

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

MISSANABIE CREE FIRST NATION, on behalf of all TREATY 9 FIRST NATIONS, and CHIEF JASON GAUTHIER, on his own behalf and on behalf of all members of MISSANABIE CREE FIRST NATION and on behalf of all members of TREATY 9 FIRST NATIONS

Plaintiffs

-and-

HIS MAJESTY THE KING IN RIGHT OF CANADA, as represented by the ATTORNEY GENERAL OF CANADA, HIS MAJESTY THE KING IN RIGHT OF ONTARIO, as represented by the ATTORNEY GENERAL OF ONTARIO

Defendants

(Proceeding under the *Class Proceedings Act*, 1992, S.O. 1992, c. 6)

AMENDED FRESH AS AMENDED STATEMENT OF CLAIM (October 31, 2024)

TO THE DEFENDANT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service in this court office, **WITHIN TWENTY DAYS** after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: May 8, 2023

Issued by: _____
(Registry Officer)

Sault Ste. Marie Courthouse
26 Queen St. East
Sault Ste. Marie, ON P6A 6W2

TO: **ATTORNEY GENERAL OF CANADA**

Address for service:

Office of the Deputy Attorney General of Canada
284 Wellington Street
Ottawa, ON K1A 0H8

Address for courtesy copy (via e-mail):

Department of Justice Canada
Ontario Regional Office
120 Adelaide Street West, Suite #400
Toronto, ON M5H 1T1
Email: agc_pgc_toronto.indig-autoch@justice.gc.ca

AND TO: **ATTORNEY GENERAL OF ONTARIO**

Address for service:

Crown Law Office – Civil
McMurtry-Scott Building
8th Floor, 720 Bay Street
Toronto, ON M7A 2S9

Address for courtesy copy (via e-mail):

Email: cloc.reception@ontario.ca

CLAIM

OVERVIEW

1. This claim is a proposed class proceeding alleging that the Crown failed to diligently implement certain terms of the James Bay Treaty #9 (“Treaty 9”) and to honour the spirit and intent of the solemn Treaty relationship and promises made by the Crown arising therefrom. In particular, this claim relates to three (3) specific Crown failures:
 - a. the failure to increase, index or augment the amount of the annual payment under Treaty 9;
 - b. the failure to provide for agricultural benefits and assistance in the terms of Treaty 9; and
 - c. the failure to protect the First Nation’s mineral rights.
2. The Plaintiff claims that when properly interpreted, the promise to provide an annual payment of \$4 (the “Annuity Payment”) under Treaty 9 to each Indian person required the Crown to maintain the comparative value of the Annuity Payment to offset the impacts of inflation and to maintain the purchasing power thereof.
3. The Crown has failed to honour this promise. From the time when Treaty 9 was entered into in 1905 and 1906, the Crown has declined or failed to augment or increase the Annuity Payment. In so doing, the Crown has been unjustly enriched at the expense of the First Nation signatories to Treaty 9 and, in particular, the individual Indian recipients of the Annuity Payments, who have suffered a corresponding deprivation.
4. In the alternative – and in the event that the Crown was not required to increase, augment or index the Annuity Payment because of an implied obligation and/or the duty of diligent implementation – the Crown breached its fiduciary and/or honourable duties when it entered into and implemented

Treaty 9 without an augmentation clause in place. In so doing, the Crown entered into and implemented Treaty 9 on terms that were foolish, improvident, or otherwise amounted to exploitation of the Indians located within the boundaries of Treaty 9. As such, the Crown breached its fiduciary duty and/or the Honour of the Crown, and/or Treaty 9 is invalid.

5. The Crown also breached other Treaty obligations and failed to uphold the Honour of the Crown by entering into and implementing Treaty 9 on certain terms that were foolish, improvident, or otherwise amounted to exploitation of the Indians located within the boundaries of Treaty 9. In particular, the Crown failed to include provisions for agricultural benefits and assistance within the terms of Treaty 9, and failed to protect the First Nation's interests in the mineral rights in their reserves.
6. Treaty 9 covers approximately two-thirds of what is today the province of Ontario, including the James Bay and Hudson Bay watersheds. This proposed class action relates to all First Nations that signed Treaty 9 or are otherwise entitled to the benefits of Treaty 9 through formal or *de facto* adherence to the Treaty (the "First Nations Class"). The Plaintiffs also propose to assert a claim on behalf of all individual status Indians who are alive and members of the First Nations Class (the "Treaty 9 Members Subclass").

RELIEF SOUGHT

7. The Plaintiffs seeks the following relief:
 - a. Certification of this action as a class proceeding and related relief under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, subject to the following conditions and/or such other conditions as counsel may advise and this Honourable Court may permit:

i. There shall be a “**First Nations Class**”, defined as follows:

Missanabie Cree First Nation and any other First Nation with members who are entitled to receive an Annuity Payment under Treaty 9;

ii. There shall be sub-class, the “**Treaty 9 Members Subclass**”, defined as follows:

Chief Jason Gauthier and any other living persons who have received an Annuity Payment under Treaty 9 as a member of Missanabie Cree First Nation or any other First Nation whose members receive Annuity Payments under Treaty 9.

b. With respect to the issue described at paragraph 1(a) above, declaratory relief as follows:

i. A Declaration that the ~~Defendant~~ Crown has an ongoing obligation to increase the annual payment of \$4 payable to each Treaty Indian “for ever” (the “Annuity Payment”) from time to time, as promised by the Crown under the terms of Treaty 9, to allocate a fair share of net Crown revenues to Treaty 9 First Nations or, alternatively, to maintain the real value of the Annuity Payment in order to give effect of to the purpose and intention of this Treaty promise;

iii. A Declaration that the ~~Defendant~~ Crown breached its Treaty, fiduciary, honourable, legal and/or equitable obligations and failed to uphold the Honour of the Crown when it failed to increase, augment or index the Annuity Payment from time to time since 1905 to maintain the real value and purchasing power of the Annuity Payment, the value of which has been seriously eroded due to inflation and the time value of money;

iv. A Declaration that the ~~Defendant’s~~ Crown’s failure to increase, augment or index the Annuity Payment has unjustly enriched the ~~Defendant~~ Crown which has produced a corresponding deprivation borne by the First

Nations Class and, in particular, by the individual Indians entitled to receive the Annuity Payment under Treaty 9 including the Treaty 9 Members Subclass;

c. With respect to the issue described at paragraph 1(b) above, the following Declaratory relief:

i. A Declaration that the ~~Defendant~~ Crown breached the Honour of the Crown and its fiduciary duty owing to the First Nations Class when it failed to provide economic assistance in agriculture, stock-raising, or other work and an annual distribution of twine and ammunition to Treaty 9 Indians;

d. With respect to the issue described at paragraph 1(c) above, the following Declaratory relief:

i. A Declaration that *An Act for the Settlement of Certain Questions between the Governments of Canada and Ontario respecting Indian Reserve Lands*, S.C. 1924, c. 48 is contrary to Treaty 9, the Honour of the Crown, and the Crown's fiduciary duty insofar as that Act purports to grant Ontario a one-half interest in all mineral rights in Indian reserves within the Province of Ontario that were set apart under the terms of Treaty 9;

e. In the alternative, the following Declaratory relief:

i. A Declaration that the ~~Defendant~~ Crown owed a fiduciary duty to Missanabie Cree First Nation and all other Treaty 9 signatories (the First Nations Class) in the negotiation and implementation of Treaty 9, which included the duty to act prudently, in good faith, with loyalty to the beneficiaries' interest, and to provide disclosure of the effects of inflation on the value of the Annuity Payment over time;

ii. A Declaration that the ~~Defendant~~ Crown breached said fiduciary duty, failed to uphold the Honour of the Crown and/or committed equitable fraud when the Governor-in-Council approved and consented to Treaty 9 on terms which were foolish, improvident, and otherwise amounted to exploitation. The ~~Defendant~~ Crown further breached its duties and obligations to the Treaty 9 signatories when the Governor-in-Council failed to withhold consent to the Treaty on terms that were foolish, improvident, or amounted to exploitation, as well as by failing to implement the terms of Treaty 9 in a uniform and equitable manner as compared to the signatories to the Robinson Treaties of 1850;

ii. A Declaration that the surrender and release in Treaty 9 should be set aside on the grounds that its terms were unconscionable, foolish, improvident and otherwise amounted to exploitation.

f. In all cases, an Order that the ~~Defendant~~ Crown is liable to pay, with respect to the three (3) specific Crown failures described at paragraph 1:

i. Equitable compensation and/or restitution to the First Nations Class due to the Defendant's unjust enrichment and the First Nations Class's corresponding deprivation and for the ~~Defendant's~~ Crown's breaches of Treaty 9, the Honour of the Crown, and/or fiduciary or other legal or equitable duties in the sum of \$10 billion or such other amount as this Honourable Court deems just;

ii. Equitable compensation and/or restitution to the Treaty 9 Members Subclass due to the ~~Defendant's~~ Crown's unjust enrichment and the Treaty 9 Members Subclass's corresponding deprivation for the adjusted value of the Annuity Payment that each member would have been entitled to but for the ~~Defendant's~~ Crown's breaches of Treaty 9, the Honour of the Crown, and the ~~Defendant's~~ Crown's fiduciary or other legal or equitable duties owing to the Treaty 9 signatories;

- iii. Punitive damages in such amount as this Honourable Court deems just;
 - iv. Pre and post-judgment interest or equitable compensation as this Honourable Court deems just;
 - v. Costs of this action on a substantial or full indemnity basis, including costs of notice and class administration;
- g. Such further and other relief as counsel may advise and this Honourable Court deems just.

FACTS

The Parties

8. Treaty 9 was first signed in 1905 and 1906. The Treaty 9 territory covers approximately two-thirds of what is today the province of Ontario, including the James Bay and Hudson Bay watersheds.
9. While Annuity Payments are paid to individuals, the promise to provide an annual payment to every Indian person was a promise made to the “bands” as the rights-bearing collectives recognized under Treaty 9. Annuity Payments are a collective right, and the holder of such rights is the First Nation collective which is the legal successor in interest to the Treaty Band.
10. The PLAINTIFF, MISSANABIE CREE FIRST NATION, has been a party to Treaty 9 since 1906 and has reserve lands located in what is now the province of Ontario. This Plaintiff is an “Indian Band” within the meaning of the *Indian Act*, R.S.C. 1985, c. 1-5, as amended. This Plaintiff seeks to represent and act on behalf of the First Nations Class in this proposed class proceeding.
11. The PLAINTIFF, CHIEF JASON GAUTHIER, is a member and the Chief of Missanabie Cree First Nation. Chief Gauthier is an “Indian” within the

meaning of the *Indian Act*, R.S.C. 1985, c. 1-5, as amended. Chief Gauthier is an individual who is entitled to receive Annuity Payments under Treaty 9 as a member of Missanabie Cree First Nation. This Plaintiff seeks to represent and act on behalf of the Treaty 9 Members Subclass in this proposed class proceeding.

12. There are thirty-six (36) First Nations with reserve lands located in what is now the province of Ontario whose members receive Annuity Payments under Treaty 9. There is also one (1) First Nation that is a signatory to Treaty 9 that is located in what is now the province of Quebec. In total there are thirty-seven (37) First Nations within the First Nations Class.
13. The Treaty 9 Members Subclass includes all living members of the First Nations that constitute the First Nations Class.
14. The DEFENDANT, HIS MAJESTY THE KING IN RIGHT OF CANADA AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA (hereinafter referred to as “Canada” or the “Crown”), has legislative authority in Canada, by and with the advice of the Parliament of Canada, with respect to Indians and lands reserved for Indians pursuant to section 91(24) of the *Constitution Act, 1867*. Canada owes enforceable fiduciary, legal and equitable duties to the Missanabie Cree and the Treaty 9 signatories pursuant to various sources, including but not limited to the *Rupert's Land and North-Western Territory Order* dated June 23, 1870, the *Constitution Act, 1867*, the *Constitution Act, 1982*, Treaty 9, or otherwise by law or in equity. Canada owes, and owed at all material times, fiduciary obligations to the Treaty 9 signatories by virtue of their Treaty entitlements and otherwise pursuant to the Constitution of Canada, relevant enactments, and at common law and equity. At all material times, officials within the Department of Indian Affairs acted as agents on behalf of Canada.
15. The DEFENDANT, HIS MAJESTY THE KING IN RIGHT OF ONTARIO AS REPRESENTED BY THE ATTORNEY GENERAL OF ONTARIO, (hereinafter referred to as “Ontario” or the “Crown”), is named pursuant to

s. 14 of the *Crown Liability and Proceedings Act*, 2009, c. 7, Sch 17.

16. The Crown Defendants as successors to the Imperial Crown and signatories to Treaty 9 are jointly and severally liable for the alleged breaches of treaty to the extent of their jurisdictional competence under the *Constitution Act, 1867*. Reference in this document to the “Crown” includes either or both Defendants.

The Crown sought to enter Treaties throughout the North-West Territories to open up Canada for settlement, immigration, mining, lumbering, trading and other purposes

17. Pursuant to the *Rupert's Land and North-Western Territory Order* dated June 23, 1870, the North-West Territories (which included lands within the present-day province of Ontario) were admitted into the Dominion of Canada on certain terms and conditions including, *inter alia*, the payment of £300,000 by the federal Crown to the Hudson’s Bay Company.
18. The Indian signatories to the numbered Treaties faced an uncertain future in the time immediately prior to the signing of the numbered Treaties. The collapse of the traditional hunting economy based on the bison and the continued encroachment of European settlers had created a sense of urgency on the part of Bands to protect their interests. At the same time, the Crown sought to pave the way for future settlement of the west by acquiring (what it viewed as) legal title to large masses of land and reduce the threat of an uprising of the Indians through the making of treaties.
19. Between 1871 and 1899, the Crown entered into Treaties 1 through 8 with various Indian Bands and Tribes (referred hereinafter as “Treaty Bands” or “Bands”) throughout the North-West Territories from northwestern Ontario to the Rocky Mountains to open up the west for settlement, immigration, mining, lumbering, trading and other purposes. According to the written terms of the Treaties, the Crown promised to provide specific benefits, including, *inter alia*, the payment of an initial present or gratuity, annuities, and reserves to be set aside for the exclusive use and benefit of Indian Bands.

20. The Treaty negotiations were fraught with conflict, as the Bands were aware that the Crown had paid the Hudson's Bay Company (£300,000) for its interests in the vast territory of what was then referred to as Rupert's Land. The Bands vehemently argued that the lands belonged to them, and that the money should have been theirs. This confirms that these Bands and the Crown contemplated the payment of monetary compensation and protection of their rights and interests to land.
21. Central to the negotiations for virtually all of the numbered Treaties were the assurances on the part of the Government that the Indian signatories would receive specific and enforceable Treaty benefits in exchange for the entering into the Treaties. The Crown's promise to provide Treaty benefits to assist and support a sustainable future for the Bands in light of their rapidly changing circumstances was critical to their acceptance of Treaty.
22. The Treaties were relational agreements that incorporated the concept of sharing the benefits of the land.
23. The negotiation of Indian treaties in Canada stretched over a period of over 200 years. While there are important differences in the treaties, there is necessarily a unity to the treaty process and the Crown intended to establish a clear set of terms with relative parity to ensure that all Bands were treated equitably and did not receive substantially more or substantially less than other Treaties.
24. In particular, the 1850 Robinson Treaties informed the terms of the numbered Treaties that followed thereafter, including the promise to provide annual payments.

Unity of the terms of the numbered Treaties

25. Treaties 1 and 2 were the first Indian Treaties negotiated by the newly-created Dominion of Canada at Fort Garry in 1871. Canada appointed the Lieutenant-Governor of Manitoba, Adams G. Archibald, and the Indian Commissioner, Wemyss M. Simpson, to negotiate the terms of the treaties with the Cree and

Saulteaux Indians to open up fertile agricultural lands in what is now southern Manitoba to settlement.

26. Since the federal Crown did not have an established practice or policy for making treaties with the Indians, the Treaty Commissioners were given some latitude and were provided a copy of the 1850 Robinson Treaty to guide them in negotiations with the Indians.
27. While negotiating the terms of Treaty 1 in 1871, Lieutenant-Governor Archibald promised the Indians assembled at the Stone Fort that they would be treated in a similar manner to the Indians of the Robinson Treaties:

Another thing I want you to think over is this: in laying aside these reserves, and in everything else that the Queen shall do for you, you must understand that she can do for you no more than she has done for her red children in the East. *If she were to do more for you that would be unjust for them. She will not do less for you because you are all her children alike, and she must treat you all alike.*

28. The Lieutenant-Governor of the Northwest Territories, Alexander Morris, negotiated many of the numbered treaties and described the Robinson Treaties as “the forerunners of the future treaties, and shaped their course...”.

Events leading up to Treaty 9

29. In the 1880s, the Cree and Ojibwe peoples in the James Bay region were increasingly concerned about the presence of settlers on their traditional lands and the decline in the local beaver population.
30. In 1901, the Indians living north of the “height of land” which defined the boundaries of the Robinson treaties sent a petition to the government to have a treaty signed in northern Ontario as they wanted the protection of their lands, resources, and fur-bearing animals. In addition, by the early 1900s, both federal and provincial governments were interested in taking control of the lands around the Hudson and James Bay watersheds.
31. In 1885, the Canadian Pacific Railway (hereafter referred to as “the CPR”) was constructed through the territory north of Lakes Huron and Superior

along the height of land.

32. In 1890, E. B. Borron, a Stipendiary Magistrate and agent of Ontario, met with Indians near Missanabie in 1886 and promised to request that the Crown enter into a treaty with the Indians. Although he considered it premature to enter into a treaty with the Indians on or near James Bay, Borron recommended that Ontario advise the Superintendent General of Indian Affairs, a Minister of the Crown in right of Canada, to enter into a treaty with the Indians north of the height of land, including the Missanabie Cree.
33. Unlike the previous numbered Treaties, the provincial government of Ontario played a role in the negotiations and had a number of “demands” regarding the proposed treaty. Firstly, the province requested that one of the three Treaty commissioners was to be a provincial appointee. Second, instead of allowing the Indians to select their own reserves, the sites were to be determined by the treaty commissioners. Third, annuity payments and related treaty costs were to be the responsibility of the Dominion. Lastly, no site suitable for the development of water-power exceeding 500 horsepower was to be included within the boundaries of any reserve. Pursuant to statutes passed by their respective legislatures in 1891, Ontario and Canada signed a formal agreement on April 6, 1894 to resolve a dispute over the legal status of Indian reserves in the Treaty 3 area near Lake of the Woods. Clause 6 of that agreement, ratified by Imperial statute, stated that “any future treaties with the Indians in respect of territory in Ontario to which they have not before the passing of the said statutes surrendered their claim aforesaid, shall be deemed to require the concurrence of the government of Ontario.”
34. In 1899, two senior officials of the Department of Indian Affairs met with the Indians of Missanabie Lake and adjoining bands at the headwaters of the Moose River near Missanabie and later reported to the Superintendent-General of Indian Affairs that the non-treaty Indians who lived between James Bay and the Great Lakes complained about the construction of railways and the influx of miners, prospectors and surveyors trespassing upon their lands and they asked what the government intended to do about the

rights of the Indians. The Department of Indian Affairs acknowledged that the Indians had “recognized and unextinguished rights” to the land in question and proceeded to collect information and reliable population figures on the Indian people north of the CPR line in preparation for treaty negotiations.

35. In 1902, the Indian Agent at Sault Ste. Marie reported to the Department of Indian Affairs that 300 to 400 Indians near Brunswick House and an additional 100 non-treaty Indians at Missanabie wanted to enter into a treaty with the Crown and to have reserves set apart for their use and benefit.
36. On April 30, 1904, the Deputy Superintendent General of Indian Affairs Frank Pedley wrote the Ontario Commissioner of Crown Lands proposing the following terms of a treaty with the Aboriginal people in the unceded territory:
 - a. a maximum annuity of \$4.00 per person plus a gratuity of \$4.00 to be paid to each person once and for all;
 - b. reserves to be set apart of sufficient area in localities chosen by the Indians with special regard for their needs, the title of which shall be held in trust by Canada free of any claims by Ontario with respect to timber or mineral rights in, upon, or under the soil;
 - c. that such reserves shall be surveyed and confirmed by the Ontario government within one year after selection by the Indians or within one year of a request by the Department of Indian Affairs;
 - d. the establishment of Indian day schools; and
 - e. that Ontario bear financial responsibility for fulfilling these terms and set apart reserves since it will acquire title to lands within the treaty area free of all Indian claims.

37. In May 1904, Frank Pedley, the Deputy Superintendent General of Indian Affairs, prepared a "Schedule of Populations" of non-treaty Indians at various locations north of the height of land in preparation for negotiating a treaty with the Indians, including an estimated population of 100 at Missanabie. The Hudson's Bay Company Commissioner advised Pedley that minimal preliminary arrangements would be necessary to meet with the Missanabie Cree and other Indian groups located on or near the CPR line.
38. On June 23, 1904, the Deputy Superintendent General of Indian Affairs urged Ontario to enter into a treaty with the Indians. Pedley stated that the "maximum terms" that would be offered to the Indians were fixed by the Robinson-Huron and Superior Treaties and that Ontario would be fortunate to obtain a surrender of aboriginal title on terms that were considered adequate in 1850.
39. On May 8, 1905, the Deputy Superintendent General of Indian Affairs sent a draft Order in Council to the Ontario Commissioner of Crown lands urging Ontario to agree to proposed terms of the treaty before the Indians made extra demands than those proposed by Canada. On June 1, 1905, the Provincial Treasurer agreed to the proposed terms on behalf of Ontario, subject to the following material changes which were agreed to by Canada:
 - a. the location of reserves were to be arranged between Her Majesty's Treaty Commissioners, one of whom was to be appointed by Ontario, and the Chiefs and Headmen of the Indian bands;
 - b. no site suitable for development of water-power exceeding 500 horsepower was to be included within the boundaries of any reserve; and
 - c. Ontario agreed to pay to Canada the amount required for annuities, but all further expenditures were to be at Canada's expense.

40. By Order in Council dated June 29, 1905, three Treaty Commissioners were appointed by Ontario and Canada to negotiate a treaty with the Indians inhabiting the proposed limits of the treaty. The constitution of the commission to negotiate the treaty to acquire the unceded lands included one member nominated by the Province of Ontario as it was now deemed that Ontario was required to give its concurrence in respect of any treaties made with the Indians in the territory of Ontario.
41. The stated purpose of Treaty was to “promote quiet settlement and colonization and to forward the construction of railroads and highways” and its terms were fixed by the Governments of Canada and the Province of Ontario well in advance of any discussions with the Indians. The Commissioners were instructed by Ontario and Canada not to alter any of the proposed terms of the draft Treaty in discussions with the Indians who were simply offered the terms of Treaty 9 as a *fait accompli* and given the option to sign an adhesion without any negotiations whatsoever. The Missanabie Cree, like several other Bands, were not even offered the option to sign an adhesion to Treaty 9 and did not receive any reserve land until 2011.
42. At all material times, the Treaty Commissioners withheld material information from the Bands who entered into the Treaty; information that was relevant from the preceding treaties that the Bands were entitled to receive in Treaty 9 and tainted the entire treaty making process by ignoring, omitting or neglecting to include those similar provisions in previous and subsequent treaties that ought to have been included in Treaty 9 and that were at all material times known to the Defendant.

The Cree and Ojibwe peoples in the James Bay region enter Treaty 9 with the Crown

43. In 1905, Duncan Campbell Scott and Samuel Stewart were appointed as Treaty Commissioners by the Government of Canada and Daniel G. MacMartin was appointed as a Commissioner by the Provincial Government.

44. The terms of Treaty 9 were approved by an Order in Council dated July 3, 1905, prior to the meeting of the Commissioners with the Cree and Ojibwe.
45. The written text of Treaty 9 states that it was between “His Most Gracious Majesty the King of Great Britain and Ireland, by His Commissioners”, including a Commissioner “representing the province of Ontario” and “the Ojibeway, Cree and other Indians, inhabitants of the territory within the limits hereinafter defined and described”.
46. Between 1905 and 1906, the Treaty Commissioners travelled to Northern Ontario to explain the written terms of the Treaty, administered and witnessed the signing of the Treaty, helped to select reserve lands for some but not all Bands, and distributed various benefits and cash payments on behalf of the Crown.
47. The first expedition began in July 1905 with a Treaty Council at Osnaburgh Post, modern-day Mishkeegogamang First Nation. From there the Commissioners travelled down the Albany River and held Treaty Councils at:
 - a. Fort Hope Post (Eabamatoong First Nation);
 - b. Marten Falls Post (Marten Falls First Nation);
 - c. Fort Albany Post (Kashechewan First Nation);
 - d. Moose Factory Post (Moose Cree First Nation); and
 - e. New Post (Taykwa Tagamou Nation).
48. The expedition also stopped at English River but the Crown did not hold a Treaty Council with the Indians who lived near and traded at this post.
49. In their report on their travels in 1905, the Treaty Commissioners indicated:

For the most part the reserves were selected by the Commissioners after conference with the Indians. They have been selected in situations which are especially advantageous to their owners, and where they will not in any way interfere with railway development or the future commercial interests of the country ... No valuable water-powers are included within the

allotments.

50. The second expedition in 1906 went to:
 - a. Abitibi Post (Abitibiwinni First Nation, Wahgoshig First Nation, now ApitipiAnicinapek Nation);
 - b. Matachewan Post (Matachewan First Nation);
 - c. Mattagami Post (Mattagami First Nation);
 - d. Flying Post (Flying Post First Nation);
 - e. New Brunswick House Post (Brunswick House First Nation); and
 - f. Long Lake Post (Ginoogaming First Nation).

51. At each Treaty Council a similar process was followed to formally execute the Treaty, with some minor variations. The Commissioners:
 - a. Elected translators to assist with negotiations;
 - b. Requested that the community select representatives;
 - c. Provided a brief overview of select terms of the Treaty orally in English, with translators interpreting for Band leadership;
 - d. Answered questions posed by Band leadership; and
 - e. Presented the written text of the Treaty to the leaders as a completed document for signature.

52. The written Treaty text was not translated into Anishinaabe or Cree. The Commissioners did not provide signatories with an English nor a translated copy of the written Treaty text. The Bands did not have any independent legal or financial advice to assist them in making a full, prior, and informed decision to consent to the terms offered by the Crown.

53. In 1929 and 1930, further adhesions were signed to incorporate lands north of the Albany River. These lands were included within the boundaries of Ontario pursuant to the *Ontario Boundaries Extension Act, 1912*.

54. Treaty Councils were again held to formally sign the Treaty at HBC posts. This time, the Commissioners toured the region by airplane with signing ceremonies at Big Trout Lake in 1929, and Wendigo River at Nikip Lake, Trout Lake, Fort Severn, and Winisk in 1930.
55. The Treaty adhesion made it clear that all Treaty benefits and promises set out in Treaty 9, including the provision of Annuity Payments, were owed to the adhering Bands when they signed the adhesion. The written text of the adhesions explicitly stated that “the provisions of the said foregoing Treaty” were to be “extended” to the adherents.

The Crown promised Annual Payments and other benefits to the Treaty 9 Bands

56. According to the written text of the Treaty first circulated between Canada and Ontario in 1905, the Indians who signed Treaty 9 agreed to “cede, release, surrender and yield up to the Government of the Dominion of Canada, for His Majesty the King and His successors forever, all their rights, titles and privileges” to approximately 90,000 square miles of land in Ontario and all other “Indian rights, titles and privileges whatever in all other lands”. The written text of the Treaty described those lands as follows:

That portion or tract of land lying and being in the province of Ontario, bounded on the south by the height of land and the northern boundaries of the territory ceded by the Robinson-Superior Treaty of 1850, and the Robinson-Huron Treaty of 1850, and bounded on the east and north by the boundaries of the said province of Ontario as defined by law, and on the west by a part of the eastern boundary of the territory ceded by the Northwest Angle Treaty No. 3; the said land containing an area of ninety thousand square miles, more or less.

57. According to the written text of the 1929 and 1920 adhesions, the Indians who adhered to Treaty 9 similarly agreed to “cede, release, surrender and yield up to the Government of the Dominion of Canada, for His Majesty the King and His successors forever, all their rights, titles and privileges” to approximately 128,320 square miles of land in Ontario and all other “Indian

rights, titles and privileges in all other lands”. The lands were described as follows:

... all that tract of land, and land covered by water in the Province of Ontario, comprising part of the District of Kenora (Patricia Portion) containing one hundred and twenty-eight thousand three hundred and twenty square miles, more or less, being bounded on the South by the Northerly limit of Treaty Number Nine; on the West by Easterly limits of Treaties Numbers Three and Five, and the boundary between the Provinces of Ontario and Manitoba; on the North by the waters of Hudson Bay, and on the East by the waters of James Bay and including all islands, islets and rocks, waters and land covered by water within the said limits, ...

58. In total, the territory of Treaty 9 and its adhesions covers more than two-thirds of what is now the province of Ontario.
59. According to the written text of the Treaty, Treaty 9 signatories were entitled to receive the following benefits promised by Canada and Ontario on behalf of the Crown:
 - a. Reserve lands not to exceed “one square mile for each family of five, or in that proportion for larger and smaller families” and subject to approval of the location by the Treaty Commissioners;
 - b. The right to pursue their usual vocations of hunting, fishing and trapping on unpatented Crown lands within the area surrendered under the Treaty;
 - c. Each Indian was to receive a one-time “present” or gratuity of \$8.00 in cash;
 - d. Each Indian was to receive in cash the sum of \$4.00 per year “for ever” as per the following (the “Annuities Clause”):

His Majesty also agrees that next year, and annually afterwards for ever, He 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, four dollars, the same, unless there be some exceptional reason, to be paid only to the heads of families for those belonging thereto.

- e. Such school buildings and educational equipment “as may seem advisable” to His Majesty's government of Canada; and
 - f. A flag, and a copy of the Treaty.
60. The promise to provide various Treaty benefits in support of the future livelihood of the Bands in changing circumstances was critical with respect to concluding the Treaty.
61. In 1906, the Deputy Superintendent General of Indian Affairs, Duncan Campbell Scott, who also served as Treaty Commissioner, wrote extensively about Treaty 9 and published memoirs in November 1906 stating that the Indians could not have understood the nuances of the Treaty and the Crown’s motives for entering into Treaty 9. According to Scott:

To individuals whose transactions had been heretofore limited to computation with sticks and skins our errand must have indeed been dark.

They were to make certain promises and we were to make certain promises, but our purpose and our reasons were alike unknowable. What could they grasp of the pronouncement on the Indian tenure which had been delivered by the law lords of the Crown, what of the elaborate negotiations between a dominion and a province which had made the treaty possible, what of the sense of traditional policy which brooded over the whole? Nothing. So there was no basis for argument. The simpler facts had to be stated, and the parental idea developed that the King is the great father of the Indians, watchful over their interests, and ever compassionate.

Disparity between benefits set out in written text of Treaty 9 and in other numbered Treaties

62. The numbered Treaties negotiated between 1899 and 1921 are all relatively similar, with Treaty 9 being the most different from the others. The written text of Treaty 9 provided for far less benefits than other Treaties. In particular:
- a. Treaty 9 only provided for a gratuity payment of \$8 per person. This is \$4 less than the gratuity provided under Treaties 3 and 5;

- b. Treaty 9 only provided for an Annuity Payment of \$4 per person. This is \$1 less per year than what is provided under Treaties 3 and 5 with no salaries for Chiefs and headmen;
- c. Unlike virtually every other numbered Treaty, Treaty 9 did not provide for any agricultural or other economic benefits such as farming implements, cattle, or assistance in earning a livelihood through wage labour. Agricultural benefits were included as part of the “Outside Promises” of Treaties 1 and 2 and were explicitly included in the written text of Treaties 3, 4, 5, 6, 7, 8, 10 and 11. Further, and unlike Treaty 9, many of these Treaties also provided additional benefits such as the distribution of ammunition or twine, chests of carpenter’s tools, salaries and clothing for Band leadership, and (in the case of Treaty 6) a medicine chest;
- d. In the case of Treaty 10, entered into in 1906 between Canada and various bands in northern Alberta and Saskatchewan, the Crown promised “to furnish such assistance as may be found necessary or advisable to aid and assist the Indians in agriculture or stock-raising or other work and to make such a distribution of twine and ammunition to them annually as is usually made to Indians similarly situated”. Treaty Commissioner J.A.J. McKenna reported that the government’s object behind the promise of agricultural or economic assistance “was simply to do for them what had been done for neighbouring Indians when the progress of trade or settlement began to interfere with the untrammelled exercise of their aboriginal privileges as hunters”; and
- e. Treaty 9 did not provide for any lands for off-reserve members. This is unlike Treaties 8 and 10, which directly preceded and followed Treaty 9, and which provided 160 acres of land “in severalty” for individuals who chose to live outside of the Band’s reserve lands. The supposed rationale for including “lands in severalty” was because populations were not as concentrated in the North.

Crown has failed to augment, increase or index the Treaty 9 Annuity Payment or to share resource revenues

63. In the years since the signing of Treaty 9, the relative value of the Annuity Payment has decreased due to inflation to the point of rendering the Annuity Payment virtually meaningless in terms of purchasing power.
64. The amount of the Annuity Payment has never been augmented, increased or indexed for the purposes of offsetting the impacts of inflation and maintaining the purchasing power thereof or to eliminate the disparity between the terms of Treaty 9 and the other numbered Treaties.
65. The Crown has benefitted from the decrease in relative value of the Annuity Payment, not to mention from lands and resources taken up following the signing of Treaty 9 more generally. Ontario has been greatly enriched and has developed into a prosperous jurisdiction following the signing of Treaty 9. In contrast, the Treaty 9 signatories and their members have suffered a corresponding loss, and there is no juristic reason for the enrichment.

LIABILITY

66. The Plaintiffs claim that the ~~Defendant~~ Crown breached its Treaty, fiduciary, honourable, legal and/or equitable obligations and the Honour of the Crown when it:
 - a. acted in bad faith during the negotiations and the subsequent implementation of Treaty 9;
 - b. approved and consented to Treaty 9 on terms which were foolish, improvident, and otherwise amounted to exploitation;
 - c. proceeded to implement Treaty 9 on terms that were unconscionable;
 - d. failed to diligently implement the terms of Treaty 9 in a uniform and fair manner for all Treaty 9 Indians;
 - e. failed to increase the Annuity Payment from time to time, as promised by

the Crown under the terms of Treaty 9, to allocate a fair share of net Crown revenues to Treaty 9 First Nations or, alternatively, to maintain the real value and purchasing power of the Annuity Payment in order to give effect to the purpose and intention of this Treaty promise;

- f. failed to provide economic assistance in agriculture, stock-raising, or other work and an annual distribution of twine and ammunition to Treaty 9 Indians;
- g. failed to protect the Treaty 9 signatories' interests in the minerals underlying their traditional territories by granting Ontario a one-half interest in all mineral rights in Indian reserves within the Province of Ontario in 1924 pursuant to *An Act for the Settlement of Certain Questions between the Governments of Canada and Ontario respecting Indian Reserve Lands*.

The federal Crown breached its legal, equitable, fiduciary and honourable duties at the time of Treaty-making and by proceeding to implement unconscionable terms

67. The Crown has recognized that it has an “obligation of honourable dealing” with Indigenous peoples as early as the *Royal Proclamation* of 1763. This obligation, which is an element of what is now referred to as the Honour of the Crown, “derives from the Crown’s assertion of sovereignty in the face of prior Aboriginal occupation”. It is well established that the Honour of the Crown is always at stake in the Crown’s dealings with Indigenous peoples. The Honour of the Crown is “a constitutional principle” and is a source of enforceable affirmative obligations on the Crown.

68. It is also well-established at law that the Crown must conduct itself honourably in the making and diligent implementation of Treaties.
69. Further, where the Crown assumes discretionary control over a specific or “cognizable” Aboriginal interest (such as Aboriginal Title), this gives rise to fiduciary duties on the part of the Crown. As a fiduciary, the Crown must act with utmost loyalty and cannot consent to any improvident bargain.
70. The Plaintiffs claim that the Crown’s actions failed to meet the standard of a fiduciary, failed to uphold the Honour of the Crown, and amounted to bad faith during the negotiations of Treaty 9. The ~~federal~~ Crown negotiated the terms of Treaty 9 with Ontario from approximately 1901 to 1905 without the involvement of the Treaty 9 Nations and before any Treaty Councils or meetings with the Indigenous Nations were held. The Treaty incorporates by reference the terms of a separate agreement entered into between Canada and Ontario.
71. The Plaintiffs claim that the Crown took undue advantage of the isolated and remote Indian Bands of Treaty 9 when it offered them significantly less benefits than the signatories to virtually every one of the numbered Treaties that preceded and followed Treaty 9 received.
72. The Plaintiffs claim that the Crown breached its fiduciary duty to the Bands when it approved and consented to Treaty 9 on terms which were foolish, improvident, and otherwise amounted to exploitation.
73. The Plaintiffs claim that the Crown further breached its duties by failing to rectify the significant disparity between Treaty 9 and the other numbered Treaties and by continuing to implement the improvident bargain with unconscionable terms.

The federal Crown breached its Treaty, fiduciary, equitable, legal duties in the implementation of the Treaty with regards to the amount of the Annuity Payment

74. Treaty 9 is a source of enforceable rights which are recognized and constitutionally affirmed at Canadian law under section 35 of the *Constitution Act, 1982*.
75. It is well established at law that the Honour of the Crown governs the interpretation of historic treaties in a way that fulfils the intended purposes of treaty and statutory grants and assumes that the Crown always intends to fulfill its promises.
76. The Treaty-making process and the promises arising therefrom necessarily requires an interpretation of the Treaty that maintains fidelity to the spirit and intent of the Treaty. The Annuities Clause must be interpreted in a way that is consistent with, *inter alia*, the Nation-to-Nation relationship between the parties, the Honour of the Crown and the duty of diligent implementation, and the Crown's fiduciary duties.
77. The intention behind the Annuities Clause was clear: the Crown was in in vital need of securing more lands for settlement and industry in northern Ontario and was, in part, to provide Annuity Payments to assist the Indians in offsetting the costs of the basic necessities they required to subsist, given the increasing impacts on their traditional territories and natural resource wealth. When Treaty 9 was signed, the value of the Annuity Payment equated with a certain amount of goods. This value, or purchasing power, was extended to the members of the signatory Bands to assist them with their livelihood.
78. The Plaintiffs claim that, when properly interpreted, Treaty 9 includes in implied promise to augment or increase the amount of the Annuity Payment from time to time.

79. The Plaintiffs claim that the Crown has an ongoing Treaty, fiduciary, and/or honourable obligation to increase the Annuity Payment, as promised by the Crown under the terms of Treaty 9, to maintain the real value of the Annuity Payment over time.
80. The Plaintiffs claim that the Crown has failed to fulfill its legal obligations to provide and to properly administer the Annuity Payment by failing to increase or index the Annuity Payment to retain its purchasing power. In the years since the signing of Treaty 9, the relative value of the Annuity Payment has decreased due to inflation to the point of rendering the Annuity Payment virtually useless in terms of purchasing power. The failure to index the Annuity Payment to account for inflation has resulted in the erosion of the value of the Annuity Payment to the point of being worthless.

In all cases, Crown breaches give rise to liability for the payment of equitable compensation, restitution and/or damages to the Plaintiffs

81. The Crown is liable to provide equitable compensation to the Plaintiffs for the losses they have suffered related to the Crown's breaches of its Treaty, legal, fiduciary, and honourable obligations. The Crown has been unjustly enriched and the Plaintiffs have suffered a corresponding deprivation, without juristic reason for the deprivation.
82. The Plaintiffs claim, *inter alia*:
- a. Equitable compensation and/or restitution to the First Nations Class due to the ~~Defendant's~~ Crown's unjust enrichment and the First Nations Class's corresponding deprivation and for the ~~Defendant's~~ Crown's breaches of Treaty 9, the Honour of the Crown, and/or fiduciary or other legal or equitable duties in the sum of \$10 billion or such other amount as this Honourable Court deems just;
 - b. Equitable compensation and/or restitution to the Treaty 9 Members Subclass due to the ~~Defendant's~~ Crown's unjust enrichment and the Treaty 9 Members Subclass's corresponding deprivation for the

adjusted value of the Annuity Payment that each member would have been entitled to but for the ~~Defendant's~~ Crown's breaches of Treaty 9, the Honour of the Crown, and the ~~Defendant's~~ Crown's fiduciary or other legal or equitable duties owing to the Treaty 9 signatories;

83. The Plaintiffs propose that this action be tried in the City of Sudbury in the Province of Ontario.

Dated ~~July 29, 2024~~ October 31, 2024



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Plaintiffs

v.

HIS MAJESTY THE KING IN RIGHT OF CANADA, as represented by the ATTORNEY GENERAL OF CANADA

Defendant

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Sault Ste. Marie

(Proceeding under the Class Proceedings Act, 1992, S.O. 1992, c. 6)

**FRESH AS AMENDED STATEMENT OF CLAIM
(July 29, 2024)**

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