicle for remedying a breach of fiduciary duty.

While *Southwind* does not engage with Indigenous legal principles and therefore does not reflect Indigenous perspectives, it is a clear departure from prior case law. By awarding damages based on a list of relatively vague considerations, including some that appear to be subjective, such as the impact on the natural beauty of the reserve,[76] Justice Zinn does demonstrate that an assessment is not always crystal clear and goes beyond strict financial loss. Instead, an assessment may enrich context—understanding "loss" as a complex tapestry, where it's hard to tell where one loss ends and another begins. The fallout of a breach cannot be compartmentalized and instead bleeds into other areas of the plaintiff's life. Justice Zinn seems to let his feeling about the inequity experienced by the First Nation influence the quantum he awarded and draw his conclusions based in part on his personal understanding of equity. This is arguably equitable compensation at its best. However, even at its best, monetary compensation is simply one piece of a larger damages package that is necessary to fully address what a First Nation has lost and been deprived of in the long term, as will be described in greater detail below.

E. The Case Law: Critical Analysis

Now that the question is no longer "how do we compensate a First Nation?" a new issue has emerged. Compensation that puts the injured First Nation back in the financial position it would have been in but for the breach is insufficient if it does not work toward the greater goal of reconciliation. Considering the law of fiduciary duty in the context of ILT, there are a number of obstacles in the way of equitable compensation adequately embodying the tenets of reconciliation. In the words of Tracey Lindberg, "reconciliation, cannot, in my understanding, be effectively and actually established without a meaningful redress of reclamation, restitution, and reparation."[77]

This body of case law highlights some clear issues with the doctrine of equitable compensation, and more importantly, the use of the Western liberalist legal system to address these issues. First, money is a temporary solution. Monetary compensation cannot replace the Indigenous connection to land or tradition and what was irreplaceably lost as a result

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75. *Ibid* at para 512.

76. *Ibid*.

77. Lindberg, *supra* note 18 at 14–15.

of the breach.[78] Courts willingly pay lip service to the concept that equitable compensation is a global assessment, meant to consider all the ways a First Nation has been injured by the breach in question. Unfortunately, those injuries are persistent and even systemic, causing intergenerational trauma as communities struggle to heal.[79] As a result, a lump sum payment will quickly be absorbed by legal fees and addressing immediate problems in the community that desperately require attention.[80]

Of course, to say that financial compensation is an inadequate remedy is not a unique or novel statement. Finding meaningful compensation for injured parties is not only a problem in fiduciary duty cases, but in other areas of law as well. However, the importance of meaningful reparation is exacerbated in the context of fiduciary duty because of the long and tumultuous history between the parties involved.[81] This is further exacerbated by the government's stated mandate of reconciliation, where Canada is allegedly working toward the reparation of its relationship with Indigenous peoples through a number of initiatives.[82] If the government is incapable of meaningfully remedying a breach of fiduciary duty, this will have repercussions in its relationship with Indigenous peoples as a whole and impede upon the goal of reconciliation.

Another obstacle to the success of equitable compensation is the inherently adversarial process required to participate in the Western liberalist legal system. Indigenous models of justice are often geared toward healing and therapeutic approaches, including restorative justice structures (outlined in greater detail below).[83] In its least adversarial form, equitable compensation is negotiated between the government and the First Nation, finding an "appropriate" quantum of damages to avoid litigation and settle the matter in advance.

Undoubtedly, the worst-case scenario is litigation. Even if the First Nation is successful in litigation, they have had to be subjected to the arduous process of collecting historical reports, expert evidence, and lengthy government applications; and if they are successful, it is only to the chagrin of the government. For reconciliation to be meaningful, it must be reparative in order to establish accountability for the wrongs committed.[84] Requiring a First Nation to fight tooth and nail to simply receive financial compensation, without even an admission of guilt or apology from the government, fails as a means of achieving this goal. In these ways, equitable

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78. Quantifying damages as a strictly monetary amount is an inherently Western concept, taking root in the liberalist concept that "the good life must be pursued *individually,* and we each strive to better ourselves according to our own sense of what is valuable." Thus, this is potentially at odds with the Indigenous concept of communal justice. Christie, *supra* note 7 at 74.

79. Lindberg, *supra* note 18 at 9.

80. *Huu-Ay-Aht First Nations, supra* note 31 at para 312.

81. One historical failure contributing to the strained relationship between the Government of Canada and Indigenous peoples is the residential school system, which has been described as follows: "cultural genocide of residential schools constitutes a harm affecting legal traditions not just because law is also part of culture and closely tied to language but also because the assumption of control was a direct travesty of Indigenous sovereignty and self-governance under traditional legal orders." Anker, *supra* note 19 at 18, citing Courtney Jung, "Canada and the Legacy of the Indian Residential Schools: Transitional Justice for Indigenous Peoples in a Non Transitional Society," in Paige Arthur, ed, *Identities in Transition: Challenges for Transitional Justice in Divided Societies* (Cambridge: Cambridge University Press, 2010) at 241.

82. See, for example, *TRC: Calls to Action, supra* note 8.

83. Jeffery G Hewitt, "Indigenous Restorative Justice: Approaches, Meaning & Possibility" (2016) 67 UNBLJ 313 at 316.

84. Anker, s*upra* note 19 at 23.

compensation fails at repairing the relationship between the Crown and the First Nation. These issues paint a picture of a compensation system that is ineffective at best.

VI EQUITABLE COMPENSATION: A TRUE REMEDY FOR BREACH OF FIDUCIARY DUTY ABSENT INDIGENOUS JUSTICE MODELS?[85]

One of the central issues with equitable compensation in fiduciary duty matters is the failure to engage with alternative dispute resolution mechanisms traditionally used by some Indigenous peoples. The following section will outline the current primary mechanisms for addressing claims in fiduciary duty, potential Indigenous justice elements, and whether they are compatible.

A. Specific Claims Process

The process to file a claim in breach of fiduciary duty is extremely complex. A First Nations complainant can either pursue a claim through the Federal Court or through the Specific Claims Tribunal. The Federal Court process is similar to any claim within the federal jurisdiction, so for the purposes of this article, it will not be addressed in great depth. The appeal of filing a claim with the Specific Claims Tribunal is that there is funding available to First Nations,[86] and the adjudicators typically have a more nuanced knowledge of Aboriginal law than a Federal Court judge, who may rarely encounter these types of claims.

However, there are also a number of drawbacks to filing a claim at the Specific Claims Tribunal. In order to file a claim, a First Nation must first file their claim with the Minister of Indigenous and Northern Affairs (INAC). Once received, the minister has three years to determine whether the government will negotiate the claim.[87] Only after the minister has refused to negotiate the claim can it proceed to the tribunal. Treaty litigation is usually historical in nature and, as a result, tends to face evidentiary delays. For example, in *Huu-Ay-Aht First Nations,* the claim was initially filed with the minister in 2005.[88] Then, after receiving a response, HFN filed the claim with the Specific Claims Tribunal in 2011.[89] The case was finally concluded in 2017, taking a total of 12 years from start to finish. This timeline is not abnormal, and could take even longer.

The minister may also decide to negotiate the claim instead of proceeding to the tribunal. In Canada, the specific claim negotiation process starts with a claim being accepted for

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85. It is important to note that there is no "pan-Indigenous" law. Rather, there are distinct laws within different Indigenous groups, some of which draw similarities and others that do not. For this next section, I try to refer to "Indigenous laws" in a general sense, as opposed to "Canadian laws." Where possible, I refer to the specific First Nation or group of whose laws I am discussing.

86. "Fact Sheet—At a Glance: The *Specific Claims Tribunal Act*" (16 September 2016), online: Indigenous and Northern Affairs Canada <https://www.aadnc-aandc.gc.ca/eng/1100100030306/1100100030307>.

87. *Specific Claims Tribunal Act,* SC 2008, c 22, s 16.

88. *Huu-Ay-Aht First Nations v Canada (Minister of Indian Affairs and Northern Development)*, 2014 SCTC 7 at para 2.

89. *Ibid* at para 5.

negotiation. This only happens after Canada has accepted that it has an "outstanding lawful obligation" to the First Nation.[90] Next, negotiators for both parties reach a joint negotiation protocol agreement, which establishes the "ground rules" for negotiation.[91]

The third step is conducting research on compensation. This is intended to assist the negotiators in determining how much compensation should be paid out at the end of negotiations once a formal settlement is reached. The fourth step involves discussions on compensation, where the studies conducted in step three are reviewed and a quantum for settlement is reached. The next step is drafting the settlement agreement, which is generally based on a template form provided by the government. Then, once confirmed, negotiators for both parties initial a number of original copies of the settlement agreement. Next, it goes to a First Nation ratification vote where members have the opportunity to vote on whether or not they approve the settlement agreement after an information session. If approved, the agreement will be ratified by Canada. Once both parties have signed, the agreement will be implemented (after being approved by the minister).[92]

Specific claims negotiations are the easiest and most reconciliatory process that INAC has to offer, and it is still incredibly cumbersome. The hoops that First Nations are forced to jump through to receive their settlement obliterate the reconciliatory quality that a settlement agreement is meant to realize. Thus, even where the research phase considers equitable compensation in its assessment, it does not effectively contribute to reconciliation in a way that transcends simple compensation.

B. Storytelling as Law

The TRC calls for recognition of Indigenous laws as equivalent alongside Canadian law.[93] Now that this principle is recognized, it is time to transition into the next phase of work—that is, to see to it that Indigenous laws are not treated as a philosophy, but are instead engaged with at a "practical, problem-solving level."[94] One aspect of reconciliation has been unambiguous since mandated by the government: Indigenous involvement is essential.[95] The issue is whether equitable compensation is compatible with Indigenous legal frameworks.

As briefly discussed, an important part of Indigenous law is oral narrative. In many Indigenous cultures, narratives are used to convey essential lessons about sharing knowledge with other groups, prophecy, obligations, respect, healing, and more.[96] While a significant part of Indigenous law, storytelling is also an important part of the Canadian common law system. Narrative has been used as a tool for legal historians, law, and literature scholars, and more recently by critical legal theorists as an instrument for communicating messages and

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90. "The Specific Claims Policy and Process Guide" (15 September 2010), online: Indigenous and Northern Affairs Canada <https://www.aadnc-aandc.gc.ca/eng/1100100030501/1100100030506>.

91. *Ibid.*

92. *Ibid.*

93. *TRC: Calls to Action*, *supra* note 8 at 50.

94. Napoleon & Friedland, *supra* note 20 at 739.

95. *TRC: Calls to Action*, *supra* note 8 at 50.

96. Napoleon & Friedland, *supra* note 20 at 742–743.

experiences from the lens of a party.[97] Moreover, narrative is particularly important to the growth and adaptation of the common law system.[98] In Canada, we frequently see the most heart-wrenching or thought-provoking cases (which resemble stories) influencing legislative reform or judicial decisions, effectively changing the way the judiciary approaches specific issues.[99] It is these stories that humanize the justice system and create courts that articulate Canadian values.

However, while the common law system now accepts stories as oral evidence in court, it is rarely included in the reasoning in judicial decisions, suggesting that it is not weighted as heavily as conventional forms of evidence.[100] Specifically, the law of equitable compensation fails to use Indigenous narrative at all.[101] The decisions of the Federal Court and the Specific Claims Tribunal do not speak to Indigenous experience, and their decisions do not turn on oral evidence expressing essential principles of Indigenous law. This not only fails to meet the Calls to Action of the Truth and Reconciliation Commission,[102] but also misses an opportunity to integrate a reconciliatory mechanism into an area of law that is specifically meant to be reconciliatory. Absent cultural recognition and legitimization on behalf of the Canadian government, the common law and Indigenous law systems will not achieve parity, and Indigenous principles cannot successfully integrate into the Canadian conceptualization of "law."

C. Restorative Principles

Most of the literature informing Indigenous approaches to alternative dispute resolution takes place in the criminal law context. However, many Indigenous legal practices have a restorative aspect[103] and often engage in therapeutic approaches as a means of repairing relationships. Given the emphasis on negotiation in fiduciary duty cases, there is an opportunity to incorporate restorative principles within this forum of resolution. Although this has a more reconciliatory tone than litigation, these negotiations still fail to put into action the Indigenous legal principles that are available.

Restorative justice can look different depending on the context. One example John Borrows describes is an Anishinaabek story recorded in 1838 that illustrates some key aspects of this First Nation's legal system.[104] To paraphrase, a member of the community had become mentally ill and was hurting himself and threatening others. After trying to help him as best

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97. Kathryn Abrams, "Hearing the Call of Stories" (1991) 79 Cal L Rev 971 at 973–975.

98. Napoleon & Friedland, *supra* note 20 at 752.

99. An example of this is the death of a young Indigenous man, Colten Boushie, which has sparked conversation about reforming the laws of jury selection: "Boushie family promised 'concrete changes' in meeting with Trudeau, ministers," *CBC News* (14 February 2018), online: <https://www.cbc.ca/news/politics/boushie-verdict-ottawa-parliament-meeting-1.4533112>.

100. Napoleon & Friedland, *supra* note 20 at 735.

101. In my review of the leading cases of breach of fiduciary duty and equitable compensation, there were no instances where Indigenous narrative was relied upon.

102. *TRC: Calls to Action*, *supra* note 8 at 50.

103. John Borrows, "Indigenous Legal Traditions in Canada: Report for the Law Commission of Canada" (2006) at 47, online (pdf): Government of Canada <http://publications.gc.ca/collections/collection_2008/lcc-cdc/JL2-66-2006E.pdf>.

104. *Ibid* at 45–47.

they could, as a community and with the permission of the band council, the Anishinabek people decided he must die. His closest friend was tasked with the duty to shoot him. Afterwards, they examined the body of the man and found that he was indeed very ill. They also gave the father of the man gifts and carried out tasks his son would have done for him had he been alive and healthy.[105]

This story demonstrates the restorative principles present at least within historic Anishinabek law. Here, the restorative aspect comes from the emphasis on community restoration after the loss of a member. By helping the man's father to heal, the community was able to reconcile and deal with the loss.[106] "Restorative justice" is an inherently vague term, which can be represented in a number of ways. This story is meant to illustrate one historical example of how this principle was applied.

There is often a fine line between "reconciliation" and "restoration." One example of a traditional reconciliatory tool is the Haudenosaunee condolence ceremony.[107] These ceremonies have been held for hundreds of years and continue to this day, and they are frequently used for restorative purposes. Kirsten Anker writes,

> Recently, a condolence was held for a whole community of Kahnawake to help "clear their minds" of fear, anger, and sadness accumulated over the 285 years of the settlement. Thus, the ceremony appears to be both polyvalent—appearing in different forms and social contexts—and ecumenical, used also in relations with non-Haudenosaunee and non-Indigenous allies.[108]

In order for compensation to move toward reconciliation, there must be an aspect of restoration. This piece, among others, can contribute to the healing that will truly help put the injured party in the position it would have been in but for the breach. In reality, equitable compensation does not accomplish this goal because Canada defines "restoration" in colonialist terms. A re-envisioning of equitable compensation with an eye toward restoration is essential to effectively remedy a breach of fiduciary duty.

D. The Significance of "Recognition"

While understanding different principles of Indigenous law is important, recognition of the mutuality of those laws is one of the most significant things Canada can do in support of reconciliation. By shifting the focus from trying to redistribute rights to substantively recognizing Indigenous rights and law, Canada could take a major step toward healing a tenuous relationship with Indigenous peoples.[109] Recognition of Indigenous laws is one of the central Calls to Action by the Truth and Reconciliation Commission.[110]

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105. *Ibid.*

106. *Ibid* at 47.

107. Anker, *supra* note 19 at 33.

108. *Ibid* at 34, citing Teyowisonte (Thomas Deer), "Releasing the Burden: Haudenosaunee Concept of Condolence," *The Eastern Door* (28 September 2001) at 14.

109. Maciel & Vine, *supra* note 29 at 1.

110. *TRC: Calls to Action*, *supra* note 8 at 50.

One of the main obstacles to recognition is creating a legal space that is neither Western-dominant nor Indigenous-dominant. Rather, a neutral ground is necessary for both sides to meet and engage with each other's laws. Neutrality would most likely be accomplished by creating an entirely new legal system.[111] Reconciliation must involve engagement with Indigenous laws and traditions to be successful.[112] In this way, recognition is not only powerful, but also essential to meaningful nation-to-nation relationship building.

In its full form, recognition of Indigenous peoples requires self-determination.[113] This is the ultimate expression of parity. This would also be a means of creating a neutral space for both sides to hear each other, since they would be recognized as equals rather than a dominant and subordinate power. In the context of treaty land claims, this is difficult. Since the concept of fiduciary duty inherently involves a power imbalance, recognition needs to be more substantial to view First Nations as equal contractual partners. Equitable compensation fails in meeting these ends because it is not supporting the recognition of Indigenous laws, but again is based on a set of considerations to determine the quantum adopted in the Canadian common law system. Since equitable compensation cannot respond to the holistic loss experienced by the First Nation through recognition of Indigenous laws and legal mechanisms, it cannot function as a reconciliatory tool.

While full self-governance is not yet a reality for Canada's Indigenous peoples, there are evidently interim steps that can be adopted into the common law. Val Napoleon and Hadley Friedland suggest using legal analysis to interpret Indigenous laws and apply them to the common law system as one method of engaging with Indigenous laws.[114] By merging two legal worlds, it is possible to at least incorporate Indigenous legal principles into a justice system otherwise barren of relevance to First Nations.

E. Comprehensive Damages Packages in the First Nations Context: Interim Solutions to Replacing Equitable Compensation

This article has established that equitable compensation cannot remedy a breach of fiduciary duty where a First Nation is the injured party. There must be a more comprehensive damages package in place.[115] What is proposed is a completely different forum to deal with compensation after a breach of fiduciary duty is found. The following recommendations are not meant to offer a complete model with which to replace equitable compensation; rather, it is meant to outline some principles that must be encompassed in the interim until self-governance can be realized.

The starting point of a new doctrine involves changing the question the court is determining. Instead of asking "What does the community need to restore it to the position it would have been in but for the breach?" the court should be determining "What does

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111. Anker, *supra n*ote 19 at 17.

112. *Ibid.*

113. Christie, *supra* note 7 at 112.

114. Napoleon & Friedland, s*upra* note 20 at 746.

115. This analysis relies on the assumption that a breach of fiduciary duty has already been accepted. As this article is critiquing the use of the doctrine of equitable compensation exclusively, this is a necessary assumption. Identifying alternative ways to assess whether a breach of fiduciary duty exists would be an interesting area for research, but it is outside the limited scope of this article.

your community need in order to heal?" This would reflect the communal interests of the First Nation. The former question stems from Western concepts of justice and is a product of existing case law. Furthermore, this question compartmentalizes the damages experienced by the First Nation as limited to what is directly related to the breach and fails to reflect the reality that a breach of fiduciary duty bleeds into all areas of life and has an intergenerational impact. A simpler question, such as "What does your community need in order to heal?" is a better starting point because it is more open and leaves room for discussion among the parties as opposed to engaging in an adversarial process.

Importantly, the answer to this question will differ depending on the needs of the community. These needs should be expressed through oral narrative and discussion instead of experts. This is not to say that the use of experts will be rendered irrelevant; however, their role may be minimized depending on what the community feels is necessary.[116] The discussion would likely involve historical impacts related to the breach, firsthand accounts of suffering or loss that are connected to the breach (i.e., if the community was forced to relocate), financial losses, and the residual effects on the community today.

In doing so, this narrative should not be presented in the forum of a Western court or tribunal. Important changes must be made to reflect the purpose of the court. First, the judiciary should include Indigenous peoples to help assess the loss incurred. In this way, Indigenous voices are being represented in a decision-making capacity. An Indigenous adjudicator is also more likely to have a greater familiarity with the lived experience of the community and may be in a better position to help assess ways to facilitate healing.[117] Second, the physical forum in which fiduciary duty matters are dealt with should reflect a more reconciliatory model. In some Indigenous traditions, the circle is deeply associated with reconciliation.[118] Sentencing circles have been adopted into criminal law as a means to determine an appropriate sentence for an offender, considering the position of a number of stakeholders, including the offender, family, the victim(s), police, counsel, elders, the judge, and more.[119] Adopting this model into the fiduciary duty context fosters a sense of equality, where the judge is no longer on a pedestal, and Indigenous rights are represented at parity with those of the Crown. After hearing what the community needs, the judge, with the assistance of the elders, will be in a better position to determine what a comprehensive compensation package will look like.

This suggested model borrows from Indigenous legal tools as well as existing Western practices. Instead of envisioning equitable compensation as a financial assessment of where the injured party would have been but for the breach, the analysis takes on a restorative focus, seeking to not only heal the community but also heal the relationship between the parties. In this way, this proposed forum supports the mandate of reconciliation. This proposed model

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116. In *Southwind,* 24 witnesses were called, all but two of which were experts. *Southwind, supra* note 31 at para 12.

117. The academic research related to the importance of Indigenous adjudicators is relatively limited. However, in one study specifically related to using sentencing circles in domestic violence matters, which is an area largely affecting Indigenous peoples, only one of the twenty-seven judges interviewed was Indigenous. It is clear that Canada needs Indigenous peoples to provide input on issues that affect them at disproportionate rates. Joanne Belknap & Courtney McDonald, "Judges' Attitudes about and Experience with Sentencing Circles in Intimate-Partner Abuse Cases" (2010) 52:4 Can J Corr 369 at 376.

118. Anker, *supra* note 19 at 29.

119. *Ibid.*

also addresses some of the concerns identified in the current Western liberalist model. This model will likely reduce the time and cost of litigation since it is not solely focused on financial compensation and will therefore require fewer experts to testify on quantum. It eliminates the adversarial quality in establishing compensation. Finally, it ultimately works toward reconciliation by respecting some Indigenous legal principles and finding meaningful resolution to historic problems.

VII CONCLUSION

This article began by asking the question, Can equitable compensation serve as a vehicle for remedying breach of fiduciary duty to Indigenous peoples? Based on the foregoing critical analysis and arguments, it is clear that equitable compensation has a series of inherent flaws preventing it from ever contributing to meaningful and ongoing remedy for the injured party.

It is not possible for equitable compensation to fully restore an injured First Nation to the position it would have been in but for the breach because it does not use any Indigenous legal principles. Reconciliation requires recognition-based models of governance, where Canada recognizes Indigenous-governing models at parity.[120] Without this fundamental shift in power dynamics, equitable compensation cannot fulfil the ends of reconciliation because it will only assess compensation in a purely monetary sense. While the courts recognize that compensation must be an "assessment" rather than a "calculation," they still fail to address the actual loss and help to repair broken communities. Unless Western liberalist mechanisms of compensation are either replaced with Indigenous mechanisms or are re-envisioned to embody Indigenous teachings, values, and law, they will always lack holistic rehabilitation. Although recent case law has illustrated a shift toward emphasizing the best interest of the injured party, equitable compensation is still an inherently Western concept. This starting point undermines the interests of First Nations.

Ultimately, this article concludes that equitable compensation is inadequate in the context of First Nations. Going forward, it is incumbent upon the Government of Canada to take greater, more meaningful, strides in supporting self-governance. Supporting rather than leading will be absolutely essential to success. In the interim, a new model encompassing Indigenous legal principles must be adopted to support comprehensive compensation and work toward an underlying objective of reconciliation.

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120. Maciel & Vine, s*upra* note 29 at 6.

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