INDIVIDUAL vs. COLLECTIVE BENEFICIARIES
of
Claim Settlements
in the
Federal Specific Claims Process

Prepared by
Robert Metcs & Peter Havlik

for the

National Claims Research Workshop
Winnipeg, Manitoba
October 14 - 16, 1999

INTRODUCTION

A conventional specific claims submission contains a statement of the redress sought by the claimant First Nation with respect to the historical grievance at issue. However, in some circumstances it is not enough to establish what compensation is expected. Sometimes, the additional and usually unexamined question of who is entitled to that compensation can make the difference between a successful claim and one fraught with difficulties.

The purpose of this short paper is to clarify certain aspects of the Specific Claims process with respect to the entitlement of individual First Nation members, and descendants of First Nation members, to claim settlements. Related to this issue, and therefore discussed also, is the position of individual Indians and First Nation members with respect to the Claims process.

This paper will not address the question of the entitlement to settlement proceeds of one First Nation over that of another in circumstances where this may be in contention, because the topic shall be covered by other conference participants.

WHO CAN FILE A SPECIFIC CLAIM

The issue of who can participate in the Specific Claims process was addressed directly by the Indian Claims Commission in the *Young Chipewayan Inquiry into the Claim Regarding Stoney Knoll Indian Reserve No. 107*:

> We observe that the Specific Claims Policy clearly contemplates claims by a band or bands, and not claims by individuals. Guidelines 1 and 2 of the Policy state:
>
> > Guidelines for the submission and assessment of specific claims may be summarized as follows:
> >
> > 1) Specific Claims shall be submitted by the claimant band to the Minister of Indian Affairs and Northern Development.
> >
> > 2) The claimant bringing the claim shall be the band suffering the alleged grievance, or group of bands, if all are bringing the same claim.

> Therefore it is our view that the claimant must be a "band" in order to advance a claim under the Specific Claims Policy.
>
> ....The policy does not afford individuals or groups of individuals redress unless they are a "band" within the meaning of the Policy.[1]

The Commission later added:

> In our view, it is the definition of a "band" under the Indian Act that is most relevant to the Specific Claims Policy. Since 1876 the various Indian Acts in place have, from time to time, prescribed comprehensive legislative regimes which have applied, inter alia, to the administration of Indian reserve lands and moneys. It is clear from a reading of Outstanding Business that this legislative framework is the foundation upon which the Specific Claims Policy is constructed.[2]

THE EXTENT OF INDIVIDUAL ENTITLEMENT TO CLAIM SETTLEMENTS

If the Commission was correct, and only "Bands" can submit Specific Claims, it is to "Bands" that any final settlements would logically be disbursed. Any land, money or other assets so disbursed become the common property of the First Nation, with individual First Nation members having no legal basis to demand any form of per capita distribution with respect to such settlements. Any such distribution must be based upon the settlement agreement itself and/or subsequent resolutions by the Band Council (on behalf of the First Nation), or the First Nation as a whole (by referendum or otherwise). Further, any settlement, unless agreed otherwise, is to the benefit of the First Nation as constituted at the time of settlement.

---

[1]. Indian Claims Commission, *Young Chipeewayan Inquiry into the Claim Regarding Stoney Knoll Indian Reserve No. 107*, December 1994, in (1995) 3 *ICCP* 175 at 196. The Commission reaffirmed its position on the matter in the *Friends of the Michel Society Inquiry* (March 1998) at 37-38.

> ....the Specific Claims Policy contemplates claims by a band or bands, not individuals or other groups. In the *Young Chipeewayan Inquiry*, the Commission concluded that the Policy does not afford individuals or groups of individuals redress unless they are a band within the meaning of the policy. The Commission went on to state that "it is the definition of 'band' under the *Indian Act* that is most relevant to the Specific Claims Policy."

[2]. Indian Claims Commission, *Young Chipeewayan Inquiry into the Claim Regarding Stoney Knoll Indian* [illegible]

These matters have been addressed by the courts. In *Sabattis et al. v. Oromocto Indian Band et al.*, the New Brunswick Court of Queen's Bench, Trial Division, was asked to consider a claim by former members of the Oromocto Indian Band (and direct descendants or next of kin of former members) that they were entitled to share in the proceeds of a land claim settlement entered into between the Federal Government and the First Nation in 1983. The settlement concerned lands taken by the Federal Government in 1953. Pursuant to a Band Council Resolution, a distribution had been made based on a 1983 Band membership list. The plaintiffs had been members of the Oromocto Band in 1953, but had moved subsequently to another First Nation. In dismissing the claim, Russell J. referred to Section 16(2) of the *Indian Act*, R.S.C. 1970, c.I-6, and amendments:

> (2) A person who ceases to be a member of one band by reason of his becoming a member of another band is not entitled to any interest in the lands or monies held by Her Majesty on behalf of the former band, but he is entitled to the same interest in common in lands and monies held by Her Majesty on behalf of the latter band as other members of that band.

He went on to state:

> It is not a question that one method to determine a band list is more just than another; rather there must be a degree of certainty. This is necessary so that individuals can determine their rights and obligations in relation to their present bands and prospective bands before deciding whether to move or transfer. Section 16(2) provides this element of certainty....[3]

Justice Russell also addressed the claim of individual First Nation members to the Nation's assets:

> Had the Oromocto Band chosen they could have, in 1953, elected to use the money for purchase of additional lands or for any other approved purpose designated at the time of receipt by a band council resolution. There was not any proprietary interest to the surrendered lands in the members of the Band in 1953 and therefore the members did not, in that year, have a right to a per capita distribution of the settlement monies. The Band in 1983 chose to make a per capita distribution to the people based on the May 25, 1983, Band list but they might just as well have chosen some other reasonable method of distribution.

> The basis of the plaintiff's argument is that they were members of the Oromocto Band before, on or after 1953, and for that reason have some interest in a share of the money. That is not necessarily so, however, because the land and whatever flows from it, whether by way of surrender or resurrender, is for the use and benefit of the Oromocto Indian Band and not any one individual. Because the Band chose to divide it among individuals selected as of a fixed date rather than, for example, constructing a recreation building does not create title in individuals prior to the passing of the July 1983 band council resolution.[4]

A similar decision was reached in the recent case before the Federal Court of Canada, Trial Division, concerning various claims to judgment proceeds arising from the decision of the Supreme Court of Canada in *Blueberry River Indian Band v. Canada*.[5] The latter case dealt with the 1945 surrender of Indian Reserve No. 172 by the then Fort St. John Beaver Band. The Supreme Court ruled against the Crown for breach of fiduciary duty with respect to the conveyance of mineral rights to the Reserve, by the Director of the *Veteran's Land Act*, subsequent to 9 August 1949. The Fort St. John Beaver Band separated itself in 1977 into the current Blueberry River and Doig River First Nations. The Federal Court was asked for a preliminary determination on the following question:

> Are any persons i.e. present descendants of the Beaver Band of Indians, who are not themselves members of the Doig River Indian Band and the Blueberry River Indian Band for the time being, entitled individually or as a group to be considered members of the collectivity which has the right to the proceeds of judgment.

The decision of Hugessen J. is worth quoting at some length:

> Indian reserve 172 was set apart for the Beaver Band. A Band is a creature of statute under the *Indian Act*. It is a body of Indians for whom lands have been set aside by the Crown and for whose benefit such lands are held. A Band is not the same thing as a first nation. Its membership is not determined by inheritance

---

[4]. *Supra.*, at 163.

[5]. Federal Court of Canada, Trial Division, Docket T-4178-78, 1999-04-07, JOSEPH APSASSIN, Chief of the Blueberry River Indian Band, and JERRY ATTACHIE, Chief of the Doig River Band, on behalf of themselves and all other members of the Doig River Indian Band, the Blueberry River Band, and all present descendants of the Beaver Band of Indians v. HER MAJESTY THE QUEEN THE RIGHT OF CANADA as represented by the Department of Indian Affairs and Northern Development and the Director of the Veterans Land Act. See also *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* [1996] 2

or descendancy but by the law itself. A Band is a collectivity and the rights which a Band has in reserves which are set apart for it are collective and not individual rights. While such rights may include aboriginal or treaty rights, they are vested only in the Band. They are not transmissible by inheritance; a descendant of a Band member does not acquire any of the latter's rights in the collectivity unless such descendant is, or becomes, him or herself a member of the Band.

The rights of the Beaver Band in Indian Reserve 172 were collective rights enjoyed by the members for the time being of that Band. When the Band ceased to exist those rights passed to the members of the two successor Bands, the Blueberry River and Doig River Bands. Since those rights were collective and not individual rights, they could neither be exercised by nor transmitted to individuals. The breach of fiduciary duty which has been established in this case was owed to the Beaver Band and the right of action which resulted therefrom was transmitted to the successor Bands. That right was equally a collective right which belonged and still belongs collectively and not individually to the members for the time being of those Bands. It is membership and not ancestry which determines entitlement to reserve lands and, in consequence, to the damages flowing from any breach of fiduciary duty in relation to those lands. Therefore, descendants who are not Band members can have no share in the proceeds of judgement.

Some claimants assert entitlement to the proceeds of judgement as a result of rights flowing to them as descendants of the signatories of Treaty 8. That claim is equally misconceived. It confuses those aboriginal and treaty rights which flowed to those first nations which signed or adhered to Treaty 8 with the rights of the Beaver Band in reserve 172 which was set aside by the Crown for that Band in partial compliance with the Crown's treaty obligations. Membership in a first nation, and the enjoyment of any aboriginal and treaty rights which may flow from such membership, is quite different from membership in a Band and the enjoyment of the rights which flow from that status. Of course, the two may and often do overlap, but that does not make them the same.[6]

---

[6]. *Supra*, at 12-13.

EXAMPLES OF CLAIMS WITH A DIMENSION OF INDIVIDUAL ENTITLEMENT

It is apparent that the current Specific Claims process presents significant restrictions with respect to the pursuance, and eventual settlement, of various legitimate grievances which contain a dimension of individual entitlement. A few examples of such grievances include:

- **Claims asserting a failure by the Federal Government to meet its lawful obligations with respect to the payment of Treaty annuity monies.**

For example, Treaty No. 8 reads:

> And with a view to show the satisfaction of Her Majesty with the behaviour and good conduct of Her Indians, and in extinguishment of all their past claims, She hereby, through Her Commissioners, agrees to make each Chief a present of thirty-two dollars in cash, to each Headman twenty-two dollars, and to every other Indian of whatever age, of the families represented at the time and place of payment, twelve dollars.
>
> Her Majesty also agrees that next year, and annually afterwards for ever, She will cause to be paid to the said Indians in cash, at suitable places and dates, of which the said Indians shall be duly notified, to each Chief twenty-five dollars, each Headman, not to exceed four to a large Band and two to a small Band, fifteen dollars, and to every other Indian, of whatever age, five dollars, the same, unless there be some exceptional reason, to be paid only to heads of families for those belonging thereto.

Treaty No. 6 reads, in part, as follows:

> It is further agreed between Her Majesty and the said Indians, that each Chief, duly recognized as such, shall receive an annual salary of twenty-five dollars per annum; and each subordinate officer, not exceeding four for each Band, shall receive fifteen dollars per annum; and each such Chief and subordinate officer, as aforesaid, shall also receive once every year, a suitable suit of clothing, and each Chief shall receive, in recognition of the closing of the treaty, a suitable flag and medal, and also as soon as convenient, one horse, harness and waggon.

Many other treaties also contain similar wording which appears to create an individual entitlement to a treaty right to annuities. Since annuities were not always paid as they should have been, the resulting outstanding breaches of the Crown's lawful obligations should be eligible for resolution under the claims process. If, however, the entitlement was an individual one, who should submit the claim and who should be the beneficiary of the settlement proceeds?

As it stands, and as the Indian Claims Commission has interpreted it, the federal specific claims process will not accept claims on behalf of the individuals, or descendants of individuals, whose treaty rights were violated by the Crown. The claim, then must be brought forward on a collective basis by a sponsoring First Nation which will eventually be faced with the problem of deciding whether or not to create individual entitlements, and of determining who the individual beneficiaries should be.

- **Claims asserting a failure by the Federal Government to meet its lawful obligations to distribute agricultural benefits to individual Indians pursuant to its Treaty commitments.**

For example, Treaty No. 3 reads:

> It is further agreed between Her Majesty and the said Indians that the following articles shall be supplied to any band of the said Indians who are now actually cultivating the soil or who shall hereafter commence to cultivate the land, that is to say: two hoes for every family actually cultivating, also one spade per family as aforesaid, one plough for every ten families as aforesaid, five harrows for every twenty families as aforesaid, one scythe for every family as aforesaid, and also one axe and one cross-cut saw, one hand-saw, one pit-saw, the necessary files, one grind-stone, one auger for each band, and also for each Chief for the use of his band one chest of ordinary carpenter's tools; also for each band enough of wheat, barley, potatoes and oats to plant the land actually broken up for cultivation by such band; also for each band one yoke of oxen, one bull and four cows; all the aforesaid articles to be given once for all for the encouragement of the practice of agriculture among the Indians.

Similarly, Treaty No. 8 reads:

> FURTHER, Her Majesty agrees that each Band that elects to take a reserve and cultivate the soil, shall, as soon as convenient after such reserve is set aside and settled upon, and the Band has signified its choice and is prepared to break up the soil, receive two hoes, one spade, one scythe and two hay forks for every family so settled, and for every three families one plough and one harrow, and to the Chief, for the use of his Band, two horses or a yoke of oxen, and for each Band potatoes, barley, oats and wheat (if such seed be suited to the locality of the reserve), to plant the land actually broken up, and provisions for one month in the spring for several years while planting such seeds; and to every family one cow, and every Chief one bull, and one mowing-machine and one reaper for the use of his Band when it is ready for them; for such families as prefer to raise stock instead of cultivating the soil, every family of five persons, two cows, and every Chief two bulls and two mowing-machines

> when ready for their use, and a like proportion for smaller or larger families. The aforesaid articles, machines and cattle to be given one for all for the encouragement of agriculture and stock raising; and for such Bands as prefer to continue hunting and fishing, as much ammunition and twine for making nets annually as will amount in value to one dollar per head of the families so engaged in hunting and fishing.

Many other treaties also contain similar wording which may, at least in part, create an individual entitlement to a treaty right to agricultural assistance, especially for holders of land in severalty. Although most treaties refer to the 'band' as the intended recipient, there is a clear intention that there be a subsequent distribution of the benefits to individuals.

- **Claims asserting a failure by the Federal Government to meet its lawful obligations to distribute annual allotments of ammunition and twine to individual Indians pursuant to its Treaty commitments.**

The ammunition benefits clause of Treaty No. 7 was examined by the Federal Court of Canada, Trial Division, in *R. v. Blackfoot Band of Indians*. The following statements by Mahoney J. are of direct relevance:

> It is clear from the preamble that the intention was to make an agreement between Her Majesty and all Indian inhabitants of the particular geographic area, whether those Indians were members of the five bands or not. The chiefs and councillors of the five bands were represented and recognized as having authority to treat for all those individual Indians. The treaty was made with Indians, not with bands. It was made with people, not with organizations.
>
> ....It was Indians, not bands, who ceded the territory to Her Majesty (paras. 5 and 17), and it was to Indians, not bands, that the ongoing right to hunt was extended (para. 8). The cash settlement (para. 10), and treaty money (para. 11) were payable to individual Indians, not the bands. The reserves (para. 9) were established for bands, and the agricultural assistance (para. 16) envisaged band action, but its population determined the size of its reserve and amount of assistance.
>
> The purpose of the ammunition clause (para. 12) was to assist the Indians to provide for themselves by hunting. No other purpose, within reason, suggests itself.[7]

---

[7]. *R. v. Blackfoot Band of Indians et al.* [1982] 4 W.W.R. 230 at 238.

The analysis could be of equal applicability to the other Treaties with similar clauses.

Despite the apparently clear entitlement of individuals to the treaty benefit, such claims can and are only being advanced collectively by First Nations because of the arbitrary restrictions within the current specific claims process. If settlements were to be reached, a problematic situation might arise wherein the Chiefs and Councils could be faced with difficult questions from individuals, or the descendants of individuals, who had been denied their treaty right to ammunition and twine. Can a First Nation, for example, sign a release and indemnity which binds its members in this circumstance?

- **Claims asserting a failure to provide lands in severalty pursuant to Treaty Nos. 8 and 10.**

The land entitlement provisions of Treaty No. 8 state:

> And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for such bands as desire reserves, the same not to exceed in all one square mile for each family of five for such number of families as may elect to reside on reserves, or in that proportion for larger or smaller families; and for such families or individual Indians as may prefer to live apart from band reserves, Her Majesty undertakes to provide land in severalty to the extent of 160 acres to each Indian, the land to be conveyed with a proviso as to non-alienation without the consent of the Governor General in Council of Canada, the selection of such reserves, and lands in severalty, to be made in the manner following, namely, the Superintendent General of Indian Affairs shall depute and send a suitable person to determine and set apart such reserves and lands, after consulting with the Indians concerned as to the locality which may be found suitable and open for selection.[5]

---

[5] The clause in Treaty No. 10 reads:

> And His Majesty the Queen hereby agrees and undertakes to lay aside reserves of land for such bands as desire the same, such reserves not to exceed in all one square mile for each family of five for such number of families as may elect to reside upon reserves or in that proportion for larger or smaller families; and for such Indian families or individual Indians as may prefer to live apart from band reserves His Majesty undertakes to provide land in severalty to the extent of one hundred and sixty (160) acres for each Indian, the land not to be alienable by the Indian for whom it is set aside without the consent of the Governor General in Council of Canada, the selection of such reserves, and lands

The provision was explained to the Indians at Lesser Slave Lake in 1899 by Commissioner David Laird:

> Then, as the white men are coming in and settling in the country, and as the Queen wishes the Indians to have lands of their own, we will give one square mile, or 640 acres, to each family of five; but there will be no compulsion to force Indians to go into a reserve. He who does not wish to go into a band can get 160 acres of land for himself, and the same for each member of his family. These reserves are holdings you can select when you please, subject to the approval of the Government, for you might select lands which interfere with the rights or lands of settlers. The Government must be sure that the land which you select is in the right place.[9]

The substance of the entitlement would appear to be an individual right to choose between residing on a Reserve, contributing 128 acres per family member, or residing apart from a Reserve, taking lands in severalty at 160 acres per family member. The choice made determines the quantum of land surveyed subsequently. The surveyor, or some "suitable person" "deputed and sent by the Superintendent General of Indian Affairs" is to consult with "the Indians concerned as to the locality which may be found suitable and open for selection." For treaty land entitlement purposes, any "collective" entitlement can arise only when specific, individual Indians and families choose to live together and take Reserve lands in common. The total number of such individuals is then multiplied by 128 acres to determine the quantum of land to which they are entitled by Treaty. While the Treaty provides, therefore, for Reserve lands in common should collectives form and request such lands, the right itself is not restricted to, or a benefit exclusively for, such collectives or First Nations. It is entirely possible, in principle, that the Crown could have fulfilled its obligations pursuant to the land entitlement provisions of Treaty No. 8 without surveying any Reserve lands in common whatsoever.

> in severalty to be made in the manner following, namely, the Superintendent General of Indian Affairs shall depute and send a suitable person to determine and set apart such reserves and lands, after consulting with the Indians concerned as to the locality which may be found suitable and open for selection

[9]. Charles Mair, *Through the Mackenzie Basin: A Narrative of the Athabasca and Peace River Treaty Expedition of 1899*. Toronto: William Briggs, 1908, at 56-63.

There is sufficient evidence to illustrate that the Crown knew precisely what the land entitlement provisions of Treaty No. 8 entailed. We may note the exchange of correspondence on the matter in the latter months of 1900, just over a year after the initial signatures were obtained at Lesser Slave Lake, and only a few months after the initial British Columbia adhesions at Fort St. John. The following is taken from a letter addressed to the Secretary, Department of Indian Affairs, from J.A. Macrae, Office of the Inspector of Indian Agencies and Reserves, dated 27 November 1900:

> I have the honour to inform you that there are two points in Treaty No. 8 about which question has already arisen, and which, I think, should be determined.
>
> 1st. As to the extent of the land which an Indian family may receive in severalty. The words of the Treaty read "for such families or individual Indians as may prefer to live apart from Reserves, her Majesty undertakes to provide land in severalty to the extent of 160 acres to each Indian." Is an Indian whose family numbers 10 souls entitled to 1600 acres or to 160 acres?
>
> 2nd. As to the rights of those taking land in severalty to receive implements, stock, &c. In the first paragraph providing for such benefits as these are to be supplied to "each Chief of a Band that selects a reserve" and in the second paragraph to "each Band that elects to take a reserve and cultivate the soil" and members thereof. It is generally understood that Indians taking land in severalty are to receive exactly the same benefits as those who take land in a reserve, and that the moment at which they become entitled to those benefits which are intended for the promotion of agriculture, is the one at which they commence to cultivate their land taken in severalty.
>
> It appears to me to be in the highest degree desirable, in order that present action may be determined and future complications avoided, to conclude at once what construction is to be put on these points of the Treaty.
>
> I may add that I have carefully abstained from betraying my opinion in respect to the quantity of land to be given in severalty, except by offering families 160 acres, but have expressed the view that the Government did not intend to allow Indians taking their land apart from reserves to suffer in any way by so doing.[10]

The questions were forwarded to Indian Commissioner, and former Treaty No. 8 Commissioner, David Laird, who replied in a letter dated 5 December 1900:

---

[10]. National Archives of Canada, RG 10, Volume 3564, File 82, pt. 21, J.A. Macrae to Secretary, Department of Indian Affairs, 27 November 1900.

With respect to the 1st. as to the extent of land which an Indian family may receive in severalty, I do not think there is any ambiguity - the words "to the extent of 160 acres of each Indian" determines the matter. Those Indians who elect to go on large reserves get land to the extent of one square mile to each family of five, or in that proportion, which is at the rate of 128 acres to each Indian. The quantity for those who take land in severalty was made greater - or 160 acres - for two reasons, first, because it was thought desirable to encourage settlement in this manner as congregating large bands of Indians on reserves has not, upon the whole, worked well; secondly, because those who settle in severalty will, in all probability, be more healthy and progressive than those on large reserves, and consequently multiply more rapidly. If a family increases in two or three generations to double or treble the number, they will only have the original allotment to occupy; whereas in large reserves if some families die off, such families as remain, whether they multiply or not, own the whole reserve.

2nd. The paragraphs in the Treaty as to the rights of those taking land in severalty to receive implements, stock, &c., and in particular, if they receive them, when the distribution is to be made, are not quite as clear as they might have been; yet the words "for every family so settled", show that in the distribution to be made all are to be treated alike. When an Indian who selects and settles upon land in severalty (which is his reserve) is prepared to cultivate the soil or keep stock, he is entitled to receive the articles promised. There may be some difficulty about bulls, as these are furnished to the Chiefs alone; but the Treaty should not be interpreted too strictly in that regard - two or three families settled near together in severalty might be allowed to have one.

In short, Mr. Macrae has correctly summarised the intention of the Treaty on the 2nd. Point which he has raised when he says: "It is generally understood that Indians taking land in severalty are to receive exactly the same benefits as those who take land in a reserve, and that the moment at which they become entitled to those benefits which are intended for the promotion of agriculture, is the one at which they commence to cultivate their land taken in severalty".[11]

Less than a decade after signing Treaty No. 8, however, the Department of Indian Affairs began to actively discourage any exercise of the land in severalty option. Further to this policy, there are numerous examples of individuals and families being denied the opportunity to select lands in severalty upon adhesion to Treaty, and also the opportunity to receive severalty lands even when requested specifically.

The current Specific Claims Policy and, indeed, the policy with respect to Treaty Land Entitlement, would appear to preclude any possibility for descendants of these individuals, individually, to assert the Treaty rights denied their ancestors unless a

---

[11]. National Archives of Canada, RG 10, Volume 3564, File 82, pt. 21, Indian Commissioner to the Secretary, Department of Indian Affairs, 5 December 1900.

First Nation were to sponsor the claim. The individual could have no entitlement unless one were to be created by agreement with such a sponsoring Nation.

An interesting variation of this question pertains to contemporary treaty adhesions. The McLeod Lake Indian Band, for example, is currently adhering to Treaty 8 on terms which clearly confirm the individual treaty right to select lands in severalty. The adhesion agreement sets up a process for individuals to select lands in severalty which is legally enforceable, and which involves the execution of releases and indemnities for Canada and the Province to be signed by the individual band members. This is as opposed to the absence of any accommodation for such legally enforceable rights within the specific claims policy which claims as its primary objective the discharge of the Crown's outstanding lawful obligations through the fulfilment of treaty promises.

- **Claims asserting a violation of Treaty rights with respect to hunting, trapping and fishing, where such violation has resulted in losses to a specific Treaty Indian.**

The nature of such Treaty rights was addressed by the Supreme Court of Canada earlier this year in *R. v. Sundown*. A member of the Joseph Bighead First Nation, the latter a signatory to Treaty No. 6, had cut down trees in Meadow Lake Provincial Park so as to construct a log cabin for hunting purposes (erecting shelters of this kind was a long-standing traditional practice). Existing regulations in Saskatchewan prohibit the construction of a temporary or permanent dwelling on parkland without permission. In ruling that a hunting cabin was reasonably incidental to the right of this particular First Nation to hunt in their traditional expeditionary style, Justice Cory, for the Court, wrote:

> Treaty rights, like aboriginal rights, must not be interpreted as if they were common law property rights....
>
> Aboriginal and Treaty rights cannot be defined in a manner which would accord

> with common law concepts of title to land or the right to use another's land. Rather, they are the right of aboriginal people in common with other aboriginal people to participate in certain practices traditionally engaged in by particular aboriginal nations in particular territories.
>
> Any interest in the hunting cabin is a collective right that is derived from the treaty and the traditional expeditionary method of hunting. It belongs to the Band as a whole and not to Mr. Sundown or any individual member of the Joseph Bighead First Nation. It would not be possible, for example, for Mr. Sundown to exclude other members of his First Nation who have the same treaty right to hunt in Meadow Lake Provincial Park.[12]

That the violation of First Nation peoples' hunting, fishing and trapping rights is a breach of the Crown's lawful obligations is trite. Without a doubt, therefore, this should constitute a significant category of claims in the future.

However, difficulties can be expected to arise when, as the *Sundown* decision appears to require, these claims are settled on a collective basis despite the fact that the grievances upon which they are based can be comprised of numerous individual ones. The claimant Band Councils may find themselves in trying situations when, for example, the descendants of individuals who suffered direct and personal economic losses from the imposition of trapline registration regimes begin to make claims on settlements awarded for the breach of the collective trapping right.

INDIVIDUAL VS. COLLECTIVE ENTITLEMENTS TO CLAIM SETTLEMENTS

It is apparent that the Specific Claims process itself, or when placed (as it has been by the Specific Claims Commission) within the constraints of the *Indian Act*, reduces, or eliminates entirely, the possibility for an appropriate resolution of many specific grievances of an individual nature. Individual First Nation members are often, and needlessly, placed in opposition to the First Nation as a whole, which is itself constrained in its actions and in the alternatives for action available to it.

---

12. *R. v. Sundown* [1999] 1 S.C.R. 393, at para 35 and 36.

As matters stand, the Specific Claims Policy is incapable of meeting its own stated primary objective which is to discharge the outstanding lawful obligations of the Crown. The policies and practices of the federal government will remain inadequate to the task until they take adequate account of instances where historical grievances can only be addressed by discharging the Crown's lawful obligations to individuals.

While the resolution of individual entitlement claims remains largely unaddressed by the government, the matter of who the beneficiaries are of settlement proceeds from collective claims is much clearer. The courts have confirmed that individuals can claim no entitlement to settlement proceeds from such claims unless the claimant First Nation deliberately creates the entitlement either through a referendum, Band Council Resolution or other such means. It is the "Band" as constituted under the *Indian Act* which is the beneficiary, and not its members, which means that the "Band" has the discretion to decide how the proceeds will be used.

Despite this relative clarity, difficulties can still be expected to arise when First Nations accept settlements for rights deemed by the courts to be held collectively but which are, in reality, exercised individually. The perceptions of the Nations' members that they should be compensated for breaches of rights which they or their ancestors exercised individually will be difficult to counter with only the somewhat fine legal point of the rights' ultimately collective nature. Therefore, First Nations leadership can expect pressure to create entitlements for their members, which will in turn increase the work load for claims researchers as we are asked to document these individual beneficiaries' entitlements.

CONCLUSION

The beneficiaries of claims advanced to redress violations of collective rights will be the "bands" as defined in the *Indian Act*, whose rights were breached. Only the "bands" may submit such claims pursuant to the current specific claims policy. Canada will not normally deal with breaches of individual treaty or aboriginal rights through the claims process despite the fact that they clearly fall within the process' overarching imperative to fulfil the outstanding lawful obligations of the Crown.

Because of the arbitrary restrictions in the federal process, claims regarding what may be argued to be individual rights are being advanced collectively by sponsoring First Nations. However, the settlement of these claims can be expected to be problematic because of the uncertainty over who the proper or lawful beneficiaries are.

Even in the more certain cases where collective rights are involved, and no individuals may technically claim to be beneficiaries of a settlement, little attention has been paid to the difficulties which the claimant Nations may face when the individuals whose exercise (or ancestors' exercise) of those rights was infringed make moral claims for compensation. The fact that, in some circumstances, a First Nation may elect to create an entitlement will present Chiefs and their councils with difficult decisions, and researchers with significant additional work which is not currently funded.

These problems could be avoided or mitigated if addressed between First Nations leadership and the Government of Canada at the appropriate policy making level.