**Case brief – *Beardy’s & Okemasis Band v. Canada,* 2015 SCTC 3**

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**Introduction**

Between 1885 and 1888 the federal government withheld treaty payments to members of Beardy's and Okemasis First Nation (“Beardy’s & Okemasis”), in the wake of the Northwest Rebellion. The government claimed participation by band members in the Métis rebellion was an act of disloyalty and thereby justified the suspension of treaty payments under Treaty 6.

Beardy’s & Okemasis brought a specific claim against Canada for compensation based on section 14(1)(a) of the *Specific Claims Tribunal Act* (the “Act”) for a “failure to fulfill a legal obligation of the Crown to provide lands and other assets under a treaty”. On May 6, 2015, the Specific Claims Tribunal (“SCT”) released its decision in *Beardy’s & Okemasis Band v. Canada,* 2015 SCTC 3 (“*Beardy’s*”). At the hearing, the SCT considered the following issues:

1. Does the SCT have jurisdiction to hear claims for the non-payment of treaty annuities?
   1. Are treaty payments “assets” under the Act?
   2. If so, are treaty annuities “assets” of the First Nation (or individual members)?
2. Did Beardy’s & Okemasis fail to honour its treaty obligations?
3. If so, was the Crown justified in withholding treaty payments from members of Beardy’s & Okemasis in the wake of the Rebellion?

**Decision**

***Are Treaty Annuities “Assets”?***

At the hearing, Canada argued that annuities are intangible and not ‘assets’. As such, the common law precludes consideration of a promise to pay as anything but incorporeal property.[[1]](#footnote-1)

The SCT rejected Canada’s position that annuities were intangible, noting that:

It is unlikely that the chief and headman who negotiated and signed Treaty 6 would have understood the promise to pay five dollars annually would have the sense that this was any different than the promises to provide land, livestock and agricultural implements…All are assets, to be delivered as promised.[[2]](#footnote-2)

Therefore, Canada’s technical and overly legalistic characterization of an annuity as incorporeal went “beyond the comprehension of all except bankers, insurers, their lawyers and mystics.”[[3]](#footnote-3) The SCT held “cash in the hands of the Indian agent was tangible property, an asset of the band, like a cow or plough.”[[4]](#footnote-4)

***Are Treaty Annuities Assets of the First Nation or Individual Members?***

Before the SCT, Canada argued that the Tribunal lacked jurisdiction to hear the Claim as annuities are, on the terms of Treaty 6, payable to individual members of the band. Therefore, the Claim cannot be brought by the First Nation for compensation of “its losses”, as provided in section 14(1) of the Act.

The SCT concluded that the collective has no legal identity distinct from its members, and is in fact and law an aggregate of those members.[[5]](#footnote-5) The Treaty promise then, is the delivery of a $5.00 banknote to each of the individuals that comprises the collective. The SCT also noted the facts of the Claim also supported that Canada viewed Treaty annuities as collective, as it had withheld annuities from all members of the band, and not only those that had actively participated in the Rebellion.[[6]](#footnote-6)

Significantly, the SCT distinguished the *Soldier* case, which is often cited as an authority by the Crown that an action for non-payment of treaty annuities may only be brought by entitled individuals. The SCT concluded that *Soldier* was not determinative of the issue at hand as it related to the certification of a class action, and it “did not rank as a precedent on the collective or individual nature of a right to an annuity.”[[7]](#footnote-7) The SCT cited the Supreme Court’s decision in *Molton* for the principle that although Aboriginal rights are collective, the can have both individual and collective aspects.[[8]](#footnote-8) Because entitlement to an annuity payment is lost when an individual is removed from the band list, it is not owed to the individual, but to the collective as then constituted.[[9]](#footnote-9)

Canada further argued that the Minister does not except claims based on the failure to pay treaty annuities, on the basis of that it does not fit within Specific Claims Policy (the “Policy”). Canada argued that in order for a claim to be accepted on the basis of the Policy, it must be “clear, countable and communal”. That is, it must be:

* a *clear* treaty obligation that does not require a significant amount of interpretation;
* *countable* in the sense that the obligation can be qualified and compensation can be calculated; and
* *communal* in that the damages were experienced by the First Nation.

Canada contended that annuity claims do not fit the requirements identified above, although these requirements were not disclosed to First Nations when their claims were submitted and rejected by the SCB.

The SCT found that the Policy was neither transparent, fair nor consistent with the promise of *Outstanding Business*. [[10]](#footnote-10) The SCT agreed with Beardy’s & Okemasis’ position that the Policy was irrelevant to the SCT’s ability to decide the case at bar or the interpretation of the Act. Instead, the Policy was “an administrative measure implemented to make life less complicated for the SCB, and [the notion] that this has any bearing on the jurisdiction Tribunal to consider claims that require analysis of the legal nature of treaty obligations, must be rejected.”[[11]](#footnote-11)

The SCT found further that the claim fell within the Act and the solemn assurances of *Justice at Last*, as it relates to a “non-fulfillment of a treaty” and “a failure to fulfill a legal obligation of the Crown to provide…assets under a treaty”.[[12]](#footnote-12) Canada, however, argued that annuity claims were intended to be excluded under the Act. The SCT strongly rejected this contention, stating:

These interpretations, if accepted, would bring dishonor upon the Crown…It would suggest the finessing of language both in order to support an argument that treaty annuity claims are not within the grounds for claims. If this was the objective, the honour of the Crown in the circumstances of the objective of *Justice at Last* would require it to have been disclosed. To fail to do so would be sharp practice. Accordingly, I decline to draw such an inference…My findings on the interpretation of “tangible property” and “its losses” have the incidental effect of leaving the honour of the Crown untarnished.[[13]](#footnote-13)

The SCT noted further that section 15(1) of the Act lists categories of claims that cannot be brought before the SCT, and treaty annuity claims are not enumerated. Therefore, “[t]o create another exclusion...is, to use an analogy, like entering a birthday party through the front door with a present, then sneaking in the back door to take the present back.”[[14]](#footnote-14) As such, it could not have been the intention of Parliament to exclude First Nations from bringing annuity claims before the SCT.

***Did Beardy’s & Okemasis Breach Treaty 6?***

The SCT found that the presence of rebel forces at Beardy’s & Okemasis’ Duck Lake reserve was merely a coincidence of location as fighting between Métis and Canadian forces broke out at the edge of the Beardy’s reserve. Although some young men from the band likely participated in the Rebellion, the chiefs had warned Canada of this possibility due to frustration over the failure to deliver on treaty promises in the years leading up to the Rebellion.[[15]](#footnote-15) “The notion that the chiefs and the members joined *en masse* is not supported by the evidence” as they were caught in the middle with no apparent option but to remain among the rebels.[[16]](#footnote-16)

Canada’s branding of the band as disloyal was therefore not warranted. In fact, the evidence showed that Beardy’s & Okemasis livestock were killed and their supplies looted. Although Treaty 6 obligated First Nations to assist Canada in enforcing the laws of the country, “they could hardly be expected to enforce the law when the government was unable to do so.”[[17]](#footnote-17) Given these findings, Beardy’s & Okemasis did not breach their treaty obligations.

***Was Canada’s Denial of Annuities Lawful?***

Even if Beardy’s & Okemasis had been found to be disloyal, the SCT questioned whether treaty rights could be denied in any event. Citing Professor Leonard Rotman, the SCT noted:

Treaty rights...are entirely a product of negotiation between the parties. Since treaties are negotiated instruments which the Crown has pledged its honour to uphold, it would be unseemly to allow those negotiated rights to be unilaterally altered by Crown legislation…If treaty rights are subject to alteration at the whim of the Crown, the solemn nature of treaties in which they are contained is necessarily ignored, the Crown’s fiduciary duty is breached, and its honour tarnished.

In any event, the Crown in this case merely made an administration (not legislative) decision to withhold treaty annuities, and in doing so breached its fiduciary duties. There was “not honourable ground on which the Crown could exercise a legal power to withhold treaty payments even if it possessed that power.”[[18]](#footnote-18) Further, Canada’s imposition of a permit system under which members could not step foot outside the reserve without express permission of the Indian agent, and its refusal to allow the band to have a chief for a period of 48 years after the Rebellion, was motivated by government officials desire to “destroy their tribal system, retrain individual mobility, and strengthen the controlling hand of local officials.”[[19]](#footnote-19)

**Implications of *Beardy’s* Decision on Treaty 8 Annuity Claims**

The *Beardy’s* decision is an important victory as it clarified a number of important issues relevant to the annuity claims made by treaty First Nations. Prior to this decision, treaty First Nations also had their claims rejected by Canada on the grounds that compensation would be payable to individual band members and, therefore, unacceptable under the Policy.

Treaty First Nations can now be certain that the SCT has jurisdiction to hear their claims, as annuity claims are collective “assets” under the Act. The SCT also provided a clear message to Canada that the Policy upon which it accepts and rejects claims for negotiation cannot and ought not to preclude annuity claims on the grounds argued before SCT, as to do so is not transparent, fair or in line with the honour of the Crown.

The SCT has yet to rule on compensation for *Beardy’s* and Canada has 30 days to appeal the decision to the Federal Court. In order to avoid setting a precedent in Federal Court, Canada may leave the *Beardy’s* decision alone and focus its efforts on trying to limit compensation. Canada may also choose to revise its Policy and agree to negotiate treaty annuity claims, in order to prevent a flood of claims before the SCT. While Canada may revise its Policy, this is not likely to occur quickly.

For treaty First Nations with rejected annuities claims, now may be an opportune time to consider filing with the SCT in order to capitalize on this positive ruling.

1. Beardy’s, at para. 276. [↑](#footnote-ref-1)
2. Beardy’s, at para. 288. [↑](#footnote-ref-2)
3. Beardy’s, at para. 290. [↑](#footnote-ref-3)
4. Beardy’s, at para. 298. [↑](#footnote-ref-4)
5. Beardy’s, at para. 305. [↑](#footnote-ref-5)
6. Beardy’s, at para. 308-309. [↑](#footnote-ref-6)
7. Beardy’s, at para. 312. [↑](#footnote-ref-7)
8. Beardy’s, at para. 313. [↑](#footnote-ref-8)
9. Beardy’s, at para. 315. [↑](#footnote-ref-9)
10. Beardy’s, at para. 375. [↑](#footnote-ref-10)
11. Beardy’s, at para. 380. [↑](#footnote-ref-11)
12. Beardy’s, at para. 351. [↑](#footnote-ref-12)
13. Beardy’s, at para. 390-393. [↑](#footnote-ref-13)
14. Beardy’s, at para. 406. [↑](#footnote-ref-14)
15. Beardy’s, at para. 410. [↑](#footnote-ref-15)
16. Beardy’s, at para. 411-412. [↑](#footnote-ref-16)
17. Beardy’s, at para. 421. [↑](#footnote-ref-17)
18. Beardy’s, at para. 431. [↑](#footnote-ref-18)
19. Beardy’s, at para. 432. [↑](#footnote-ref-19)