

**FEDERAL COURT**

BETWEEN:

**CHIEF DEREK NEPINAK**

**and**

**CHIEF BONNY LYNN ACOOSE**

Plaintiffs

– and –

**HIS MAJESTY THE KING**

Defendant

Class Proceeding commenced under Part 5.1 of the *Federal Court Rules*, SOR/98-106

---

**REPLY**

---

June 10, 2024

**McCarthy Tétrault LLP**  
Suite 5300 Toronto Dominion Bank Tower  
Toronto ON M5K 1E6  
T: (416) 362-1812; F: (416) 868-0673

**Michael Rosenberg**  
mrosenberg@mccarthy.ca

**Thomas Sutton**  
tsutton@mccarthy.ca

**Alana Robert**  
alrobert@mccarthy.ca

**Audrey-Anne Delage**  
adelage@mccarthy.ca

**Norman J.R. Boudreau**  
nboudreau@boudreaulaw.ca

**Jason Zushman**  
jason.j.zushman@gmail.com

**Karen Wittman**  
kwittman@myersfirm.com

Lawyers for the Plaintiff

TO: **ATTORNEY GENERAL OF CANADA**

Department of Justice Canada  
Prairie Regional Office  
601 – 400 St. Mary Avenue  
Winnipeg MB R3C 4K5  
F: (204) 983-3636

**Scott Farlinger**  
scott.farlinger@justice.gc.ca

**Neil Goodridge**  
neil.goodridge@justice.gc.ca

**Lisa Cholosky**  
lisa.cholosky@justice.gc.ca

**Evan Morrow**  
evan.morrow@justice.gc.ca

**Christine Williams**  
christine.williams@justice.gc.ca

Lawyers for the Defendant

## REPLY

1. The Plaintiffs repeat and rely upon all of the allegations contained in the Amended Statement of Claim (the “**Claim**”).
2. The Plaintiffs admit the new assertions contained in paragraphs 42, and 43 of the Statement of Defence (the “**Defence**”).
3. The Plaintiffs deny the new assertions contained in paragraphs 3, 5, 9, 20, 22, 27, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 44, 45, 46, 47, 48, 49, 50, 52, 53, and 54 of the Defence.
4. The Plaintiffs have no knowledge of the new assertions contained in paragraphs 1, 2, 4, 15, 17, and 24 of the Defence. The Plaintiffs have insufficient knowledge to respond to the new assertions made by the Defendant in paragraph 23 of the Defence.
5. The Plaintiffs state that paragraphs 6, 7, 10, 11, 12, 13, 38, 41, 51, and 55 of the Defence do not contain material facts to admit or deny. The Plaintiffs further acknowledge the Defendant’s admissions at paragraphs 8, 14, 16, 18, 19, 21, 25, 26, and 28 of the Defence and state that those paragraphs otherwise do not contain material facts to admit or deny.
6. In further response to paragraph 3 of the Defence, the Plaintiffs admit that Treaty 4 was signed on September 15, 1874 and that the text of Treaty 4 as recorded by the Defendant in 1874 provides for annuity payments of twenty-five dollars (\$25) to each Chief, fifteen dollars (\$15) to each Headman (Councillor), and five dollars (\$5) to every Treaty 4 beneficiary, but deny that Treaty 4 limits the payment of annuities to these specified amounts.

7. In further response to paragraph 4 of the Defence, the Plaintiffs acknowledge the Defendant's recognition that the Treaty 4 right to annuity payments is recognized and affirmed by s. 35 of the *Constitution Act, 1982* and the Defendant's recognition of its ongoing legal obligation to pay annuities in perpetuity. The Plaintiffs have insufficient knowledge of the Defendant's intentions with respect to its ongoing dialogue with First Nations on the interpretation of Treaty 4 and its ongoing relationship with the Treaty 4 First Nations.

8. In further response to paragraph 20 of the Defence, the Plaintiffs acknowledge the admissions of the Defendant, but deny that the parties to Treaty 4 intended annuity payments to be limited to the specific amounts recorded in the text of Treaty 4 in 1874.

9. In further response to paragraph 22 of the Defence, the Plaintiffs acknowledge that the First Nation parties to Treaty 4 negotiated in good faith, but deny that the Crown negotiated Treaty 4 in good faith. The Plaintiffs also deny that Canada is not required to increase the annuity payment made under Treaty 4 and further deny that the Defendant has met its legal obligations under the Treaty.

10. In further response to paragraph 27 of the Defence, the Plaintiffs deny that the First Nation signatories to Treaty 4 agreed to "cede, release, surrender, and yield up to the Government of the Dominion of Canada" their rights, titles and privileges to the lands described.

11. In further response to paragraph 31 of the Defence, the Plaintiffs deny all assertions contained therein, except for the Defendant's admission that the purchasing power of the annuities has decreased since the date of the Treaty.

12. In further response to paragraph 33 of the Defence, the Plaintiffs deny that the Treaty 4 lands were surrendered by the signatory First Nations.

13. In further response to paragraph 35 of the Defence, the Plaintiffs acknowledge the Defendant's admission of the principal conditions of Treaty 4 as described by Alexander Mackenzie, and maintain that the promise to provide annuities included a promise to increase the annuities over time, as necessary, to maintain their real value.

14. In further response to paragraph 36 of the Defence, the Plaintiffs acknowledge Canada's admissions with respect to the significance of the Royal Commission on Aboriginal Peoples' ("**RCAP**") 1996 Report, but deny that the RCAP Report does not create obligations on the Defendant to increase treaty annuity payments.

15. In further response to paragraph 38 of the Defence, the Plaintiffs acknowledge the Defendant's admission that the rights set out in Treaty 4 are recognized and affirmed under s. 35 of the *Constitution Act, 1982*. However, the Plaintiffs deny that the right to a treaty annuity payment does not include a right to augmentation, that Treaty 4 is silent as to inflation, and that Treaty 4 is not subject to an augmentation clause of any kind.

16. In further response to paragraph 40 of the Defence, the Plaintiffs acknowledge the Crown's recognition of the Crown's obligation to act honourably, but deny that Canada has properly described the common intention of the parties at the time Treaty 4 was signed. The Plaintiffs maintain that the Defendant's actions were, and remain, inconsistent with the Honour of the Crown.

17. In further response to paragraph 45 of the Defence, the Plaintiffs deny that the Attorney General of Canada's Directive on Civil Litigation Involving Indigenous People

(the “**Litigation Directive**”) is not a source of substantive law aiding in the interpretation of specific treaty rights. The Plaintiffs state that the Directive informs what the Honour of the Crown requires in the context of this Claim.

## **I. LIMITATION PERIOD**

18. In further response to paragraphs 50 and 51 of the Defence, the Plaintiffs deny that any portion of the relief sought in the Claim is time-barred.

19. The Plaintiffs’ claim relates to the Defendant’s obligations under a nation-to-nation agreement which the Defendant has not renounced. The Defendant is not entitled to unilaterally curtail obligations arising from its nation-to-nation relationship with the Treaty 4 signatories, or the annuitants who benefit from Treaty 4. This applies with equal or greater force to His Majesty the King in Right of the Province of Alberta, His Majesty the King in Right of the Province of Saskatchewan, and His Majesty the King in Right of the Province of Manitoba.

20. In any event, to the extent that the Defendant relies on legislation that purports to derogate from the Plaintiffs’ treaty rights, that legislation is inapplicable or ineffective on the basis that it is contrary to s. 35(1) of the *Constitution Act, 1982*, which expressly preserves “[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada”. Accordingly, neither the federal nor the provincial statutes of limitation relied on by the Defendant restrict the scope of this action.

21. Moreover, and in any event, the Defendant cannot rely on *The Limitation of Actions Act*, RSS 1978, c L-15, which was repealed prior to the commencement of this action. Under s. 3(2) of *The Limitations Act*, SS 2004, c L-16.1, which was the limitations statute in force in the Province of Saskatchewan at the time of the

commencement of this action, no limitation period applies to court proceedings based on existing Aboriginal and treaty rights of the Aboriginal peoples of Canada that are recognized and affirmed in the *Constitution Act, 1982*.

22. Similarly, the Defendant cannot rely on the *Limitation of Actions Act*, RSA 1980, c L-15, which was repealed prior to the commencement of this action, in support of its limitations defence. The *Limitations Act*, RSA 2000, c L-12, which was the limitations statute in force in the Province of Alberta at the time of the commencement of the action, makes no reference whatsoever to treaty rights. Had the Legislature intended to designate a limitation period for proceedings relating to treaty rights, it would have done so expressly.

23. The Defendant's reliance on federal and provincial statutes of limitations is also expressly contrary to the Truth and Reconciliation Commission of Canada's Call to Action #26, which provides:

We call upon the federal, provincial, and territorial governments to review and amend their respective statutes of limitations to ensure that they conform to the principle that governments and other entities cannot rely on limitation defences to defend legal actions of historical abuse brought by Aboriginal people.

24. In addition, the Defendant's reliance on federal and provincial statutes of limitations is contrary to the *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14 (the "**UNDRIP Act**"), and the Litigation Directive, including Litigation Guideline #14 thereunder.

25. Neither the federal nor the provincial statutes of limitations pleaded at paragraph 50 of the Statement of Defence bar any part of the Plaintiffs' claim. In the alternative, even if a part of the Plaintiffs' claims is statute-barred, the Plaintiffs are nevertheless entitled to the declaratory relief sought at paragraph 1(c) to (i) of the Claim

and to compensatory relief falling within the applicable limitation periods due to the ongoing and recurring nature of the annuity obligation under Treaty 4.

## II. DOCTRINE OF LACHES

26. In further response to paragraphs 50 and 51 of the Defence, the Plaintiffs deny that the within action was brought with excessive delay. The Plaintiffs further deny that the Treaty 4 annuitants' acceptance of the \$5.00 annuity payment since 1874 constitutes acquiescence to the Defendant's breach of its obligations under Treaty 4. The Treaty 4 annuitants' acceptance of partial payment of annuities does not discharge the Defendant from its liability to pay the full, indexed amount of annuities it owes. The Treaty 4 annuitants have never waived their treaty rights, which include a right to the indexation or augmentation of the annuity owed to them by the Defendant under Treaty 4.

27. Moreover, the Defendant is not entitled to rely on the doctrine of laches because for many years it systematically barred the Treaty 4 annuitants from effectively asserting their rights, including by statutorily prohibiting them from obtaining legal representation. Additionally, and in any event, the Plaintiffs deny that the doctrine of laches applies to claims arising under Treaty 4, as a nation-to-nation agreement protected by s. 35(1) of the *Constitution Act, 1982*.

28. In further response to paragraphs 50 and 51 of the Defence, the Plaintiffs state that the Defendant's reliance on the doctrine of laches is contrary to the *UNDRIP Act* and the Litigation Directive, including Litigation Guideline #14.

29. In the alternative, even if the doctrine of laches applies, the Plaintiffs are nevertheless entitled to the declaratory relief sought at paragraph 1(c) to (i) of the Claim

and to compensatory relief falling within the applicable limitation periods due to the ongoing and recurring nature of the treaty annuity obligation.

### III. INJUNCTIVE RELIEF, SPECIFIC PERFORMANCE, AND PREJUDGMENT INTEREST

30. In response to paragraph 52 of the Defence, the Plaintiffs deny that any provisions of the *Crown Liability and Proceedings Act*, RS 1985, c C-50 (the “**Crown Liability and Proceedings Act**”) restrict the Plaintiffs’ right to obtain injunctive relief or specific performance. The Defendant is not entitled to legislate so as to unilaterally limit or curtail its obligations under a nation-to-nation agreement. In any event, to the extent that the Defendant relies on legislation that purports to derogate from the Plaintiffs’ treaty rights, that legislation is inapplicable or ineffective on the basis that it is contrary to section 35(1) of the *Constitution Act, 1982*. The *Crown Liability and Proceedings Act* has no application to the Plaintiffs’ claim for injunctive relief or specific performance, which arises out of the Defendant’s breach of its obligations under Treaty 4.

31. In further response to paragraph 53 of the Defence, the Plaintiffs deny that any provisions of the *Crown Liability and Proceedings Act*, or the *Judicature Act*, RSA 2000, c J-2; *The Court of King’s Bench Act*, CCSM, c C280; and *The Pre-Judgment Interest Act*, SS 1984-85-86, c P-22.2 restrict the Plaintiffs’ right to pre-judgment interest. The Defendant, His Majesty the King in Right of the Province of Alberta, His Majesty the King in Right of the Province of Saskatchewan, and His Majesty the King in Right of the Province of Manitoba are not entitled to legislate so as to unilaterally limit or withdraw from the Defendant’s obligations under a nation-to-nation agreement. In any event, to the extent that the Defendant relies on legislation that purports to derogate from the Plaintiffs’ treaty rights, that legislation is inapplicable or ineffective on the basis

that it is contrary to section 35(1) of the *Constitution Act, 1982*. The statutes relied on by the Defendant have no application to the Plaintiffs' claim for prejudgment interest, which arises out of the Defendant's breach of its obligations under Treaty 4, and which does not require any enabling legislation.

#### **IV. UNITED NATIONS DECLARATION ACT**

32. In further response to paragraph 44 of the Defence, the Plaintiffs state that the *UNDRIP Act* gives rise to an actionable claim by the Plaintiff, which claim is enforceable in this Court. In any event, s. 35 of the *Constitution Act, 1982* protects treaty rights in the manner set out in the *UNDRIP Act*, such that recourse to the *UNDRIP Act* is duplicative.

June 10, 2024

---

**McCarthy Tétrault LLP**  
Suite 5300  
Toronto Dominion Bank Tower  
Toronto ON M5K 1E6  
T: (416) 362-1812, F: (416) 868-0673

**Michael Rosenberg**  
mrosenberg@mccarthy.ca

**Thomas Sutton**  
tsutton@mccarthy.ca

**Alana Robert**  
alrobert@mccarthy.ca

**Audrey-Anne Delage**  
adelage@mccarthy.ca

**Norman Boudreau**  
nboudreau@boudreaulaw.ca

**Jason Zushman**  
jason.j.zushman@gmail.com

**Karen Wittman**  
kwittman@myersfirm.com

Lawyers for the Plaintiffs

**FEDERAL COURT**

---

**CHIEF DEREK NEPINAK**

and

**CHIEF BONNY LYNN ACOOSE**

Plaintiffs

- and -

**HIS MAJESTY THE KING**

Defendant

---

**REPLY**

---

**McCarthy Tétrault LLP**

Suite 5300, Toronto Dominion Bank Tower  
Toronto ON M5K 1E6

T: (416) 362-1812, F: (416) 868-0673

**Michael Rosenberg**

mrosenberg@mccarthy.ca

**Thomas Sutton**

tsutton@mccarthy.ca

**Alana Robert**

alrobert@mccarthy.ca

**Audrey-Anne Delage**

adelage@mccarthy.ca

**Norman Boudreau**

nboudreau@boudreaulaw.ca

**Jason J. Zushman**

jason.j.zushman@gmail.com

**Karen Wittman**

kwittman@myersfirm.com

Lawyers for the Plaintiffs