

Compensation or Damages as a Remedy for Breaches of Indigenous Rights

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Since at least 2004, Aboriginal law has centered on consultation and accommodation. Hundreds of cases, articles, seminars and conferences have been dedicated to this undeniably important topic. Other related Aboriginal law issues have not received as much attention in the courts. One such area is the role of compensatory damages as a potential remedy for impacts on Indigenous rights.

Outside of the courts, compensation for impacts on Indigenous rights has routinely been raised and addressed in consultations between Aboriginal groups and the Crown as well as with third party resource developers. Generally, the parties have worked out agreements, such as Adverse Effects Agreements (AEA's) or Impact Benefit Agreements (IBA's), that address the impacts of a proposed project in a way that is acceptable to the Aboriginal Group and which allows the project to proceed. Where such an agreement has not been reached, the parties have found themselves in court on issues related to the duty of consultation, not entitlement to compensation.

Clearly compensation is a tool in accommodation but is it an appropriate remedy for breaches. This issue will ultimately come before the courts but in the absence of any significant jurisprudence, the concept of compensatory damages for impacts on Indigenous rights raises a host of difficult issues, which do not have ready answers.

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