

## Case Brief – Impact of Recent Specific Claims Tribunal Decisions

*Beardy's & Okemasis Band #96 and 97 v. Her Majesty the Queen in Right of Canada (Minister of Indian Affairs and Northern Development); and*

*Huu-Ay-Aht First Nations v. Her Majesty the Queen in Right of Canada (Minister of Indian Affairs and Northern Development), 2016 SCTC 14.*

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The Specific Claims Tribunal (SCT) recently released the following two decisions that will greatly impact how Canada compensates First Nations for fiduciary breaches:

- *Beardy's & Okemasis Band #96 and 97 v. Her Majesty the Queen in Right of Canada (Minister of Indian Affairs and Northern Development), 2016 SCTC 15.*
- *Huu-Ay-Aht First Nations v. Her Majesty the Queen in Right of Canada (Minister of Indian Affairs and Northern Development), 2016 SCTC 14.*

The SCT's consideration of the value of consumption in both *Beardy's* and *Huu-Ay-Aht* has a direct impact on the calculable ratio for compensation in current and future claims.

Current Crown policy with respect to compensation is based on the assumption that the First Nations would have spent the money they were owed on consumable items and that they should not be compensated for those consumable purchases. We are of the view that the First Nations should receive compensation for the value of the foregone consumption. Our view is now supported by these recent SCT decisions.

We provide a more detailed analysis of this issue below.

### CANADA'S POLICY - 80/20 RULE

The standard approach that Canada has taken in calculating the compensation that any particular First Nation should receive has been based on an internal 80/20 Rule. This Rule assumes that 80% of monies that should have been provided would have been spent on consumable items. It then assumes that there is no present-day value for the foregone consumption by the First Nation. Only the remaining 20% of the total loss, therefore, is now compensable.

While this was Canada's policy approach in settlement negotiations, the Tribunal's recent decisions are not in accordance.

Canada has argued that consumption differs from investment income and that it has no value beyond the year in which it is consumed. However, this ignores the fact that capital consumption on roads, bridges and other infrastructure may increase the financial productivity of an area. Likewise, more strictly consumer related goods such as food and medicine can have an impact on

the health, wellbeing and productivity of the population. Foregone consumption, therefore, can have a measurable loss that can then be carried forward and compensated today.

## APPLICATION OF THE LAW

Equitable compensation attempts to put the wronged party in the same position they would have been but for the breach. This can be accomplished by restoring a parcel of land or other asset. Where these lands or assets have been alienated and cannot be returned, financial compensation can be paid.

Prior to the SCT decisions, the law on equitable compensation was vague at best. One of the most discussed cases was *Whitefish Band of Indians v. Canada (Attorney General)*, 2007 ONCA 744.

In *Whitefish*, Justice Laskin concluded that an award in equity required considering the “realistic contingencies” in order to determine the final amounts to be paid. He ruled that it was reasonable that the most of the money owed to the First Nation would have been spent on consumables, and that the First Nation should not be compensated for money that would be spent on consumable items.

The application of *Whitefish* for equitable compensation in specific claims was considered in the two recent SCT decisions. In *Beardy’s* and *Huu-Ay-Aht*, Canada argued that *Whitefish* meant that awards must be reduced for consumption. However, the SCT took a different view. The SCT held in both *Beardy’s* and *Huu-Ay-Aht* that it was not automatic that a realistic contingency required a downward adjustment to an award.

Additionally, both cases looked at the role of consumption in determining a final award in much more detail than *Whitefish*. This included an examination of the issue of what types of consumption should be used to discount an award and which should be compensated.

## APPLICATION OF *BEARDY’S*

*Beardy’s* deals with the Crown’s refusal to make treaty annuity payments on the assumption that the bands in question had either sided with or harbored and supported rebel forces. The total annuity payments that were withheld for members of Beardy First Nation totaled \$4250. The Crown argued that the treaty payments, being directly disbursed to the membership, would have been almost entirely spent on consumption. If *Whitefish* were applied, they argued that nearly the entire award must be discounted for this consumption. Put simply, the Crown argued that, as the First Nation members were poor, they needed all of the annuity monies for consumption. There was, as a result, nothing left with which to calculate equitable compensation.

The First Nation acknowledged that the entire annuity payment would have been likely spent on consumption, probably within days of receipt. However, it argued that the principles of equity prevented an interpretation of *Whitefish* in a manner that would dissipate the entire award. Chairperson Slade agreed with the claimant nations. He concluded that to accept the Crown's position would be to unfairly disadvantage poorer individuals and essentially allow a trustee to apply a lesser standard of care when dealing with the poor. This, Chairperson Slade concluded, would not be a fair conclusion. A trustee must owe the same duty of care regardless of whether the fiduciary is wealthy or poor. The courts cannot create a system whereby trustees are immune from compensation on the basis of the poverty of the beneficiary. This must especially be so when the trustee's actions greatly contributed to the beneficiary's impoverishment.

Ultimately the SCT ruled in favour of the claimant nations. It did not apply any discount for consumption to the final award.

Equity requires clean hands. We further suggest that the Crown cannot benefit from dishonourable behavior or contributing to misdeeds. Where it can be established that the honour of the Crown has not been upheld, there can be no discount for consumption. The Crown decided not to appeal this decision.

## **APPLICATION OF *HUU-AY-AHT***

The SCT ruling in *Huu-Ay-Aht* was released just weeks prior to *Beardy's*. It also contains a detailed consideration of the role that consumption plays in determining a final award for equitable compensation.

The arguments of the Crown and the First Nations were very similar to those in *Beardy's*. The Crown argued that *Whitefish* meant that compensation was entirely deductible from any final award. The First Nations conceded that some elements of consumption may be realistically discounted, but other forms of consumption can receive a financial value. Thus, foregone consumption should be compensated.

The SCT looked at the expenditures from the Huu-Ay-Aht trust account over the years in question and ultimately ruled that there was sufficient evidence to reach a conclusion on its consumption patterns. Based on these consumption patterns, it was possible to place a value on the foregone consumption of Huu-Ay-Aht First Nation and that many forms of consumption would have long-term value. Huu-Ay-Aht, as a result, should receive compensation for the value of the foregone consumption.

This ruling was based on the SCT's finding that many forms of consumption had an impact on the health of the First Nations going forward, as well as their ability to extract value from their land and other assets. The Tribunal rejected the Crown's argument that consumption has no long-term

value. The Crown now seeks a judicial review of the *Huu-Ay-Aht* decision before the Federal Court of Appeal.

## CONSIDERATIONS

The SCT's consideration of the value of consumption in both *Beardy's* and *Huu-Ay-Aht* has a direct effect on the calculable ratio for compensation in current and future claims when considering consumable items.

Based on the two SCT decisions, it is abundantly clear that the law has moved away from any approach akin to an 80/20 calculation ratio.

Both *Beardy's* and *Huu-Ay-Aht* establish that First Nations should receive compensation for the value of the foregone consumption. And both decisions reject the Crown's arguments with respect to the application of *Whitefish*.

It may take another 3-6 years before the court clarify their views on equitable compensation as the Crown now seeks judicial review of the *Huu-Ay-Aht* decisions in the Federal Court of Appeal, and a subsequent appeal to the Supreme Court of Canada is likely.

First Nations seeking settlement mandates in current claims would be prejudiced by an obligation to wait 3-6 years until a Supreme Court of Canada ruling to receive the full benefit of its negotiations. However, the SCT's recent decisions put these First Nations in a strong position to negotiate compensation in an amount that exceeds what would be offered under Canada's 80/20 Rule.