

FEDERAL COURT

BETWEEN:

CHIEF 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***

STATEMENT OF DEFENCE TO AMENDED STATEMENT OF CLAIM

OVERVIEW

1. His Majesty the King in right of Canada (“Canada”) is committed to reconciliation and to a renewed nation-to-nation relationship with Indigenous peoples based on recognition of rights, respect, cooperation, and partnership. This commitment exists within the context of litigation and beyond. Canada endeavors to embody these principles as it assists the Court in its task of adjudicating matters brought before it.

2. Canada favours resolving claims made by Indigenous peoples through negotiation and settlement. As this matter evolves and the historical record is assembled and analyzed, Canada will consider all appropriate forms of resolution regarding the Claim. Further, Canada recognizes the significant role treaty-making has played in building Canada and the contemporary importance of treaties as foundations for continuing progress toward reconciliation.
3. Treaty 4 was signed on September 15, 1874 and makes provision for the annual payment of a specified sum of money to each beneficiary under the treaty, commonly referred to as the annuity payment. The annuity payment in Treaty 4 is twenty-five dollars (\$25.00) to each Chief, fifteen dollars (\$15.00) to each Headman (Councillor) (not exceeding four in each Band), and five dollars (\$5.00) to every other treaty beneficiary.
4. Canada recognizes an ongoing legal obligation to pay these annuities to its treaty partners in perpetuity. Canada acknowledges the Treaty 4 right to annuity payments is recognized and affirmed by section 35 of the *Constitution Act, 1982*. Canada values its ongoing dialogue with First Nations on the interpretation of agreements like Treaty 4, and the role of these agreements in the ongoing relationship between treaty First Nations and the Crown.
5. The treaty annuity obligation is confined to the specific nominal amounts set out in the text of the Treaty 4 treaty annuity term payable in Canadian dollars. Consistent with Canada's payment practices for 150 years, Canada is not under a duty or obligation to adjust, index to inflation, or otherwise "modernize" the annuity payments to beneficiaries of the treaty. The parties did not intend the treaty annuity term to provide anything more than the fixed payment specified in the text of Treaty 4. Canada has accordingly paid the specific amounts set out in

Treaty 4 and continues to do so.

I. SUMMARY RESPONSES TO PARAGRAPHS OF THE CLAIM

6. In this Statement of Defence, Canada periodically uses terminology now recognized as antiquated. Canada only does so when required for legal accuracy or when referring to or quoting from historical sources.
7. In accordance with the requirements of the *Federal Courts Rules* and Form 171B, Canada responds to each of the paragraphs in the Amended Statement of Claim (“Claim”) as follows.
8. Canada admits paragraphs 2, 4, 18, 20, 23, 25, 27, 29, 32, 44, 46, and 47 of the Claim and acknowledges that the plaintiffs rely upon the Acts and regulations set out in paragraph 57 of the Claim.
9. Canada denies the assertions contained in paragraphs 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 24, 28, 30, 31, 33, 34, 35, 36, 37, 39, 40, 41, 42, 43, 45, 48, 49, 50, 51, 52, 53, 54, 55, and 56 of the Claim and denies that the plaintiffs are entitled to the relief requested in paragraph 1 of the Claim.
10. Canada has no knowledge of the assertions contained in paragraphs 14, 15, 16, 17 and 26 of the Claim.
11. Paragraph 38 of the Claim is evidence and does not assert material facts to admit or deny.
12. Canada acknowledges that the Treaty 4 beneficiaries’ intentions with respect to this action are stated at paragraphs 19, 21, and 22, but states that those paragraphs do not contain assertions of material fact to admit or deny. Canada reserves its rights to make all

representations and submissions concerning the appropriate nature of the proceedings, including that this matter is not appropriate as a class proceeding. Regarding the estates of deceased Treaty 4 beneficiaries, Canada may rely on *The Survival of Actions Act*, SS 1990-91, c S-66.1 at paragraph 6(1)(2), *Survival of Actions Act*, RSA 2000 c S-27 at paragraph 5(1)(2), and *The Trustee Act*, CCSM c T160 at paragraph 53(1)(2), as appropriate.

13. Canada agrees with the Treaty 4 beneficiaries' proposal that this action be tried at Winnipeg, Manitoba.

II. THE PARTIES

14. In further response to paragraphs 14 and 15 of the Claim, Canada admits that Chief Derek Nepinak ("Chief Nepinak") is the Chief of Minegoziibe Anishinabe First Nation. Chief Nepinak is a beneficiary of Treaty 4, who is eligible to receive the yearly annuity payment for as long as he remains a member of a Treaty 4 First Nation. Canada does not have direct knowledge of, but does not dispute, Chief Nepinak's education and personal and professional experience.
15. In further response to paragraph 15 of the Claim, Canada does not have direct knowledge that Chief Nepinak has due authorization of the Band Council of Minegoziibe Anishinabe First Nation to act in a representative capacity and that the Band Council unanimously endorse this action and Chief Nepinak's role as plaintiff.
16. In further response to paragraphs 16 and 17 of the Claim, Canada admits that Chief Bonny Lynn Acoose ("Chief Acoose") is the Chief of Zagime Anishinabek First Nation. Chief Acoose is a beneficiary of Treaty 4, who is eligible to receive the yearly annuity payment

for as long as she remains a member of a Treaty 4 First Nation. Canada does not have direct knowledge of, but does not dispute, Chief Acoose's education and personal and professional experience.

17. In further response to paragraphs 16 and 17 of the Claim, Canada does not have direct knowledge that Chief Acoose has due authorization of the Band Council of Zagime Anishinabek First Nation to act in a representative capacity or as a spokesperson, and that the Band Council unanimously endorse this action and Chief Acoose's role as plaintiff.
18. In further response to paragraph 18 of the Claim, Canada admits that Chief Nepinak, Chief Acoose, and the beneficiaries of Treaty 4 are individuals who are included within the scope of Aboriginal peoples pursuant to section 35 of the *Constitution Act, 1982*.
19. In further response to paragraph 20 of the Claim, Canada admits that it is the Defendant in this action and, pursuant to section 48 of, and the Schedule to, the *Federal Courts Act, R.S.C. 1985, c. F-7*, is properly named in this action as His Majesty the King.
20. In further response to paragraph 23 of the Claim, Canada agrees that the First Nations listed are successors to the First Nations parties or adherents to Treaty 4, and their members are entitled to receive annuity payments to the extent they are registered under the *Indian Act*.

III. BACKGROUND – TREATY 4 AND THE ANNUITY CLAUSE

21. In further response to paragraph 2 of the Claim, Canada admits that Treaty 4 was entered into between the signatories in September 1874, represents solemn and sacred promises between Canada and First Nations, and perpetuates nation-to-nation relationships. Canada and the Treaty 4 First Nations' relationship is guided by the terms of Treaty 4, taken as a

whole, and the annuity provision should be considered in the context of the entirety of Treaty 4.

22. In further response to paragraph 6 of the Claim, Canada acknowledges that colonial expansion into the Treaty 4 area presented challenges and disrupted the traditional lifestyle of Treaty 4 First Nations. However, Canada says that Treaty 4 was negotiated in good faith. Canada is not required to increase the annuity payment made under Treaty 4 and says it has met, and continues to meet, its legal obligations under the treaty.
23. In further response to paragraph 24 of the Claim, Canada admits that in 1874, a delegation was sent to Fort Qu'Appelle to conduct negotiations on behalf of the Crown with First Nations, but states that the delegation left Fort Garry on August 26, 1874, and arrived at Fort Qu'Appelle on September 8, 1874. The Crown's delegation included Alexander Morris, Lieutenant-Governor of the North-West Territory, David Laird, Minister of the Interior, and William Christie, a retired Hudson's Bay Company factor. The Crown's delegation was accompanied by militia. Canada does not currently have knowledge as to the number of militia or number of persons gathered for those discussions, but states that the First Nation individuals gathered for those discussions numbered fewer than 2,000. Canada admits that those discussions spanned the course of several days, from September 8 to 15, 1874.
24. In further response to paragraph 24 of the Claim, Canada states that the delegation also included Charles Pratt and William Daniel, who acted as interpreters.
25. In further response to paragraphs 25, 26 and 32 of the Claim, Canada admits that the First Nation communities sought reassurance from the Crown that it was engaging with good intentions; that lead commissioner, Lieutenant Governor Morris, assured First Nations that

the Crown's intentions and promises were sincere; that the Crown was concerned for the wellbeing of First Nations people in perpetuity; and that Lieutenant Governor Morris spoke of the good of the First Nations' children. The specific phrases quoted in those paragraphs are evidence, but Canada admits that those words were spoken during the negotiation of Treaty 4, and that the written text of Treaty 4 expresses its aim to foster "peace and good will" between the Crown and First Nations. At this time, Canada does not have knowledge of all the reassurances sought, provided, and relied upon regarding the Crown's good intentions throughout the negotiations.

26. In further response to paragraph 27 of the Claim, Canada admits that shortly thereafter, First Nations that had been unable or unwilling to join the 1874 negotiations at Fort Qu'Appelle adhered to Treaty 4 and their members became entitled to receive annuities thereunder.
27. In further response to paragraphs 3, 28, and 30 of the Claim, the terms of Treaty 4 as recorded in English state that the First Nation signatories to the treaty "do hereby cede, release, surrender, and yield up to the Government of the Dominion of Canada... forever, all their rights, titles and privileges whatsoever to the lands" covered by Treaty 4, but the interpretation of this provision is not at issue in this proceeding. Canada admits that the lands, as described at paragraph 28 of the claim, span from southeast Alberta through southern Saskatchewan and west-central Manitoba and amount to approximately 195,000 kilometers, or approximately 74,600 square miles. Canada further admits that the lands were of significant value.
28. In further response to paragraphs 29 and 33 of the Claim, Canada acknowledges that Treaty 4 provides that the several purposes of the treaty included both the Crown's intention to

“open up for settlement, immigration, trade and such other purposes as to Her Majesty may seem meet” the land surrendered, and that “Indian people may know and be assured of what allowance they are to count upon and receive from Her Majesty’s bounty and benevolence.”

29. In further response to paragraphs 4 and 5 of the Claim, Canada admits that Treaty 4 contains several promises to First Nations, to obtain their consent to open up the area covered by Treaty 4 to settlement, immigration, and trade. These promises included the provision of annuities, in perpetuity, of five dollars (\$5.00) per person per year for each member of a signatory First Nation. Canada says the parties to Treaty 4 intended treaty annuity payments to be confined to the specific amounts in the text of Treaty 4.
30. In further response to paragraph 7 of the Claim, Canada acknowledges that the treaty annuity payment was an important part of the treaty, but does not agree with the emphasis placed on annuities by this paragraph. Canada states that the annuity payment was one of several measures taken, within the treaty and otherwise, to further the reconciliation of the interests of the First Nations with those of the Crown and new settlers.
31. In further response to paragraphs 7, 8, 9, and 10 of the Claim, Canada says that the annuities were to be fixed, notwithstanding that they were to be paid in perpetuity. Canada denies that the parties’ shared understanding was that the annuities were to be increased over time, or based on the cost of living. Measures taken outside of the treaty, pursuant to social policy, include the funding of a wide range of programs and services available to the First Nations in Treaty 4 and their members. These programs and services include, but are not limited to, initiatives in the areas of housing and infrastructure, education, health care, social assistance, child and family services, economic development, employment assistance, transportation,

democratic participation, higher education, dental care, cultural development and cultural and linguistic preservation, governance and salaries. These programs and services are not provided in relation to treaty fulfillment, but their value complements and exceeds the annuity payment. Canada does not currently have knowledge as to whether from time to time, Canada paid all or part of the annuities in kind, but Canada admits that the purchasing power of the annuities has decreased since the date of the treaty.

32. In response to paragraphs 11, 12, 13, and 35 of the Claim, Canada currently does not have knowledge of the First Nations' understanding of money in 1874, and insufficient information at this time to assess Canada's or the Treaty 4 beneficiaries' understanding of inflation at the time Treaty 4 was formed. Canada denies that the promise of perpetual monetary compensation in an amount sufficient to purchase the necessities of life was an integral part of the Treaty 4 bargain. Rather, the parties to the Treaty did not intend the treaty annuity term to provide anything more than the fixed payment specified in the text of Treaty 4 in perpetuity. Canada denies that the Treaty 4 beneficiaries have been deprived of any benefits or suffered any losses. The remainder of these paragraphs are argument, and do not contain assertions of material fact to admit or deny.
33. In further response to paragraph 30 of the Claim, Canada admits that Treaty 4 provides, among other things, that the Crown will set aside land for reserves; distribute up to seven hundred and fifty dollars (\$750.00) each year in powder, shot, ball and twine; provide a school on reserve; provide various tools and supplies; and provide several one-time monetary payments and goods. Treaty 4 gave beneficiaries (other than the Chief and Headman, who received twenty-five dollars (\$25.00) and fifteen dollars (\$15.00) respectively) an initial payment of twelve dollars (\$12.00). Additionally, the Crown

promised to provide First Nations with annual annuity payments in perpetuity.

34. In further response to paragraphs 31, 34, and 39 of the Claim, at this time, Canada does not know the material purchasing power of five dollars in 1874. Canada denies that there was any obligation to increase treaty annuity payments or that the intended effect of the treaty annuity term was to provide anything more than the fixed payment specified in the text of Treaty 4.
35. In further response to paragraph 36 of the Claim, Canada admits that Alexander Mackenzie described the “principal conditions” of Treaty 4 as including “An Annual payment in perpetuity, of... \$5 to every other man, woman and Child in the Band”. Canada denies that the promise to provide annuities was also a promise to increase the annuities over time.
36. In further response to paragraphs 37 and 38 of the Claim, Canada admits that the Royal Commission on Aboriginal Peoples (“RCAP”) was established in August 1991 and issued its Report in 1996. Canada acknowledges that the work of the RCAP has been accepted as a valuable resource by Canadian courts, particularly for its contribution in documenting the perspectives of Indigenous peoples on a wide variety of issues affecting Indigenous lives and interest. While Canada admits that paragraphs 37 and 38 contain partial excerpts from the RCAP Report, those excerpts are evidence and do not create obligations on Canada to increase treaty annuity payments.

FIDUCIARY DUTIES AND THE HONOUR OF THE CROWN

37. Canada is not required by Treaty 4, any fiduciary duty, or the honour of the Crown to discharge its treaty annuity payment obligations in the manner asserted and disagrees with

all breaches asserted in the remainder of the Claim (as described in paragraphs 40 – 55, inclusive). Canada does not have a legal duty to adjust its treaty annuity payment obligations under Treaty 4 based on purchasing power, comparative value of monetary amounts, or any form of indexation or augmentation.

38. In further response to paragraphs 40 – 43 of the Claim, Treaty 4 is a *sui generis* agreement, which was solemnly entered into between the signatories with the intention of having legal effect. The rights set out in Treaty 4, including the right to treaty annuity payments, are recognized and affirmed under section 35 of the *Constitution Act, 1982*. However, the right to a treaty annuity payment does not include a right to augmentation, as the Treaty 4 beneficiaries assert. Treaty 4 is silent as to inflation and does not include an augmentation clause of any kind.

39. In further response to paragraphs 40 – 43 of the Claim, Canada acknowledges that although the honour of the Crown governs treaty implementation and guides all interactions with First Nations peoples, the honour of the Crown is not a cause of action in itself and does not give rise to the performance of specific obligations in the circumstances of this case. Canada further acknowledges that the relationship between the Crown and the First Nation signatories of Treaty 4 is a fiduciary one, and that in certain circumstances the relationship may give rise to fiduciary obligations. However, Canada does not owe such obligations to the Treaty 4 beneficiaries in the circumstances of this case. Canada has also not undertaken discretionary control over any specific, cognizable and communal interest of Treaty 4 beneficiaries with respect to treaty annuity payment. Rather, Canada states that the treaty right to annuity payments is entirely defined in the treaty. The amount and timing of the treaty annuity payments was a specific negotiated term of Treaty 4 and reflects the common

intention of the Treaty 4 partners.

40. In further response to paragraphs 40 – 43 of the Claim, the honour of the Crown requires Canada to take a broad, purposive approach to the interpretation of Treaty 4, and to act with good faith, diligence, integrity, and fair dealing when implementing the terms of the treaty. Canada's interpretation of the treaty promise reflects the common intention of the parties at the time Treaty 4 was signed and is consistent with the honour of the Crown.

UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

41. In further response to paragraphs 44, 45 and 57(f) of the Claim, Canada supports the United Nations Declaration on the Rights of Indigenous Peoples ("UN Declaration") and is committed to its implementation. Canada recognizes that international instruments for which Canada has expressed support, like the UN Declaration, may be used as a contextual aid to interpret domestic law, including the Constitution of Canada.
42. The UN Declaration describes a range of both individual and collective rights of Indigenous peoples around the world, including collective rights relating to, among other things: redress, restitution, or compensation relating to lands, territories, and resources (Article 28); observance and enforcement of treaties (Article 37); and the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes and to effective remedies for all infringements of their individual and collective rights (Article 40). The UN Declaration also acknowledges that these rights are minimum standards (Article 43) but that the rights contained in it are not absolute and can be subject to limitations (Article 46).

43. The *United Nations Declaration on the Rights of Indigenous Peoples Act (UN Declaration Act)* affirms the UN Declaration as a universal human rights instrument with application in Canadian law and provides a framework for implementation of the UN Declaration at the federal level. It requires the Government of Canada to take all measures necessary to ensure that the laws of Canada are consistent with the UN Declaration, and that an action plan be prepared and implemented. Both obligations must be carried out in consultation and cooperation with Indigenous peoples in Canada. Canada has committed through its Action Plan, released June 2023, to “honourably implement historic...treaties...” (Action Plan, Shared priorities chapter, measure 25) and to “[r]e-affirm pre-1975 treaty relationships based on the principles of mutual respect, self-determination, and the nation-to-nation relationship” (Action Plan, First Nations priorities chapter, measure 2).
44. In further response to paragraph 45, neither the UN Declaration nor the *UN Declaration Act* create a stand-alone cause of action and the UN Declaration is not directly enforceable in Canadian Courts.

CANADA’S CIVIL LITIGATION DIRECTIVE

45. In further response to paragraphs 46 – 47 of the Claim, Canada acknowledges that the Attorney General of Canada’s Directive on Civil Litigation Involving Indigenous People (“the Directive”) recognizes the importance of respecting treaty promises. The Directive also recognizes that “some matters will require legal clarification, and that at times litigation will be unavoidable”. The Directive reflects Canada’s commitment to respectful, fair and efficient adjudicative and other resolution processes where disagreement over the interpretation and legal effect of Indigenous rights, including treaty rights, are determined.

The Directive is not a source of substantive law aiding in the interpretation of specific treaty rights.

DAMAGES, EQUITABLE COMPENSATION, MISCELLANEOUS

46. In further response to paragraphs 48 – 52 of the Claim, Canada did not breach any obligations and upheld the honour of the Crown in relation to the implementation of the treaty annuity payment. Accordingly:
- a) Canada has not realized savings or unjust gains that must be disgorged to the Treaty 4 beneficiaries.
 - b) Canada does not owe equitable compensation.
 - c) The Treaty 4 beneficiaries have not suffered adverse effects, injury, or damages.
47. In further response to paragraphs 53 – 55 of the Claim, Canada denies that its conduct in relation to the implementation of the treaty annuity payment was high-handed, callous, or improper, such that would warrant punitive or exemplary damages.
48. In further response to paragraph 56, Canada denies that it breached Treaty 4 and its duties. Canada denies that the full particulars respecting the Claim are within its knowledge, control, and possession. One hundred and fifty years have passed since Treaty 4 was signed. However, Canada acknowledges that some particulars regarding the Claim are within its knowledge, control and possession and will produce them in due course.

VI. ADDITIONAL DEFENCES

49. In further response to the Claim as a whole, as Canada does not have an obligation to index or augment annuity payments made under Treaty 4, none of the asserted losses are recoverable at law.
50. In the alternative, if there was a breach of the terms of Treaty 4, a breach of fiduciary duty, or a failure by Canada to uphold the honour of the Crown, which is not admitted, Canada pleads and relies on the:
- a) *Federal Courts Act*, RSC 1985, c F-7, s 39(2), as the cause of action arises otherwise than in a province.
 - b) In the alternative:
 - i. *The Limitations Act*, RSA 2000, c L-12;
 - ii. *The Limitation of Actions Act*, RSA 1980, c L-15;
 - iii. *The Limitation Act*, CCSM c L150;
 - iv. *The Limitation of Actions Act*, RSS 1978, c L-15.
 - c) The doctrine of laches and acquiescence applies, given the Treaty 4 beneficiaries' delay in bringing this claim, coupled with Treaty 4 recipients' acceptance of treaty annuity payments (and the terms thereof) since 1874. Alternatively, the delay in bringing this action renders the granting of relief unreasonable, unjust and prejudicial to Canada.

51. Canada pleads the defences immediately above in relation to coercive relief only, including claims for orders relating to a constructive trust, an accounting of profits and/or disgorgement, interest, compensation, and damages, and not in relation to the claimed declaratory relief concerning the proper interpretation of the treaty annuity term in Treaty 4, related legal duties and breaches. Given the annual recurring nature of the treaty annuity obligation, these defences are also not pleaded in relation to compensatory relief falling within the applicable limitation period.

52. With respect to the relief sought at subparagraphs 1(d) and (i) of the Claim, Canada acknowledges that declaratory relief is permissible concerning the rights of future annuity recipients under Treaty 4, but says that the requested declarations provide that Canada “must” or is “require[d]” to augment or index treaty annuities, and is therefore a remedy in the nature of a mandatory injunction or specific performance, which is not available against the Crown. Canada pleads and relies upon the *Crown Liability and Proceedings Act*, RSC 1985, c C-50, s 22, as amended.

53. Further, with respect to the relief sought at subparagraph 1(p) of the Claim:
 - a) Canada states that prejudgment interest is not available for any period prior to February 1, 1992. Canada pleads and relies upon the *Crown Liability and Proceedings Act* RSC 1985, c C-50, s 31, and the *Federal Court Act*, RSC 1985, c F-7, s 36.

 - b) In the alternative, Canada states that prejudgment interest is not available for any period prior to March 31, 1984, for causes of action that arose in Alberta; September 10, 1986, for causes of action that arose in Manitoba; and January 1, 1986 for causes of action that arose in Saskatchewan. Canada pleads and relies upon the *Judicature*

*Act, RSA 2000, c J-2, s 14, The Court of King's Bench Act, CCSM c C280, s 80, and
The Pre-judgment Interest Act, SS 1984-85-86, c P-22.2, s 8.*

Disposition Requested

54. Canada is not liable to the Treaty 4 beneficiaries for any damages as asserted, nor are they entitled to the declaratory relief sought. In the alternative, Canada requests that any remedies be limited to a declaration to the extent and nature of any breach.
55. Canada therefore asks that the Claim be dismissed.

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