

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

Defendant

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

AMENDED MOTION RECORD OF THE PLAINTIFF

July 31, 2025

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**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**

Defendant

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

**NOTICE OF MOTION OF THE PLAINTIFFS
Motion for Certification
(Sections 2(2), 5 of the *Class Proceedings Act*)**

THE PLAINTIFFS will make a motion to this Court, as soon as the motion can be heard, at the Sault Ste. Marie Courthouse, 26 Queen St. East, Sault Ste. Marie, ON P6A 6W2.

PROPOSED METHOD OF HEARING: The motion is to be heard orally.

RELIEF SOUGHT

1. This Motion is for:
 - 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 a subclass, 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. an ORDER defining the class as set out in (a)(i);
- c. an ORDER defining the subclass as set out in (a)(ii);
- d. an ORDER that that the proposed proceeding is certified based on the following common issues:
 - i. Did the Defendant owe a duty of good faith to the treaty beneficiaries in its conduct of the negotiation and implementation of James Bay Treaty #9?
 - ii. Did the Defendant owe a fiduciary duty to the treaty beneficiaries in its conduct of the negotiation and implementation of James Bay Treaty #9?
 - iii. Was the Defendant required to uphold the Honour of the Crown in the negotiation and implementation of James Bay Treaty #9, and in their subsequent dealings with the treaty beneficiaries?
 - iv. Does the Defendant owe an ongoing obligation to the treaty beneficiaries to maintain the real value of the annual payment of \$4 payable to each Treaty Indian, “for ever” as promised by the Crown under the terms of James Bay Treaty #9?
 - v. Did the Defendant breach the Honour of the Crown and its fiduciary duty owing to the treaty beneficiaries when it

failed to include a provision in the terms of James Bay Treaty #9 for economic assistance in agriculture, stock-raising, or other work and a provision for the annual distribution of twine and ammunition?

- vi. Is the *An Act for the Settlement of Certain Questions between the Governments of Canada and Ontario respecting Indian Reserve Lands*, contrary to James Bay Treaty #9 insofar as it purports to grant the Government of the Province of Ontario a one-half interest in all mineral rights in Indian Reserves within the Province of Ontario that were set apart under James Bay Treaty #9?
- vii. Did the Defendant breach its fiduciary duty to the treaty beneficiaries when the Governor-in-Council approved and consented to James Bay Treaty #9 on terms which were improvident, or otherwise amounted to exploitation?
- viii. Were the terms of James Bay Treaty #9 unconscionable?
- ix. Did the Defendant fail to diligently implement the terms of James Bay Treaty #9 in a uniform and equitable matter?
- x. Was the Defendant unjustly enriched by its failure to augment, increase or index the Annuity Payment from time to time and did the treaty beneficiaries and in particular, the individual recipients of the Annuity Payment, suffer a corresponding deprivation without juristic reason?
- xi. Can the monetary damages for the Defendant's breaches of its duty of good faith, fiduciary duty, and the Honour of the Crown, or some portion thereof, be determined on an aggregate basis? If so, in what amount and who should pay it to the class?
- xii. Do the actions of the Defendant give rise to punitive, exemplary, or aggravated damages?
- xiii. Should the Defendant pay equitable compensation and/or restitution for its breaches of the duty of good faith, fiduciary duty, and the Honour of the Crown and for unjust enrichment? If so, in what amount?

- xiv. Should the Defendant pay pre-and post-judgment interest pursuant to the *Courts of Justice Act* to the class? If so, in what amount?
- e. an ORDER appointing Missanabie Cree First Nation on behalf of all Treaty 9 First Nations as the representative plaintiff for the First Nations Class;
- f. an ORDER appointing 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 all Treaty 9 First Nations as the representative plaintiff for the Treaty 9 Members Subclass;
- g. an ORDER approving the proposed notice plan and litigation plan;
- h. an ORDER requiring the Defendant to pay the costs of the notice program;
- i. an ORDER staying any other proceeding based on the facts giving rise to this proposed class proceeding;
- j. an ORDER declaring that no other proceeding based upon the facts giving rise to this proceeding may be commenced without leave of the court;
- k. an ORDER that the Defendant shall pay to the Plaintiffs their costs of this motion plus any applicable taxes; and
- l. SUCH OTHER RELIEF as counsel may advise, and this Honourable Court may permit.

2. In the alternative, this Motion is for:
- a. an ORDER authorizing the Plaintiffs to bring this proceeding as a representative action pursuant to Rule 12.08 of the *Rules of Civil Procedure*;
 - b. an ORDER that that the representative proceeding is based on the following common issues:
 - i. Did the Defendant owe a duty of good faith to the treaty beneficiaries in its conduct of the negotiation and implementation of James Bay Treaty #9?
 - ii. Did the Defendant owe a fiduciary duty to the treaty beneficiaries in its conduct of the negotiation and implementation of James Bay Treaty #9?
 - iii. Was the Defendant required to uphold the Honour of the Crown in the negotiation and implementation of James Bay Treaty #9, and in their subsequent dealings with the treaty beneficiaries?
 - iv. Does the Defendant owe an ongoing obligation to the treaty beneficiaries to maintain the real value of the annual payment of \$4 payable to each Treaty Indian, “for ever” as promised by the Crown under the terms of James Bay Treaty #9?
 - v. Did the Defendant breach the Honour of the Crown and its fiduciary duty owing to the treaty beneficiaries when it failed to include a provision in the terms of James Bay Treaty #9 for economic assistance in agriculture, stock-raising, or other work and a provision for the annual distribution of twine and ammunition?
 - vi. Is the *An Act for the Settlement of Certain Questions between the Governments of Canada and Ontario respecting Indian Reserve Lands*, contrary to James Bay Treaty #9 insofar as it purports to grant the Government of the Province of Ontario a one-half interest in all mineral rights in Indian Reserves within the Province of Ontario that were set apart under James Bay Treaty #9?

- vii. Did the Defendant breach its fiduciary duty to the treaty beneficiaries when the Governor-in-Council approved and consented to James Bay Treaty #9 on terms which were improvident, or otherwise amounted to exploitation?
 - viii. Were the terms of James Bay Treaty #9 unconscionable?
 - ix. Did the Defendant fail to diligently implement the terms of James Bay Treaty #9 in a uniform and equitable matter?
 - x. Was the Defendant unjustly enriched by its failure to augment, increase or index the Annuity Payment from time to time and did the treaty beneficiaries and in particular, the individual recipients of the Annuity Payment, suffer a corresponding deprivation without juristic reason?
 - xi. Can the monetary damages for the Defendant's breaches of its duty of good faith, fiduciary duty, and the Honour of the Crown, or some portion thereof, be determined on an aggregate basis? If so, in what amount and who should pay it to the class?
 - xii. Do the actions of the Defendant give rise to punitive, exemplary, or aggravated damages?
 - xiii. Should the Defendant pay equitable compensation and/or restitution for its breaches of the duty of good faith, fiduciary duty, and the Honour of the Crown and for unjust enrichment? If so, in what amount?
 - xiv. Should the Defendant pay pre-and post-judgment interest pursuant to the *Courts of Justice Act* to the class? If so, in what amount?
- c. an ORDER appointing Missanabie Cree First Nation as the representative plaintiff for all Treaty 9 First Nations;
 - d. an ORDER appointing Chief Jason Gauthier as the representative plaintiff for all members of Missanabie Cree First Nation and all members of all Treaty 9 First Nations;
 - e. an ORDER approving the proposed notice plan and litigation plan;

- f. an ORDER requiring the Defendant to pay the costs of the notice program;
- g. an ORDER staying any other proceeding based on the facts giving rise to this proposed representative proceeding, except with leave of the Court, which this Court may grant in conjunction with this Order;
- h. an ORDER declaring that no other proceeding based upon the facts giving rise to this proceeding may be commenced without leave of the Court;
- i. an ORDER that the Defendant shall pay to the Plaintiffs their costs of this motion plus any applicable taxes; and
- j. SUCH OTHER RELIEF as counsel may advise, and this Honourable Court may permit.

GROUND

- 3. This action was commenced by way of Statement of Claim, issued on May 8, 2023, under the *Class Proceedings Act, 1992*.
- 4. A Fresh-as-Amended Statement of Claim was served and filed on July 29, 2024.
- 5. The Plaintiffs advance several recognized causes of action including claims for breaches of the duty of good faith, fiduciary obligations, and the Honour of the Crown and a claim for unconscionability with respect to the Crown's negotiation and implementation of James Bay Treaty #9 ("Treaty 9"), including without limitation:
 - a. the Crown's failure to honour the spirit and intent of the solemn Treaty relationship and promises made by the Crown to Treaty 9 bands, the Crown's failure to increase annual payments of \$4 to each

Treaty Indian for the purposes of offsetting the impacts of inflation and purchasing power, and

- b. the Crown's exploitation of the treaty beneficiaries by entering into and implementing Treaty 9 on terms that were foolish, improvident, unconscionable, or otherwise exploitive.
- 6. The Fresh-as-Amended Statement of Claim discloses those causes of action against the Defendant.
- 7. The representative plaintiff, Missanabie Cree First Nation, is a band under the *Indian Act* and is therefore a juridical person with standing to bring this action. It is the rights-bearing entity and seeks to represent itself and the other thirty-six (36) Treaty 9 First Nations who themselves are rights-bearing entities and who together constitute the First Nations Class.
- 8. The representative plaintiff, Chief Jason Gauthier, is an "Indian" under the *Indian Act* and a member of Missanabie Cree First Nation and is therefore entitled to receive Annuity Payments under Treaty 9. He seeks to represent himself and all other members of Missanabie Cree First Nation as well as all members of all Treaty 9 First Nations and who together constitute the Treaty 9 Members Subclass.
- 9. There is a large class consisting of all First Nations who are beneficiaries of the James Bay Treaty # 9, being the successors in interest to the signatories to Treaty 9.
- 10. There is a large subclass consisting of all members of all First Nations who are beneficiaries of the James Bay Treaty #9 who receive Annuity Payments pursuant to the terms of Treaty 9.

11. The class is objectively defined, with its membership being rationally bound by those First Nations who are beneficiaries of the James Bay Treaty # 9 being the successors-in-interest of the signatories to Treaty 9.
12. The subclass is objectively defined, with its membership being rationally bound by membership in those First Nations who are beneficiaries of the James Bay Treaty # 9 and who receive Annuity Payments.
13. There is a rational relationship between the class and subclass and the common issues, and neither the class nor subclass is unnecessarily broad.
14. The claims alleged in the Fresh-as-Amended Statement of Claim raise common issues between the proposed class, and the determination of which will move the litigation substantially forward. The common issues pertain to the legal and equitable obligations that the Crown owes to the treaty bands which adhered to Treaty 9. The representative plaintiff, Missanabie Cree First Nation and the class members being all Treaty 9 First Nations are the successors in interest to the treaty bands and are recognized bands under the *Indian Act*. Allowing the claim to proceed as a class action will avoid duplication of fact-finding and legal analysis given that the Crown owes the same obligations to all the class members. Resolution of the issues is necessary for each class member's claim to be resolved. Success for one class member will not result in failure for another.
15. Likewise, all members of the subclass are recipients of Annuities Payments under Treaty 9 and have a common claim for unjust enrichment vis a vis the Defendant. Allowing their claims to proceed as a class action will avoid duplication of fact-finding and legal analysis given that the Crown owes the same obligations to all the subclass members. Resolution of the issues is necessary for each subclass member's claim to be resolved. Success for one subclass member will not result in failure for another.

16. In light of the access to justice concerns and with regard to achieving judicial economy, a class proceeding is the preferable procedure for the fair and efficient resolution of the common issues. Given the number of First Nations that make up the class, and the number of members of those Nations which make up the subclass, it would not be preferable for the action to proceed as separate claims. Class proceedings would advance the claims in a meaningful way and resolution of the common issues would put the class and subclass members in a better position than if they had pursued separate claims. Access to justice is promoted by the economy of scale that will be achieved through certifying the action under the *Class Proceedings Act, 1992*. Other means of resolving the common issues, such as each class or subclass member pursuing a separate claim or pursuing a joint claim in which each class or subclass member is a plaintiff with full participatory rights, are less practical and less efficient.
17. A class proceeding in this case would constitute the fairest, most efficient, and manageable means of adjudication of the common issues.
18. The proposed representative plaintiffs, Missanabie Cree First Nation, and Chief Jason Gauthier can fairly and adequately represent the interests of the class and subclass, with respect to whom there is no conflict with the class or subclass on the common issues. The proposed representative plaintiffs are represented by competent counsel, have capacity to bear costs associated with the action and will vigorously and capably prosecute the interests of the class and subclass.
19. The representative plaintiffs have produced a workable litigation plan for advancing the claims on behalf of the class and subclass up to the common issues and afterwards.
20. The Plaintiffs further rely on the following acts, legislation, orders, and regulations:

- a. *Class Proceedings Act 1992*, SO 1992, c 6;
- b. *Ontario Boundaries Extension Act*, SC 1912, 2 Geo. V, c. 40
- c. *Indian Act*, RSC 1985, c. 1-5, as amended;
- d. *An Act for the Settlement of Certain Questions between the Governments of Canada and Ontario respecting Indian Reserve Lands* (SC 1924, c. 48);
- e. *Royal Proclamation of 1763*;
- f. *Constitution Act, 1867*, originally enacted as the *British North America Act, 1867* (BNA Act);
- g. *Order of Her Majesty in Council admitting Rupert's Land and the North-Western Territory into the union, dated the 23rd day of June 1870*, also known as *Rupert's Land and North-Western Territory Order – Enactment No. 3*;
- h. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11;
- i. *Courts of Justice Act*, RSO 1990, c. C-43, as amended; and
- j. *Rules of Civil Procedure*, RRO 1990, Reg 194, as amended.

21. Such other grounds as counsel may advise and this Honourable Court may permit.

DOCUMENTARY EVIDENCE

22. The following documentary evidence will be used at the hearing of the Motion:

- a. the affidavit of Chief Jason Gauthier, sworn July 29, 2024;
- b. the affidavit of Chief Bruch Archibald, sworn July 29, 2024;

- c. the affidavit of Veronika Crawford, sworn July 29, 2024;
- d. the affidavit of J.R. Miller, sworn July 24, 2024;
- e. the affidavit of David Hutchings, sworn July 23, 2024; and
- f. such other material as counsel may advise and this Honourable Court may permit.

Dated: July 29, 2024



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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 NOTICE OF MOTION OF THE
PLAINTIFFS Motion for Certification
(Sections 2(2), 5 of the *Class Proceedings Act*)**

THE PLAINTIFFS will make a motion to this Court, as soon as the motion can be heard, at the Sault Ste. Marie Courthouse, 26 Queen St. East, Sault Ste. Marie, ON P6A 6W2

PROPOSED METHOD OF HEARING: The motion is to be heard orally.

RELIEF SOUGHT

1. This Motion is for:
 - 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 a subclass, 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. an ORDER certifying the Class, defined as “Any First Nation who is a successor in interest to the bands that signed or adhered to Treaty 9”;
- ~~c. an ORDER defining the subclass as set out in (a)(ii);~~
- d. an ORDER that that the proposed proceeding is certified based on the following common issues:
 - ~~i. Did the Defendant owe a duty of good faith to the treaty beneficiaries in its conduct of the negotiation and implementation of James Bay Treaty #9? 1) Was the Crown under an obligation to maintain the real value of the annual payment of four dollars (the “Annuity Payment”) provided for in the terms of The James Bay Treaty – Treaty No. 9 (“Treaty 9”)?~~
 - 2) If the answer to (1) is yes, did the Crown fail to maintain the real value of the Annuity Payment since Treaty 9 was entered into?
 - ~~ii. Did the Defendant owe a fiduciary duty to the treaty beneficiaries in its conduct of the negotiation and implementation of James Bay Treaty #9? 3) Was the Crown under an obligation to make provision in Treaty 9 for economic assistance in agriculture, stock-raising, or other work and an annual distribution of twine and ammunition?~~
 - ~~iii. Was the Defendant required to uphold the Honour of the Crown in the negotiation and implementation of James Bay Treaty #9, and in their subsequent dealings with the treaty beneficiaries? 4) If the answer to (2) and/or (3) is yes, by failing to maintain the real value of the Annuity Payment and/or to make provision in~~

Treaty 9 for economic assistance in agriculture, stock-raising or other work and an annual distribution of ammunition and twine, did the Crown fail to act in accordance with:

- A. Its obligations to the Class under Treaty 9;
- B. Its fiduciary obligations owing to the Class Members;
- C. The Honour of the Crown; and/or
- D. Any other equitable duties?

~~iv. Does the Defendant owe an ongoing obligation to the treaty beneficiaries to maintain the real value of the annual payment of \$4 payable to each Treaty Indian, “for ever” as promised by the Crown under the terms of James Bay Treaty #9? 5) If the answer to (4)(A), (B), (C) or (D) is yes, is the Crown liable to pay damages and/or equitable compensation to the Class and if so, in what amount?~~

~~v. Did the Defendant breach the Honour of the Crown and its fiduciary duty owing to the treaty beneficiaries when it failed to include a provision in the terms of James Bay Treaty #9 for economic assistance in agriculture, stock raising, or other work and a provision for the annual distribution of twine and ammunition?~~

vi. **6) Is the *An Act for the Settlement of Certain Questions between the Governments of Canada and Ontario respecting Indian Reserve Lands*, contrary to James Bay Treaty #9 insofar as it purports to grant the Government of the Province of Ontario a one-half interest in all mineral rights in Indian Reserves within the Province of Ontario that were set apart under James Bay Treaty 9 #9?**

~~vii. Did the Defendant breach its fiduciary duty to the treaty beneficiaries when the Governor in Council approved and consented to James Bay Treaty #9 on terms which were improvident, or otherwise amounted to exploitation? 7) In the alternative, if the answer to (1) is no, did the Crown breach the Class Members’ rights with respect to the negotiation and implementation of Treaty 9 by failing to include an express requirement to increase the Annuity Payment (an “Escalator Clause”) in the text of Treaty 9, specifically did the Crown:~~

- A. Fail to act in good faith;

B. Breach its fiduciary obligations owing to the Class;

C. Fail to act in accordance with the Honour of the Crown; and/or

D. Any other equitable duties?

viii. ~~Were the terms of James Bay Treaty #9 unconscionable? 8) If the answer to (7) is yes, did the Governor-in-Council approve and consent to Treaty 9 on terms which were unconscionable, foolish, improvident or otherwise amounted to exploitation of the Class?~~

ix. ~~Did the Defendant fail to diligently implement the terms of James Bay Treaty #9 in a uniform and equitable matter? 9) If the answer to (7) is yes, did the Crown commit further breaches of its equitable, fiduciary and honourable obligations owing to the Class Members by failing to correct its error at any time since the signing of Treaty 9?~~

10) If the answer to (7)(A), (B), (C), or (D), and/or (8), and/or (9) is yes, is the Crown liable to pay damages and/or equitable compensation to the Class and if so, in what amount?

x. 11) By failing to maintain the real value of the Annuity Payment and/or to make provision for economic assistance in agriculture, stock-raising or other work and an annual distribution of ammunition and twine, or alternatively, by failing to uphold its equitable, fiduciary and honourable obligations in the negotiation and implementation of Treaty 9 Was the Defendant Crown unjustly enriched by its failure to augment, increase or index the Annuity Payment from time to time and did the treaty beneficiaries and in particular, the individual recipients of the Annuity Payment, and did the Class suffer a corresponding deprivation without juristic reason?

12) If the answer to (11) is yes, is the Crown liable to pay damages and/or restitution to the Class and if so, in what amount?

xi. 13) Can the monetary damages for the Defendant's breaches of its duty of good faith, fiduciary duty, and the Honour of the Crown, or some portion thereof, be determined on an aggregate basis? If so, in what amount and who should pay it to the class?

- xii. 14) Do the actions of the ~~Defendant~~ Crown give rise to punitive, exemplary, or aggravated damages? If so, in what amount?
- ~~xiii. Should the Defendant pay equitable compensation and/or restitution for its breaches of the duty of good faith, fiduciary duty, and the Honour of the Crown and for unjust enrichment? If so, in what amount?~~
- xiv. 15) Should the ~~Defendant~~ Crown pay pre-and post-judgment interest pursuant to the *Courts of Justice Act* to the class? If so, in what amount?
- e. an ORDER appointing Missanabie Cree First Nation ~~on behalf of all Treaty 9 First Nations~~ as the representative plaintiff for the First Nations Class;
- ~~f. an ORDER appointing 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 all Treaty 9 First Nations as the representative plaintiff for the Treaty 9 Members Subclass;~~
- g. An ORDER appointing Maurice Law Barristers & Solicitors (“Maurice Law”) and Rochon Genova as class counsel (“Class Counsel”);
- h. An ORDER directing the manner in which, and the time within which, a member of the Class may opt out of the class action;
- i. an ORDER approving the form and method of publication and dissemination of notice to be given to members of the Class and to notify them of the certification of the class proceeding as set out in the proposed notice plan and litigation plan;
- j. an ORDER requiring the ~~Defendant~~ Crown to pay the costs of ~~the any~~ notice program, as well as the Plaintiff’s costs of this Motion plus any applicable taxes;
- k. an ORDER staying any other proceeding before the Superior Court of Justice based on the facts giving rise to this proposed class proceeding;
- l. an ORDER declaring that no other proceeding based upon the facts giving rise to this proceeding may be commenced before the Superior Court of Justice without leave of the eCourt;

- m. ~~an ORDER that the Defendant shall pay to the Plaintiffs their costs of this motion plus any applicable taxes; and~~
- n. SUCH OTHER RELIEF as counsel may advise, and this Honourable Court may permit.

2. ~~In the alternative, this Motion is for~~

- a. ~~an ORDER authorizing the Plaintiffs to bring this proceeding as a representative action on behalf of the Class pursuant to Rule 12.08 of the Rules of Civil Procedure;~~
- b. ~~an ORDER that that the representative proceeding is based on the following common issues:~~
 - i. ~~Did the Defendant owe a duty of good faith to the treaty beneficiaries in its conduct of the negotiation and implementation of James Bay Treaty #9?~~
 - ii. ~~Did the Defendant owe a fiduciary duty to the treaty beneficiaries in its conduct of the negotiation and implementation of James Bay Treaty #9?~~
 - iii. ~~Was the Defendant required to uphold the Honour of the Crown in the negotiation and implementation of James Bay Treaty #9, and in their subsequent dealings with the treaty beneficiaries?~~
 - iv. ~~Does the Defendant owe an ongoing obligation to the treaty beneficiaries to maintain the real value of the annual payment of \$4 payable to each Treaty Indian, “for ever” as promised by the Crown under the terms of James Bay Treaty #9?~~
 - v. ~~Did the Defendant breach the Honour of the Crown and its fiduciary duty owing to the treaty beneficiaries when it failed to include a provision in the terms of James Bay Treaty #9 for economic assistance in agriculture, stock raising, or other work and a provision for the annual distribution of twine and ammunition?~~
 - vi. ~~Is the *An Act for the Settlement of Certain Questions between the Governments of Canada and Ontario respecting Indian Reserve Lands*, contrary to James Bay Treaty #9 insofar as it purports to grant the Government of the Province of Ontario a one-half interest in all mineral rights in Indian Reserves within the Province of Ontario that were set apart under James Bay~~

~~Treaty #9?~~

- ~~vii. Did the Defendant breach its fiduciary duty to the treaty beneficiaries when the Governor in Council approved and consented to James Bay Treaty #9 on terms which were improvident, or otherwise amounted to exploitation?~~
- ~~viii. Were the terms of James Bay Treaty #9 unconscionable?~~
- ~~ix. Did the Defendant fail to diligently implement the terms of James Bay Treaty #9 in a uniform and equitable matter?~~
- ~~x. Was the Defendant unjustly enriched by its failure to augment, increase or index the Annuity Payment from time to time and did the treaty beneficiaries and in particular, the individual recipients of the Annuity Payment, suffer a corresponding deprivation without juristic reason?~~
- ~~xi. Can the monetary damages for the Defendant's breaches of its duty of good faith, fiduciary duty, and the Honour of the Crown, or some portion thereof, be determined on an aggregate basis? If so, in what amount and who should pay it to the class?~~
- ~~xii. Do the actions of the Defendant give rise to punitive, exemplary, or aggravated damages?~~
- ~~xiii. Should the Defendant pay equitable compensation and/or restitution for its breaches of the duty of good faith, fiduciary duty, and the Honour of the Crown and for unjust enrichment? If so, in what amount?~~
- ~~xiv. Should the Defendant pay pre and post judgment interest pursuant to the *Courts of Justice Act* to the class? If so, in what amount?~~
- ~~e. an ORDER appointing Missanabie Cree First Nation as the representative plaintiff for all Treaty 9 First Nations;~~
- ~~d. an ORDER appointing Chief Jason Gauthier as the representative plaintiff for all members of Missanabie Cree First Nation and all members of all Treaty 9 First Nations;~~
- ~~e. an ORDER approving the proposed notice plan and litigation plan;~~

- ~~f. an ORDER requiring the Defendant to pay the costs of the notice program;~~
- ~~g. an ORDER staying any other proceeding based on the facts giving rise to this proposed representative proceeding, except with leave of the Court, which this Court may grant in conjunction with this Order;~~
- ~~h. an ORDER declaring that no other proceeding based upon the facts giving rise to this proceeding may be commenced without leave of the Court;~~
- ~~i. an ORDER that the Defendant shall pay to the Plaintiffs their costs of this motion plus any applicable taxes; and~~
- ~~j. SUCH OTHER RELIEF as counsel may advise, and this Honourable Court may permit.~~

GROUND S

3. This action was commenced by way of Statement of Claim, issued on May 8, 2023, under the Class Proceedings Act, 1992.
4. A Fresh-as-Amended Statement of Claim was served and filed on July 29, 2024. An Amended Fresh-as-Amended Claim adding His Majesty the King in right of Ontario as represented by the Attorney General of Ontario (“Ontario”) was filed on October 31, 2024. A draft Amended Amended Fresh as Amended Claim is to be served and filed concurrent with the serving and filing of the Plaintiff’s Amended Motion Record.
5. The Plaintiffs advances several recognized causes of action including claims for breaches of the duty of good faith, fiduciary obligations, and the Honour of the Crown and a claim for unconscionability with respect to the Crown’s negotiation and implementation of James Bay Treaty #9 (“Treaty 9”), including without limitation:
 - a. the Crown’s failure to honour the spirit and intent of the solemn Treaty relationship and promises made by the Crown ~~to Treaty 9 bands, the Crown’s failure by failing to increase maintain the real value of annual payments of \$4 to each Treaty Indian since the time Treaty 9 was entered into for the purposes of offsetting the impacts of inflation and purchasing power, and/or~~
 - b. the Crown’s exploitation of the ~~treaty beneficiaries~~ Class by entering into and implementing Treaty 9 on

terms that were foolish, improvident, unconscionable, or otherwise exploitive.

6. The ~~Amended~~ ~~Amended~~ Fresh-as-Amended Statement of Claim discloses those causes of action against the ~~Defendant~~ Crown.
7. The representative plaintiff, Missanabie Cree First Nation, is a band under the *Indian Act* and is therefore a juridical person with standing to bring this action. It is the rights-bearing entity and seeks to represent itself and the other thirty-six (36) Treaty 9 First Nations who themselves are rights-bearing entities and who together constitute the ~~First Nations Class~~. Because the Treaty is a Nation-to-Nation agreement, the collective that entered into Treaty 9, as represented by its modern Chief and Council, is the only party with standing to enforce the promises contained in the Treaty. Individual members of First Nations, including Chiefs, cannot enforce treaty rights or bind the collective.
8. ~~The representative plaintiff, Chief Jason Gauthier, is an “Indian” under the *Indian Act* and a member of Missanabie Cree First Nation and is therefore entitled to receive Annuity Payments under Treaty 9. He seeks to represent himself and all other members of Missanabie Cree First Nation as well as all members of all Treaty 9 First Nations and who together constitute the Treaty 9 Members Subclass. This action pertains to past losses arising from the Crown’s failure to maintain the real value of the Annuity Payment since Treaty 9 was entered into, present and ongoing losses which continue to accrue as a result of the Crown’s breaches and the future implementation of the requirement to increase, index or augment the Annuity Payment. Only the authorized representative of the collective, the Chief and Council of each First Nation, may enforce past, present and future rights of the collective.~~
9. There is an large identifiable class consisting of all First Nations who are beneficiaries of the James Bay Treaty # 9, being the successors in interest to the signatories to Treaty 9.
10. ~~There is a large subclass consisting of all members of all First Nations who are beneficiaries of the James Bay Treaty #9 who receive Annuity Payments pursuant to the terms of Treaty 9.~~
11. The class is objectively defined, with its membership being rationally bound by those First Nations who are beneficiaries of the James Bay Treaty # 9 being the successors-in-interest of the signatories to Treaty 9.
12. ~~The subclass is objectively defined, with its membership being rationally bound by membership in those First Nations who are beneficiaries of the James Bay Treaty # 9 and who receive Annuity Payments.~~

13. ~~There is a rational relationship between the class and subclass and the common issues, and neither the class nor subclass is unnecessarily broad.~~
14. The claims alleged in the Amended Amended Fresh-as-Amended Statement of Claim raise common issues between the proposed class for which there is some basis in fact, and the determination of which will move the litigation substantially forward. The treaty relationship between the Treaty 9 bands and the Crown is premised on good faith, equity and the fiduciary and honourable obligations of the Crown. Since the Treaty was entered into in 1905 and 1906, the real value of the Annuity Payment has been rendered meaningless by the erosive impacts of inflation. The Honour of the Crown precludes empty promises and therefore the Crown was required to maintain the real value of the Annuity Payment from the time of Treaty to the present. Further, the Crown has an ongoing obligation to maintain the real value of the Annuity Payment in perpetuity. The common issues pertain to the legal and equitable obligations that the Crown owes to the treaty bands which adhered to Treaty 9. The representative plaintiff, Missnabie Cree First Nation and the class members being all Treaty 9 First Nations are the successors in interest to the treaty bands and are recognized bands under the *Indian Act*.
15. There is some basis in fact that the bands who entered into Treaty 9 were at a disadvantage in terms of bargaining power relative to the treaty commissioners who represented the Crown. The lack of knowledge and experience with colonial governments and their agents combined with the fact that the parties came to treaty negotiations with different mindsets and different worldviews meant that the Treaty 9 First Nations were not on equal footing. The advantage enjoyed by the treaty commissioners left the bands with no choice but to trust the Crown to deal fairly and honourably. It is in keeping with this relationship of trust and the recognized inequality in bargaining power that the Crown must now be held to account for failing to maintain the real value of the Annuity Payment for the past 125 years and counting.
16. There is some basis in fact that the Class has suffered compensable harm. As a consequence of the Crown's failure to augment the value of the Annuity Payment to offset inflation, buying power has eroded over time.
17. There exists a plausible or credible methodology for establishing loss on a class-wide basis. Well-established methodologies exist to calculate damages arising from the Crown's failure to maintain the real value of the Annuity Payment over time using publicly available data. A standard and straightforward methodology exists for bringing forward the historical losses into present day dollars. Establishing loss on a class-wide basis is straightforward given that the methodology for assessing how the Annuity Payment would have increased would be the same for each member of the Class. The methodology for bringing forward historical

losses would also be the same for each member of the Class.

18. A class action proceeding is the preferable procedure for the resolution of the common issues of the Class. Allowing the claim to proceed as a A class action will avoid duplication of fact-finding and legal analysis given that the Crown owes the same obligations to all the class members. Resolution of the issues is necessary for each class member's claim to be resolved. Success for Missanabie Cree First Nation means success for all members of the Class.~~one class member will not result in failure for another.~~
19. ~~Likewise, all members of the subclass are recipients of Annuities Payments under Treaty 9 and have a common claim for unjust enrichment vis a vis the Defendant. Allowing their claims to proceed as a class action will avoid duplication of fact-finding and legal analysis given that the Crown owes the same obligations to all the subclass members. Resolution of the issues is necessary for each subclass member's claim to be resolved. Success for one subclass member will not result in failure for another.~~
20. In light of the access to justice concerns and with regard to achieving judicial economy, a class proceeding is the preferable procedure for the fair and efficient resolution of the common issues. There is no alternative procedure that can realistically or feasibly provide the Class with access to justice. A representation action pursuant to Rule 12.08 is not available because the Class are not persons who are members of an unincorporated association or trade unions; they are Indian Act bands and are therefore juridical persons who have the capacity to sue in their own names. Given the number of First Nations that make up the Class, ~~and the number of members of those Nations which make up the subclass,~~ it would not be preferable for the action to proceed as separate claims. ~~Class proceedings would advance the claims in a meaningful way and resolution of the common issues would put the class and subclass members in a better position than if they had pursued separate claims. Access to justice is promoted by the economies of scale that will be achieved through certifying the action under the Class Proceedings Act, 1992. Other means of resolving the common issues, such as each class or subclass member pursuing a separate claim or pursuing a joint claim in which each class or subclass member is a plaintiff with full participatory rights, are less practical impractical, and less inefficient, and could lead to divergent interpretations of treaty which would not be in the interests of justice. A class proceeding in this case would constitute the fairest, most efficient, and manageable means of adjudication of the common issues.~~
21. The proposed representative plaintiffs, Missanabie Cree First Nation, ~~and Chief Jason Gauthier~~ can fairly and adequately represent the interests of the class ~~and subclass~~, with respect to whom there is no conflict with the

class ~~or subclass~~ on the common issues. The proposed representative plaintiffs ~~are~~ is represented by competent counsel, ~~hasve~~ has capacity to bear costs associated with the action and will vigorously and capably prosecute the interests of the class ~~and subclass~~.

22. The representative plaintiffs ~~hasve~~ has produced a workable litigation plan for advancing the claims on behalf of the class ~~and subclass~~ up to the common issues and afterwards.

23. The Plaintiffs further ~~reliesy~~ relies on the following acts, legislation, orders, and regulations:

- a. *Class Proceedings Act 1992*, SO 1992, c 6;
- b. *Ontario Boundaries Extension Act*, S.C. 1912, 2 Geo. V, c. 40
- c. *Indian Act*, R.S.C 1985, c. 1-5, as amended;
- d. *An Act for the Settlement of Certain Questions between the Governments of Canada and Ontario respecting Indian Reserve Lands* (S.C. 1924, c. 48);
- e. *Royal Proclamation of 1763*;
- f. *Constitution Act*, 1867, originally enacted as the *British North America Act*, 1867 (BNA Act);
- g. *Order of Her Majesty in Council admitting Rupert's Land and the North-Western Territory into the union, dated the 23rd day of June 1870*, also known as *Rupert's Land and North-Western Territory Order – Enactment No. 3*;
- h. *Constitution Act*, 1982; Schedule B to the Canada Act 1982 (UK), 1982, c 11;
- i. *Courts of Justice Act*, R.S.O 1990, c. C-43, as amended;
- j. *Rules of Civil Procedure*, RRO 1990, Reg 194, as amended; and

24. Such other grounds as counsel may advise and this Honourable Court may permit.

DOCUMENTARY EVIDENCE

25. The following documentary evidence will be sued at the hearing of the Motion:

- a. The affidavit of Chief Jason Gauthier sworn July 29, 2024;
- b. the affidavit of Chief ~~Bruce~~ Archibald sworn July 29, 2024
- c. the affidavit of Veronika Crawford sworn July 24, 2024
- d. the affidavit of J.R. Miller sworn July 24, 2024
- e. the affidavit of David Hutchings sworn July 23, 2024; and
- f. the supplemental affidavit of Chief Jason Gauthier sworn July 31, 2025;
- g. the Updated Litigation Plan dated July 31, 2025; and
- h. such other material as counsel may advise and this Honourable Court may permit.

Dated: ~~July 29, 2024~~ July 31, 2025

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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 NOTICE OF MOTION OF THE
PLAINTIFFS Motion for Certification
(Sections 2(2), 5 of the *Class Proceedings Act*)**

THE PLAINTIFFS will make a motion to this Court, as soon as the motion can be heard, at the Sault Ste. Marie Courthouse, 26 Queen St. East, Sault Ste. Marie, ON P6A 6W2

PROPOSED METHOD OF HEARING: The motion is to be heard orally.

RELIEF SOUGHT

1. This Motion is for:

- 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;

- b. an ORDER certifying the Class, defined as “Any First Nation who is a successor in interest to the bands that signed or adhered to Treaty 9”;
- c. an ORDER that that the proposed proceeding is certified based on the following common issues:

1) Was the Crown under an obligation to maintain the real value of the annual payment of four dollars (the “Annuity Payment”) provided for in the terms of The James Bay Treaty – Treaty No. 9 (“Treaty 9”)?

2) If the answer to (1) is yes, did the Crown fail to maintain the real value of the Annuity Payment since Treaty 9 was entered into?

3) Was the Crown under an obligation to make provision in Treaty 9 for economic assistance in agriculture, stock-raising, or other work and an annual distribution of twine and ammunition?

4) If the answer to (2) and/or (3) is yes, by failing to maintain the real value of the Annuity Payment and/or to make provision in Treaty 9 for economic assistance in agriculture, stock-raising or other work and an annual distribution of ammunition and twine, did the Crown fail to act in accordance with:

- A. Its obligations to the Class under Treaty 9;
- B. Its fiduciary obligations owing to the Class Members;
- C. The Honour of the Crown; and/or
- D. Any other equitable duties?

5) If the answer to (4)(A), (B), (C) or (D) is yes, is the Crown liable to pay damages and/or equitable compensation to the Class and if so, in what amount?

6) Is the *An Act for the Settlement of Certain Questions between the Governments of Canada and Ontario respecting Indian Reserve Lands*, contrary to Treaty #9 insofar as it purports to grant the Government of the Province of Ontario a one-half interest in all mineral rights in Indian Reserves within the Province of Ontario that were set apart under Treaty 9?

7) In the alternative, if the answer to (1) is no, did the Crown breach the Class Members' rights with respect to the negotiation and implementation of Treaty 9 by failing to include an express requirement to increase the Annuity Payment (an "Escalator Clause") in the text of Treaty 9, specifically did the Crown:

- A. Fail to act in good faith;
- B. Breach its fiduciary obligations owing to the Class;
- C. Fail to act in accordance with the Honour of the Crown; and/or
- D. Any other equitable duties?

8) If the answer to (7) is yes, did the Governor-in-Council approve and consent to Treaty 9 on terms which were unconscionable, foolish, improvident or otherwise amounted to exploitation of the Class?

9) If the answer to (7) is yes, did the Crown commit further breaches of its equitable, fiduciary and honourable obligations owing to the Class Members by failing to correct its error at any time since the signing of Treaty 9?

10) If the answer to (7)(A), (B), (C), or (D), and/or (8), and/or (9) is yes, is the Crown liable to pay damages and/or equitable compensation to the Class and if so, in what amount?

11) By failing to maintain the real value of the Annuity Payment and/or to make provision for economic assistance in agriculture, stock-raising or other work and an annual distribution of ammunition and twine, or alternatively, by failing to uphold its equitable, fiduciary and honourable obligations in the negotiation and implementation of Treaty 9 was the Crown unjustly enriched and did the Class suffer a corresponding deprivation without juristic reason?

12) If the answer to (11) is yes, is the Crown liable to pay damages and/or restitution to the Class and if so, in what amount?

13) Can damages or some portion thereof, be determined on an aggregate basis?

14) Do the actions of the Crown give rise to punitive,

exemplary, or aggravated damages? If so, in what amount?

15) Should the Crown pay pre-and post-judgment interest pursuant to the *Courts of Justice Act* to the class? If so, in what amount?

- d. an ORDER appointing Missanabie Cree First Nation as the representative plaintiff for the Class;
- e. An ORDER appointing Maurice Law Barristers & Solicitors (“Maurice Law”) and Rochon Genova as class counsel (“Class Counsel”);
- f. An ORDER directing the manner in which, and the time within which, a member of the Class may opt out of the class action;
- g. an ORDER approving the form and method of publication and dissemination of notice to be given to members of the Class and to notify them of the certification of the class proceeding as set out in the proposed notice and litigation plan;
- h. an ORDER requiring the Crown to pay the cost of any notice program, as well as the Plaintiff’s costs of this Motion plus any applicable taxes;
- i. an ORDER staying any other proceeding before the Superior Court of Justice based on the facts giving rise to this proposed class proceeding;
- j. an ORDER declaring that no other proceeding based upon the facts giving rise to this proceeding may be commenced before the Superior Court of Justice without leave of the Court;
- k. SUCH OTHER RELIEF as counsel may advise, and this Honourable Court may permit.

GROUND

- 2. This action was commenced by way of Statement of Claim, issued on May 8, 2023, under the Class Proceedings Act, 1992.
- 3. A Fresh-as-Amended Statement of Claim was served and filed on July 29, 2024. An Amended Fresh-as-Amended Claim adding His Majesty the King in right of Ontario as represented by the Attorney General of Ontario (“Ontario”) was filed on October 31, 2024. A draft Amended Amended

Fresh as Amended Claim is to be served and filed concurrent with the serving and filing of the Plaintiff's Amended Motion Record.

4. The Plaintiff advances several recognized causes of action including claims for breaches of the duty of good faith, fiduciary obligations, and the Honour of the Crown and a claim for unconscionability with respect to the Crown's negotiation and implementation of James Bay Treaty #9 ("Treaty 9"), including without limitation:
 - a. the Crown's failure to honour the spirit and intent of the solemn Treaty relationship and promises made by the Crown by failing to maintain the real value of annual payments of \$4 to each Treaty Indian since the time Treaty 9 was entered into, and/or
 - b. the Crown's exploitation of the Class by entering into and implementing Treaty 9 on terms that were foolish, improvident, unconscionable, or otherwise exploitive.
5. The Amended Amended Fresh-as-Amended Statement of Claim discloses those causes of action against the Crown.
6. The representative plaintiff, Missanabie Cree First Nation, is a band under the *Indian Act* and is therefore a juridical person with standing to bring this action. It is the rights-bearing entity and seeks to represent itself and the other thirty-six (36) Treaty 9 First Nations who themselves are rights-bearing entities and who together constitute the Class. Because the Treaty is a Nation-to-Nation agreement, the collective that entered into Treaty 9, as represented by its modern Chief and Council, is the only party with standing to enforce the promises contained in the Treaty. Individual members of First Nations, including Chiefs, cannot enforce treaty rights or bind the collective.
7. This action pertains to past losses arising from the Crown's failure to maintain the real value of the Annuity Payment since Treaty 9 was entered into, present and ongoing losses which continue to accrue as a result of the Crown's breaches and the future implementation of the requirement to increase, index or augment the Annuity Payment. Only the authorized representative of the collective, the Chief and Council of each First Nation, may enforce past, present and future rights of the collective.
8. There is an identifiable class consisting of all First Nations who are beneficiaries of the James Bay Treaty # 9, being the successors in interest to the signatories to Treaty 9.
9. The class is objectively defined, with its membership being rationally bound by those First Nations who are beneficiaries of the James Bay Treaty

9 being the successors-in-interest of the signatories to Treaty 9.

10. The claims alleged in the Amended Amended Fresh-as-Amended Statement of Claim raise common issues between the proposed class for which there is some basis in fact, and the determination of which will move the litigation substantially forward. The treaty relationship between the Treaty 9 bands and the Crown is premised on good faith, equity and the fiduciary and honourable obligations of the Crown. Since the Treaty was entered into in 1905 and 1906, the real value of the Annuity Payment has been rendered meaningless by the erosive impacts of inflation. The Honour of the Crown precludes empty promises and therefore the Crown was required to maintain the real value of the Annuity Payment from the time of Treaty to the present. Further, the Crown has an ongoing obligation to maintain the real value of the Annuity Payment in perpetuity.
11. There is some basis in fact that the bands who entered into Treaty 9 were at a disadvantage in terms of bargaining power relative to the treaty commissioners who represented the Crown. The lack of knowledge and experience with colonial governments and their agents combined with the fact that the parties came to treaty negotiations with different mindsets and different worldviews meant that the Treaty 9 First Nations were not on equal footing. The advantage enjoyed by the treaty commissioners left the bands with no choice but to trust the Crown to deal fairly and honourably. It is in keeping with this relationship of trust and the recognized inequality in bargaining power that the Crown must now be held to account for failing to maintain the real value of the Annuity Payment for the past 125 years and counting.
12. There is some basis in fact that the Class has suffered compensable harm. As a consequence of the Crown's failure to augment the value of the Annuity Payment to offset inflation, buying power has eroded over time.
13. There exists a plausible or credible methodology for establishing loss on a class-wide basis. Well-established methodologies exist to calculate damages arising from the Crown's failure to maintain the real value of the Annuity Payment over time using publicly available data. A standard and straightforward methodology exists for bringing forward the historical losses into present day dollars. Establishing loss on a class-wide basis is straightforward given that the methodology for assessing how the Annuity Payment would have increased would be the same for each member of the Class. The methodology for bringing forward historical losses would also be the same for each member of the Class.
14. A class action proceeding is the preferable procedure for the resolution of the common issues of the Class. A class action will avoid duplication of fact-finding and legal analysis given that the Crown owes the same

obligations to all the class members. Resolution of the issues is necessary for each class member's claim to be resolved. Success for Missanabie Cree First Nation means success for all members of the Class.

15. In light of the access to justice concerns and with regard to achieving judicial economy, a class proceeding is the preferable procedure for the fair and efficient resolution of the common issues. There is no alternative procedure that can realistically or feasibly provide the Class with access to justice. A representation action pursuant to Rule 12.08 is not available because the Class are not persons who are members of an unincorporated association or trade unions; they are *Indian Act* bands and are therefore juridical persons who have the capacity to sue in their own names. Given the number of First Nations that make up the Class, access to justice is promoted by the economies of scale that will be achieved through certifying the action under the *Class Proceedings Act, 1992*. Other means of resolving the common issues, such as each class member pursuing a separate claim or pursuing a joint claim in which each class member is a plaintiff with full participatory rights, are impractical, inefficient, and could lead to divergent interpretations of treaty which would not be in the interests of justice.
16. The proposed representative plaintiff, Missanabie Cree First Nation, can fairly and adequately represent the interests of the class with respect to whom there is no conflict with the class on the common issues. The proposed representative plaintiff is represented by competent counsel, has capacity to bear costs associated with the action and will vigorously and capably prosecute the interests of the class.
17. The representative plaintiff has produced a workable litigation plan for advancing the claims on behalf of the class up to the common issues and afterwards.
18. The Plaintiff further relies on the following acts, legislation, orders, and regulations:
 - a. *Class Proceedings Act 1992*, SO 1992, c 6;
 - b. *Ontario Boundaries Extension Act*, S.C. 1912, 2 Geo. V, c. 40
 - c. *Indian Act*, R.S.C 1985, c. 1-5, as amended;
 - d. *An Act for the Settlement of Certain Questions between the Governments of Canada and Ontario respecting Indian Reserve Lands* (S.C. 1924, c. 48);
 - e. *Royal Proclamation of 1763*;

- f. *Constitution Act, 1867*, originally enacted as the *British North America Act, 1867* (BNA Act);
- g. *Order of Her Majesty in Council admitting Rupert's Land and the North-Western Territory into the union, dated the 23rd day of June 1870*, also known as *Rupert's Land and North-Western Territory Order – Enactment No. 3*;
- h. *Constitution Act, 1982*; Schedule B to the Canada Act 1982 (UK), 1982, c 11;
- i. *Courts of Justice Act*, R.S.O 1990, c. C-43, as amended;
- j. *Rules of Civil Procedure*, RRO 1990, Reg 194, as amended; and

19. Such other grounds as counsel may advise and this Honourable Court may permit.

DOCUMENTARY EVIDENCE

20. The following documentary evidence will be sued at the hearing of the Motion:

- a. The affidavit of Chief Jason Gauthier sworn July 29, 2024;
- b. the affidavit of Chief Bruce Archibald sworn July 29, 2024
- c. the affidavit of Veronika Crawford sworn July 24, 2024
- d. the affidavit of J.R. Miller sworn July 24, 2024
- e. the affidavit of David Hutchings sworn July 23, 2024;
- f. the supplemental affidavit of Chief Jason Gauthier sworn July 31, 2025;
- g. the Updated Litigation Plan, dated July 31, 2025; and
- h. such other material as counsel may advise and this Honourable Court may permit.

Dated: July 31, 2025

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Lawyers for the Defendant, the Attorney General of Canada

AND TO: ATTORNEY GENERAL OF ONTARIO
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Lawyers for the Defendant, the Attorney General of Ontario

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-

ATTORNEY GENERAL OF CANADA

Defendant

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

AFFIDAVIT OF CHIEF JASON GAUTHIER
Sworn July 29, 2024 (in support of Certification Motion)

I, JASON GAUTHIER, of Missanabie Cree First Nation in the Province of Ontario,
DO SOLEMNLY AFFIRM THAT:

1. I am a member of and the Chief of the proposed representative plaintiff in this action: Missanabie Cree First Nation (“Missanabie”). This is my fourth term as Chief: I have held the position since 2013. Prior to becoming Chief, I was a Councillor of Missanabie from 2010 -2013 during which I was responsible for the whole earth portfolio within the Lands and Resources Department. I have a degree in Sociology from Algoma University and I’ve worked as a Land Use Manger and a Land Use Planner for the Mushkegowuk Council, a tribal organization representing eight Treaty 9 First Nations, including Missanabie. From 2018 – 2019, I was the lead negotiator for Provincial Revenue Sharing for the Mushkegowuk Council. Attached hereto and marked as **Exhibit “A”** is a copy of my resume.

2. I have personal knowledge of the facts and matters set out in this Affidavit, except where same are stated to be based upon information and belief. Where I have been informed of facts, I have stated the source of my information and I hereby confirm that I believe such facts to be true.

3. I am an “Indian” and Missanabie is an “Indian Band” within the meaning of the *Indian Act*, R.S.C. 1985, c. 1-5, as amended.

4. I submit this Affidavit in support of Missanabie’s motion to certify the Claim (the “Treaty 9 Disparity Class Action”) set out in the Statement of Claim filed May 8, 2023, attached hereto as **Exhibit “B”** as amended per the Fresh-as-Amended Statement of Claim, an unfiled copy of which is attached hereto as **Exhibit “C”** as a class action.

5. On May 4, 2023, Chief and Council of Missanabie authorized its legal counsel Maurice Law Barristers and Solicitors (“Maurice Law”) to file the Treaty 9 Disparity Class Action in the Ontario Superior Court of Justice. A Band Council resolution was passed on October 23, 2023 confirming the authorization given on May 4, 2023. Attached hereto and marked as **Exhibit “D”** is a copy of the Band Council Resolution.

BACKGROUND TO CLAIM

6. Missanabie has accessed, occupied, and exercised its jurisdiction as a nation and as stewards of the land throughout its traditional territory since time immemorial. Missanabie became a beneficiary of Treaty 9 in 1906 and Missanabie members have been receiving Annuity Payments pursuant to Treaty 9 since that time. Attached hereto and marked as **Exhibit “E”** is copy of the James Bay Treaty No. 9. Page 20 sets out the promise to pay a yearly annuity of \$4 cash to each “Indian”:

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.

7. Over time, 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. The Crown’s failure to maintain the real value of the Annuity Payment is in breach of its honourable and fiduciary obligations under Treaty 9. 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.

8. The Treaty 9 Disparity Class Action alleges, *inter alia*, that:

- (a) The Crown failed to augment or increase the annual payments of \$4 to each Indian person as set out in Treaty 9 for the purposes of offsetting the impacts of inflation and maintaining the purchasing power of the Annuity Payments;
- (b) The Crown failed to include in Treaty 9 a provision for economic assistance in agriculture, stock-raising, or other work and - a provision for the annual distribution of twine and ammunition to the class to facilitate the Indians transition into a euro-centric economy;

- (c) The Crown failed to uphold its honourable obligations by entering into and implementing a Treaty with such disparity in terms when compared to the Treaties which precede and succeed it; and
- (d) The Crown was unjustly enriched and the treaty signatories and their members suffered a corresponding deprivation due to the Crown's failure to augment, increase or index the Annuity Payment to offset inflation and maintain the purchasing power thereof.

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THE PROPOSED CLASS

9. Missanabie is prepared to act as representative plaintiff for the First Nations Class defined as “All Treaty 9 First Nations”. A list of the First Nations Class members is available on the website for Indigenous Services Canada, reproduced below:

Treaty No. 9

Band number	First Nation	Region
142	Albany	ON
242	Aroland	ON
143	Attawapiskat	ON
207	Bearskin Lake	ON
228	Brunswick House	ON
216	Cat Lake	ON
221	Chapleau Cree First Nation	ON
229	Chapleau Ojibway	ON
055	Conseil de la Première Nation Abitibiwinni	QC
182	Constance Lake	ON
183	Eabametoong First Nation	ON
227	Flying Post	ON
215	Fort Severn	ON
185	Ginoogaming First Nation	ON
210	Kasabonika Lake	ON
212	Kingfisher	ON
209	Kitchenuhmaykoosib Inninuwug	ON
186	Martin Falls	ON
219	Matachewan	ON
226	Mattagami	ON
203	Mishkeegogamang	ON
223	Missanabie Cree	ON
144	Moose Cree First Nation	ON
213	Muskrat Dam Lake	ON
239	Neskantaga First Nation	ON
241	Nibinamik First Nation	ON
204	North Caribou Lake	ON
214	Sachigo Lake	ON
259	Slate Falls Nation	ON
145	Taykwa Tagamou Nation	ON
233	Wahgoshig First Nation	ON
206	Wapekeka	ON
234	Wawakapewin	ON
240	Webequie	ON
146	Weenusk	ON
217	Wunnumin	ON

10. While there are thirty-six (36) Nations on the above list, Albany First Nation is actually two First Nations: Fort Albany First Nation and Kasheschwan First Nation. Therefore, the First Nations Class consists of thirty-seven (37) First Nations, including the putative representative plaintiff, Missanabie.

THE PROPOSED SUBCLASS

11. As a member and Chief of Missnabie, and an “Indian” under the *Indian Act*, I receive Annuity Payments pursuant to the terms of Treaty 9. I am prepared to act as representative plaintiff for the Treaty 9 Members Subclass consisting of all members of Missanabie as well as all members of all Treaty 9 Nations who receive Annuity Payments. While I am not aware of the exact number of individuals within the Treaty 9 Members Subclass, I believe it to be in the tens of thousands.

NISHNAWBE ASKI NATION

12. Nishnawbe Aski Nation (“NAN”) is a political territorial organization with offices in Thunder Bay and Timmins, Ontario. NAN represents the interests of forty-nine (49) First Nations with a total population of approximately 45,000 people living on and off reserve. NAN’s member Nations include unrecognized bands as well as adherents to Treaties 3, 5, 9 and the Robinson Superior Treaty.

13. Of the Nations within the First Nations Class, thirty-five (35) out of thirty-seven (37) are members of NAN. This includes Missanabie. The two Nations within the First Nations Class that are not members of NAN are Conseil de la Premiere Abitibiwinini, located in Quebec, and Kitchenuhmaykoosib Inninuwug, located in Northern Ontario. I have reached out to the Chiefs of both Nations to advise them of the Treaty 9 Disparity Class Action and the certification motion. Maurice Law has also written to the governments of these Nations advising them of the Class Action and certification motion. Attached hereto and marked as **Exhibit “F”** are copies of the letters that

Maurice Law sent to Conseil de la Première Abitibiwinini and Kitchenuhmaykoosib Inninuwug and a receipt confirming that the letters were sent by registered mail.

14. Established in 1973, NAN was known as Grand Council Treaty No. 9 until 1983. NAN advocates on behalf of its member Nations for self-determination through functioning self-government via partnerships and agreements with Canada and Ontario. NAN is led by an Executive Council consisting of a Grand Chief and three Deputy Grand Chiefs, each of whom are elected for a three-year term. Currently, the Grand Chief is Alvin Fiddler. The Deputy Chiefs are Anna Betty Anchneepinskum, Bobby Narcisse, and Victor Linklater. The Executive Council leads Nation-to-Nation engagement with the governments of Ontario and Canada.

15. Four advisory councils support the Executive Council in their work. These are:

- (a) The Elder's Council consisting of representatives from across NAN territory. The Elder's Council reviews NAN resolutions and provides advice and guidance to the Executive Council particularly with respect to the interpretation of treaty;
- (b) The Women's Council which advises on women's and family issues;
- (c) The Oshkaatisak (All Young People's) Council which represents the youth from the member Nations of NAN; and
- (d) The Nikanigawbowin Council, a survivor-led initiative that promotes the inclusion of survivors' and their families' perspectives in directing how the Executive Council carries out its work.

16. NAN has fourteen (14) departments which administer its initiatives and programs:

- (a) Administration & Human Resources

- (b) Communications, Media & Information Technology
- (c) Community Wellness
- (d) Early Years
- (e) Education
- (f) Environment, Energy, Climate Change
- (g) Finance
- (h) Governance & Treaty Implementation
- (i) Health Transformation
- (j) Infrastructure & Housing
- (k) Justice Research & Policy
- (l) Reclamation & Healing
- (m) Seven Youth Inquest
- (n) Social Services

17. The Chiefs or delegates of NAN's member Nations meet in Assembly (the "Chiefs-in-Assembly") four times per year on a seasonal basis in the winter, spring, summer and fall. As Chief of Missanabie, I attend Chiefs-in-Assembly meetings and vote on resolutions that provide the Executive Council with their mandate in respect of various portfolios that each Executive Council member is responsible for.

18. During the Chiefs-in-Assembly's winter session that took place February 6 – 8, 2024, Missanabie's legal counsel presented the Treaty 9 Disparity Class Action to the Chiefs and delegates of the NAN Member Nations. Because the session took place *in camera*, there is no record of what was discussed, however I was present at the session and witnessed legal counsel explain that the Class Action had been commenced by Missanabie on behalf of all Treaty 9 First Nations and therefore, if certified, would proceed to a trial of common issues, the results of which would be binding on all members of the Class that did not opt-out of the proceeding. Attached hereto and marked as **Exhibit "G"** is a copy of the powerpoint presentation that counsel gave at the Chiefs-in-Assembly winter session.

ACTING AS REPRESENTATIVE PLAINTIFF FOR THE CLASS AND SUBCLASS

19. I understand the major steps in the Treaty 9 Disparity Class Action are as follows:

- (a) Legal counsel filed the Statement of Claim on May 8, 2023;
- (b) Legal counsel intend to file an Amended version of the Statement of Claim on July 29, 2024;
- (c) by this motion for certification, Missanabie as representative plaintiff for the First Nations Class and myself as representative plaintiff for the Treaty 9 Members Subclass are asking the Court to certify the action as a class proceeding;
- (d) if the Court certifies the action as a class proceeding, the defendant will be required to file a Statement of Defence, and the notice of the certification order is to be provided to the First Nations Class and the Treaty 9 Members Subclass who are given the opportunity to opt out of the class action within a fixed time period;
- (e) I must list all relevant documents in an affidavit of documents and the defendant too must list all of its relevant documents in a list of documents;
- (f) Examinations for discovery will be held at which lawyers for the defendant may ask me questions and my counsel will ask questions of the defendant's representative;
- (g) Conferences will be held with a Case Management Judge, from time to time;

- (h) if the action is not settled, there will be a common issues trial;
- (i) if the plaintiff is successful at the common issues trial, notice must be given to the First Nations Class and Treaty 9 Members Subclass to give members an opportunity to participate because their involvement may be necessary at that stage to prove their membership in the Class or Subclass and/or entitlement to damages;
- (j) appeals of judicial decisions may be made at various stages of the action;
and
- (k) this action may be settled at any stage, but only with the Court's approval.

20. Throughout this action, Missanabie will represent the interests of all members of the Class who do not opt-out of the proceeding. Missanabie's representation of the Class must be fair to all members of the Class and in particular, no Class member's interests may be advanced to the prejudice of the other Class members. As Chief of Missanabie, my role will be to interact with and instruct counsel and ensure that the Class is kept apprised of developments in the litigation. As Chief of the representative plaintiff, I will make myself available to the Court as required.

21. Likewise, as representative plaintiff of the Treaty 9 Members Subclass, my responsibilities are the same as set out in the paragraph directly above.

COMMON ISSUES

22. I understand that the common issues presently being asserted in this case are set out in the Notice of Motion for Certification.

INTENTION IN BRINGING CLASS PROCEEDING

23. I recognise that the costs of obtaining a judgement against the Crown in an individual action are prohibitive for Missanabie and other members of the Class. The same is true for myself and the Subclass.

24. I believe that most, if not all, members of the Class will also find it prohibitively expensive to sue the Crown on their own. The same is true for myself and the Subclass.

25. I also understand that it would be procedurally inefficient for each member of the Class and each member of the Subclass to sue the defendant individually when there are issues common to all members of the Class and Subclass. These can be litigated in a single action. Requiring each Class member and Subclass member to obtain their own lawyer and to retain their own experts will unnecessarily waste the resources of the court and the Class and Subclass when a single action would answer all the common issues for everyone.

ACTING AS REPRESENTATIVE PLAINTIFF

Commitment to Represent Interests of the Class

26. Missanabie is prepared to act as representative plaintiff for the First Nations Class in this class proceeding. I am prepared to act as representative plaintiff for the Treaty 9 Members Subclass in this proceeding. As representative plaintiffs, Missanabie and I are obliged to direct this litigation, give instructions to its lawyers and to act in the best interests of the Class and Subclass. For example, I understand that any settlement discussions with the defendant cannot relate only to Missanabie's damages or my damages but must relate to the claims and damages of the Class and Subclass as a whole.

27. I have been actively involved in the advancement of Missanabie's interests, the interests of Treaty 9 Nations and Indigenous rights-at-large. I have the privilege of being the longest sitting Chief of Missanabie. During my time as Chief, I was appointed

by the other Treaty 9 Chiefs to act as the lead negotiator in our resource revenue sharing negotiations with the Province of Ontario. I have also held various positions aimed at the advancement of reconciliation and transfer of knowledge between Indigenous and non-Indigenous peoples, including sitting on the Sault Ste Marie Committee and as a Fellow of the Royal Society for the Arts.

28. I understand that, in agreeing to seek and accept Missanabie's appointment by the Court to act as representative plaintiff of the First Nations Class, and my appointment as representative plaintiff of the Treaty 9 Members Subclass, it is my responsibility, among other things to:

- (a) become familiar with the issues to be decided by the Court;
- (b) review the Statement of Claim and any further amendments;
- (c) assist in the preparation and execution of this affidavit in support of the motion for certification;
- (d) attend, if necessary, with counsel to be cross-examined on my affidavit;
- (e) attend, if necessary, with counsel for my examination for discovery where I will be asked questions;
- (f) assist, if necessary, in preparation and execution of an affidavit listing the relevant documents that I have or previously had in my possession or under my control;
- (g) attend, if necessary, with counsel at the trial to observe and/or give evidence;
- (h) receive briefings from counsel from time to time;

- (i) to express my opinions on strategy to counsel;
- (j) to express my opinion to counsel and to the Court if settlement positions are to be formulated; and
- (k) to assist in the preparation and execution of an affidavit in support of a motion seeking the Court's approval of a settlement if there is one.

29. I am also strongly motivated to move this action forward in order to:

- (a) ensure that all members of the Class and Subclass are appropriately compensated by the defendant for damages that they have suffered;
- (b) use this litigation to hold the defendant accountable for its actions; and
- (c) protect others who, in the future, may be at risk of suffering similar wrongs as those committed by the defendant against the Class and Subclass.

30. As Chief of the representative plaintiff for the Class, and as the representative plaintiff for the Subclass, I intend to take the following steps to ensure that the interests of the Class and Subclass are fairly and adequately represented, including, but not limited to:

- (a) instructing and seeking advice from counsel, and generally remaining informed of and engaged in the litigation;
- (b) producing any relevant documents with respect to the Treaty 9 Disparity Class Action;
- (c) attending an examination for discovery to be conducted by the defendant;

- (d) ensuring that counsel act in the best interests of the Class and Subclass as a whole;
- (e) ensuring the Class and Subclass is kept informed of this proceeding, as required;
- (f) discussing this proceeding with members of the Class and Subclass and media, as required;
- (g) Attending any settlement meetings, or mediations and pretrial conferences, as required;
- (h) Attending at and giving my evidence at the common issues trial, and at an individual issues hearing, if necessary; and
- (i) Participating as otherwise may be required in moving this action forward.

Litigation Plan

31. I have reviewed the Litigation Plan, attached hereto and marked as **Exhibit “H”** which counsel have developed to advance the within proceeding. I do not have experience with litigation plans, but I am advised by counsel and believe that the Litigation Plan is consistent with applicable law. The Litigation Plan provides, among other things, for notice to the Class and Subclass if the action is certified. I have reviewed the notice program and believe that, if implemented, it is a reasonable way to give notice to all members of the Class and Subclass.

32. I also understand that the Litigation Plan is subject to review by the Court and that it may need to be adjusted to account for new developments and changing circumstances.

Conflicts Of Interest

33. Missanabie does not have a conflict of interest with any member of the Class with respect to any of the Common Issues or an issue arising from same. Nor do I have a conflict of interest with any member of the Subclass. I am not, and never was, employed by the defendant and I have no special relationship with the defendant. I understand that this affidavit will be used in the motion for certification against the defendant.

34. I know of no fact that is material to the certification motion that has not been disclosed in this affidavit.

Retainer Agreement

35. Missanabie signed an agreement with Maurice Law respecting fees and disbursements (the “Retainer Agreement”). Pursuant to the Retainer Agreement, Counsel will only be paid if they are successful at obtaining a judgment or settlement with the defendant and Maurice Law will cover any costs awarded against Missanabie in the event that the Claim is dismissed. From the total amount of settlement, award, compensation, or damages recovered for the class, counsel’s fee will be 15% of the total compensation including any costs recovered for the class through a negotiated settlement with the defendant or 20% of the total compensation including any costs recovered for the class after the completion of trial or earlier resolution through the courts, including without limitation, a motion for summary judgment.

36. All of the above fees are subject to the approval of the Court.

37. I make this Affidavit in support of a motion for an Order that this lawsuit be certified as a class proceeding and for no other purpose.

[signature on next page]

**AFFIRMED BEFORE ME in the city
of Ottawa in the Province of Ontario
on July 29, 2024 in accordance with
O.Reg. 431/20, Administering Oath or
Declaration Remotely.**

Antonela Cicko

**Antonela Cicko
A Commissioner for Taking Affidavits
in the Province of Ontario**

A handwritten signature in black ink, appearing to read 'J. Gauthier', written over a horizontal line.

CHIEF JASON GAUTHIER
Chief of Missanabie Cree Nation

This is **Exhibit “A”** to the Affidavit of Jason Gauthier, sworn July 29, 2024.

Antonela Cicko

A Commissioner for Taking Affidavits



JASON GAUTHIER

Chief of Missanabie Cree First Nation

Education

Algoma University

2008-2009

4-year Honours Degree in Sociology

Social Welfare Certificate

St Mary's College High School

1986-1990

Elected Positions

Chief (Re-elected)	Missanabie Cree First Nation
2016-present	

Chief (Re-elected)	Missanabie Cree First Nation
2019-2022	

Chief (Re-elected)	Missanabie Cree First Nation
2016-2019	

Chief	Missanabie Cree First Nation
2013-2016	

Councillor	Missanabie Cree First Nation
2010-2013	

Work Experience

Mushkegowuk Council	Land Use Planner
2011-2013	

Mushkegowuk Council	Land Use Manager
2011	

Missanabie Cree First Nation	Mining Assistant
2009-2010	

Dell Computers	Hardware Specialist/Trainor
2004-2005	

Gateway Computers	Computer Technician
2004	

Missanabie Cree First Nation	Computer Technician
2000-2004	

Gilly's/Rods Party Golf	Manager
1997-1999	

Winsor Park Hotel	Night Auditor
1996-1997	

Nor West Inn	Night Auditor
1990-1992	

Profile

Jason Gauthier was elected to Council of Missanabie Cree First Nation in August of 2010, and held the whole earth portfolio (Lands and Resources) and went on to be elected as the Chief of Missanabie Cree First Nation in 2013 and Re-elected in 2016, 2019, and 2022. He graduated from the Sociology Program at Algoma University in 2009 with Honours. He has continued to create many new partnerships and relationships in his terms as Chief. His vision of a balance between economic sustainability and community wellbeing is shared by communities across Canada. On the cutting edge of such projects as Resource Revenue Sharing and First Nation led Passenger Rail service, Chief Gauthier believes that the First Nation communities have to reach out and grasp opportunities to better the lives of our people.

Committees, Boards, President, Reps & CEO

Chiefs of Ontario Economic Development Committee	Representative
2021-present	
Community Development Corporation of Sault Ste Marie	Board Member
2021	
Missanabie Cree First Nation	Child Welfare Band Representative
2016-Present	
Mahikan Incorporated	Chairman of Board/President
2020-Present	
Missanabie Cree Gold Corporation	President/CEO
2020-Present	
Superior Aggregates Inc.	Board Member
2020-Present	
The Alliance of Canadian Cinema	Member
2020-present	
Mushkegowuk Council	Lead Negotiator for Provincial Resource Revenue Sharing
2018-2019	
Nishnawbe Aski Nation Chiefs Committee for Education	Member
2017-present	
Society for The Advancement of the Arts in England	Member
2016-Present	
Missanabie Cree Business Corporation	President/Chairman of the Board
2014-Present	

Awards

Sault Ste. Marie Chamber of Commerce
Missanabie Cree Business Corporation Aboriginal Business of the Year 2022
Timmins Chamber of Commerce
Speaker Award 2019
Timmins Chamber of Commerce
Speaker Award 2019
NOVA
Missanabie Cree Bear Train—Non-Profit of the Year 2019

Publications

Online Law & Justice Journal—Restorative Justice 2009

Conference Presentations

Prospectors & Developers Association of Canada
Guest Panelist Speaker PDAC - 2015-2020
Algoma University
Guest Lecturer - 2015 - 2019
Ryerson University
Guest Lecturer - 2016

This is **Exhibit “B”** to the Affidavit of Jason Gauthier, sworn July 29, 2024.

Antonela Cicko

A Commissioner for Taking Affidavits



Court File No. _____

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**CHIEF JASON GAUTHIER, on behalf of the
MISSANABIE CREE FIRST NATION and on behalf of all
Treaty 9 First Nations in the Province of Ontario**

Plaintiff

-and-

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

Defendant

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

STATEMENT OF CLAIM

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

CLAIM

OVERVIEW

1. This claim is a proposed class proceeding challenging the Crown's failure to diligently implement the terms of the James Bay Treaty #9 ("Treaty 9") and the failure to honour the spirit and intent of the solemn Treaty relationship and promises made by the Crown with the Treaty 9 Bands.
2. From the time when Treaty 9 was entered into in 1905 and 1906, the Crown has declined or failed to augment or increase the annual payments of \$4 to each Indian person as set out in Treaty 9 for the purposes of offsetting the impacts of inflation and maintaining the purchasing power.
3. The Crown also breached other treaty obligations and failed to uphold the Honour of the Crown by entering into and implementing Treaty 9 on terms that were foolish, improvident, or otherwise amounted to exploitation of the Indians located within the boundaries of Treaty 9.

RELIEF SOUGHT

4. The Plaintiff, on behalf of the Class, 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;
 - b. A Declaration that the Defendant failed to act in good faith and that its conduct in the negotiation and implementation of Treaty 9 constitutes a breach of Treaty, the Honour of the Crown, fiduciary duty, and equitable fraud;
 - c. A Declaration that the Defendant has an ongoing obligation to increase the annual payment of \$4 payable to each Treaty Indian "for ever" (the "Treaty Annuities" or "Annuity Payments") as promised by the Crown under the terms of Treaty 9 to maintain the real value of the Annuity Payments and the effect of this promise to the Treaty 9 Indian Bands in exchange for the

taking of over approximately 218,320 square miles of land rich in natural resources, being over two-thirds of what is now the province of Ontario;

- d. A Declaration that the Defendant breached the Honour of the Crown and the terms of Treaty 9 by failing to increase the Treaty Annuities from time to time to maintain their real value and the purchasing power of the Annuity Payments of \$4, the value of which has been seriously eroded due to inflation;
- e. A Declaration that the Defendant breached the Honour of the Crown and fiduciary duty 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;
- f. 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;
- g. A Declaration that the Defendant breached its fiduciary duty to the Plaintiff and other Treaty 9 Indians when the Governor-in-Council approved and consented to Treaty 9 on terms which were foolish, improvident, and otherwise amounted to exploitation;
- h. A Declaration that the surrender and release in Treaty 9 should be set aside on the grounds that its terms were unconscionable, foolish, and improvident and the Crown failed to diligently implement the terms of Treaty 9 in a uniform and equitable manner for all Treaty 9 Bands;
- i. An Order that the Defendant is liable to pay damages for breach of Treaty 9 and for breach of the honour of the Crown and fiduciary duty in the sum of \$10 billion or such other amount as this Honourable Court deems fit to

account for the disparity of the terms of Treaty 9 compared to those Treaties which preceded and followed the signing of Treaty 9 in 1905;

- j. An Order that the Defendant is liable to pay punitive damages in such amount as this Honourable Court deems just;
- k. Equitable compensation, or pre- and post-judgment interest pursuant to the provisions of the *Courts of Justice Act*, R.S.O. 1990, c. C-43, as amended;
- l. Costs of this action on a substantial or full indemnity basis, including costs of notice and class administration;
- m. Such further and other relief as counsel may advise and this Honourable Court deem just.

FACTS

The Parties

- 5. The Plaintiff is the Chief of the Missanabie Cree First Nation, which has been a party to Treaty 9 since 1906. The Plaintiff is an “Indian” and the Missanabie Cree First Nation is an “Indian Band” within the meaning of the *Indian Act*, R.S.C. 1985, c. 1-5, as amended.
- 6. The Plaintiff brings this claim on behalf of Missanabie Cree First Nation and on behalf of all Treaty 9 First Nations in the province of Ontario. While Treaty Annuities are paid to individuals, the promise to provide Treaty Annuities was a promise made to “bands” as the rights-bearing collectives recognized under Treaty 9. Treaty Annuities 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.
- 7. The proposed class for this action includes forty-nine (49) First Nations which are collectively the successors to the signatories and adherents of Treaty 9:

- Aroland First Nation;

- Attawapiskat First Nation (formerly Attawapiskat Band of Cree);
- Bearskin Lake First Nation;
- Beaverhouse First Nation;
- Brunswick House First Nation (formerly New Brunswick House Band of Ojibway);
- Cat Lake First Nation;
- Chapleau Cree First Nation (formerly Chapleau Community of Moose Factory Band of Cree);
- Chapleau Ojibwe First Nation (formerly Chapleau Band of Ojibway);
- Constance Lake First Nation (formerly English River Band of Oji-Cree);
- Deer Lake First Nation;
- Eabametoong First Nation (also known as Fort Hope First Nation);
- Flying Post First Nation (formerly Flying Post Indians);
- Fort Albany First Nation (formerly Fort Albany Band of Cree);
- Fort Severn First Nation;
- Ginoogaming First Nation (formerly Long Lake Band of Ojibway);
- Hornepayne First Nation;
- Kasabonika Lake First Nation;
- Kashechewan First Nation;
- Keewaywin First Nation;
- Kingfisher Lake First Nation;
- Koocheching First Nation;
- Lac Seul First Nation;
- Long Lake #58 First Nation;
- McDowell Lake First Nation;
- Marten Falls First Nation (formerly Marten Falls Band of Oji-Cree);

- Matachewan First Nation (formerly Matchewan Indians);
- Mattagami First Nation;
- Mishkeegogamang First Nation (formerly known as New Osnaburgh First Nation);
- Missanabie Cree First Nation;
- Mocreebec Council of Cree Nation
- Moose Cree First Nation (formerly Moose Factory Band of Cree);
- Muskrat Dam First Nation;
- Neskantaga First Nation (also known as Lansdowne House First Nation);
- Nibinamik First Nation (also known as Summer Beaver First Nation);
- North Caribou Lake First Nation;
- North Spirit Lake First Nation;
- Pikangikum First Nation;
- Poplar Hill First Nation;
- Sachigo Lake First Nation;
- Sandy Lake First Nation;
- Slate Falls Nation;
- Taykwa Tagamou Nation (formerly New Post Band of Cree);
- Wahgoshig First Nation (formerly Abitibi-Ontario Band of Abitibi Indians);
- Wapekeka First Nation;
- Wawakapewin First Nation;
- Webequie First Nation;
- Weenusk First Nation (formerly Winisk Band of Cree);
- Whitewater Lake First Nation; and
- Wunnumin Lake First Nation.

8. 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 Bands 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 has, and had at all material times, fiduciary obligations to the Treaty 9 First Nations 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.

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

9. 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.
10. 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.

11. 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.
12. 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 in exchange for rights and interests to land.
13. 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 their agreement to cede their collective rights and interests to a vast area of land. 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.
14. 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.

15. Particularly instructive of the Crown's promise in relation to the Treaty benefits promise is the 1850 Robinson Treaties which informed the terms of the numbered treaties that followed thereafter.

Unity of the terms of the numbered Treaties

16. 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.
17. 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.
18. 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.*

19. 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

20. 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.
21. 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.
22. 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.
23. 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.
24. 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.”

25. 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.
26. 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.
27. 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.
28. 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.
29. 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.
30. 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.
31. 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.
32. 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.
33. 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

34. 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.
35. 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.
36. The written text of Treaty 9 states that it was entered 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 Ojibway, Cree and other Indians, inhabitants of the territory within the limits hereinafter defined and described”.
37. 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 to some but not all Bands, and distributed various goods and cash payments on behalf of the Crown.
38. 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).

39. 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.
40. 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.
41. The second expedition in 1906 went to:
- a. Abitibi Post (Abitiwinni 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).
42. 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.
43. 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 consent to the terms offered by the Crown.

44. 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*.
45. 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.
46. 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

47. 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.

48. According to the written text of the 1929 and 1920 adhesions, the Indians who adhered 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, ...

49. In total, the territory of Treaty 9 and its adhesions covers more than two-thirds of what is now the province of Ontario.
50. In exchange, Treaty 9 signatory Indian Bands 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.

51. 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.

52. 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

53. 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 net twice, chests of carpenters 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. Unlike its immediate predecessor and successor, 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 severality” was because populations were not as concentrated in the North.

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

54. In the years since the signing of Treaty 9, the relative value of the Annuity Payments has decreased due to inflation to the point of rendering the Annuity Payments virtually meaningless in terms of purchasing power.
55. 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.

LIABILITY

56. The Plaintiff claims that the federal Crown breached its Treaty, fiduciary, honourable, legal and 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 meet its ongoing obligation to increase the Annuity Payments, as promised by the Crown under the terms of Treaty 9, to maintain the real value of the Treaty Annuities over time;

- f. breached the terms of Treaty 9 by failing to increase the Treaty Annuities from time to time to maintain their real value and purchasing power of the Annuity Payments of \$4, the value of which has been seriously eroded due to inflation;
- g. failed to provide economic assistance in agriculture, stock-raising, or other work and an annual distribution of twine and ammunition to Treaty 9 Indians;
- h. breached the Honour of the Crown, fiduciary duties, Treaty 9 and the surrender provisions of the *Indian Act* 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

- 57. 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 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.
- 58. It is well-established at law that the Crown must conduct itself honourably in the making and diligent implementation of Treaties.
- 59. Further, where the Crown assumes discretionary control over a specific or “cognizable” Aboriginal interest (such as Aboriginal Title that existing prior to Treaty), 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.

60. The Plaintiff claims 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.
61. The Plaintiff claims 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.
62. The Plaintiff claims 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.
63. The Plaintiff claims 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 Annuities Payment

64. 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*.
65. 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.

66. The Treaty-making process and the promises arising therefrom, which resulted in the Crown's taking of lands held pursuant to Aboriginal Title in exchange for certain promises, necessarily requires an interpretation of the Treaty that maintains fidelity to the spirit and intent of the Treaty. The Annuity Payments 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.
67. The intention of the Annuity Payment term in Treaty 9 was clear: in exchange for the surrender of vast traditional territories and natural resource wealth, the Crown was, in part, to provide Annuity Payments to assist the Indians in offsetting the costs of the basic necessities they required to subsist. 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.
68. The Plaintiff claims that, when properly interpreted, Treaty 9 includes an implied promise to augment or increase the amount of the Treaty Annuities from time to time.
69. The Plaintiff claims that the Crown has an ongoing Treaty, fiduciary, and/or honourable obligation to increase the Annuity Payments, as promised by the Crown under the terms of Treaty 9, to maintain the real value of the Treaty Annuities over time.
70. The Plaintiff claims that the Crown has failed to fulfill its legal obligations to provide and to properly administer the Annuity Payments by failing to increase or index the annual payments to retain their purchasing power. In the years since the signing of Treaty 9, the relative value of the Annuity Payments has decreased due to inflation to the point of rendering the Annuity Payments virtually useless

in terms of purchasing power. The failure to index the Annuity Payments to account for inflation has resulted in the erosion of the value of the Annuity Payments to the point of being worthless.

Crown breaches give rise to liability for the payment of equitable compensation to the Treaty Bands

71. The Crown is liable to provide equitable compensation to the Treaty 9 First Nations for the losses they have suffered related to the Crown's breaches of its Treaty, legal, fiduciary, and honourable obligations.
72. On behalf of the Class, the Plaintiff claims declaratory and monetary relief and equitable compensation for breaches of Treaty 9 and for breach of the Honour of the Crown and fiduciary duty in the sum of \$10 billion or such other amount as the Honourable Court deems just.
73. The Plaintiff proposes that this action be tried in the City of Sudbury in the Province of Ontario.

Dated May 8, 2023



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Lawyers for the Plaintiff

Court File No. _____

***CHIEF JASON GAUTHIER, on behalf of the
MISSANABIE CREE FIRST NATION***
Plaintiff

v.

THE ATTORNEY GENERAL OF CANADA
Defendant

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Sault Ste. Marie

STATEMENT OF CLAIM

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This is **Exhibit “C”** to the Affidavit of Jason Gauthier, sworn July 29, 2024.

Antonela Cicko

A Commissioner for Taking Affidavits

**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**

Defendant

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

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

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* adhesion 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 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 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 failure to increase, augment or index the Annuity Payment has unjustly enriched the Defendant 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 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 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 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 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 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 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 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 breaches of Treaty 9, the Honour of the Crown, and the Defendant'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.

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

15. 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.
16. 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.
17. 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.
18. 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.

19. 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.
20. The Treaties were relational agreements that incorporated the concept of sharing the benefits of the land.
21. 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.
22. 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

23. 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.

24. 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.
25. 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.*

26. 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

27. 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.
28. 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.
29. 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.

30. 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.
31. 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.”
32. 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.

33. 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.
34. 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.

35. 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.
36. 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.
37. 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.

38. 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.
39. 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.
40. 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

41. 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.

42. 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.
43. 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”.
44. 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.
45. 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).
46. 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.
47. 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.

48. The second expedition in 1906 went to:
 - a. Abitibi Post (Abitibiwinini 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).
49. 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.
50. 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.
51. 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*.

52. 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.
53. 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

54. 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.

55. 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, ...

56. In total, the territory of Treaty 9 and its adhesions covers more than two-thirds of what is now the province of Ontario.
57. 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.
58. 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.
59. 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

60. 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

61. 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.
62. 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.
63. 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

64. The Plaintiffs claim that the Defendant 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

- 65. 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.

66. It is also well-established at law that the Crown must conduct itself honourably in the making and diligent implementation of Treaties.
67. 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.
68. 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.
69. 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.
70. 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.
71. 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

72. 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*.
73. 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.
74. 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.
75. 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.
76. 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.

77. 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.
78. 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

79. 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.
80. The Plaintiffs claim, *inter alia*:
- a. 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 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 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 breaches of Treaty 9, the Honour of the Crown, and the Defendant's fiduciary or other legal or equitable duties owing to the Treaty 9 signatories;

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

Dated July 29, 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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Counsel for the Plaintiffs

TO: **DEPARTMENT OF JUSTICE CANADA**

Glynis Evans (et al) – glynis.evans@justice.ca

This is **Exhibit “D”** to the Affidavit of Jason Gauthier, sworn July 29, 2024.

Antonela Cicko

A Commissioner for Taking Affidavits



BAND COUNCIL RESOLUTION

Note: The words “from our Band funds” “capital” or “revenue” whichever is the case, must appear in all resolutions requesting expenditures from Band Funds

The council of the:

Missanabie Cree First Nation

Date of duly
convened meeting:

Day
23

Mo.
10

Year
2023

Province
ON

Cash free balance

Capital account

\$ _____

Capital Account

\$ _____

DO HEREBY RESOLVE:

WHEREAS the Chief and Council of Missanabie Cree First Nation are empowered through their own right to govern and through powers conferred upon them as duly elected representatives of the First Nation;

AND WHEREAS Missanabie Cree First Nation seek to commence a class proceeding challenging the Crown’s failure to diligently implement the terms of Treaty 9 and the failure to honour the spirit and intent of the solemn Treaty relationship and promises made by the Crown with the Treaty 9 Bands (the “**Treaty 9 Annuities Indexation and Disparity Claim**”);

AND WHEREAS Missanabie Cree First Nation is a Treaty 9 signatory and is directly impacted by the Court’s determination of whether the Crown breached its enforceable fiduciary, legal and equitable obligations to the Treaty 9 First Nations as pled, and in particular:

- i. **The Crown failed to index or augment the Treaty 9 annuity:** From the time when Treaty 9 was entered into in 1905 and 1906, the Crown has declined or failed to *ever* augment or increase the annual payments (“annuities”) of \$4 to each Indian person as set out in Treaty 9 for the purposes of offsetting the impacts of inflation and maintaining the purchasing power;
- ii. **The Crown provided significantly less benefits in Treaty 9 than in the other Treaties:** The Crown took undue advantage of the isolated and remote 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. For example, Treaty 9 offers a lower annuity payment (only \$4 instead of \$5) and does not provide for *any* agricultural or economic benefits whatsoever (such as farming implements);

AND WHEREAS the Crown must be held accountable to fulfill its longstanding obligations to Missanabie Cree First Nation (and to all Treaty 9 First Nations), as part of the larger project of righting historic wrongs and reconciliation;

NOW THEREFORE IT BE RESOLVED THAT the Chief and Council:

1. Authorize and direct Maurice Law to commence a class proceeding challenging the Crown’s failure to diligently implement the terms of Treaty 9 and the failure to honour the spirit and intent of the solemn Treaty relationship and promises made by the Crown with the Treaty 9 Bands; and
2. Support the proposed Certification Motion seeking to have Chief Jason Gauthier appointed as representative plaintiff on behalf of all Treaty 9 First Nations.

Quorum: 4



BAND COUNCIL RESOLUTION

Note: The words "from our Band funds" "capital" or "revenue" whichever is the case, must appear in all resolutions requesting expenditures from Band Funds

The council of the:

Missanabie Cree First Nation

Date of duly
convened meeting:

Day
23

Mo.
10

Year
2023

Province
ON

Cash free balance

Capital account

\$ _____

Capital Account

\$ _____


Chief
Councillor
Councillor
Councillor

Councillor

Councillor

FOR DEPARTMENT USE ONLY							
Expenditure	Authority (Indian Act Sec.)	Source of Funds		Expenditure	Authority (Indian Act Sec.)	Source of Funds	
		Capital	Revenue			Capital	Revenue
Recommending Officer				Recommending Officer			
Signature		date		Signature		date	
Approving Officer				Approving Officer			
Signature		date		Signature		date	

This is **Exhibit “E”** to the Affidavit of Jason Gauthier, sworn July 29, 2024.

Antonela Cicko

A Commissioner for Taking Affidavits



CANADA

THE JAMES BAY TREATY

TREATY No. 9

(MADE IN 1905 AND 1906)

AND

ADHESIONS MADE IN
1929 AND 1930

Reprinted from the edition of 1931 by

ROGER DUHAMEL F.R.S.C.

QUEENS

PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1964

Cat. No. Ci 72-0964



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(MADE IN 1905 AND 1906)

AND

ADHESIONS MADE IN
1929 AND 1930

QS-0577-000-EE-A-1

JAMES BAY TREATY

TREATY No. 9

OTTAWA, November 6, 1905.

The Honourable
The Supt. General of Indian Affairs,
Ottawa.

SIR,—Since the treaties known as the Robinson Treaties were signed in the autumn of the year 1850, no cession of the Indian title to lands lying within the defined limits of the province of Ontario had been obtained. By these treaties the Ojibeway Indians gave up their right and title to a large tract of country lying between the height of land and Lakes Huron and Superior. In 1873, by the Northwest Angle Treaty (Treaty No. 3), the Saulteaux Indians ceded a large tract east of Manitoba, part of which now falls within the boundaries of the province of Ontario. The first-mentioned treaty was made by the old province of Canada, the second by the Dominion.

Increasing settlement, activity in mining and railway construction in that large section of the province of Ontario north of the height of land and south of the Albany river rendered it advisable to extinguish the Indian title. The undersigned were, therefore, appointed by Order of His Excellency in Council on June 29, 1905, as commissioners to negotiate a treaty with the Indians inhabiting the unceded tract. This comprised about 90,000 square miles of the provincial lands drained by the Albany and Moose river systems.

When the question first came to be discussed, it was seen that it would be difficult to separate the Indians who came from their hunting grounds on both sides of the Albany river to trade at the posts of the Hudson's Bay Company, and to treat only with that portion which came from the southern or Ontario side. As the cession of the Indian title in that portion of the Northwest Territories which lies to the north of the Albany river would have to be consummated at no very distant date, it was thought advisable to make the negotiations with Indians whose hunting grounds were in Ontario serve as the occasion for dealing upon the same terms with all the Indians trading at Albany river posts, and to add to the community of interest which for trade purposes exists amongst these Indians a like responsibility for treaty obligations. We were, therefore, given power by Order of His Excellency in Council of July 6, 1905, to admit to treaty any Indian whose hunting grounds cover portions of the Northwest Territories lying between the Albany river, the district of Keewatin and Hudson bay, and to set aside reserves in that territory.

In one essential particular the constitution of the commission to negotiate this treaty differed from that of others which undertook similar service in the past. One member* was nominated by the province of Ontario under the provisions of clause 6 of the Statute of Canada, 54-55 Vic., chap. V., which reads: "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." The concurrence of the government of Ontario carried with it the stipulation that one member of the commission should be nominated by and represent Ontario.

*Mr. D. G. MacMartin.

It is important also to note that under the provisions of clause 6 just quoted, the terms of the treaty were fixed by the governments of the Dominion and Ontario; the commissioners were empowered to offer certain conditions, but were not allowed to alter or add to them in the event of their not being acceptable to the Indians.

After the preliminary arrangements were completed, the commissioners left Ottawa for Dinorwic, the point of departure for Osnaburg, on June 30, and arrived there on July 2.

The party consisted of the undersigned, A. G. Meindl, Esq., M.D., who had been appointed to carry out the necessary work of medical relief and supervision, and James Parkinson and J. L. Vanasse, constables of the Dominion police force. At Dinorwic the party was met by T. C. Rae, Esq., chief trader of the Hudson's Bay Company, who had been detailed by the commissioner of the Hudson's Bay Company to travel with the party and make arrangements for transportation and maintenance en route. Mr. Rae had obtained a competent crew at Dinorwic to take the party to Osnaburg. The head man was James Swain, an old Albany river guide and mail-carrier, who is thoroughly familiar with the many difficult rapids of this river.

The party left Dinorwic on the morning of July 3, and after crossing a long portage of nine miles, first put the canoes into the water at Big Sandy Lake. On July 5 we passed Frenchman's Head reservation, and James Bunting, councillor in charge of the band, volunteered the assistance of a dozen of his stalwart men to help us over the difficult Ishkaqua portage, which was of great assistance, as we were then carrying a great weight of supplies and baggage. On the evening of the 5th, the waters of Lac Seul were reached, and on the morning of the 6th the party arrived at Lac Seul post of the Hudson's Bay Company. Here the commission met with marked hospitality from Mr. J. D. McKenzie, in charge of the post, who rendered every assistance in his power. He interpreted whenever necessary, for which task he was eminently fitted by reason of his perfect knowledge of the Ojibeway language.

The hunting grounds of the Indians who traded at this post had long ago been surrendered by Treaty No. 3, but it was thought advisable to call at this point to ascertain whether any non-treaty Indians had assembled there from points beyond Treaty No. 3, but adjacent to it. Only one family, from Albany river, was met with. The case was fully investigated and the family was afterwards attached to the new treaty.

The afternoon of the 6th was spent in a visit to the Lac Seul reserve in an attempt to discourage the dances and medicine feasts which were being held upon the reserve. The Indians of this band were well dressed, and for the most part seemed to live in a state of reasonable comfort. Their hunting grounds are productive.

The party left Lac Seul on the morning of July 7, en route for Osnaburg passing through Lac Seul, and reached the height of land, via Root river, on July 10. Thence by the waters of Lake St. Joseph, Osnaburg was reached on the 11th.

This was the first point at which treaty was to be made, and we found the Indians assembled in force, very few being absent of all those who traded at the post. Those who were absent had been to the post for their usual supplies earlier in the summer, and had gone back to their own territory in the vicinity of Cat lake.

Owing to the water connection with Lac Seul, these Indians were familiar with the provisions of Treaty No. 3, and it was feared that more difficulty might be met with at that point than almost any other, on account of the terms which the commissioners were empowered to offer not being quite so favourable as those of the older treaty.

The annuity in Treaty No. 3 is \$5 per head, and only \$4 was to be offered in the present instance. The proposed treaty did not provide for an issue of implements, cattle, ammunition or seed-grain.

As there was, therefore, some uncertainty as to the result, the commissioners requested the Indians to select from their number a group of representative men to whom the treaty might be explained. Shortly after, those nominated presented themselves and the terms of the treaty were interpreted. They were then told that it was the desire of the commissioners that any point on which they required further explanations should be freely discussed, and any questions asked which they desired to have answered.

Missabay, the recognized chief of the band, then spoke, expressing the fears of the Indians that, if they signed the treaty, they would be compelled to reside upon the reserve to be set apart for them, and would be deprived of the fishing and hunting privileges which they now enjoy.

On being informed that their fears in regard to both these matters were groundless, as their present manner of making their livelihood would in no way be interfered with, the Indians talked the matter over among themselves, and then asked to be given till the following day to prepare their reply. This request was at once acceded to and the meeting adjourned.

The next morning the Indians signified their readiness to give their reply to the commissioners, and the meeting being again convened, the chief spoke, stating that full consideration had been given the request made to them to enter into treaty with His Majesty, and they were prepared to sign, as they believed that nothing but good was intended. The money they would receive would be of great benefit to them, and the Indians were all very thankful for the advantages they would receive from the treaty.

The other representatives having signified that they were of the same mind as Missabay, the treaty was then signed and witnessed with all due formality, and payment of the gratuity was at once proceeded with.

The election of chiefs also took place, the band being entitled to one chief and two councillors. The following were elected:—Missabay, John Skunk and George Wawaashkung.

After this, the feast which usually accompanies such formalities was given the Indians. Then followed the presentation of a flag, one of the provisions of the treaty; this was to be held by the chief for the time being as an emblem of his authority. Before the feast began, the flag was presented to Missabay the newly elected chief, with words of advice suitable for the occasion. Missabay received it and made an eloquent speech, in which he extolled the manner in which the Indians had been treated by the government; advised the young men to listen well to what the white men had to say, and to follow their advice and not to exalt their own opinions above those of men who knew the world and had brought them such benefits. Missabay, who is blind, has great control over his band, and he is disposed to use his influence in the best interests of the Indians.

At Osnaburg the civilizing work of the Church Missionary Society was noticeable. A commodious church was one of the most conspicuous buildings at the post and the Indians held service in it every evening. This post was in charge of Mr. Jabez Williams, who rendered great service to the party by interpreting whenever necessary. He also gave up his residence for the use of the party.

On the morning of July 13 the question of the location of the reserves was gone fully into, and the Indians showed great acuteness in describing the location of the land they desired to have reserved for them. Their final choice is shown in the schedule of reserves which is annexed to this report.

We left Osnaburg on the morning of July 13, and entered the Albany river, which drains Lake St. Joseph, and, after passing many rapids and magnificent lake stretches of this fine river, we reached Fort Hope at 5 o'clock on the afternoon of the 18th. This important post of the Hudson's Bay Company is situated on the shore of Lake Eabamet, and is the meeting point of a large number of Indians, certainly 700, who have their hunting grounds on both sides of the Albany and as far as the headwaters of the Winisk river. The post was in charge of Mr. C. H. M. Gordon.

The same course of procedure was followed as at Osnaburg. The Indians were requested to select representatives to whom the business of the commission might be explained, and on the morning of the 19th the commissioners met a number of representative Indians in the Hudson's Bay Company's house. Here the commissioners had the benefit of the assistance of Rev. Father F. X. Fafard, of the Roman Catholic Mission at Albany, whose thorough knowledge of the Cree and Ojibeway tongues was of great assistance during the discussion.

A more general conversation in explanation of the terms of the treaty followed than had occurred at Osnaburg. Moonias, one of the most influential chiefs, asked a number of questions. He said that ever since he was able to earn anything, and that was from the time he was very young, he had never been given something for nothing; that he always had to pay for everything that he got, even if it was only a paper of pins. "Now," he said "you gentlemen come to us from the King offering to give us benefits for which we can make no return. How is this?" Father Fafard thereupon explained to him the nature of the treaty, and that by it the Indians were giving their faith and allegiance to the King, and for giving up their title to a large area of land of which they could make no use, they received benefits that served to balance anything that they were giving.

"Yesno," who received his name from his imperfect knowledge of the English language, which consisted altogether in the use of the words "yes" and "no," made an excited speech, in which he told the Indians that they were to receive cattle and implements, seed-grain and tools. Yesno had evidently travelled, and had gathered an erroneous and exaggerated idea of what the government was doing for Indians in other parts of the country, but, as the undersigned wished to guard carefully against any misconception or against making any promises which were not written in the treaty itself, it was explained that none of these issues were to be made, as the band could not hope to depend upon agriculture as a means of subsistence; that hunting and fishing, in which occupations they were not to be interfered with, should for very many years prove lucrative sources of revenue. The Indians were informed that by signing the treaty they pledged themselves not to interfere with white men who might come into the country surveying, prospecting, hunting, or in other occupations; that they must respect the laws of the land in every particular, and that their reserves were set apart for them in order that they might have a tract in which they could not be molested, and where no white man would have any claims without the consent of their tribe and of the government.

After this very full discussion, the treaty was signed, and payment was commenced. The payment was finished on the next day, and the Indian feast took place, at which the chiefs elected were Katchange, Yesno, Joe Goodwin, Benj. Ooskinegisk, and George Quisees. The newly elected chiefs made short speeches, expressing their gladness at the conclusion of the treaty and their determination to be true to its terms and stipulations.

It is considered worthy of record to remark on the vigorous and manly qualities displayed by these Indians throughout the negotiations. Although undoubtedly at times they suffer from lack of food owing to the circumstances under which they live, yet they appeared contented, and enjoy a certain degree

of comfort. Two active missions are established at Fort Hope, the Anglican, under the charge of Rev. Mr. Richards, who is resident, and the Roman Catholic, under the charge of Rev. Father Fafard, who visits from the mission at Albany.

Fort Hope was left on the morning of July 21, and after passing through Lake Eabamet the Albany was reached again, and after three days' travel we arrived at Marten Falls at 7:35 on the morning of Tuesday, July 25.

This is an important post of the Hudson's Bay Company, in charge of Mr. Samuel Iserhoff. A number of Indians were awaiting the arrival of the commission. The first glance at the Indians served to convince that they were not equal in physical development to those at Osnaburg or Fort Hope, and the comparative poverty of their hunting grounds may account for this fact.

The necessary business at this post was transacted on the 25th. The treaty, after due explanation, was signed and the payment made immediately. Shortly before the feast the Indians elected their chief, Wm. Whitehead, and two councillors, Wm. Coaster and Long Tom Ostamas.

At the feast Chief Whitehead made an excellent speech, in which he described the benefits that would follow the treaty and his gratitude to the King and the government for extending a helping and protecting hand to the Indians.

The reserve was fixed at a point opposite the post and is described fully in the schedule of reserves.

The commodious Roman Catholic church situated on the high bank of the river overlooking the Hudson's Bay Company's buildings was the most conspicuous object at this post.

Marten Falls was left on the morning of Wednesday, July 26. Below this point the Albany flows towards James Bay without any impediment of rapids or falls, but with a swift current, which is a considerable aid to canoe travel.

The mouth of the Kenogami river was reached at 2.45 on the afternoon of July 27. This river flows in with a large volume of water and a strong current. It took two days of heavy paddling and difficult tracking to reach the English River post, which is situated about 60 miles from the mouth of the river and near the Forks. We found many of the Indians encamped along the river, and they followed us in their canoes to the post, where we arrived on the afternoon of July 29.

This is a desolate post of the Hudson's Bay Company, in charge of Mr. G. B. Cooper. There are very few Indians in attendance at any time: about half of them were assembled, the rest having gone to "The Line," as the Canadian Pacific railway is called, to trade.

Compared with the number at Fort Hope or Osnaburg, there was a mere handful at English River, and it did not take long to explain to the Indians the reason why the commission was visiting them. As these people cannot be considered a separate band, but a branch of the Albany band, it was not thought necessary to have them sign the treaty, and they were merely admitted as an offshoot of the larger and more important band.

The terms of the treaty having been fully explained, the Indians stated that they were willing to come under its provisions, and they were informed that by the acceptance of the gratuity they would be held to have entered treaty, a statement which they fully realized. As the morrow was Sunday, and as it was important to proceed without delay, they were paid at once.

We left the English River post early on Monday morning, and reached the mouth of the river at 6 p.m. Coming again into the Albany, we met a number of Marten Falls Indians who had not been paid, and who had been camped at the mouth of the river, expecting the commission. After being paid, they camped on the shore near us, and next morning proceeded on their way to Marten Falls, with their York boats laden with goods from Fort Albany. The

next day a party of Albany Indians were paid at the mouth of Cheepy river, and the post itself was reached on the morning of August 3, at 9:30. Here the commissioners had the advantage of receiving much assistance from Mr. G. W. Cockram, who was just leaving the post on his way to England, and Mr. A. W. Patterson, who had just taken charge in his stead.

In the afternoon the chief men selected by the Indians were convened in a large room in the Hudson's Bay Company's store, and an interesting and satisfactory conversation followed. The explanations that had been given at the other points were repeated here, and two of the Indians, Arthur Wesley and Wm. Goodwin, spoke at some length, expressing on their own behalf and on behalf of their comrades the pleasure they felt upon being brought into the treaty and the satisfaction they experienced on receiving such generous treatment from the Crown. Some of the Indians were away at their hunting grounds at Attawapiskat river, and it was thought advisable to postpone the election of chiefs until next year. The Indians were paid on August 4 and 5.

During the afternoon the Hudson's Bay Company's steamer *Innenew* arrived, with the Right Rev. George Holmes, the Anglican Bishop of Moosonee, on board.

On Saturday the Indians feasted and presented the commissioners with an address written in Cree syllabic, of which the following is a translation.—

"From our hearts we thank thee, O Great Chief, as thou hast pitied us and given us temporal help. We are very poor and weak. He (the Great Chief) has taken us over, here in our own country, through you (his servants).

"Therefore from our hearts we thank thee, very much, and pray for thee to Our Father in heaven. Thou hast helped us in our poverty.

"Every day we pray, trusting that we may be saved through a righteous life; and for thee we shall ever pray that thou mayest be strong in God's strength and by His assistance.

"And we trust that it may ever be with us as it is now; we and our children will in the church of God now and ever thank Jesus.

"Again we thank you (commissioners) from our hearts."

Fort Albany is an important post of the Hudson's Bay Company, and here there are two flourishing missions, one of the Roman Catholic and one of the Church of England. Father Fafard has established a large boarding school, which accommodates 20 Indian pupils in charge of the Grey Nuns from the parent house at Ottawa. Here assistance is given to sick Indians in the hospital ward, and a certain number of aged people who cannot travel with their relatives are supported each winter. The church and presbytery are commodious and well built, and the whole mission has an air of prosperity and comfort. The celebration of mass was well attended on Sunday. The Church of England mission is also in a flourishing condition. The large church was well filled for all Sunday services conducted by Bishop Holmes, and the Indians took an intelligent part in the services.

We left Albany on the morning of Monday, August 7, in a sail-boat chartered from the Hudson's Bay Company, and, the wind being strong and fair, we anchored off the mouth of Moose river at 7 o'clock the same evening. Weighing anchor at daylight on Tuesday morning, we drifted with the tide, and a light, fitful wind and reached Moose Factory at 10.30. We had been accompanied on the journey by Bishop Holmes, who immediately upon landing interested himself with Mr. J. G. Mowat, in charge of this important post of the Hudson's Bay Company, to secure a meeting of representative Indians on the morrow.

On the morning of the 9th a meeting was held in a large room placed at our disposal by the Hudson's Bay Company. The Indians who had been chosen

to confer with us seemed remarkably intelligent and deeply interested in the subject to be discussed. When the points of the treaty were explained to them, they expressed their perfect willingness to accede to the terms and conditions. Frederick Mark, who in the afternoon was elected chief, said the Indians were all delighted that a treaty was about to be made with them; they had been looking forward to it for a long time, and were glad that they were to have their hopes realized and that there was now a prospect of law and order being established among them. John Dick remarked that one great advantage the Indians hoped to derive from the treaty was the establishment of schools wherein their children might receive an education. George Teppaise said they were thankful that the King had remembered them, and that the Indians were to receive money, which was very much needed by many who were poor and sick. Suitable responses were made to these gratifying speeches by ourselves and Bishop Holmes, and the treaty was immediately signed. Payment commenced next day and was rapidly completed.

It was a matter of general comment that the Moose Factory Indians were the most comfortably dressed and best nourished of the Indians we had so far met with.

On the evening of Thursday the Indians announced that they had elected the following chief and councillors: Frederick Mark, James Job, Simon Quatchequan and Simon Cheena. As they were to have their feast in the evening, it was decided to present the flag to the chief on that occasion. The feast was held in a large workshop placed at the disposal of the Indians by the Company; and before this hall, just as night was coming on, the flag was presented to Chief Mark. In many respects it was a unique occasion. The gathering was addressed by Bishop Holmes, who began with a prayer in Cree, the Indians making their responses and singing their hymns in the same language. Bishop Holmes kindly interpreted the address of the commissioners, which was suitably replied to by Chief Mark. It may be recorded that during our stay at this point a commodious church was crowded every evening by interested Indians, and that the good effect of the ministrations for many years of the Church Missionary Society were plain, not only to Moose Factory but after the immediate influence of the post and the missionaries had been left. The crew from Moose Factory which accompanied the commissioners as far as Abitibi held service every night in camp, recited a short litany, sang a hymn and engaged in prayer, a fact we think worthy of remark, as in the solitude through which we passed this Christian service made a link with civilization and the best influences at work in the world which had penetrated even to these remote regions. On Friday, August 11, the question of a reserve was gone into, and settled to the satisfaction of ourselves and the Indians. A description of the location is given in the schedule of reserves.

During our stay we had the opportunity of inspecting Bishop's Court, at one time the residence of the Bishop of Moosonee, but which the present bishop intends to convert into a boarding school for Indian children. The hospital under the supervision of Miss Johnson was also inspected.

On Saturday, August 12, we left Moose Factory at 12.30. For one week we were engaged with the strong rapids of the Moose and Abitibi rivers, and did not reach New Post, our next point of call, until 12.30 on Saturday, the 19th. New Post is a small and comparatively unimportant post of the Hudson's Bay Company. It is situated on a beautiful bend of the Abitibi river, and commands an excellent hunting country. The post is in charge of Mr. S. B. Barrett, and nowhere was the commission received with greater consideration and hospitality than at this place. The New Post Indians, although few in number, are of excellent character and disposition. They met us with great friendliness. The treaty was concluded on Monday, the 21st, and the Indians were at once paid.

The reserve question was also discussed, and the location finally fixed as shown by the schedule of reserves. One of the leading Indians, Esau Omakess, was absent from the reserve during the negotiations. He, however, arrived during the time the payments were being made, and signified his approval of the action taken by his fellow Indians. He was subsequently chosen unanimously as chief of the band.

We started for Abitibi on Tuesday morning, August 22. On the previous evening the chief had announced to the commissioners his intention of accompanying the party, with five companions, to assist in passing the difficult series of portages which lie immediately above New Post. One unacquainted with the methods of travel in these regions will not perhaps realize the great assistance this was to the party. At a moderate estimate, it saved one day's travel; and this great assistance was to be rendered, the chief said, without any desire for reward or even for maintenance on the route (they were to bring their own supplies with them), but simply to show their good-will to the commissioners and their thankfulness to the King and the government for the treatment which had been accorded them. They remained with us until the most difficult portages were passed, and left on the evening of August 24, with mutual expressions of good-will. As we ascended the Abitibi evidences of approaching civilization and of the activity in railway construction and surveying, which had rendered the making of the treaty necessary, were constantly met with. Surveying parties of the Transcontinental railway, the Timiskaming and Northern Ontario railway and Ontario township surveyors were constantly met with.

On the morning of August 29 we reached Lake Abitibi, camped at the Hudson's Bay Company's winter post at the Narrows on the same evening, and arrived at Abitibi post the next night at dusk. We did not expect to find many Indians in attendance, as they usually leave for their hunting grounds about the first week in July. There were, however, a few Indians who were waiting at the post in expectation of the arrival of the commission. These were assembled at 2.30 on the afternoon of August 31, and the purpose of the commission was carefully explained to them. Until we can report the successful making of the treaty, which we hope to accomplish next year, we do not think it necessary to make any further comment on the situation at this post. A full list of the Indians was obtained from the officer in charge of the Hudson's Bay Company's post, Mr. George Drever. Mr. Drever has thorough command of the Cree and Ojibeway languages, which was of great assistance to the commissioners at Abitibi, where, owing to the fact of the Indians belonging to the two provinces, Ontario and Quebec, it was necessary to draw a fine distinction, and where the explanations had to be most carefully made in order to avoid future misunderstanding and dissatisfaction. Mr. Drever cheerfully undertook this difficult office and performed it to our great satisfaction.

We left Abitibi on the morning of September 1, with an excellent crew and made Klock's depot without misadventure on Monday, September 4. We reached Haileybury on the 6th and arrived at Ottawa on September 9.

In conclusion we beg to give a short resume of the work done this season. Cession was taken of the tract described in the treaty, comprising about 90,000 square miles, and, in addition, by the adhesion of certain Indians whose hunting grounds lie in a northerly direction from the Albany river, which may be roughly described as territory lying between that river and a line drawn from the north-east angle of Treaty No. 3, along the height of land separating the waters which flow into Hudson Bay by the Severn and Winisk from those which flow into James Bay by the Albany and Attawapiskat, comprising about 40,000 square miles. Gratuity was paid altogether to 1,617 Indians, representing a total population, when all the absentees, are paid and allowance made for names not on the list, of 2,500 approximately. Throughout all the negotiations we carefully

guarded against making any promises over and above those written in the treaty which might afterwards cause embarrassment to the governments concerned. No outside promises were made, and the Indians cannot, and we confidently believe do not, expect any other concessions than those set forth in the documents to which they gave their adherence. It was gratifying throughout to be met by these Indians with such a show of cordiality and trust, and to be able fully to satisfy what they believed to be their claims upon the governments of this country. The treatment of the reserve question, which in this treaty was most important, will, it is hoped, meet with approval. 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. While it is doubtful whether the Indians will ever engage in agriculture, these reserves, being of a reasonable size, will give a secure and permanent interest in the land which the indeterminate possession of a large tract could never carry. No valuable water-powers are included within the allotments. The area set apart is, approximately, 374 square miles in the Northwest Territories and 150 square miles in the province of Ontario. When the vast quantity of waste and, at present, unproductive land, surrendered is considered, these allotments must, we think, be pronounced most reasonable.

We beg to transmit herewith copy of the original of the treaty signed in duplicate, and schedule of reserves.

We have the honour to be, sir,

Your obedient servants,

DUNCAN C. SCOTT,
SAMUEL STEWART,
DANIEL G. MACMARTIN,
Treaty Commissioners.

Schedule of Reserves—Treaty No. 9—1905

OSNABURG

In the province of Ontario, beginning at the western entrance of the Albany river running westward a distance estimated at four miles as far as the point known as "Sand Point" at the eastern entrance of Pedlar's Path Bay, following the shore of this point southwards and around it and across the narrow entrance of the bay to a point on the eastern shore of the outlet of Paukumjeesenaneeseepee, thence due south; to comprise an area of twenty square miles.

In the Northwest Territories, beginning at a point in the centre of the foot of the first small bay west of the Hudson's Bay Company's post, thence west a frontage of ten miles and north a sufficient distance to give a total area of fifty-three square miles.

FORT HOPE

In the Northwest Territories, beginning at Kitchesagi on the north shore of Lake Eabamet extending eastward along the shore of the lake ten miles, lines to be run at right angles from these points to contain sufficient land to provide one square mile for each family of five, upon the ascertained population of the band.

MARTEN FALLS

In the Northwest Territories, on the Albany river, beginning at a point one-quarter of a mile below the foot of the rapid known as Marten Falls down stream a distance of six miles and of sufficient depth to give an area of thirty square miles.

ENGLISH RIVER

In the province of Ontario, beginning at a point on the Kenogami or English river, three miles below the Hudson's Bay Company's post, known as English River post, on the east side of the river, thence down stream two miles and with sufficient depth to give an area of twelve square miles.

PORT ALBANY

In the Northwest Territories, beginning at the point where the North river flows out of the main stream of the Albany, thence north on the west side of the North river a distance of ten miles and of sufficient depth to give an area of one hundred and forty square miles.

MOOSE FACTORY

In the province of Ontario, beginning at a point on the east shore of Moose river at South Bluff creek, thence south six miles on the east shore of French river, and of sufficient depth to give an area of sixty-six square miles.

NEW POST

In the province of Ontario, beginning at a point one mile south of the north-east end of the eastern arm of the lake known as Taquahtagama, or Big lake, situated about eight miles inland south from New Post on the Abitibi river, thence in a northerly direction about four miles, and of sufficient depth in an easterly direction to give an area of eight square miles.

The reserves are granted with the understanding that connections may be made for settlers' roads wherever required.

DUNCAN C. SCOTT,
SAMUEL STEWART,
DANIEL G. MACMARTIN,
Treaty Commissioners.

James' Bay Treaty—Treaty No. 9

OTTAWA, October 5, 1906

The Honourable
The Supt. General of Indian Affairs,
Ottawa.

SIR,—The operations of the Treaty 9 commission during last season ceased at Abitibi, as owing to the absence of the most influential Indians interested in the proposed negotiations it was found impossible to complete the business at that point. In addition to the Abitibi Indians there also remained a number comprising probably a third of the whole population of the treaty situated at various Hudson's Bay Company's posts, north of the height of land, and scattered along the line of the Canadian Pacific railway as far west as Heron Bay.

Accordingly, to meet and conclude negotiations with these Indians, the commissioners left Ottawa on May 22. Some changes in the party had of necessity to be made. Mr. T. C. Rae, who last year had charge of transportation, was unable to accompany the commission. In his place Mr. Pelham Edgar, of Toronto, who acted as secretary, was added to the party. The services of Mr. J. L. Vanasse, Dominion police constable, were alone retained, as, owing to promotion, Mr. Parkinson could not be detailed for the work. With these exceptions the personnel of the party was the same as last year.

The route to Fort Abitibi from Mattawa, which latter place was left on the morning of May 23, was by the Canadian Pacific railway to Timiskaming, thence by boat to New Liskeard and North Timiskaming. A portage of 17 miles had next to be encountered before reaching Quinze lake, the starting point by canoe for Fort Abitibi.

Arrangements were completed on the morning of May 29 for departure, but a violent wind-storm prevented our starting. Through the kindness of Mr. McCaig, foreman for Mr. R. H. Klock, we were able to leave at one o'clock in the afternoon by "alligator" boat *Trudel*, for The Barrier, 10 miles distant, the first portage north of our starting point. Here we were obliged to camp, as the river was blocked for a considerable distance by a "drive" of logs.

At half-past nine on the morning of the 30th the "drive" was all through, and we were able to leave for the post, which was reached at three in the afternoon of June 4.

A majority of the Indians had arrived, but there were a number reported to be on the way who were expected within a day or two. It was thought advisable to wait for them, the interval being utilized by the commissioners in preparing the pay-lists, and by the doctor in giving medical advice to those requiring it.

On June 7, the looked-for Indians having arrived, a meeting was called for the afternoon of that day. Some difficulty was anticipated in negotiating the treaty at Abitibi owing to the peculiar position of the Indians who trade at that post. The post is situated a few miles within the province of Quebec, and the majority of the Indians who trade there belong to that province. It was natural for the Indians to conclude that, as it was the Dominion government and not the provincial government that was negotiating the treaty, no distinction would be made between those hunting in Ontario and those hunting in Quebec. The commissioners had, however, to state that they had no authority to treat with the Quebec Indians, and that the conference in regard to the treaty could only be held with those whose hunting grounds are in the province of Ontario. The Quebec Indians were, however, given to understand that a conference would be held with them later, and that upon their signifying where they desired to have a reserve set apart for them, the government would undertake to secure, if possible, the land required by them at the place designated.

The policy of the province of Ontario has differed very widely from that of Quebec in the matter of the lands occupied by the Indians.

In Ontario, formerly Upper Canada, the rule laid down by the British government from the earliest occupancy of the country has been followed, which recognizes the title of the Indians to the lands occupied by them as their hunting grounds, and their right to compensation for such portions as have from time to time been surrendered by them. In addition to an annual payment in perpetuity, care has also been taken to set apart reservations for the exclusive use of the Indians, of sufficient extent to meet their present and future requirements.

Quebec, formerly Lower Canada, on the other hand, has followed the French policy, which did not admit the claims of the Indians to the lands in the province, but they were held to be the property of the Crown by right of discovery and conquest. Surrenders have not, therefore, been taken from the Indians by the Crown of the lands occupied by them.

The reserves occupied by the Indians within the province of Quebec are those granted by private individuals, or lands granted to religious corporations in trust for certain bands. In addition, land to the extent of 230,000 acres was set apart and appropriated in different parts of Lower Canada under 14 and 15 Vic., chap. 106, for the benefit of different tribes.

Several reserves have also been purchased by the Federal government for certain bands desiring to locate in the districts where the purchases were made.

The conference with the Ontario Indians proved to be highly satisfactory. When the terms of the treaty were fully explained to them through Mr. George Drever, who has a mastery of several Indian dialects, Louis McDougall, Jr. one of the principal men of the band, stated that they were satisfied with the conditions offered and were willing to faithfully carry out the provisions of the treaty. They would also rely upon the government keeping its promises to them. The band hoped that the reserve to be set apart for them would include as great an extent of lake frontage as possible. The other Indians being asked whether they were all of like mind with the spokesman in regard to the treaty, replied that they were, and that they were willing that representatives of the band should sign for them at once. The treaty was accordingly signed by the commissioners and representative Indians, as well as by several witnesses who were present at the conference.

In the forenoon of June 8, payments of annuities were made with great care, in order that only those Indians whose hunting grounds are in Ontario should have their names placed on the list. The commissioners are satisfied that in the performance of this duty they were successful.

In the afternoon an election of a chief and councillors was held, which resulted in Louis McDougall, Jr., being chosen as chief and Michel Penatouche and Andrew McDougall as councillors.

A conference was also held with representative Indians regarding the reserves desired by the band. The conclusion arrived at will be seen by reference to the schedule of reserves attached. After due deliberation the Quebec Indians decided upon the location of their reserve.

The usual feast was held, at which the presentation of a flag and a copy of the treaty took place.

The commissioners and the medical officer having concluded their duties, we left on the morning of June 9 for Quinze lake, which place was reached on the evening of the 12th.

On the morning of the 13th the long and difficult portage between Quinze lake and North Timiskaming was crossed, and at the latter place the boat was taken for Haileybury. Latchford was reached by the Timiskaming and Northern Ontario railway on the afternoon of the 14th. The crew, consisting of five men from Temagami and a number of Indians from Matachewan post, including Michel Baptiste, who was afterwards elected chief, assembled late in the afternoon, and on the morning of the 15th we left by way of Montreal river for Matachewan. The post at Matachewan was reached on the afternoon of June 19, after a difficult journey owing to the numerous rapids in the river and the height of the water. Matachewan is beautifully situated at a point on the Montreal river upon high grounds; the lofty shores of the stream are thickly wooded.

A conference was held with the Indians on the afternoon of the 20th. As usual, the terms of the treaty were fully explained, and an opportunity given the Indians to ask any questions regarding any matter on which further information was desired. Michel Baptiste, on behalf of the Indians, said that the terms of the treaty were very satisfactory to them, and that they were ready to have representatives of the band sign at once. The treaty was therefore signed and witnessed with all due formality.

Payments were made on the 21st to the 79 Indians. The election for a chief resulted in Michel Baptiste being chosen for that position, and at the feast in the evening he was presented with a flag and a copy of the treaty.

The location of the reserve desired by the Indians received careful consideration, and no objection can, it is thought, be taken to the site finally decided upon.

Arrangements have been made for leaving Matachewan early in the morning of the 23rd, but a heavy rain-storm prevented our doing so before half-past four in the afternoon.

The return trip was made by way of Montreal river, Lady Evelyn lake and Lake Temagami to Temagami station. From the latter place we proceeded by train to Biscotasing, our point of departure both for Fort Mattagami and Flying Post. At Biscotasing we also expected to meet a number of Indians belonging to Treaty No. 9, who reside in the vicinity of that place during the summer months.

Biscotasing was reached at twenty minutes past four on the afternoon of Saturday, June 30, and the commissioners were obliged to remain there awaiting the men from Mattagami who were to bring them by canoe to that place, and who did not arrive until the evening of July 3.

We left for Mattagami on the morning of July 4. The Fort was reached about ten on the morning of July 7, when a cordial welcome was given us by Mr. Joseph Miller, who is in charge of that post. We also met at the post Dr. W. Goldie and his brother, of Toronto, who were spending their holidays at that place. Dr. Goldie had been giving the Indians free medical attendance as far as the medicine he had with him permitted, and he also offered his services in association with Dr. Meindl during our stay at the post. Here we also met Mr. Kenneth G. Ross, chief forest ranger for the district, and several of his assistants, who had come to the post owing to the Indians employed by them desiring to be present at the treaty.

The Indians treated with at Mattagami were well dressed, and appeared to be living comfortably. A degree of unusual cleanliness was to be observed in their surroundings and habits. They gave a cheerful hearing to the terms of the proposed treaty, which was fully explained to them through Mr. Miller, who acted as interpreter. They, like the other Indians visited, were given an opportunity to ask any questions or to make any remarks they might desire with reference to the propositions made to them.

The Indians held a short conversation among themselves, and then announced through Joseph Shemeket, one of their number, that they were fully satisfied with the terms of the treaty, and were prepared to have it signed by representatives of the band. The treaty was, therefore, at once signed and witnessed. Payments were begun and concluded in the afternoon, and preparations made for the feast. An election for chief was also held, resulting in Andrew Luke being chosen for that position, to whom a flag and a copy of the treaty were presented in the presence of the band.

It is considered by the commissioners that the reserve selected, as shown by the schedule of reserves, should meet with approval.

Mattagami was left on the morning of July 9, and Biscotasing reached on the evening of the 11th. The party left on the afternoon of the 12th for Flying Post and arrived there about eleven on the morning of the 15th (Sunday). The Indians at Flying Post, although small of stature, are lively and energetic, and the journey from Biscotasing to Flying Post and return was rendered enjoyable by the cheerfulness with which they undertook all tasks, and the quickness with which they accomplished the journey. The Indians were assembled on the morning of the 10th, and the terms of the treaty were fully explained through Mr. A. J. McLeod, Hudson's Bay Company's officer, who acted as interpreter. Isaac, one of the leading Indians, speaking for the band, said that they thankfully accepted the benefits offered by the treaty and were willing to observe its provisions. The treaty was, therefore, duly signed and witnessed. The Indians also signified their desire regarding the position of the reserve to be allotted to them, and their choice, as indicated in the schedule, is recommended for approval. Albert Black Ice was unanimously elected as chief of the band, and

at the feast which was held in the evening, the usual presentation of a flag and a copy of the treaty was made. The return journey to Biscotasing was begun on the morning of July 17, and that place was reached on the afternoon of the 19th. On the morning of the 20th payments were made to the Indians of Flying Post and Mattagami residing at Biscotasing.

The work of the commission was facilitated by the assistance of Mr. J. E. T. Armstrong, who is in charge of the Hudson's Bay Company's store at that place, and who is thoroughly familiar with the Indians. The considerable Indian population at this point is made up of stragglers from the Spanish River band of the Robinson Treaty, and from Flying Post and Mattagami. They make their living by acting as guides and canoeists for sportsmen, and occasionally work in the mills. Their children have the advantage of attendance at a day school to which the department has been able to give some financial assistance, and also the benefit of mingling on terms of educational equality with white children.

We left for Chapleau about a quarter-past four in the afternoon, and arrived about seven in the evening. Here we were met by the Right Rev. George Holmes, Bishop of Moosonee, and Rev. C. Banting, who aided us in every way possible in the discharge of our duties at Chapleau. Mr. J. M. Austin, who has had long experience with the Indians of that place, also gave us valuable assistance.

It was not necessary to make treaty with the Indians of Chapleau, as they belong to bands residing at Moose Factory, English River, and other points where treaty had already been made. They were, however, recognized as members of the bands to which they belong, and were paid the gratuity due them, after being informed as to what the acceptance of the money by them involved.

Reference to the schedule of reserves will show that small areas are recommended for the Ojibeways and Crees at this point. Large reserves having been set apart for the bands to which they belong at other points in the province, it is only thought advisable and necessary to give them a sufficient area upon which to build their small houses and cultivate garden plots. The Ojibeway reserve is contiguous to the land purchased by the Robinson treaty Indians, which has already been considerably improved.

Payments having been completed at Chapleau, the party left on the evening of the 22nd for Missinaibi and arrived at that station at eight in the evening. This place is of considerable local importance as being the point of departure of one of the main routes to Moose Factory and James Bay by way of Missinaibi river. There is also direct water communication with Michipicoten on lake Superior.

Bishop Holmes, with Rev. Mr. Ovens and his wife and two lady missionaries, who had expected to accompany us as far as New Brunswick House, on their way to Moose Factory, arrived at Missinaibi on the morning of July 23. Their crew had, however, been awaiting them for several days and they were, therefore, able to leave at once for their destinations. Our crew, with a canoe from New Brunswick House, did not reach Missinaibi until the evening of the 23rd, and our departure was thus delayed until the morning of the 24th.

New Brunswick House was reached on the afternoon of the 25th, where we found the bishop and his party, who had only arrived a few hours before us. This post is situated at the northern end of the beautiful Missinaibi lake, and the outlook from the post is delightful.

The Indians were assembled in the evening and the terms of the treaty explained to them. On being asked whether they had any questions to ask or any remarks to make, they replied, through Mr. J. G. Christie, Hudson's Bay Company's officer, that they were perfectly satisfied with what they were to receive under the treaty, and were willing to sign at once. The signatures of the commissioners and of five of the leading men were, therefore, affixed to the

treaty, as well as that of six witnesses. Payments were made on the 25th to about 100 Indians. Alex. Peeketay was chosen by the Indians for the position of chief, and he was presented with a flag and a copy of the treaty at the feast held on the evening of the 26th. A conference regarding the reserve to be set apart was also held. The decision arrived at in regard to this matter will be seen by reference to the schedule attached.

Our duties, as well as those of the doctor, being concluded, we left on the morning of the 28th for Missinaibi, and arrived at that place on the afternoon of the 29th.

Payments were made on the 30th to ninety-eight Moose Factory Indians who live at Missinaibi.

We left on the 31st for Heron Bay, our point of departure for Long Lake, and arrived at the former place at half-past twelve in the afternoon. Arrangements for canoes were not completed until the afternoon of the following day, so that it was not until a quarter to five that we were able to leave for the last post to be visited by us.

The route to Long Lake is at all times a rather difficult one, but was more than ordinarily so this season owing to the water in the Pic river being unusually low. The post was reached on the morning of the 8th. We were accompanied on this trip by Mr. H. A. Tremayne, District Inspector, Hudson's Bay Company, and his wife and young daughter.

A conference was held with the Indians on August 9, and their adhesion to treaty obtained. Peter Taylor, speaking for the Indians, said they were perfectly satisfied with the terms of the treaty, and much pleased that they were to receive annuity like their brethren of the Robinson Treaty, and also that they were to be granted land which they could feel was their own. Payments were made to 135 Indians. The question of a reserve was carefully gone into, and the commissioners have no hesitation in recommending the confirmation of the site chosen.

The Indians of Treaty 9 stated that they desired to have Newatchkigigswabe, the Robinson Treaty chief, recognized as their chief also, as he had been recognized by them in the past. This was agreed to, and at the feast held on the evening of August 9 the usual presentation of a flag and a copy of the treaty was made. At the conclusion of the feast the chief spoke, thanking the government for what had been done for the Indians of Long Lake. He said that the Indians who had been receiving annuity money for years were glad that their brethren were now placed on an equal footing with them. He hoped that provision would be made for their sick and destitute, as even in the best seasons the Indians found it very difficult to do more than make a living, and were able to do very little towards assisting one another. In reply, the chief was informed that the government was always ready to assist those actually requiring help, but that the Indians must rely as much as possible upon their own exertions for their support.

The return journey was begun on the afternoon of August 10, and Heron Bay was reached on the evening of the 14th. At this place we concluded our duties in connection with the making of the treaty by paying English River Indians, now residing at Montizambert.

The commissioners have pleasure in referring to the evident desire of the Indians at all points visited to display their loyalty to the government, by the reception given to the commissioners, and also by their recognition of the benefits conferred upon them by the treaty.

We desire also to acknowledge the kind attention paid to us and the assistance given by the officers of the Hudson's Bay Company and Revillon Frères.

Nine hundred and fifteen Indians were paid at the points mentioned. Inspector J. G. Ramsden, who visited the Indians who joined treaty in the summer of 1905, paid 2,047. The population of the whole treaty may, therefore, be placed at 3,000 approximately.

Attached to this report will be found a copy of the treaty with signatures as completed, and schedule of reserves.

We have, &c.,

DUNCAN C. SCOTT,

SAMUEL STEWART,

D. G. MACMARTIN,

Treaty Commissioners.

Schedule of Reserves—Treaty No. 9—1906

ABITIBI

In the province of Ontario, beginning at a point on the south shore of Abitibi lake, at the eastern boundary of the township of Milligan projected, thence east following the lake shore to the outlet of Kaquaquechewaig (Current-running-both-ways) creek, and of sufficient depth between the said creek and the eastern boundaries of the townships of Milligan and McCool to give an area of thirty square miles.

MATACHEWAN

In the province of Ontario, inland and north from Fort Matachewan, beginning at the creek connecting a small lagoon with the northwest shore of Turtle lake, thence south on the west shore of said lake a sufficient distance to give an area of sixteen square miles.

MATTAGAMI

In the province of Ontario, on the west side of Mattagami lake, three-quarters of a mile north of a point opposite the Hudson's Bay Company's post, thence north following the lake front a distance of four miles, and of sufficient depth to give an area of twenty square miles.

FLYING POST

In the province of Ontario, commencing at a point half a mile south of Six-mile rapids, on the east side of Ground Hog river, thence south a distance of four miles, and of sufficient depth to give an area of twenty-three square miles.

OJIBEWAYS—CHAPLEAU

In the province of Ontario, one hundred and sixty acres abutting and south of the reserve sold to the Robinson Treaty Indians, one mile below the town of Chapleau.

MOOSE FACTORY CREES—CHAPLEAU

In the province of Ontario, one hundred and sixty acres fronting Kerebesquashesing river.

NEW BRUNSWICK HOUSE

In the province of Ontario, beginning at the entrance to an unnamed creek on the west shore of Missinaibi river, about half a mile southwest of the Hudson's Bay Company's post, thence north four miles, and of sufficient depth to give an area of twenty-seven square miles.

LONG LAKE

In the province of Ontario, beginning at a point where the "Suicide" or Little Albany river enters Long lake, thence in a southerly direction four miles, following the lake frontage, of a sufficient depth to give an area of twenty-seven square miles.

The reserves are granted with the understanding that connections may be made for settlers' roads wherever required.

DUNCAN C. SCOTT,
S. STEWART,
D. GEO. MACMARTIN,
Treaty Commissioners.

The James Bay Treaty—Treaty No. 9

ARTICLES OF A TREATY made and concluded at the several dates mentioned therein, in the year of Our Lord one thousand and nine hundred and five, between His Most Gracious Majesty the King of Great Britain and Ireland, by His Commissioners, Duncan Campbell Scott, of Ottawa, Ontario, Esquire, and Samuel Stewart, of Ottawa, Ontario, Esquire; and Daniel George MacMartin, of Perth, Ontario, Esquire, representing the province of Ontario, of the one part; and the Ojibeway, Cree and other Indians, inhabitants of the territory within the limits hereinafter defined and described, by their chiefs, and headmen hereunto subscribed, of the other part:—

Whereas, the Indians inhabiting the territory hereinafter defined have been convened to meet a commission representing His Majesty's government of the Dominion of Canada at certain places in the said territory in this present year of 1905, to deliberate upon certain matters of interest to His Most Gracious Majesty, of the one part, and the said Indians of the other.

And, whereas, the said Indians have been notified and informed by His Majesty's said commission that it is His desire to open for settlement, immigration, trade, travel, mining, lumbering, and such other purposes as to His Majesty may seem meet, a tract of country, bounded and described as hereinafter mentioned, and to obtain the consent thereto of His Indian subjects inhabiting the said tract, and to make a treaty and arrange with them, so that there may be peace and good-will between them and His Majesty's other subjects, and that His Indian people may know and be assured of what allowances they are to count upon and receive from His Majesty's bounty and benevolence.

And whereas, the Indians of the said tract, duly convened in council at the respective points named hereunder, and being requested by His Majesty's commissioners to name certain chiefs and headmen who should be authorised on their behalf to conduct such negotiations and sign any treaty to be found thereon, and to become responsible to His Majesty for the faithful performance by their respective bands of such obligations as shall be assumed by them, the said Indians have therefore acknowledged for that purpose the several chiefs and headmen who have subscribed hereto.

And whereas, the said commissioners have proceeded to negotiate a treaty with the Ojibeway, Cree and other Indians, inhabiting the district hereinafter defined and described, and the same has been agreed upon, and concluded by the respective bands at the dates mentioned hereunder, the said Indians do hereby cede, release, surrender and yield up to the government of the Dominion of Canada, for His Majesty the King and His successors for ever, all their rights titles and privileges whatsoever, to the lands included within the following limits, that is to say: 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.

And also, the said Indian rights, titles and privileges whatsoever to all other lands wherever situated in Ontario, Quebec, Manitoba, the District of Keewatin, or in any other portion of the Dominion of Canada.

To have and to hold the same to His Majesty the King and His successors for ever.

And His Majesty the King hereby agrees with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the government of the country, acting under the authority of His Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.

And His Majesty the King hereby agrees and undertakes to lay aside reserves for each band, the same not to exceed in all one square mile for each family of five, or in that proportion for larger and smaller families; and the location of the said reserves having been arranged between His Majesty's commissioners and the chiefs and headmen, as described in the schedule of reserves hereto attached, the boundaries thereof to be hereafter surveyed and defined, the said reserves when confirmed shall be held and administered by His Majesty for the benefit of the Indians free of all claims, liens, or trusts by Ontario.

Provided, however, that His Majesty reserves the right to deal with any settlers within the bounds of any lands reserved for any band as He may see fit; and also that the aforesaid reserves of land, or any interest therein, may be sold or otherwise disposed of by His Majesty's government for the use and benefit of the said Indians entitled thereto, with their consent first had and obtained; but in no wise shall the said Indians, or any of them, be entitled to sell or otherwise alienate any of the lands allotted to them as reserves.

It is further agreed between His said Majesty and His Indian subjects that such portions of the reserves and lands above indicated as may at any time be required for public works, buildings, railways, or roads of whatsoever nature may be appropriated for that purpose by His Majesty's government of the Dominion of Canada, due compensation being made to the Indians for the value of any improvements thereon, and an equivalent in land, money or other consideration for the area of the reserve so appropriated.

And with a view to show the satisfaction of His Majesty with the behaviour and good conduct of His Indians, and in extinguishment of all their past claims, He hereby, through His commissioners, agrees to make each Indian a present of eight dollars in cash.

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.

Further, His Majesty agrees that each chief, after signing the treaty, shall receive a suitable flag and a copy of this treaty to be for the use of his band.

Further, His Majesty agrees to pay such salaries of teachers to instruct the children of said Indians, and also to provide such school buildings and educational equipment as may seem advisable to His Majesty's government of Canada.

And the undersigned Ojibeway, Cree and other chiefs and headmen, on their own behalf and on behalf of all the Indians whom they represent, do hereby solemnly promise and engage to strictly observe this treaty, and also to conduct and behave themselves as good and loyal subjects of His Majesty the King.

They promise and engage that they will, in all respects, obey and abide by the law; that they will maintain peace between each other and between themselves and other tribes of Indians, and between themselves and others of His Majesty's subjects, whether Indians, half-breeds or whites, this year inhabiting and hereafter to inhabit any part of the said ceded territory; and that they will not molest the person or property of any inhabitant of such ceded tract, or of any other district or country, or interfere with or trouble any person passing or travelling through the said tract, or any part thereof, and that they will assist the officers of His Majesty in bringing to justice and punishment any Indian offending against the stipulations of this treaty, or infringing the law in force in the country so ceded.

And it is further understood that this treaty is made and entered into subject to an agreement dated the third day of July, nineteen hundred and five, between the Dominion of Canada and Province of Ontario, which is hereto attached.

In witness whereof, His Majesty's said commissioners and the said chiefs and headmen have hereunto set their hands at the places and times set forth in the year herein first above written.

Signed at Osnaburg on the twelfth day of July, 1905, by His Majesty's commissioners and the chiefs and headmen in the presence of the undersigned witnesses, after having been first interpreted and explained.

Witnesses:

THOMAS CLOUSTON RAE, C.T.,
Hudson's Bay Co.
ALEX. GEORGE MEINDL, M.D.
JABEZ WILLIAMS, Clerk, H. B. Co.

DUNCAN CAMPBELL SCOTT.
SAMUEL STEWART.
DANIEL GEORGE MACMARTIN.
his
MISSABAY x
mark
his
THOMAS X MISSABAY.
mark
his
GEORGE X WAHWAASHKUNG.
mark
his
KWIASH x
mark
his
NAHOKEESIC x
mark
his
OOMBASH x
mark
his
DAVID x SKUNK
mark

his
 John X SKUNK.
 mark
 his
 THOMAS X PANACHEESE.
 mark

Signed at Fort Hope on the nineteenth day of July, 1905, by His Majesty's commissioners and the chiefs and headmen in the presence of the undersigned witnesses, after having been first interpreted and explained.

Witnesses:

F. X. FAFARD, O.M.I.	DUNCAN CAMPBELL SCOTT.
THOMAS CLOUSTON RAE.	SAMUEL STEWART.
ALEX. GEORGE MEINDL, M.D.	DANIEL GEORGE MACMARTIN.
CHAS. H. M. GORDON, H. B. CO.	YESNO, x
	GEORGE X NAMAY.
	WENANGASIE x DRAKE.
	GEORGE X QUISEES.
	KATCHANG, x
	MOONIAS, x
	JOE x GOODWIN.
	ABRAHAM x ATLOOKAN.
	HARRY X OOSKINEGISH.
	NOAH X NESHINAPAIS.
	JOHN A. x ASHPANAQUESHKUM.
	JACOB X RABBIT.

Signed at Marten Falls on the twenty-fifth day of July, 1905, by His Majesty's commissioners and the chief and headmen in the presence of the undersigned witnesses, after having been first interpreted and explained.

Witnesses:

THOMAS CLOUSTON RAE, C. T., H. B.	DUNCAN CAMPBELL SCOTT.
Co.	SAMUEL STEWART.
ALEX. GEORGE MEINDL, M.D.	DANIEL GEORGE MACMARTIN.
SAMUEL ISERHOFF.	WILLIAM X WHITEHEAD.
	WILLIAM X COASTER.
	DAVID X KNAPAYSWET.
	OSTAMAS x LONG TOM.
	WILLIAM X WEENJACK.

Signed at Fort Albany on the third day of August, 1905, by His Majesty's commissioners and the chiefs and headmen in the presence of the undersigned witnesses, after having been first interpreted and explained.

Witnesses:

THOMAS CLOUSTON RAE, C. T., H. B.	DUNCAN CAMPBELL SCOTT.
Co.	SAMUEL STEWART.
A. W. PATTERSON.	DANIEL GEORGE MACMARTIN.
G. W. COCHRAN.	CHARLIE x STEPHEN.
ALEX. GEORGE MEINDL, M.D.	PATRICK X STEPHEN.
JOSEPHA PATTERSON.	DAVID GEO. X WYNNE.
MINNIE	ANDREW X WESLEY.
COCKRAM.	JACOB X TAHTAIL.
	JOHN X WESLEY.
	XAVIER x BIRD.
	PETER x SACKANEY.
	WM. x GOODWIN.
	SAML. x SCOTT.

Signed at Moose Factory on the ninth day of August, 1905, by His Majesty's commissioners and the chiefs and headmen in the presence of the undersigned witnesses, after having been first interpreted and explained.

Witnesses:

GEORGE MOOSONEE.	DUNCAN CAMPBELL SCOTT.
THOMAS CLOUSTON RAE, C. T., H. B. Co.	SAMUEL STEWART.
JOHN GEORGE MOWAT, H. B. CO.	DANIEL GEORGE MACMARTIN.
THOMAS BIRD HOLLAND, B.A.	SIMON SMALLBOY, X
JAMES PARKINSON.	GEORGE TAPPAISE, X
	HENRY SAILOR—Signed in Cree syllabic
	JOHN NAKOGEE " "
	JOHN DICK " "
	SIMON QUATCHEWAN " "
	JOHN JEFFRIES " "
	FRED. MARK " "
	HENRY UTAPPE, X
	SIMON CHEENA, X

Signed at New Post on the twenty-first day of August, 1905, by His Majesty's commissioners and the chiefs and headmen in the presence of the undersigned witnesses, after having been first interpreted and explained.

Witnesses:

THOMAS CLOUSTON RAE, C.T., H. B. Co.	DUNCAN CAMPBELL SCOTT.
SYDNEY BLENKARNE BARRETT, H. B. Co.	SAMUEL STEWART.
JOSEPH LOUIS VANASSE.	DANIEL GEORGE MACMARTIN.
	his
	ANGUS X WEENUSK.
	mark
	his
	JOHN X LUKE.
	mark
	his
	WILLIAM X GULL.
	mark

Signed at Abitibi on the seventh day of June, 1906, by His Majesty's commissioners and the chiefs and headmen in the presence of the undersigned witnesses, after having been first interpreted and explained.

Witnesses:

GEORGE DREVER.	DUNCAN CAMPBELL SCOTT.
ALEX. GEORGE MEINDL, M.D.	SAMUEL STEWART.
PELHAM EDGAR.	DANIEL GEORGE MACMARTIN.
	his
	Louis X MCDOUGALL, SR.
	mark
	his
	ANDREW X MCDOUGALL.
	mark
	his
	OLD x CHEESE.
	mark
	his
	MICHEL X PENATOUCHE.
	mark
	LOUI MACDOUGALL.
	ANTOINE PENATOUCHE,

Signed at Matachewan on the twentieth day of June, 1906, by His Majesty's commissioners and the chiefs and headmen in the presence of the undersigned witnesses, after having been first interpreted and explained.

Witnesses:

PELHAM EDGAR.	DUNCAN CAMPBELL SCOTT.
GEORGE MONTEITH.	SAMUEL STEWART.
ALEX. GEORGE MEINDL, M.D.	DANIEL GEORGE MACMARTIN.
	his
	MICHEL X BATISE.
	mark
	his
	ROUND X EYES.
	mark
	his
	THOMAS X FOX.
	mark
	his
	JIMMY X PIERCE.
	mark

Signed at Mattagami on the seventh day of July, 1906, by His Majesty's commissioners and the chiefs and headmen in the presence of the undersigned witnesses, after having been first interpreted and explained.

Witnesses:

Jos. MILLER.	DUNCAN CAMPBELL SCOTT.
PELHAM EDGAR.	SAMUEL STEWART.
A. M. C. BANTING.	DANIEL GEORGE MACMARTTN.
KENNETH ROSS.	his
	ANDREW X LUKE.
	mark
	JOSEPH SHEMEKET—Signed in syllabic characters.
	THOMAS CHICKEN—Signed in syllabic characters.
	JAMES NEVUE—Signed in syllabic characters.

Signed at Flying Post on the sixteenth day of July, 1906, by His Majesty's commissioners and the chiefs and headmen in the presence of the undersigned witnesses, after having been first interpreted and explained.

Witnesses:

A. J. MCLEOD.	DUNCAN CAMPBELL SCOTT.
PELHAM EDGAR.	SAMUEL STEWART.
ALEX. GEORGE MEINDL, M.D.	DANIEL GEORGE MACMARTIN.
JOSEPH LOUIS VANASSE.	ALBERT BLACK ICE—Signed in syllabic characters.
	JOHN ISAAC—Signed in syllabic characters.
	WILLIAM FROG—Signed in syllabic characters.
	THOMAS FROG—Signed in syllabic characters.

Signed at New Brunswick House on the twenty-fifth day of July, 1906, by His Majesty's commissioners and the chiefs and headmen in the presence of the undersigned witnesses, after having been first interpreted and explained.

Witnesses:

GEORGE MOOSONEE.
JAMES G. CHRISTIE.
GRACE MCTAVISH.
CLAUDE D. OVENS.
PELHAM EDGAR.
EDMUND MORRIS.

DUNCAN CAMPBELL SCOTT.
SAMUEL STEWART.
DANIEL GEORGE MACMARTIN.
ALEX. PEEKETAY—Signed in syllabic characters.
POOTOOSH, ^{his}X
mark
PETER MITIGONABIE, ^{his}X
mark
TOM NESHWABUN—Signed in syllabic characters.
JACOB WINDABAIE—Signed in syllabic characters.

Signed at Long Lake on the ninth day of August, 1906, by His Majesty's commissioners and the chiefs and headmen in the presence of the undersigned witnesses, after having been first interpreted and explained.

Witnesses:

H. E. TREMAYNE.
ISABELLA TREMAYNE.
P. GODCHERE.
PELHAM EDGAR.

DUNCAN CAMPBELL SCOTT.
SAMUEL STEWART.
DANIEL GEORGE MACMARTIN.
KWAKIGIGICKWEANG—Signed in syllabic characters.
KENESWABE—Signed, in syllabic characters.
MATAWAGAN—Signed in syllabic characters
ODAGAMEA—Signed in syllabic characters.

Agreement Between the Dominion of Canada and the Province of Ontario

THIS AGREEMENT made on the third day of July, in the year of Our Lord, 1905, between

The Honourable Frank Oliver, Superintendent General of Indian Affairs,
on behalf of the government of Canada

Of the one part:

And

The Honourable Francis Cochrane, Minister of Lands and Mines of the province of Ontario, on behalf of the government of Ontario

On the other part.

Whereas, His Most Gracious Majesty the King of Great Britain and Ireland is about to negotiate a treaty with the Ojibeway and other Indians inhabitants of the territory within the limits hereinafter defined and described by their chiefs and headmen for the purpose of opening for settlement, immigration, trade, travel, mining and lumbering, and for such other purposes as to His Majesty may seem meet, a tract of country bounded and described as hereinafter mentioned, and of obtaining the consent thereto of His Indian subjects inhabiting the said tract, and of arranging with them for the cession of the Indian rights, titles and privileges to be ceded, released, surrendered and yielded up to His

Majesty the King and His successors for ever, so that there may be peace and good-will between them and His Majesty's other subjects, and that His Indian people may know and be assured of what allowances they are to count upon and receive from His Majesty's bounty and benevolence, which said territory may be described and defined as follows, that is to say, all that portion or tract of land lying and being in the province of Ontario, bounded on the south side 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, said treaty to release and surrender also all Indian rights and privileges whatsoever of the said Indians to all or any other lands wherever situated in Ontario, Quebec, Manitoba, or the district of Keewatin, or in any other portion of the Dominion of Canada.

And whereas, by the agreement made the 16th day of April, 1894, entered into between the government of the Dominion of Canada, represented by the Honourable T. Mayne Daly, and the government of the province of Ontario, represented by the Honourable John M. Gibson, in pursuance of the statute of Canada passed in the fifty-fourth and fifty-fifth years of Her Majesty's reign, chaptered five and intituled, "An Act for the settlement of certain questions between the governments of Canada and Ontario respecting Indian lands," and the statute of Ontario passed in the fifty-fourth year of Her Majesty's reign, chaptered three, and entitled, "An Act for the settlement of certain questions between the governments of Canada and Ontario respecting Indian lands," and by the sixth clause of the said agreement it is provided, "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," and by the said intended treaty it is signified and declared that His Majesty show his satisfaction with the behaviour and good conduct of His Indian subjects, and in extinguishment of all their past claims through His commissioners, will make to each Indian a present of eight dollars in cash, and will also next year and annually afterwards for ever cause to be paid to each of the said Indians in cash, at suitable places and dates, of which the said Indians shall be duly notified, the sum of four dollars, and that unless there be some exceptional reason, such sums will be paid only to heads of families for those belonging thereto.

It is therefore agreed by and between the governments of Canada and of Ontario as aforesaid, as follows:—

That, subject to the provisions contained in the hereinbefore recited agreement of 16th April, 1894, and also the agreement made on 7th July, 1902, by counsel on behalf of the governments of the Dominion and Ontario, intervening parties, upon the appeal to the Judicial Committee of the Privy Council in the suit of the Ontario Mining Company v. Seybold et al. (Ont. S.P., 1904, No. 93), a copy whereof is hereto attached; and the surrender of the Indian title within Ontario to the entire territory herein defined and described, duly obtained,—

The government of the province of Ontario hereby gives consent and upon the following conditions concurs in the terms proposed to be entered into, made and agreed by the said treaty, in so far that the said government of Ontario, on and after the payment to the Indians of the above mentioned present of eight dollars, and thereafter the payment annually of four dollars to each Indian, for ever, as above specified, promises and agrees to pay the said sums to the government of Canada, upon request when and as the same are paid to the Indians,

upon proof, when required, of such payments—such payments to be free from any expenses at the cost of Ontario attendant upon distribution of the said sums of money.

And the government of Ontario, subject to the conditions, aforesaid, further concurs in the setting apart and location of reserves within any part of the said territory, as surrendered or intended to be surrendered, in area not greater than one square mile for each family of five, or in like proportion, at points to be chosen by the commissioners negotiating the said treaty, one of the said commissioners to be appointed by the Lieutenant Governor of Ontario in Council, and the selection of the said reserves to be subject to the approval of the Lieutenant Governor in Council.

And the government of Ontario stipulates no part of the expense of survey and location of the said reserves to be at any time at the cost of the government of Ontario.

And further, that no site suitable for the development of water-power exceeding 500 horse-power shall be included within the boundaries of any reserve.

It is also agreed between the parties hereto that no part of the cost of negotiating the said treaty is to be borne by the province of Ontario.

In witness whereof, these presents have been signed and sealed on behalf of the government of Canada by the Honourable Frank Oliver, Superintendent General of Indian Affairs, and on behalf of the government of Ontario by the Honourable Francis Cochrane, Minister of Lands and Mines.

Signed, sealed and delivered by the Hon-
ourable Frank Oliver, in presence
of FRANK PEDLEY, and by the Hon-
ourable FRANCIS COCHRANE in the
presence of GEO. W. YATES.

FRANK OLIVER. F. COCHRANE.

Agreement between counsel on behalf of the Dominion and Ontario, intervening parties upon the appeal to the Judicial Committee of the Privy Council in Ontario Mining Company vs. Seybold et al.

As to all treaty Indian reserves in Ontario (including those in the territory covered by the Northwest Angle Treaty, which are or shall be duly established pursuant to the statutory agreement of one thousand eight hundred and ninety-four), and which have been or shall be duly surrendered by the Indians to sell or lease for their benefit, Ontario agrees to confirm the titles heretofore made by the Dominion, and that the Dominion shall have full power and authority to sell or lease and convey title in fee simple or for any less estate.

The Dominion agrees to hold the proceeds of such lands when or so far as they have been converted into money upon the extinction of the Indian interest therein, subject to such rights of Ontario thereto as may exist by law.

As to the reserves in the territory covered by the Northwest Angle Treaty which may be duly established as aforesaid, Ontario agrees that the precious metals shall be considered to form part of the reserves and may be disposed of by the Dominion for the benefit of the Indians to the same extent and subject to the same undertaking as to the proceeds as heretofore agreed with regard to the lands in such reserves.

The question as to whether other reserves in Ontario include precious metals to depend upon the instruments and circumstances and law affecting each case respectively.

Nothing is hereby conceded by either party with regard to the constitutional or legal rights of the Dominion or Ontario as to the sale or title to Indian reserves or precious metals, or as to any of the contentions submitted by the cases of either government herein, but it is intended that as a matter of policy and convenience the reserves may be administered as hereinbefore agreed.

Nothing herein contained shall be considered as binding Ontario to confirm the titles heretofore made by the Dominion to portions of Reserve 38B already granted by Ontario as appearing in the proceedings.

(Sgd.) E. L. NEWCOMBE, *for the Dominion.*

(Sgd.) EDWARD BLAKE, *for Ontario.*

Dated 7th July, 1902.

DEPARTMENT OF ATTORNEY GENERAL, TORONTO.

Copy of an Order in Council approved by His Honour the Lieutenant Governor, the 13th day of February, A.D. 1907.

Upon consideration of the report of the Honourable the Minister of Lands, Forests and Mines, dated 11th February, 1907, the Committee of Council advise that Your Honour may be pleased to ratify so far as may be necessary the treaty entitled the James Bay Treaty No. 9, made by the Commissioners, Messrs. Duncan Campbell Scott, Samuel Stewart and Daniel George Mac-Martin, who were appointed to negotiate with the Ojibeway, Cree and other Indians inhabiting the territory hereinafter defined for the cession by the said Indians to the Crown on the terms embodied in the treaty, all their rights, titles and privileges to the land included in the said territory, the limits of which may be described 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 boundary 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 committee further advise that Your Honour may be pleased to approve and confirm the selection of the following reserves described in the schedule attached to the report of the said commissioners, dated 6th November, 1905, and in the schedule of reserves Treaty No. 9, 1906, it being clearly understood that the government of the Dominion shall be responsible for the survey of the said reserves and that plans and field notes of the said reserves shall be deposited in the office of the Minister of Lands, Forests and Mines when such surveys have been made.

Osnaburg, an area of 20 square miles.

English River, an area of 12 square miles.

Moose Factory, an area of 66 square miles.

New Post, an area of 8 square miles.

Abitibi, an area of 30 square miles.

Matachewan, an area of 16 square miles.

Metagami, an area of 20 square miles.

Flying Post, an area of 23 square miles.

Ojibeways, at Chapleau, 160 acres.

Moose Factory Crees, at Chapleau. 160 acres.

New Brunswick House, an area of 27 square miles.

Long Lake, an area of 27 square miles.

Certified,

J. LONSDALE CAPREOL,

Clerk, Executive Council.

P.C. 2547

Certified to be a true copy of a Minute of a Meeting of the Committee of the Privy Council, approved by His Excellency the Governor General on the 5th November, 1930.

The Committee of the Privy Council, on the recommendation of the Superintendent General of Indian Affairs, submit for Your Excellency's ratification and confirmation the annexed instrument containing the adhesion to James Bay Treaty Number Nine of the Ojibeway Indians and other Indians in Northern Ontario, taken at Trout Lake on the 5th day of July, 1929; at Windigo River on the 18th day of July, 1930; at Fort Severn on the 25th day of July, 1930; at Winisk on the 28th day of July, 1930, by Mr. Walter Charles Cain and Mr. Herbert Nathaniel Awrey, who were appointed by Order in Council P.C. 921, 30th May, 1929, as His Majesty's Commissioners to take the said adhesion.

E. J. LEMAIRE,

Clerk of the Privy Council.

The Honourable

The Superintendent General of Indian Affairs.

Adhesions to Treaty Number Nine

WHEREAS His Most Gracious Majesty George V, by the Grace of God of Great Britain, Ireland and the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India, has been pleased to extend the provisions of the Treaty known as The James Bay Treaty or Treaty Number Nine, of which a true copy is hereto annexed, to the Indians inhabiting the hereinafter described territory adjacent to the territory described in the said Treaty, in consideration of the said Indians agreeing to surrender and yield up to His Majesty all their rights, titles and privileges to the hereinafter described territory.

AND WHEREAS we, the Ojibeway, Cree and all other Indians inhabiting the hereinafter described Territory, having had communication of the foregoing Treaty and of the intention of His Most Gracious Majesty to extend its provisions to us, through His Majesty's Commissioners, Walter Charles Cain, B.A., of the City of Toronto, and Herbert Nathaniel Awrey, of the City of Ottawa, have agreed to surrender and yield up to His Majesty all our rights, titles and privileges to the said territory.

Now THEREFORE we, the said Ojibeway, Cree and other Indian inhabitants, in consideration of the provisions of the said foregoing Treaty being extended to us, do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada for His Majesty the King and His Successors forever, all our rights, titles and privileges whatsoever in 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 Hay and including all islands, islets and rocks, waters and land covered by water within the said limits, and also all the said Indian rights, titles and privileges whatsoever to all other lands and lands covered by water, wherever situated in the Dominion of Canada

TO HAVE AND TO HOLD the same to His Majesty the King and His Successors forever.

AND we, the said Ojibeway, Cree and other Indian inhabitants, represented herein by our Chiefs and Councillors presented as such by the Bands, do hereby agree to accept the several provisions, payments and other benefits, as stated in the said Treaty, and solemnly promise and engage to abide by, carry out and fulfil all the stipulations, obligations and conditions therein on the part of the said Chiefs and Indians therein named, to be observed and performed, and in all things to conform to the articles of the said Treaty as if we ourselves had been originally contracting parties thereto.

AND HIS MAJESTY through His said Commissioners agrees and undertakes to set aside reserves for each band as provided by the said aforementioned Treaty, at such places or locations as may be arranged between the said Commissioners and the Chiefs and headmen of each Band.

IN WITNESS WHEREOF, His Majesty's said Commissioners and the said Chiefs and headmen have hereunto subscribed their names at the places and times hereinafter set forth.

SIGNED at Trout Lake, on the Fifth day of July, 1929, by His Majesty's Commissioners and the Chief and headmen in the presence of the undersigned witnesses after having been first interpreted and explained.

Witnesses:

MARY C. GARRETT.

LESLIE GARRETT.

GORDON L. BELL, M.B.

KARL BAYLY.

WALTER CHARLES CAIN, *Commissioner.*

HERBERT NATHANIEL AWREY, *Commissioner.*

SAMSON BEARDY—Signed in Syllabic.

GEORGE WINNAPETONGE—Signed in Syllabic.

JEREMIAH SAINNAWAP—Signed in Syllabic.

ISAAC BARKMAN.

JACK MCKAY—Signed in Syllabic.

JACOB FROG—Signed in Syllabic.

SIGNED at Windigo River on the Eighteenth day of July, 1930, by His Majesty's Commissioners and the Chief and headmen in the presence of the undersigned witnesses after having been first interpreted and explained.

Witnesses:

JOHN T. O'GORMAN.

JOHN WESLEY.

WALTER CHARLES CAIN, *Commissioner.*

HERBERT NATHANIEL AWREY, *Commissioner.*

APIN KA-KE-PE-NESS—Signed in syllabic.

JONAS WA-SA-KI-MIK—Signed in Syllabic.

SAMUEL SA-WA-NIS — Signed in Syllabic.

JOHN QUE-QUE-ISH—Signed in Syllabic.

PATRICK KA-KE-KA-YASH—Signed in Syllabic.

SENIA SAK-CHE-KA-POW—Signed in Syllabic.

SIGNED at Fort Severn on the Twenty-fifth day of July, 1930, by His Majesty's Commissioners and the Chief and headmen in the presence of the undersigned witnesses after having been first interpreted and explained.

Witnesses:

JOHN T. O'GORMAN.

DAVID A. HARDING.

R. KINGSLEY ROSE.

GEO. THIRD.

GERALD MCMANUS.

RENE GAUTHIER.

H. F. BLAND.

HENRY J. MANN.

WALTER CHARLES CAIN, *Commissioner.*

HERBERT NATHANIEL AWREY, *Commissioner.*

GEORGE BLUECOAT—Signed in Syllabic.

MUNZIE ALBANY—Signed in Syllabic.

SAUL CROW—Signed in Syllabic.

SIGNED at Winisk on the Twenty-eighth day of July, 1930, by His Majesty's Commissioners and the Chief and headmen in the presence of the undersigned witnesses after having been first interpreted and explained.

Witnesses:

L. PH. MARTEL, O.M.I.
JOHN THOMAS O'GORMAN.
JOHN HARRIS.
RAY T. WHEELER.

WALTER CHARLES CAIN, *Commissioner*.
HERBERT NATHANIEL AWREY, *Commissioner*.
XAVIER PATRICK—Signed in Syllabic.
JOHN BIRD—Signed in Syllabic.
DAVID SUTHERLAND—Signed in Syllabic.

ONTARIO
EXECUTIVE COUNCIL OFFICE

Copy of an Order in Council, approved by the Honourable the Lieutenant Governor, dated the 18th day of June, A.D. 1931

The Committee of Council have had under consideration the report of the Honourable the Minister of Lands and Forests, dated June 8, 1931, therein he states that, by a Commission dated the thirtieth day of May, 1929, issued in pursuance of an agreement dated the first day of March, 1929, between the Superintendent General of Indian Affairs on behalf of the Government of Canada and the Minister of Lands and Forests of the Province of Ontario on behalf of the Government of Ontario, and in accordance with a Minute of a Meeting of the Committee of the Privy Council approved by His Excellency the Governor General on the said thirtieth day of May, 1929, Mr. Walter Charles Cain, Deputy Minister of Lands and Forests for the Province of Ontario, and Mr. Herbert Nathaniel Awrey, of the Department of Indian Affairs, were appointed Commissioners "For the purpose of negotiating an extension of James Bay Treaty No. 9 with the Ojibeway and other Indians, inhabitants of the territory within the limits hereinafter defined and described, by their chiefs and headmen, for the purpose of opening for settlement, immigration, trade, travel, mining and lumbering, and for such other purposes as to His Majesty may seem meet, a tract of country bounded and described as hereinafter mentioned, and of obtaining the consent thereto of His Indian subjects inhabiting the said tract, and of arranging with them for the cession of the Indian rights, titles and privileges to be ceded, released, surrendered and yielded up to His Majesty the King, and His successors forever, so that there may be peace and good-will between them and His Majesty's other subjects, and that His Indian people may know and be assured of what allowances they are to count upon and receive from His Majesty's bounty and benevolence, which said territory may be described and defined as follows, that is to say:—

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 Nine; on the west by the easterly limits of Treaties 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;

the said treaty to release and surrender also all Indian rights and privileges whatsoever of the said Indians to all or any other lands wherever situated in Ontario, Quebec, Manitoba or the District of Keewatin or in any other portion of the Dominion of Canada."

That the said James Bay Treaty amongst other things provided for the laying aside of reserves for each band in the proportion of one square mile for each family of five or in that proportion for larger or smaller families, such reserves when confirmed to be held and administered by His Majesty for the benefit of the Indians free of all claims, liens or trusts by Ontario.

That adhesions to Treaty Number Nine, copy of which Adhesions is hereto annexed, marked Schedule "A", entered into between the said Commissioners and the Indians under the authority heretofore referred to, provide for the setting aside, through the said Commissioners, such reserves for each Band as is provided for by the said aforementioned Treaty at such places or locations as may be arranged between the said Commissioners and the Chiefs and Headmen of each Band.

That, by Ontario Statute, 1912, ch. 3, the Legislative Assembly of the Province of Ontario consented to recognize the rights of the Indian inhabitants in the territory added to and now included in the Province of Ontario by The Ontario Boundaries Extension Act, Statutes of Canada, 1912, Chapter 40.

That said Commissioners appointed to negotiate said extension of said James Bay Treaty Number 9, among other things, reported that,—

"A band of Indians residing in the vicinity of Deer Lake within the territory included in Treaty No. 5, signed Adhesion to said Treaty on the 9th June, 1910, and under its conditions were assured a reserve in the proportion of 32 acres per capita. At this time the territory formed no part of the Province of Ontario, it being then part of the Northwest Territories. A final selection of the reserve had not been made and although the band in 1910 resided in the vicinity of Deer Lake and the members have since changed their abode and are now in larger numbers resident about Sandy Lake, situate within territory covered by the Commission under which the undersigned Commissioners are functioning.

In 1910 when this band was admitted they numbered 95, augmented in the year following by 78 Indians transferred from the Indian Lake band resident in Manitoba. These numbers have now increased to 332, and as the Island Lake Indians have been allotted their reserve and have had it duly surveyed on a basis excluding those transferred to the Deer Lake band, the latter are now entitled to a grant."

That the Deer Lake band of Indians desires that a reserve be set aside for said band.

That the places or locations for the reserves set aside for each band of Indians, whose Chiefs and Headmen in the years 1929 and 1930 signed the Adhesions to Treaty No. 9, have been arranged between said Commissioners and the Chiefs and Headmen of each respective band of Indians.

That the places or locations of said reserves so set aside and so arranged between the said Commissioners and the Chiefs and Headmen of each respective band of Indians are set forth in the Report of Commissioners re Adhesions to Treaty No. 9 for the year 1930, in which Report said Commissioners recommend:—

"(a) That the surrender made in the year 1905 by the Indians of such portion of the territory then in the Northwest Territories and now within the Province of Ontario be approved and confirmed.

"(b) That the following reserves situated in the area referred to in the preceding paragraph (a) be approved and confirmed.

1. Osnaburg, North side Albany river, 53 square miles.
2. Fort Hope, 100 square miles.
3. Marten Falls, 30 square miles.
4. Fort Albany, 140 square miles.

These reserves having been duly surveyed and plans of same filed some years ago.

"(c) That all the new reserves hereinafter roughly described and shown coloured black on accompanying map (marked Schedule "B") be approved and confirmed.

"(d) That any mining claims staked out and recorded, within any of the above mentioned unsurveyed reserves, subsequent to the date of the signing of the Adhesion covering the areas, shall in all respects be subject to the provisions of Ontario Statutes 1924, Cap. 15, 14 Geo. V, which defines and protects the rights of the Indians."

The Minister, therefore, recommends the approval, ratification and confirmation of:—

1. The surrenders, as far as may be necessary, made in the year 1905 by the Indians of such portions of the territory as at that time were within the limits of the Northwest Territories and now within the Province of Ontario by reason of The Ontario Boundaries Extension Act, Statutes of Canada, 1912, Ch. 40.

2. The Osnaburg (North side Albany river, 53 square miles), Fort Hope (100 square miles), Marten Falls (30 square miles) and Fort Albany Reserve (140 square miles) allotted to the Indians in pursuance of the surrenders made by them in the year 1905 under Treaty No. 9, at which time such reserves were within the limits of the Northwest Territories but now, under The Ontario Boundaries Extension Act, Statutes of Canada, 1912, Ch. 40, within the limits of the Province of Ontario.

3. The Treaty entitled Adhesions to Treaty No. 9 made by Messrs. Walter Charles Cain and Herbert Nathaniel Awrey, who were appointed to negotiate with the Ojibeway and other Indian inhabitants of the territory, referred to in page 1 hereof, for the cession by said Indians to the Crown on the terms embodied in said Treaty No. 9 of their rights, titles and privileges to the land included in the said territory.

4. The reserves mentioned in the report of the said Commissioners and duly selected by them under agreement with the representative Chiefs and Headmen of each Band, such reserves being described and set out on Schedule "C" hereto attached; it being clearly understood however that the Government of Canada shall be responsible for the survey of these reserves and that plans and field notes of such shall be deposited in the Department of Lands and Forests for the Province and be duly approved by the Surveyor-General.

The Minister further recommends that any mining claims staked out and recorded within any of the above mentioned unsurveyed reserves subsequent to the date of the signing of the Adhesion covering the areas shall in all respects be subject to the provisions of Ontario Statutes, 1924, Chapter 15, which defines and protects the rights of the Indians.

The Committee of Council concur in the recommendations of the Honourable the Minister of Lands and Forests, and advise that the same be acted on.

Certified,

C. H. BULMER,
Chief, Executive Council.

SCHEDULE "C"

Reserves Approved and Confirmed

FOB TROUT LAKE INDIANS

RESERVE 1, *Trout Lake*.—Lying on the East and Southeast shore of Trout Lake where it empties into the Fawn river and on both sides thereof along the shore of said lake for $3\frac{1}{2}$ miles more or less and back therefrom to a distance of approximately 12 miles, always, as far as possible, at a distance of $3\frac{1}{2}$ miles from the shore on each side of the main channel of the said Fawn river, containing 85 square miles more or less.

RESERVE 2, *Sachigo Lake*.—Lying at the outlet of Sachigo lake where it empties into Sachigo river and extending on both sides thereof along the shore of the said lake $1\frac{3}{4}$ miles more or less and back therefrom to a distance of approximately 4 miles, always, as far as possible, at a distance of $1\frac{3}{4}$ miles from the shores on each side of the main channel of the said river, containing 14 square miles more or less.

RESERVE 3, *Wunnumin Lake*.—Lying at the southeast end of Wunnumin lake where it empties into the Winisk river, $4\frac{1}{2}$ miles in frontage by 6 miles in depth, the area to be largely to the South side, the North boundary to be so extended as to include sufficient area on both sides of the river, containing 27 square miles more or less.

FOR CARIBOU LAKE INDIANS

Caribou Lake.—Lying on the South shore of Caribou lake, slightly to the left or Westerly end, so that sufficient frontage of a somewhat extended bay will be included, the dimensions to be approximately 8 miles long by 4.4 miles wide.

FOR DEER LAKE BAND

Sandy Lake Narrows.—Lying at the Narrows, being a stretch of water lying between Sandy Lake and Lake Co-pe-te-qua-yah, the reserve to comprise 10,624 acres, or approximately 17 square miles, to be laid out in a rectangle having a width, so far as possible, of at least 3 miles with sufficient depth to satisfy the acreage requirement.

FOR FORT SEVERN BAND

Fort Severn.—At the mouth of the Beaverstone river, where it joins the Severn river, $1\frac{1}{2}$ miles frontage on each side of the Beaverstone river and back 5 miles more or less from the mouth, the said river being shown on map No. 20a, issued in 1926 by the Province of Ontario, as "Beaverstone", although called "Castorum" by the Hudson's Bay Company and "We-ke-mow" by the Indians, containing 15 square miles more or less.

FOR WINISK BAND

Winisk.— Situated at the old outpost of the Hudson's Bay Company up the Winisk river at its junction with what is known as the Asheweig river, the reserve to be so laid out as to comprise a width of 3 miles or $1\frac{1}{2}$ miles on each side of the West branch of the Asheweig river where it empties into the Winisk, and to follow both sides of the said Asheweig river $5\frac{2}{3}$ miles, or such distances as will afford a total area of 17 square miles more or less.

FOR ATTAWAPISCAT BAND

Attawapiscat.—Situated at the junction of the Little Eqwan river with the main Eqwan river, to start on the main Eqwan river at a point $4\frac{1}{2}$ miles west of the said junction and to comprise a width of 6 miles, or 3 miles on each side of the river, and a depth down the river of approximately 17.4 miles, containing 104.4 square miles more or less.

It being clearly understood that the Government of the Dominion is to be responsible for the survey of these reserves and that plans and field notes of the said reserves shall be deposited in the office of the Minister of Lands and Forests when such surveys have been made.

This is **Exhibit “F”** to the Affidavit of Jason Gauthier, sworn July 29, 2024.

Antonela Cicko

A Commissioner for Taking Affidavits

Anjalika Rogers
Direct Line: (778) 847-4911
Email: arogers@mauricelaw.com

July 23, 2024

Conseil de la Première Nation Abitibiwinini
45 rue Migwan
Pikogan, Quebec J9T 3A3

Attention: Chief Chantal Kistabish

Via Mail

Dear Chief:

RE: Treaty 9 Class Action - Chief Jason Gauthier on behalf of Missanabie Cree First Nation v HMTK in right of Canada (CV-23-29205CP)

We are counsel for Missanabie Cree First Nation, the putative representative plaintiff (the “Class Plaintiff”) in a class action brought on behalf of all Treaty 9 First Nations in the Ontario Superior Court of Justice (the “Treaty 9 Class Action”). The Treaty 9 Class Action concerns three specific issues with respect to the Crown’s negotiation and implementation of the James Bay Treaty #9 (“Treaty 9”):

1. The treaty promise to pay each member of the adhering Nations, \$4 per year in perpetuity (the “Annuity Provision”) included the promise to increase, augment or index the annuity so as to offset the impact of inflation and maintain purchasing power;
2. *An Act for the Settlement of Certain Questions between the Governments of Canada and Ontario respecting Indian Reserve Lands*, S.C. 1924, c. 48 in so far as it purported to grant the Province of Ontario a one-half interest in all mineral rights in Indian reserves within the Province of Ontario set apart pursuant to Treaty 9 is contrary to the explicit terms and the spirit and intent of Treaty 9; and
3. The Crown’s failure to include an explicit provision for agricultural assistance and a provision for the annual distribution of twine and ammunition found in the earlier numbered treaties.

A Statement of Claim seeking \$10 billion in damages and equitable compensation among other relief was filed in the Ontario Superior Court of Justice on May 8, 2023. The next step in the proceeding is for the Court to hear the Class Plaintiff’s motion for certification of the Treaty 9 Class Action. If the Court certifies the Treaty 9 Class Action, the case will proceed as a class action which means that the outcome will be binding on all Treaty 9 First Nations who do not opt out.

The Nishnawbe Aski Nation ("NAN") is in support of the Treaty 9 Class Action. NAN members include 35 of the 37 First Nations who are adherents to Treaty 9. We have identified your First Nation as one of two First Nations that is not a member of NAN and therefore we write to provide you with notice of the Treaty 9 Class Action.

If you require further information or have questions in relation to the foregoing, please do not hesitate to reach out to our office and we would be happy to assist.

Sincerely,

MAURICE LAW

Per:


Anjalika Rogers

cc.: Ryan Lake (rlake@mauricelaw.com)
Paul Miller (pmiller@hshlawyers.com)
Garrett Lafferty (glafferty@mauricelaw.com)
Genevieve Boulay (gboulay@mauricelaw.com)

Anjalika Rogers
Direct Line: (778) 847-4911
Email: arogers@mauricelaw.com

July 23, 2024

Kitchenuhmaykoosib Inninuwug
P.O Box 329 c/o Band Office
Big Trout Lake, ON P0V 1G0

Attention: Chief Donny Morris

Via Mail

Dear Chief:

RE: Treaty 9 Class Action - Chief Jason Gauthier on behalf of Missanabie Cree First Nation v HMTK in right of Canada (CV-23-29205CP)

We are counsel for Missanabie Cree First Nation, the putative representative plaintiff (the “Class Plaintiff”) in a class action brought on behalf of all Treaty 9 First Nations in the Ontario Superior Court of Justice (the “Treaty 9 Class Action”). The Treaty 9 Class Action concerns three specific issues with respect to the Crown’s negotiation and implementation of the James Bay Treaty #9 (“Treaty 9”):

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2. *An Act for the Settlement of Certain Questions between the Governments of Canada and Ontario respecting Indian Reserve Lands*, S.C. 1924, c. 48 in so far as it purported to grant the Province of Ontario a one-half interest in all mineral rights in Indian reserves within the Province of Ontario set apart pursuant to Treaty 9 is contrary to the explicit terms and the spirit and intent of Treaty 9; and
3. The Crown’s failure to include an explicit provision for agricultural assistance and a provision for the annual distribution of twine and ammunition found in the earlier numbered treaties.

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The Nishnawbe Aski Nation ("NAN") is in support of the Treaty 9 Class Action. NAN members include 35 of the 37 First Nations who are adherents to Treaty 9. We have identified your First Nation as one of two First Nations that is not a member of NAN and therefore we write to provide you with notice of the Treaty 9 Class Action.

If you require further information or have questions in relation to the foregoing, please do not hesitate to reach out to our office and we would be happy to assist.

Sincerely,

MAURICE LAW

Per:


Anjalika Rogers

cc.: Ryan Lake (rlake@mauricelaw.com)
Paul Miller (pmiller@hshlawyers.com)
Garrett Lafferty (glafferty@mauricelaw.com)
Genevieve Boulay (gboulay@mauricelaw.com)

Canada Post/Postes Canada
CALGARY BELTLINE
911 - 10 AVENUE SW
CALGARY, AB T2R 0Z0
GST/TPS#119321495

2024/07/23 13:00:51 Rizalina
CC101486 W/G 1

G/S 1 @ \$2.09 \$2.09
OTHER LETTERS/AUTRES LETTRES

Item Weight/Poids de l'article: 0.023
kg
Volumetric Equivalent (VE)/
Équivalent volumétrique (EV): 0.000
Kg

Destination: Canada
Postal code - ZIP Code/Code postal -
ZIP: J9T3A3

||||| 752873215CA
RN752873215CA

G/S \$10.50
REG DOMESTIC/COURRIER RECOMMANDE

G/S \$0.00
INSUR. PARC XP P/C/COLIS ASSUR XP P/C

Amount covered/Montant de la
couverture: \$100.00

G/S 1 @ \$2.09 \$2.09
OTHER LETTERS/AUTRES LETTRES

Item Weight/Poids de l'article: 0.023
kg
Volumetric Equivalent (VE)/
Équivalent volumétrique (EV): 0.000

TRANSACTION RECORD

CALGARY BELTLINE
911 - 10 AVENUE SW
CALGARY, AB T2R 0Z0

TYPE: PURCHASE
ACCT: INTERAC FLASH DEFAULT
AMOUNT: \$ 26.44

CARD NUMBER: *****2710
DATE/TIME: 2024-07-23 13:00:45
REFERENCE #: 0010019960 H
AUTH #: 150176
Interac
A0000002771010
8080008000

INVOICE NUMBER 1167149

00 Approved - Thank You 001

FF / DT 00

IMPORTANT - retain this copy for
your records

CUSTOMER COPY

R	RECOMMANDÉ	FOR DELIVERY	CONFIRMATION
REGISTERED	DOMESTIC	DE LA LIVRAISON	CONFIRMATION
CUSTOMER RECEIPT	RÉGIME INTÉRIEUR	Canada Post	Postes Canada
REçu DU CLIENT		1888 550-6333	
Canada Post	POSTES CANADA	City / Prov. / Postal Code	City / Prov. / Postal Code
Destinataire	Nom	Adresse	Ville / Prov. / Code postal
Donny Morris	Kitchener	PO Box 1460	Big Trout Lake, ON
Declared Value	Value déclarée	\$	33-086-584 (17-12)

Chantal Kishish	Address	59T 3A3	City / Prov. / Postal Code	Plkogan, QC
1888 550-6333	Canada Post	POSTES CANADA	33-086-584 (17-12)	

This is **Exhibit “G”** to the Affidavit of Jason Gauthier, sworn July 29, 2024.

Antonela Cicko

A Commissioner for Taking Affidavits



Legal Briefing:

Treaty 9 Annuities Indexing Claim launched by Missanabie Cree and Chief Gauthier

December 20, 2023

Presented by: Ryan Lake and Simon Sigler
Maurice Law Barristers & Solicitors

Legal Briefing:

I. Background

II. Updates and Next Steps

I. BACKGROUND: Basis of the Claim

Why bring a Claim for Treaty Annuity Indexing?

- Claim is about Crown's **failure** to diligently implement the terms of Treaty 9
 - Failure to **implement the promise of annual payment ("annuity")** to each Band member
 - Further, the **disparity** between benefits/terms of Treaty 9 and other Treaties
 - Although the promise of the annual payment was to each Band member individually, the annuity payment is a collective treaty right and must be asserted by the Band as a whole.
 - Asserting that the annual payment is a collective treaty right also allows for the Band to collect on historic owed payments instead of those exclusively owed to living bands members and avoids the difficulties of asserting that payments are owed to the estate of deceased Band members

I. BACKGROUND: Basis of the Claim (continued)

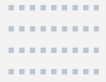
Crown failure to implement promise of annual payment

- Bands who signed or adhered to Treaty 9 in 1905 and subsequent years were promised a number of benefits by Canada and Ontario on behalf of the Crown, including an annual payment of \$4 per person “for ever”
- However, the impacts of inflation have significantly eroded the value and purchasing power of the \$4 annual payment ever since
- Despite this fact, the Crown has never augmented or increased the annual payment in order

I. BACKGROUND: Basis of the Claim (continued)

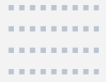
Disparity between terms of Treaty 9 and other numbered Treaties

- Written text of Treaty 9 provided for far less benefits than the other numbered Treaties, in particular:
 - Smaller gratuity payment - \$8/person vs \$12 (Treaties 3 and 5)
 - Smaller annuity payment - \$4/person vs \$5 (Treaties 3 and 5)
 - **No** agricultural or other economic benefits whatsoever – vs virtually every other numbered Treaty, which provided for farming implements, cattle, assistance in earning a livelihood through wage labour, etc.



I. BACKGROUND: Opportunity

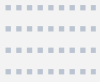
- Given the recent announcement of a \$10 billion settlement in the Robinson-Huron Treaty annuities litigation, the **time is ripe** to similarly challenge the Crown's failure to augment the annual payment promised under Treaty 9
 - While the numbered Treaties do not contain the explicit "augmentation" language that is unique to the Robinson Treaties, we have developed novel legal arguments for why the courts must interpret Treaty 9 to include an obligation to augment the amount of the annuities to offset inflation



I. BACKGROUND: Strategy

Why bring a class action?

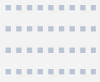
- Multi-prong strategy & approach
 - We see this class action as one prong of a broader legal strategy to push the Crown to (1) compensate Treaty Nations for historic wrongs and the failure to diligently implement the terms of the numbered Treaties, and (2) renew the Nation-to-Nation relationship, which may include resource revenue sharing arrangements going forward
 - Other prong is Specific Claims



I. BACKGROUND: Class Action Procedure

Why bring a class action?

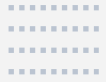
- A Class Action provides for the most efficient and cost effective means to litigate the claim for all members of Treaty 9
- Multi-prong strategy & approach
 - We see this class action as one prong of a broader legal strategy to push the Crown to (1) compensate Treaty Nations for historic wrongs and the failure to diligently implement the terms of the numbered Treaties, and (2) renew the Nation-to-Nation relationship, which may include resource revenue sharing arrangements going forward
 - Commencing a Class Action is an extremely effective tool to bring the Crown to the negotiation table to attempt to resolve the claim out of court
 - Specific Claims can be filed but are limited to a recovery of \$150 Million



I. BACKGROUND: Class Action Procedure (Continued)

Consultation

- We have begun a consultation process with other affected Treaty 9 Bands
- We expect to continually consult with the affected Treaty 9 Bands throughout the litigation process
- A defined and detailed consultation and communication process is provided for in our Litigation Plan, which will be approved by the Court
- The Litigation Plan provides for regular updates from counsel on the status of the litigation both to Band members and to the Band itself
- The Litigation Plan also provides mechanisms for affected Band members to ask questions and ascertain further information or details on the claim.



II. RECAP, UPDATES & NEXT STEPS

- Statement of Claim filed May 8, 2023
 - Filed at Ontario Superior Court of Justice in Sault Ste. Marie on May 8, 2023 as court file CV-23-00029205-00CP
 - Claim served on the Attorney General of Canada in Ottawa on May 10
 - Canada's Provided its Notice of Intent to Defend on July 29, 2023
- Expert retained to provide evidence of the Crown's obligation to increase the Annuity Payment and the Crown's failure to do so.
- Expert retained to provide a methodology to calculate the damages that stem from the Crown's failure to increase and pay the Annuity Payment.
- Next steps include:
 - Filing Certification Motion

II. RECAP, UPDATES & NEXT STEPS (Continued)

- Draft Expert Report on the methodology to calculate damages received on December 1, 2023
- Draft Expert Report on the Crown's obligations to increase the Annuity Payment expected to be received on December 15, 2023
- Next steps include:
 - Complete Draft Certification Record
 - File Certification Record by December 15, 2023
 - Submit Case Management and Case Conference Request to Establish Timelines and Procedure for the Action



QUESTIONS?

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This is **Exhibit “H”** to the Affidavit of Jason Gauthier, sworn July 29, 2024.

Antonela Cicko

A Commissioner for Taking Affidavits

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**

Defendant

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

LITIGATION PLAN
Draft last update July 25, 2024

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DEFINITIONS

1. The definitions below will be used throughout this Litigation Plan. Any term defined in the Statement of Claim that is also used in this Litigation Plan has the same meaning as that included in the Statement of Claim or as otherwise defined by the Court. The definitions are as follows:

- (i) **Equitable Compensation Distribution Process** means the system directed by the Court for the **Class Action Administrator** to distribute equitable compensation to Approved Class Members;
- (ii) **Approved Class Member(s)** means Approved First Nation Class Member(s)
- (iii) **Approved Subclass Member(s)** means Approved Treaty 9 Members Subclass Member
- (iv) **Approved First Nation Class Member(s)-** means a First Nation under Treaty 9 Class Member who has been approved by the **Class Action Administrator** as meeting the criteria for being a Treaty 9 First Nation Class Member and whose approval as a Treaty 9 First Nation Class Member has not been successfully challenged;
- (v) **Approved Treaty 9 Members Subclass Member(s)-** means an individual under Treaty 9 Members Subclass who has been approved by the **Class Action Administrator** as meeting the criteria for being a Treaty 9 Members Subclass member and whose approval has not been successfully challenged;
- (vi) **Certification Notice** means the information set out in Schedule A to this Litigation Plan, as may be subsequently amended and as approved by the Court;
- (vii) **Claim Form** means the form set out in Schedule C to this Litigation Plan used by the First Nation Class Members and Treaty 9 Members Subclass Members to submit a claim, as may be subsequently amended and as approved by the Court;

- (viii) **Class Action Administrator** means any settlement administrator or other appropriate firm appointed by the Court to assist in the administration of the class proceeding, the Plaintiff proposes that the Class Action Administrator be [REDACTED] and this Litigation Plan assumes same;
- (ix) **Class Counsel** means the consortium of law firms acting as Co-Counsel in this class proceeding, with the firm of Maurice Law Barristers & Solicitors and Howie, Sacks & Henry;
- (x) **Class Member(s)** means the thirty-seven (37) First Nations which are the beneficiaries of the James Bay Treaty # 9, collectively the successors to the signatories and adherents of Treaty 9 as pleaded in the Fresh-As-Amended Statement of Claim and as approved by the Court;
- (xi) **Subclass Member(s)** means the members of the thirty-seven (37) First Nations which are the beneficiaries of the James Bay Treaty # 9 who receive Annuity Payments;
- (xii) **Common Issues** means the issues listed in the Notice of Motion for Certification, or as found by the Court, as may be subsequently amended, and as approved by the Court;
- (xiii) **Common Issues Notice** means the information set out in the notice regarding the **Common Issues** to be certified by the Court at Certification, as may be subsequently amended, and as approved by the Court;
- (xiv) **Crown Class Member Information** means information to be provided by the Crown, at the request of the Plaintiffs and/or as ordered by the Court, to the **Class Action Administrator** and/or **Class Counsel** regarding the names and last known contact information of all individuals who meet the criteria of Class Members and Subclass Members as set out in the Fresh-As-Amended Statement of Claim or as otherwise defined by the Court, including: (a) a list of all known Class Members' and Subclass Members' names and last known addresses using the information in the Crown's possession or under its control.
- (xv) **Notice Program** means the process, set out in the Litigation Plan, for communicating the **Certification Notice** and/or the **Common**

Issues Notice to Class Members and Subclass Members, as may be subsequently amended and as approved by the Court;

- (xvi) **Opt Out Form** means the form set out in Schedule B to this Litigation Plan used by Class Members and Subclass Members to opt out of the class proceeding, as may be subsequently amended, and as approved by the Court;
- (xvii) **Opt Out Period** means the deadline, proposed by the Plaintiff as 180 days post Certification or as determined by the Court, to opt out of the class proceeding;
- (xviii) **Opt Out Procedures** means the procedures, set out in the Litigation Plan, for Class Members and Subclass Members to opt out of this class proceeding, as may be subsequently amended and as approved by the Court; and
- (xix) **Special Opt Out Procedures** means the procedures, set out in the Litigation Plan, for Class Members and Subclass Members who have already commenced a civil proceeding in Canada or who are known by the Crown to have already retained legal counsel to opt out of this class proceeding, as may be subsequently amended, and as approved by the Court.

OVERVIEW

2. This Claim is about the Crown’s failure to diligently implement the terms of Treaty 9, with a special focus on the failure to implement the promise of an annual payment (or “annuity”) to each member of the signatory Bands and other adherents.

3. The Bands who signed or adhered to Treaty 9 in 1905 and subsequent years were promised a number of benefits by Canada and Ontario on behalf of the Crown, including an annual payment of \$4 per person “for ever”. However, the impacts of inflation have significantly eroded the value and purchasing power of the \$4 annual payment ever since. Despite this fact, the Crown has never augmented or increased the annual payment in order to offset the impacts of inflation.

4. Further, the written text of Treaty 9 provided for far less benefits than the other numbered Treaties. In particular, Treaty 9 provided for a smaller gratuity payment (only \$8/person instead of the \$12 provided under Treaties 3 and 5), a smaller annuity payment (only \$4/person instead of the \$5 provided under Treaties 3 and 5), and provided for no agricultural or other economic benefits whatsoever (unlike the other numbered Treaties, which provided for farming implements, cattle, assistance in earning a livelihood through wage labour, etc).

5. This Claim seeks damages for the Crown's failure to increase the annual payments on the basis of breach of treaty, breach of fiduciary duty and on the principles of equitable compensation, and unjust enrichment.

6. This Litigation Plan is advanced as a workable method of advancing the proceeding on behalf of the Class and Subclass and of notifying Class Members and Subclass Members as to how the class proceeding is progressing, pursuant to section 5(1)(e)(ii) of the *Class Proceedings Act*, 1992, S.O. c. 6, as amended (the "Act"). The Litigation Plan is modelled on the various class and CHRTC proceedings with respect to First Nations Child Welfare.¹

7. This Litigation Plan sets out a detailed plan for the common stages of this litigation, and sets out, on a without prejudice basis, an early plan for how the individual stage of the action may progress. Given the early stage of the litigation, the plan is necessarily subject to substantial revisions as the case progresses.

¹ See [Moushoom v. Canada \(Attorney General\)](#), 2021 FC 1225

PRE-CERTIFICATION PROCESS

A. The Parties

i. The Plaintiffs and Proposed Class and Subclass

8. The Plaintiff is Missanabie Cree First Nation. The proposed class for this action consists of the First Nations who are the beneficiaries to the James Bay Treaty # 9. There are thirty-seven (37) putative members of the class.

9. The Plaintiff is Chief Jason Gauthier. The proposed subclass is all of the individuals who are members of the First Nations that constitute the Class and who receive Annuity Payments pursuant to Treaty 9. The number of individuals in the subclass is unknown but is estimated to be in the tens of thousands.

The Defendant

10. The defendant is His Majesty the King in Right of Canada as represented by the Attorney General of Canada.

B. The Pleadings

i. Statement of Claim

11. The Plaintiff has served the Statement of Claim on the Attorney General of Canada on May 10, 2023. The Plaintiffs intend to serve and file a Fresh-As-Amended Statement of Claim on July 29, 2024.

ii. Statement of Defence

12. On, the Attorney General of Canada served their Notice of Intent to Defend

on June 29, 2023. The Attorney General of Canada advised the Plaintiff that it would file its Statement of Defence after the Plaintiff delivers its Certification Record and the parties have conferred with respect to the common issues.

iii. Third Party Claim

13. The Attorney General of Canada has not issued a Third Party Claim. However, the Plaintiff anticipates that the Attorney General of Canada will bring a motion pursuant to Rule 5.03 to add the Government of Ontario as a necessary party to the action.

C. Preliminary Motions

14. The Plaintiff proposes that any preliminary motions be dealt with at the Motion for Certification or as directed by the Court. The Plaintiff also proposes that all Motions, References, Questions of Law, or Determinations of Issues that may be heard in chambers or by case conference are done so accordingly to preserve judicial economy and case efficiency.

15. The proposed class proceeding alleges, *inter alia*:

- (a) The Crown has failed to augment or increase the annual payments of \$4 to each Indian person as set out in Treaty 9 for the purposes of offsetting the impacts of inflation and maintaining the purchasing power; and
- (b) The Crown has failed to uphold its honourable obligations by entering and implementing a Treaty with such disparity in terms when compared to the Treaties which precede and succeed it.

D. Class Counsel

16. Maurice Law Barristers & Solicitors is working with Howie, Sacks & Henry in a co-counsel arrangement.

E. Pre-Certification Communication Strategy

i. Responding to Inquiries from Putative Class Members

17. The Proposed Class Co-Counsel expect to receive many communications from Class Members and Subclass Members affected by this Class Action. Maurice Law and Howie, Sacks, & Henry LLP will be responsible for responding to inquiries and communicating with Class Members and Subclass Members.

18. Maurice Law is responsible for the prosecution of the Class Action.

19. With respect to each inquiry, the individual's name, address, email, and telephone number will be added to a confidential database. Class Members and Subclass Members will be asked to register on the websites of Maurice Law Barristers & Solicitors or Howie, Sacks, & Henry LLP, including either its own website or an established specific website for this Class Action. Once registered, they will receive regular updates on the progress of the Class Action in English and French. Any individual Class Members and Subclass Members who contact Proposed Class Co-Counsel are responded to in their preferred official language.

ii. Pre-Certification Status Reports

20. In addition to responding to individual inquiries, Class Co-Counsel will create a webpage concerning the class proceeding in English and French. The most current information on the status of the class proceeding is posted and is updated

regularly in English and French.

21. Copies of the publicly filed court documents and court decisions will be accessible from the webpage and downloadable in PDF format. Links to any decisions that are posted on CanLII will also be provide. Phone numbers and emails for Class Counsel in Alberta and Ontario will be provided.

22. Class Counsel will send update reports to Class Members and Subclass Members who have provided their contact information and have indicated an interest in being notified of further developments in the class proceeding.

iii. Pre-Certification Outreach

23. Proposed Class Counsel will present the proposed class action to Individual Class Members and Subclass Members and/or through umbrella political territorial organizations like the Assembly of First Nations, Nishnabek Aski Nation, Mushkegowuk Council, among others.

F. Settlement Conference

i. Pre-Certification Procedures

24. The Plaintiff proposes that the Class Action proceed in accordance with Superior Court of Justice's published *Best Practices Guide for Class Actions in Ontario* (<https://www.ontariocourts.ca/scj/civil/resources/guide-class-actions/>).

25. Additionally, the Plaintiff and Attorney General of Canada propose that the Class Action proceed in accordance with the Notice to Profession – Toronto Region – G – Class Actions (February 16, 2022) (<https://www.ontariocourts.ca/scj/notices-and-orders-covid-19/notice->

[to/#G_Class_Action_Matters](#)) notwithstanding that the Class Action may proceed outside the Toronto Region.

26. The Plaintiff and the Attorney General of Canada have agreed to jointly draft a request for case management and to file same with the Superior Court of Justice. The Plaintiff commenced the Class Action at the Sault Ste Maire Courthouse. However, the Plaintiff and Attorney General of Canada expect and propose that the claim will be managed by the Toronto Region Class Actions Team. The Plaintiff will propose that the parties jointly request approval from the Team Lead, Class Actions, Toronto Region for Out-of-Town case management with the Toronto Region Class Actions Team.

27. The Plaintiff and the Attorney General of Canada have agreed to meet and confer with respect to the common issues and to take a principled approach in resolving same. The Plaintiff also proposes that it and the Attorney General of Canada agree to a plan to resolve the various steps contained in the *Best Practices Guide for Class Action in Ontario* at the meet and confer.

28. After the meet and confer, should a formal pre-Certification Settlement Conference be required to resolve any outstanding issues, the Plaintiff proposes that a pre-Certification Settlement Conference be conducted at least one month after the Motion for Certification and responding materials, if any, have been filed with the Court.

29. After the meet and confer, if all or most of the issues are resolved, the Plaintiff proposes that a pre-Certification Settlement Conference be conducted within

one month after the Motion for Certification and responding materials, if any, have been filed with the Court.

G. Timetable

i. Plaintiff's Proposed Timetable for the Pre-Certification Process

30. The Plaintiff proposes that the pre-Certification process timetable set out below be imposed by Court Order at an early case conference.

	Deadline
Plaintiff's Certification Motion Record	Date of Serving and Filing the Notice of Motion for Certification and Motion Record ("DOF")
Respondent's Motion Record, if any	Within 90 days from DOF
Plaintiff's Reply Motion Record, if any	Within 120 days from DOF
Cross-examinations, if any, to be completed	Within 150 days from DOF
Undertakings answered	Within 180 days from DOF
Motions arising from cross examinations, if any, heard	Within 120 days from DOF
Further cross-examinations, if necessary, completed by	Within 230 days of DOF
Plaintiff's Factum	Within 250 days from DOF
Respondent's Factum	Within 280 days from DOF
Plaintiff's Reply, if any	Within 300 days from DOF
Motion for Certification and all other Motions commencing	Within 310 days from DOF

31. The parties agree that they will file the information required under Rule 37.10.1 of the *Rules* and as further described in Part B – Section 6 of the *Best Practices Guide For Class Actions in Ontario* in advance of the Certification Motion and any other preliminary motions. Notwithstanding the time prescribed by Rule 37.10.1, the parties agree that they will the information required no later than 10 days before the hearing of the Certification Motion.

POST-CERTIFICATION PROCESS

A. Timetable

i. Plaintiff's Timetable for the Post-Certification Process

32. The Plaintiff intends to proceed to trial on an expedited basis. The Plaintiff intends to proceed to a Trial under Rule 52. However, if appropriate, and the parties consent or the Court directs, the parties may proceed to a Summary Trial.

33. The Plaintiff proposes that the following post-Certification process timetable, as explained in detail below, be imposed by the Court upon Certification:

Certification Notice to Class Members commences	Upon Certification
Exchange Affidavits of Documents within	30 days
Motions for Production of Documents, Multiple Examinations of Crown representatives or for Examinations of Non-Parties to be conducted within	60 days
Examinations for Discovery to be conducted within	90 days
Certification Notice to Class Members completed within	90 days

Trial Management Conference re: Expert Evidence	100 days
Motions arising from Examinations for Discovery within	120 days
Undertakings answered within	135 days
Further Examinations, if necessary, within	150 days
Common Issues Pre-Trial to be conducted	150 days
Opt Out Period deadline	180 days
Common Issues Trial or Hybrid Trial to be conducted within	240 days

B. Certification Notice, Notice Program and Opt Out Procedures

i. Certification Notice

34. The Certification Notice and all other notices to Class Members and Subclass Members provided by the Plaintiff will, once finalized and approved by the Court, be translated into French.

35. The Plaintiff will explore whether it will be necessary to translate the Certification Notice and/or other notices and documents provided to Class Members and Subclass Members into some First Nations languages spoken within Treaty 9 Territory, subject to Court approval.

36. The Certification Notice will, subject to any amendments, be in the form set out in Schedule A hereto.

ii. Notice Program

37. The Plaintiff proposes to communicate the Certification Notice to Class and Subclass Members through the below described Notice Program.

38. The Plaintiff will provide Certification Notice to Class Members and Subclass Members by arranging to have the Certification Notice (and its translated versions where applicable) communicated or published in the following media within 90 days of Certification, as frequently as may be reasonable or as directed by the Court under section 17 of the *Act*. In particular, the Plaintiff proposes the following means of providing Certification Notice:

(a) A press release within 15 days of the Certification order being issued;

(b) Direct communication with Class Members and Subclass Members:

i. by email or regular mail to the last known contact information of Class Members and Subclass Members provided by the Crown (*i.e.*, Crown Class Member Information);

ii. by email or regular mail to all Class Members and Subclass Members who have provided their contact information to Class Counsel, including through the Class Proceeding's webpage;

(c) Distribution to the Assembly of First Nations for circulation to its membership of First Nations bands

across Treaty 9, and to all regional Councils of Chiefs within Treaty 9, including without limitation Mushkegowuk Council and Nishnawbe Aski Nation.

(d) Circulation through the following media:

- i. Aboriginal newspapers/publications APTN National News;
- ii. radio outlets, such as Aboriginal radio CBC National, CBC Regional, and CBC North; and/or,
- iii. television outlets, such as CBC/ICI Television and The Aboriginal Peoples Television Network;

iii. Opt Out Procedures

39. The Plaintiff proposes Opt Out Procedures for Class Members and Subclass Members who do not wish to participate in the class proceeding.

40. The Certification Notice will include information about how to Opt Out of the class proceeding and will provide information about how to obtain and submit the appropriate Opt Out Forms to the Class Action Administrator and/or Class Counsel.

41. There will be one standard Opt Out Form for all Class Members and Subclass Members. Class Members and Subclass Members will be required to file the Opt Out Form with the Class Action Administrator and/or Class Counsel within the Opt Out Period, proposed by the Plaintiff as 60 days post Certification or as directed by the Court.

The Class Action Administrator or Class Counsel shall, within 30 days after the expiration of the Opt Out Period, deliver to the Court and the Parties an affidavit listing the names of all persons who have opted out of the Class Action.

C. Identifying and Communicating with Class Members

i. Identifying Class Members

42. As stated above, the Plaintiff intends to request the Crown Class Member Information.

ii. Database of Class Members

43. Class Counsel will maintain a confidential database of all Class Members and Subclass Members who contact Class Counsel. The database will include each Class Member's and Subclass Member's name, address, telephone number, and email address where available.

iii. Responding to Inquiries from Class Members

44. Class Counsel and their staff will respond to each inquiry by Class Members and Subclass Members.

45. Class Counsel will have a system in place to allow for responses to inquiries by Class Members and Subclass Members in their official language of their choice, and where necessary and approved, a First Nations language spoken within Treaty 9 Territory.

iv. Post Certification Status Reports

46. In addition to responding to individual inquiries, Class Counsel will continually update the webpage dedicated to this class action with information

concerning the status of the class proceeding.

47. Class Counsel will send update reports to Class Members and Subclass Members who have provided their contact information. These update reports will be sent as necessary or as directed by the Court.

D. Documentary Production

i. Affidavit/List of Documents

48. The Plaintiff will be required to deliver an Affidavit of Documents within 30 days after Certification. The Attorney General of Canada will similarly be required to deliver a List of Documents within 30 days after Certification.

49. The Parties are expected to serve Supplementary Affidavits (or Lists) of Documents as additional relevant documents are located in accordance with the regular laws and Rules with respect to ongoing discovery and disclosure.

ii. Production of Documents

50. All Parties are expected to provide, at their own expense, electronic copies of all Schedule “A” productions at the time of delivering their Affidavit of Documents. All productions are to be made in electronic format.

iii. Motions for Documentary Production

51. Any motions for documentary production shall be made within 60 days of Certification.

iv. Document Management

52. The Parties will each manage their productions with a compatible

document management system, or as directed by the Court. All documents are to be produced in OCR format. The Plaintiff and the Attorney General of Canada will coordinate compatibility with each of their respective eDiscovery and document management systems.

53. All productions should be numbered and scanned electronically to enable quick access and efficient organization of documents. The Plaintiff and the Attorney General of Canada will create a unified document index and bates numbering systems.

E. Examinations for Discovery

54. Examinations for Discovery will take place within 90 days after Certification.

55. The Plaintiff expects to request the Crown's consent to examine more than one Crown representative. In the event that a dispute arises in this regard, the Plaintiff proposes to resolve the matter at a case management conference, failing which, the Plaintiff will bring a motion within 60 days after Certification.

56. The Plaintiff anticipates that the Examination for Discovery of a properly selected and informed officer of the Crown will take approximately 10 days, subject to refusals and undertakings.

57. The Plaintiff anticipates that the Examination for Discovery of the representative Plaintiff will take approximately two days, subject to refusals and undertakings.

F. Interlocutory Matters

i. Motions for Refusals and Undertakings

58. Specific dates for motions for undertakings and refusals that arise from the Examinations for Discovery will be requested upon Certification. Motions for refusals and undertakings will be heard within 120 days of Certification.

ii. Undertakings

59. Undertakings are to be answered within 35 days of Certification.

iii. Re-Attendances and Further Examinations for Discovery

60. Any re-attendances or further Examinations for Discovery required as a result of answers to undertakings or as a result of the outcome of the motions for refusals and undertakings should be completed within 150 days of Certification.

G. Expert Evidence

i. Identifying Experts and Issues

61. A Trial Management Conference will take place following Examinations for Discovery at which guidelines for identifying experts and their proposed evidence at trial will be determined. The Experts may or may not include those experts that were retained by either the Plaintiff or the Attorney General of Canada for the purposes of the Motion for Certification.

62. The Plaintiff has identified the following initial experts that are required:

(a) An expert to testify to a plausible methodology for the calculation of damages.

(b) An expert to testify to the factual basis for the common issues

between Class Members.

63. The parties will identify further experts as the matter progress and as they become necessary.

H. Determination of the Common Issues

i. Pre-Trial of the Common Issues

64. Upon Certification, the Court will be asked to assign a date for a Pre-Trial relating to the Common Issues trial.

65. The Plaintiff expects that two full days will be required for a Pre-Trial and will request that the Pre-Trial be held 150 days after Certification and, in any event, at least 90 days before the date of the Common Issues trial.

ii. Trial of the Common Issues

66. Upon Certification, the Court will be asked to assign a date for the Common Issues trial.

67. The Plaintiff proposes that the trial of the Common Issues be held 240 days after Certification.

68. The length of time required for the Common Issues trial will depend on many factors and will be determined at the Trial Management Conference

POST COMMON ISSUES DECISION PROCESS

A. Timetable

i. Plaintiff's Timetable for the Post-Common Issues Decision Process

69. The Plaintiff proposes that the following timetable be imposed by the

Court following the Court's judgment on the Common Issues:

Common Issues Notice provided	Within 90 days of Common Issues decision
Individual Issue Hearings, if any, begin	120 days after decision
Individual Damage Assessments, if any, begin	240 days after decision
Deadline to Submit Claim Forms (as of right)	Within 1 year of decision
Deadline to Submit Claim Forms (as of right in prescribed circumstances or with leave of the Court)	1 year after decision

70. Given the nature of the Class Action, the parties do not expect there to be any Individual Issues. However, if this changes the parties will amend the Litigation Plan to include a procedure with respect to Individual Issues in accordance with section 25 of the *Act*.

B. Common Issues Notice

i. Notifying Class Members and Subclass Members

71. The Common Issues Notice will, subject to further amendments, be substantially in the form approved by the Court at the Common Issues trial. The Common Issues Notice may contain, amongst others, information on any aggregate damages awarded and any issues requiring individual determination, as approved by the Court.

72. The Plaintiff proposes to circulate the Common Issues Notice within 90 days after the Common Issues judgment.

73. The Common Issues Notice will be circulated in the same manner as set out above dealing with the Certification Notice or as directed by the Court.

C. Claim Forms

i. Use of Claim Forms

74. The Court will be asked to approve under section 21(4)(6)(a) of the *Act* the use of standardized claims forms by Class Members and Subclass Members who may be entitled to a portion of the aggregate damage award or who may be entitled to have an individual assessment.

ii. Obtaining and Filing Claim Forms

75. The procedure for obtaining and filing Claim Forms will be set out in the Common Issues Notice.

76. The Plaintiff proposes to use a single standard Claim Form, substantially in the form attached as Schedule C, for all three classes, subject to further amendments and as approved by the Court.

77. The Plaintiff proposes that support be made available to Class Members and Subclass Members in need of support and assistance when completing the Claim Forms. Where necessary, a process for appointing a guardian or trustee to assist the Class Members and Subclass Members will be developed.

78. Before completing a Claim Form, Class Members and Subclass Members will be able to review information about them in the possession of Canada relevant to their claim (the Crown Class Member Information).

79. Class Members and Subclass Members will be required to file the appropriate Claim Form with the Class Action Administrator and/or Class Counsel within the deadlines set out below or as directed by the Court.

80. The Class Action Administrator will be responsible for receiving all Claim Forms.

iii. Deadline for Filing Claim Forms

81. Class Members and Subclass Members will be advised of the deadline for filing Claim Forms in the Common Issues Notice.

82. The Plaintiff proposes that Class Members and Subclass Members be given one year, or such period as set out by the Court, after the Common Issues judgment to file Claim Forms as of right.

83. The Plaintiff proposes that Class Members and Subclass Members be entitled to file Claim Forms more than one year after the Court's judgment on the Common Issues in certain circumstances prescribed by the Court (i.e., lack of awareness of entitlement, etc.) or with leave of the Court (i.e., based on mental or physical health issues, etc.).

D. Determining and Categorizing Class Membership

i. Approving Class Members and Subclass Members

84. The Class Action Administrator will determine whether a First Nation or its individual members submitting a Claim Form as a Class Member or Subclass Member properly qualifies as a Class Member or Subclass Member.

85. The Class Action Administrator will make these determinations by referring to the information set out in the Claim Form as well as the Crown Class Member Information.

ii. Notifying Class Members/Subclass Members, Challenging and Recording Decisions

86. Within 30 days of receipt of a Claim Form, the Class Action Administrator will notify the First Nation on whether the First Nation is an Approved Class Member. First Nations who are not approved as Class Members will be provided with information on the procedures to follow to challenge the decision of the Class Action Administrator. The Plaintiff proposes that these procedures include an opportunity to resubmit an amended Claim Form with supporting documentation capable of verifying that the individual is a Class Member.

87. The same process applies for individuals who seek to be approved Subclass Members.

88. All interested parties will be provided with the ability to appeal a decision by the Class Action Administrator to the Court or in a manner to be prescribed. Proposed Class Counsel may challenge the decision on behalf of affected individuals.

89. The Class Action Administrator will keep records of all Approved Class Members (Subclass Members) and their respective Claim Forms and will provide this information to Class Counsel, the Crown and other interested parties on a monthly basis. Class Counsel and/or other interested parties will have 30 days after

receiving this information to challenge the Class Action Administrator's decision by advising the Class Action Administrator and the other affected parties in writing of the basis for their challenge. The responding party will be given 30 days thereafter to respond in writing to the challenge at which time the Class Action Administrator will reconsider its decision and advise all parties.

Equitable Compensation Distribution Process

i. Distribution of Equitable Compensation

90. The Class Action Administrator will distribute the equitable compensation to all Approved Class Members and Subclass Members in the manner directed by the Court. The Class Action Administrator will be required to determine a method of distribution that ensures that each First Nation that is an Approved Class Member or Subclass Member will receive its proportionate share of the equitable compensation.

91. The Plaintiff will propose that Approved Class Members and Subclass Members be entitled to a proportion of the equitable compensation as determined by the Class Action Administrator based on factor to be approved by the Court for::
(a) the losses they have suffered related to the Crown's breaches of its Treaty, legal, fiduciary and honourable obligations by failing to increase or index the Annuity Payments as promised by the Crown under the terms of Treaty 9

92. The Class Action Administrator, upon advising Approved Class Members and Subclass Members of its decision on their membership as set out above, will within a reasonable period of time to be determined by the Court, advise the

Approved Class Members and Subclass Members of the proportion of equitable compensation owing to each Approved Class Member or Subclass Member under the Distribution Process to be approved by the Court.

E. Class Proceeding Funding and Fees

i. Plaintiff's Legal Fees

93. The Plaintiff's fees are to be paid on a contingency basis, subject to the Court's approval under section 32(1) of the Act.

94. The agreement between the representative Plaintiff and Class Counsel states that legal fees and disbursements to be paid to Class Counsel shall be on the following basis:

(a) Class damages recovery: 20% of the first two hundred million dollars (\$200,000,000) in recovery by settlement or judgment, plus 10% of any amounts recovered by settlement or judgment beyond the first two hundred million dollars; and

(b) Individual damages recovery: 25% of settlement or judgment.

ii. Funding of Disbursements

95. Funding of legal disbursements for the representative Plaintiff has been, and will continue to be, available through Class Counsel, unless the Plaintiff and Class Counsel subsequently deem it to be in the best interests of the Class to obtain third-party funding. Class Counsel will advise the Court of such

third-party funding and seek approval thereof if required.

F. Settlement Issues

i. Settlement Offers and Negotiations

96. The Plaintiff will conduct settlement negotiations with the Crown from time to time with a view to achieving a fair and timely resolution.

ii. Mediation and Other Non-Binding Dispute Resolution Mechanisms

97. The Plaintiff will participate in mediation or other non-binding dispute resolution mechanisms, if and when appropriate, in an effort to try to resolve the dispute or narrow the issues in dispute between the Parties.

I. Review of the Litigation Plan

i. Flexibility of the Litigation Plan

98. This Litigation Plan will be reconsidered on an ongoing basis and may be revised under the continued case management authority of the Court before or after the determination of the Common Issues or as the Court sees fit.

July 25, 2024 **MAURICE LAW
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& SOLICITORS**
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Lawyers for the Proposed Representative Plaintiff, Proposed Class C

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-

ATTORNEY GENERAL OF CANADA

Defendant

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

AFFIDAVIT OF CHIEF BRUCE ARCHIBALD
Affirmed July 29, 2024 (in support of Certification Motion)

I, BRUCE ARCHIBALD, of Taykwa Tagamou Nation in the Province of Ontario, DO
SOLEMNLY AFFIRM THAT:

1. I am a member of and the Chief of the Taykwa Tagamou Nation (“Taykwa Tagamou”), a signatory to James Bay Treaty No. 9 (“Treaty 9”). I have served as Chief since October 14th, 2021.
2. I have personal knowledge of the facts and matters set out in this Affidavit, except where same are stated to be based upon information and belief. Where I have been informed of facts, I have stated the source of my information and I hereby confirm that I believe such facts to be true.
3. I am an “Indian” and the Taykwa Tagamou Nation is an “Indian Band” within the meaning of the *Indian Act*, R.S.C. 1985, c. 1-5, as amended.
4. I submit this Affidavit in support of the plaintiff, Missanabie Cree First Nation’s motion to certify the claim (the “Treaty 9 Disparity Class Action”) set out in the Statement of Claim filed with the Court on May 8, 2023 and attached hereto and marked as **Exhibit “A”** as amended pursuant to the Fresh-As-Amended Claim, an unfiled copy of which is attached hereto and marked as **Exhibit “B”**. I have had an opportunity to review the Statement of Claim and the Fresh-As-Amended Statement of Claim and to speak with counsel for the plaintiff about the Class Action.
5. Taykwa Tamagou supports and endorses the Treaty 9 Disparity Class Action and supports an order certifying the Class Action and appointing Missanabie Cree First Nation (“Missanabie”) as the representative plaintiff for a class defined as “all Treaty 9 First Nations” (the “Class”) which includes Taykwa Tamagou. As a member of Taykwa Tamagou and a recipient of Annuities Payments under Treaty 9, I also support and endorse Chief Gauthier as the representative plaintiff for the subclass of Treaty 9 Members Subclass who are all individuals who receive Annuity Payments and are members of Treaty 9 Nations. It is my belief that Missanabie and Chief Gauthier are capable of fairly and adequately advancing the interests of the Class and Subclass and that their legal counsel are competent counsel for the purposes of these class proceedings.
6. If necessary, Taykwa Tamagou is prepared to become a co-representative plaintiff in the Treaty 9 Disparity Class Action. As Chief of a putative representative plaintiff, I understand that my role will be to:

- (a) become familiar with the issues to be decided by the Court;
- (b) review the Statement of Claim and any further amendments;
- (c) assist in the preparation and execution of this affidavit in support of the motion for certification;
- (d) attend, if necessary, with counsel to be cross-examined on my affidavit;
- (e) attend, if necessary, with counsel for my examination for discovery where I will be asked questions;
- (f) assist, if necessary, in preparation and execution of an affidavit listing the relevant documents that I have or previously had in my possession or under my control;
- (g) attend, if necessary, with counsel at the trial to observe and/or give evidence;
- (h) receive briefings from counsel from time to time;
- (i) to express my opinions on strategy to counsel;
- (j) to express my opinion to counsel and to the Court if settlement positions are to be formulated; and
- (k) to assist in the preparation and execution of an affidavit in support of a motion seeking the Court's approval of a settlement if there is one.

INVOLVMENT IN NISHNAWBE ASKI NATION (NAN)

7. Taykwa Tagamou Nation is a Member Nation of the Nishnawbe Aski Nation ("NAN"), an organization that represents forty-nine (49) First Nations with a total population of approximately

45,000 people living on and off reserve. NAN includes First Nations that have not been recognized by Canada in addition to Nations that are recognized adherents to Treaties 3, 5, 9 and the Robinson Superior Treaty.

8. As Chief of Taykwa Tagamou, I participate in the Chiefs-in-Assembly which consists of all of the Chiefs or their delegates of the NAN Member Nations. The Chiefs-in-Assembly meets four times per year, in the winter, spring, summer and fall, and passes resolutions authorizing the Executive Council of NAN to carry out its mandates in relation to various portfolios.

9. During the Chiefs-in-Assembly's winter session that took place February 6 – 8, 2024, the Chiefs and their delegates agreed to unanimously support the Treaty 9 Disparity Class Action following a presentation by legal counsel for Missanabie. I was not present at the winter session but was briefed on the matter by my delegate who acted on my behalf in my absence and who voiced unanimous support of the Treaty 9 Disparity Class Action alongside the other Chiefs or delegates from all of the NAN Member Nations. Consistent with my delegate's position at the meeting, Taykwa Tagamou continues to support and endorse the Treaty 9 Disparity Class Action and the motion to certify same as a class action.

10. I make this Affidavit in support of the motion for certification of the Treaty 9 Disparity Class Action and for no improper purpose.

**AFFIRMED BEFORE ME in the city of
Ottawa in the province of Ontario** on July
29, 2024 in accordance with O.Reg. 431/20,
Administering Oath or Declaration Remotely.

Antonela Cicko

Antonela Cicko
**A Commissioner for Taking Affidavits in
the Province of Ontario**



CHIEF BRUCE ARCHIBALD
Chief of Taykwa Tagamou Nation

This is **Exhibit “A”** to the Affidavit of
Bruce Archibald sworn July 29, 2024.

Antonela Cicko

A Commissioner for Taking Affidavits



Court File No. _____

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

**CHIEF JASON GAUTHIER, on behalf of the
MISSANABIE CREE FIRST NATION and on behalf of all
Treaty 9 First Nations in the Province of Ontario**

Plaintiff

-and-

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

Defendant

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

STATEMENT OF CLAIM

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

CLAIM

OVERVIEW

1. This claim is a proposed class proceeding challenging the Crown's failure to diligently implement the terms of the James Bay Treaty #9 ("Treaty 9") and the failure to honour the spirit and intent of the solemn Treaty relationship and promises made by the Crown with the Treaty 9 Bands.
2. From the time when Treaty 9 was entered into in 1905 and 1906, the Crown has declined or failed to augment or increase the annual payments of \$4 to each Indian person as set out in Treaty 9 for the purposes of offsetting the impacts of inflation and maintaining the purchasing power.
3. The Crown also breached other treaty obligations and failed to uphold the Honour of the Crown by entering into and implementing Treaty 9 on terms that were foolish, improvident, or otherwise amounted to exploitation of the Indians located within the boundaries of Treaty 9.

RELIEF SOUGHT

4. The Plaintiff, on behalf of the Class, 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;
 - b. A Declaration that the Defendant failed to act in good faith and that its conduct in the negotiation and implementation of Treaty 9 constitutes a breach of Treaty, the Honour of the Crown, fiduciary duty, and equitable fraud;
 - c. A Declaration that the Defendant has an ongoing obligation to increase the annual payment of \$4 payable to each Treaty Indian "for ever" (the "Treaty Annuities" or "Annuity Payments") as promised by the Crown under the terms of Treaty 9 to maintain the real value of the Annuity Payments and the effect of this promise to the Treaty 9 Indian Bands in exchange for the

taking of over approximately 218,320 square miles of land rich in natural resources, being over two-thirds of what is now the province of Ontario;

- d. A Declaration that the Defendant breached the Honour of the Crown and the terms of Treaty 9 by failing to increase the Treaty Annuities from time to time to maintain their real value and the purchasing power of the Annuity Payments of \$4, the value of which has been seriously eroded due to inflation;
- e. A Declaration that the Defendant breached the Honour of the Crown and fiduciary duty 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;
- f. 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;
- g. A Declaration that the Defendant breached its fiduciary duty to the Plaintiff and other Treaty 9 Indians when the Governor-in-Council approved and consented to Treaty 9 on terms which were foolish, improvident, and otherwise amounted to exploitation;
- h. A Declaration that the surrender and release in Treaty 9 should be set aside on the grounds that its terms were unconscionable, foolish, and improvident and the Crown failed to diligently implement the terms of Treaty 9 in a uniform and equitable manner for all Treaty 9 Bands;
- i. An Order that the Defendant is liable to pay damages for breach of Treaty 9 and for breach of the honour of the Crown and fiduciary duty in the sum of \$10 billion or such other amount as this Honourable Court deems fit to

account for the disparity of the terms of Treaty 9 compared to those Treaties which preceded and followed the signing of Treaty 9 in 1905;

- j. An Order that the Defendant is liable to pay punitive damages in such amount as this Honourable Court deems just;
- k. Equitable compensation, or pre- and post-judgment interest pursuant to the provisions of the *Courts of Justice Act*, R.S.O. 1990, c. C-43, as amended;
- l. Costs of this action on a substantial or full indemnity basis, including costs of notice and class administration;
- m. Such further and other relief as counsel may advise and this Honourable Court deem just.

FACTS

The Parties

- 5. The Plaintiff is the Chief of the Missanabie Cree First Nation, which has been a party to Treaty 9 since 1906. The Plaintiff is an “Indian” and the Missanabie Cree First Nation is an “Indian Band” within the meaning of the *Indian Act*, R.S.C. 1985, c. 1-5, as amended.
- 6. The Plaintiff brings this claim on behalf of Missanabie Cree First Nation and on behalf of all Treaty 9 First Nations in the province of Ontario. While Treaty Annuities are paid to individuals, the promise to provide Treaty Annuities was a promise made to “bands” as the rights-bearing collectives recognized under Treaty 9. Treaty Annuities 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.
- 7. The proposed class for this action includes forty-nine (49) First Nations which are collectively the successors to the signatories and adherents of Treaty 9:

- Aroland First Nation;

- Attawapiskat First Nation (formerly Attawapiskat Band of Cree);
- Bearskin Lake First Nation;
- Beaverhouse First Nation;
- Brunswick House First Nation (formerly New Brunswick House Band of Ojibway);
- Cat Lake First Nation;
- Chapleau Cree First Nation (formerly Chapleau Community of Moose Factory Band of Cree);
- Chapleau Ojibwe First Nation (formerly Chapleau Band of Ojibway);
- Constance Lake First Nation (formerly English River Band of Oji-Cree);
- Deer Lake First Nation;
- Eabametoong First Nation (also known as Fort Hope First Nation);
- Flying Post First Nation (formerly Flying Post Indians);
- Fort Albany First Nation (formerly Fort Albany Band of Cree);
- Fort Severn First Nation;
- Ginoogaming First Nation (formerly Long Lake Band of Ojibway);
- Hornepayne First Nation;
- Kasabonika Lake First Nation;
- Kashechewan First Nation;
- Keewaywin First Nation;
- Kingfisher Lake First Nation;
- Koocheching First Nation;
- Lac Seul First Nation;
- Long Lake #58 First Nation;
- McDowell Lake First Nation;
- Marten Falls First Nation (formerly Marten Falls Band of Oji-Cree);

- Matachewan First Nation (formerly Matchewan Indians);
- Mattagami First Nation;
- Mishkeegogamang First Nation (formerly known as New Osnaburgh First Nation);
- Missanabie Cree First Nation;
- Mocreebec Council of Cree Nation
- Moose Cree First Nation (formerly Moose Factory Band of Cree);
- Muskrat Dam First Nation;
- Neskantaga First Nation (also known as Lansdowne House First Nation);
- Nibinamik First Nation (also known as Summer Beaver First Nation);
- North Caribou Lake First Nation;
- North Spirit Lake First Nation;
- Pikangikum First Nation;
- Poplar Hill First Nation;
- Sachigo Lake First Nation;
- Sandy Lake First Nation;
- Slate Falls Nation;
- Taykwa Tagamou Nation (formerly New Post Band of Cree);
- Wahgoshig First Nation (formerly Abitibi-Ontario Band of Abitibi Indians);
- Wapekeka First Nation;
- Wawakapewin First Nation;
- Webequie First Nation;
- Weenusk First Nation (formerly Winisk Band of Cree);
- Whitewater Lake First Nation; and
- Wunnumin Lake First Nation.

8. 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 Bands 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 has, and had at all material times, fiduciary obligations to the Treaty 9 First Nations 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.

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

9. 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.
10. 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.

11. 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.
12. 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 in exchange for rights and interests to land.
13. 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 their agreement to cede their collective rights and interests to a vast area of land. 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.
14. 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.

15. Particularly instructive of the Crown's promise in relation to the Treaty benefits promise is the 1850 Robinson Treaties which informed the terms of the numbered treaties that followed thereafter.

Unity of the terms of the numbered Treaties

16. 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.
17. 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.
18. 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.*

19. 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

20. 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.
21. 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.
22. 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.
23. 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.
24. 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.”

25. 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.
26. 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.
27. 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.
28. 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.
29. 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.
30. 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.
31. 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.
32. 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.
33. 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

34. 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.
35. 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.
36. The written text of Treaty 9 states that it was entered 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 Ojibway, Cree and other Indians, inhabitants of the territory within the limits hereinafter defined and described”.
37. 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 to some but not all Bands, and distributed various goods and cash payments on behalf of the Crown.
38. 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).

39. 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.
40. 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.
41. The second expedition in 1906 went to:
- a. Abitibi Post (Abitiwinini 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).
42. 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.
43. 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 consent to the terms offered by the Crown.

44. 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*.
45. 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.
46. 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

47. 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.

48. According to the written text of the 1929 and 1920 adhesions, the Indians who adhered 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, ...

49. In total, the territory of Treaty 9 and its adhesions covers more than two-thirds of what is now the province of Ontario.
50. In exchange, Treaty 9 signatory Indian Bands 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.

51. 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.

52. 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

53. 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 net twice, chests of carpenters 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. Unlike its immediate predecessor and successor, 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 severality” was because populations were not as concentrated in the North.

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

54. In the years since the signing of Treaty 9, the relative value of the Annuity Payments has decreased due to inflation to the point of rendering the Annuity Payments virtually meaningless in terms of purchasing power.
55. 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.

LIABILITY

56. The Plaintiff claims that the federal Crown breached its Treaty, fiduciary, honourable, legal and 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 meet its ongoing obligation to increase the Annuity Payments, as promised by the Crown under the terms of Treaty 9, to maintain the real value of the Treaty Annuities over time;

- f. breached the terms of Treaty 9 by failing to increase the Treaty Annuities from time to time to maintain their real value and purchasing power of the Annuity Payments of \$4, the value of which has been seriously eroded due to inflation;
- g. failed to provide economic assistance in agriculture, stock-raising, or other work and an annual distribution of twine and ammunition to Treaty 9 Indians;
- h. breached the Honour of the Crown, fiduciary duties, Treaty 9 and the surrender provisions of the *Indian Act* 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

- 57. 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 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.
- 58. It is well-established at law that the Crown must conduct itself honourably in the making and diligent implementation of Treaties.
- 59. Further, where the Crown assumes discretionary control over a specific or “cognizable” Aboriginal interest (such as Aboriginal Title that existing prior to Treaty), 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.

60. The Plaintiff claims 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.
61. The Plaintiff claims 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.
62. The Plaintiff claims 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.
63. The Plaintiff claims 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 Annuities Payment

64. 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*.
65. 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.

66. The Treaty-making process and the promises arising therefrom, which resulted in the Crown's taking of lands held pursuant to Aboriginal Title in exchange for certain promises, necessarily requires an interpretation of the Treaty that maintains fidelity to the spirit and intent of the Treaty. The Annuity Payments 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.
67. The intention of the Annuity Payment term in Treaty 9 was clear: in exchange for the surrender of vast traditional territories and natural resource wealth, the Crown was, in part, to provide Annuity Payments to assist the Indians in offsetting the costs of the basic necessities they required to subsist. 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.
68. The Plaintiff claims that, when properly interpreted, Treaty 9 includes an implied promise to augment or increase the amount of the Treaty Annuities from time to time.
69. The Plaintiff claims that the Crown has an ongoing Treaty, fiduciary, and/or honourable obligation to increase the Annuity Payments, as promised by the Crown under the terms of Treaty 9, to maintain the real value of the Treaty Annuities over time.
70. The Plaintiff claims that the Crown has failed to fulfill its legal obligations to provide and to properly administer the Annuity Payments by failing to increase or index the annual payments to retain their purchasing power. In the years since the signing of Treaty 9, the relative value of the Annuity Payments has decreased due to inflation to the point of rendering the Annuity Payments virtually useless

in terms of purchasing power. The failure to index the Annuity Payments to account for inflation has resulted in the erosion of the value of the Annuity Payments to the point of being worthless.

Crown breaches give rise to liability for the payment of equitable compensation to the Treaty Bands

71. The Crown is liable to provide equitable compensation to the Treaty 9 First Nations for the losses they have suffered related to the Crown's breaches of its Treaty, legal, fiduciary, and honourable obligations.
72. On behalf of the Class, the Plaintiff claims declaratory and monetary relief and equitable compensation for breaches of Treaty 9 and for breach of the Honour of the Crown and fiduciary duty in the sum of \$10 billion or such other amount as the Honourable Court deems just.
73. The Plaintiff proposes that this action be tried in the City of Sudbury in the Province of Ontario.

Dated May 8, 2023



Ron S. Maurice
Ryan M. Lake
Geneviève Boulay

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Lawyers for the Plaintiff

Court File No. _____

***CHIEF JASON GAUTHIER, on behalf of the
MISSANABIE CREE FIRST NATION***
Plaintiff

v.

THE ATTORNEY GENERAL OF CANADA
Defendant

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Sault Ste. Marie

STATEMENT OF CLAIM

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Lawyers for the Plaintiff

This is **Exhibit “B”** to the Affidavit of
Bruce Archibald, sworn July 29, 2024.

Antonela Cicko

A Commissioner for Taking Affidavits

**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**

Defendant

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

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

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* adhesion 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 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 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 failure to increase, augment or index the Annuity Payment has unjustly enriched the Defendant 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 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 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 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 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 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 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 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 breaches of Treaty 9, the Honour of the Crown, and the Defendant'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.

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

15. 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.
16. 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.
17. 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.
18. 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.

19. 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.
20. The Treaties were relational agreements that incorporated the concept of sharing the benefits of the land.
21. 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.
22. 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

23. 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.

24. 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.
25. 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.*

26. 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

27. 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.
28. 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.
29. 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.

30. 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.
31. 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.”
32. 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.

33. 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.
34. 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.

35. 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.
36. 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.
37. 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.

38. 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.
39. 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.
40. 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

41. 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.

42. 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.
43. 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”.
44. 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.
45. 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).
46. 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.
47. 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.

48. The second expedition in 1906 went to:
 - a. Abitibi Post (Abitibiwinini 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).
49. 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.
50. 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.
51. 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*.

52. 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.
53. 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

54. 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.

55. 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, ...

56. In total, the territory of Treaty 9 and its adhesions covers more than two-thirds of what is now the province of Ontario.
57. 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.
58. 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.
59. 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

60. 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

61. 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.
62. 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.
63. 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

64. The Plaintiffs claim that the Defendant 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

- 65. 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.

66. It is also well-established at law that the Crown must conduct itself honourably in the making and diligent implementation of Treaties.
67. 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.
68. 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.
69. 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.
70. 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.
71. 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

72. 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*.
73. 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.
74. 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.
75. 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.
76. 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.

77. 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.
78. 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

79. 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.
80. The Plaintiffs claim, *inter alia*:
- a. 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 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 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 breaches of Treaty 9, the Honour of the Crown, and the Defendant's fiduciary or other legal or equitable duties owing to the Treaty 9 signatories;

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

Dated July 29, 2024



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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

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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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-

ATTORNEY GENERAL OF CANADA

Defendant

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

AFFIDAVIT OF CHIEF BRUCE ARCHIBALD
Affirmed July 29, 2024 (in support of Certification Motion)

I, BRUCE ARCHIBALD, of Taykwa Tagamou Nation in the Province of Ontario, DO
SOLEMNLY AFFIRM THAT:

1. I am a member of and the Chief of the Taykwa Tagamou Nation (“Taykwa Tagamou”), a signatory to James Bay Treaty No. 9 (“Treaty 9”). I have served as Chief since October 14th, 2021.
2. I have personal knowledge of the facts and matters set out in this Affidavit, except where same are stated to be based upon information and belief. Where I have been informed of facts, I have stated the source of my information and I hereby confirm that I believe such facts to be true.
3. I am an “Indian” and the Taykwa Tagamou Nation is an “Indian Band” within the meaning of the *Indian Act*, R.S.C. 1985, c. 1-5, as amended.
4. I submit this Affidavit in support of the plaintiff, Missanabie Cree First Nation’s motion to certify the claim (the “Treaty 9 Disparity Class Action”) set out in the Statement of Claim filed with the Court on May 8, 2023 and attached hereto and marked as **Exhibit “A”** as amended pursuant to the Fresh-As-Amended Claim, an unfiled copy of which is attached hereto and marked as **Exhibit “B”**. I have had an opportunity to review the Statement of Claim and the Fresh-As-Amended Statement of Claim and to speak with counsel for the plaintiff about the Class Action.
5. Taykwa Tamagou supports and endorses the Treaty 9 Disparity Class Action and supports an order certifying the Class Action and appointing Missanabie Cree First Nation (“Missanabie”) as the representative plaintiff for a class defined as “all Treaty 9 First Nations” (the “Class”) which includes Taykwa Tamagou. As a member of Taykwa Tamagou and a recipient of Annuities Payments under Treaty 9, I also support and endorse Chief Gauthier as the representative plaintiff for the subclass of Treaty 9 Members Subclass who are all individuals who receive Annuity Payments and are members of Treaty 9 Nations. It is my belief that Missanabie and Chief Gauthier are capable of fairly and adequately advancing the interests of the Class and Subclass and that their legal counsel are competent counsel for the purposes of these class proceedings.
6. If necessary, Taykwa Tamagou is prepared to become a co-representative plaintiff in the Treaty 9 Disparity Class Action. As Chief of a putative representative plaintiff, I understand that my role will be to:

- (a) become familiar with the issues to be decided by the Court;
- (b) review the Statement of Claim and any further amendments;
- (c) assist in the preparation and execution of this affidavit in support of the motion for certification;
- (d) attend, if necessary, with counsel to be cross-examined on my affidavit;
- (e) attend, if necessary, with counsel for my examination for discovery where I will be asked questions;
- (f) assist, if necessary, in preparation and execution of an affidavit listing the relevant documents that I have or previously had in my possession or under my control;
- (g) attend, if necessary, with counsel at the trial to observe and/or give evidence;
- (h) receive briefings from counsel from time to time;
- (i) to express my opinions on strategy to counsel;
- (j) to express my opinion to counsel and to the Court if settlement positions are to be formulated; and
- (k) to assist in the preparation and execution of an affidavit in support of a motion seeking the Court's approval of a settlement if there is one.

INVOLVMENT IN NISHNAWBE ASKI NATION (NAN)

7. Taykwa Tagamou Nation is a Member Nation of the Nishnawbe Aski Nation ("NAN"), an organization that represents forty-nine (49) First Nations with a total population of approximately

45,000 people living on and off reserve. NAN includes First Nations that have not been recognized by Canada in addition to Nations that are recognized adherents to Treaties 3, 5, 9 and the Robinson Superior Treaty.

8. As Chief of Taykwa Tagamou, I participate in the Chiefs-in-Assembly which consists of all of the Chiefs or their delegates of the NAN Member Nations. The Chiefs-in-Assembly meets four times per year, in the winter, spring, summer and fall, and passes resolutions authorizing the Executive Council of NAN to carry out its mandates in relation to various portfolios.

9. During the Chiefs-in-Assembly's winter session that took place February 6 – 8, 2024, the Chiefs and their delegates agreed to unanimously support the Treaty 9 Disparity Class Action following a presentation by legal counsel for Missanabie. I was not present at the winter session but was briefed on the matter by my delegate who acted on my behalf in my absence and who voiced unanimous support of the Treaty 9 Disparity Class Action alongside the other Chiefs or delegates from all of the NAN Member Nations. Consistent with my delegate's position at the meeting, Taykwa Tagamou continues to support and endorse the Treaty 9 Disparity Class Action and the motion to certify same as a class action.

10. I make this Affidavit in support of the motion for certification of the Treaty 9 Disparity Class Action and for no improper purpose.

**AFFIRMED BEFORE ME in the city of
Ottawa in the province of Ontario** on July
29, 2024 in accordance with O.Reg. 431/20,
Administering Oath or Declaration Remotely.

Antonela Cicko

Antonela Cicko
**A Commissioner for Taking Affidavits in
the Province of Ontario**



CHIEF BRUCE ARCHIBALD
Chief of Taykwa Tagamou Nation

This is **Exhibit “A”** to the Affidavit of
Bruce Archibald sworn July 29, 2024.

Antonela Cicko

A Commissioner for Taking Affidavits



Court File No. _____

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

**CHIEF JASON GAUTHIER, on behalf of the
MISSANABIE CREE FIRST NATION and on behalf of all
Treaty 9 First Nations in the Province of Ontario**

Plaintiff

-and-

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

Defendant

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

STATEMENT OF CLAIM

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

CLAIM

OVERVIEW

1. This claim is a proposed class proceeding challenging the Crown's failure to diligently implement the terms of the James Bay Treaty #9 ("Treaty 9") and the failure to honour the spirit and intent of the solemn Treaty relationship and promises made by the Crown with the Treaty 9 Bands.
2. From the time when Treaty 9 was entered into in 1905 and 1906, the Crown has declined or failed to augment or increase the annual payments of \$4 to each Indian person as set out in Treaty 9 for the purposes of offsetting the impacts of inflation and maintaining the purchasing power.
3. The Crown also breached other treaty obligations and failed to uphold the Honour of the Crown by entering into and implementing Treaty 9 on terms that were foolish, improvident, or otherwise amounted to exploitation of the Indians located within the boundaries of Treaty 9.

RELIEF SOUGHT

4. The Plaintiff, on behalf of the Class, 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;
 - b. A Declaration that the Defendant failed to act in good faith and that its conduct in the negotiation and implementation of Treaty 9 constitutes a breach of Treaty, the Honour of the Crown, fiduciary duty, and equitable fraud;
 - c. A Declaration that the Defendant has an ongoing obligation to increase the annual payment of \$4 payable to each Treaty Indian "for ever" (the "Treaty Annuities" or "Annuity Payments") as promised by the Crown under the terms of Treaty 9 to maintain the real value of the Annuity Payments and the effect of this promise to the Treaty 9 Indian Bands in exchange for the

taking of over approximately 218,320 square miles of land rich in natural resources, being over two-thirds of what is now the province of Ontario;

- d. A Declaration that the Defendant breached the Honour of the Crown and the terms of Treaty 9 by failing to increase the Treaty Annuities from time to time to maintain their real value and the purchasing power of the Annuity Payments of \$4, the value of which has been seriously eroded due to inflation;
- e. A Declaration that the Defendant breached the Honour of the Crown and fiduciary duty 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;
- f. 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;
- g. A Declaration that the Defendant breached its fiduciary duty to the Plaintiff and other Treaty 9 Indians when the Governor-in-Council approved and consented to Treaty 9 on terms which were foolish, improvident, and otherwise amounted to exploitation;
- h. A Declaration that the surrender and release in Treaty 9 should be set aside on the grounds that its terms were unconscionable, foolish, and improvident and the Crown failed to diligently implement the terms of Treaty 9 in a uniform and equitable manner for all Treaty 9 Bands;
- i. An Order that the Defendant is liable to pay damages for breach of Treaty 9 and for breach of the honour of the Crown and fiduciary duty in the sum of \$10 billion or such other amount as this Honourable Court deems fit to

account for the disparity of the terms of Treaty 9 compared to those Treaties which preceded and followed the signing of Treaty 9 in 1905;

- j. An Order that the Defendant is liable to pay punitive damages in such amount as this Honourable Court deems just;
- k. Equitable compensation, or pre- and post-judgment interest pursuant to the provisions of the *Courts of Justice Act*, R.S.O. 1990, c. C-43, as amended;
- l. Costs of this action on a substantial or full indemnity basis, including costs of notice and class administration;
- m. Such further and other relief as counsel may advise and this Honourable Court deem just.

FACTS

The Parties

5. The Plaintiff is the Chief of the Missanabie Cree First Nation, which has been a party to Treaty 9 since 1906. The Plaintiff is an “Indian” and the Missanabie Cree First Nation is an “Indian Band” within the meaning of the *Indian Act*, R.S.C. 1985, c. 1-5, as amended.
6. The Plaintiff brings this claim on behalf of Missanabie Cree First Nation and on behalf of all Treaty 9 First Nations in the province of Ontario. While Treaty Annuities are paid to individuals, the promise to provide Treaty Annuities was a promise made to “bands” as the rights-bearing collectives recognized under Treaty 9. Treaty Annuities 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.
7. The proposed class for this action includes forty-nine (49) First Nations which are collectively the successors to the signatories and adherents of Treaty 9:

- Aroland First Nation;

- Attawapiskat First Nation (formerly Attawapiskat Band of Cree);
- Bearskin Lake First Nation;
- Beaverhouse First Nation;
- Brunswick House First Nation (formerly New Brunswick House Band of Ojibway);
- Cat Lake First Nation;
- Chapleau Cree First Nation (formerly Chapleau Community of Moose Factory Band of Cree);
- Chapleau Ojibwe First Nation (formerly Chapleau Band of Ojibway);
- Constance Lake First Nation (formerly English River Band of Oji-Cree);
- Deer Lake First Nation;
- Eabametoong First Nation (also known as Fort Hope First Nation);
- Flying Post First Nation (formerly Flying Post Indians);
- Fort Albany First Nation (formerly Fort Albany Band of Cree);
- Fort Severn First Nation;
- Ginoogaming First Nation (formerly Long Lake Band of Ojibway);
- Hornepayne First Nation;
- Kasabonika Lake First Nation;
- Kashechewan First Nation;
- Keewaywin First Nation;
- Kingfisher Lake First Nation;
- Koocheching First Nation;
- Lac Seul First Nation;
- Long Lake #58 First Nation;
- McDowell Lake First Nation;
- Marten Falls First Nation (formerly Marten Falls Band of Oji-Cree);

- Matachewan First Nation (formerly Matchewan Indians);
- Mattagami First Nation;
- Mishkeegogamang First Nation (formerly known as New Osnaburgh First Nation);
- Missanabie Cree First Nation;
- Mocreebec Council of Cree Nation
- Moose Cree First Nation (formerly Moose Factory Band of Cree);
- Muskrat Dam First Nation;
- Neskantaga First Nation (also known as Lansdowne House First Nation);
- Nibinamik First Nation (also known as Summer Beaver First Nation);
- North Caribou Lake First Nation;
- North Spirit Lake First Nation;
- Pikangikum First Nation;
- Poplar Hill First Nation;
- Sachigo Lake First Nation;
- Sandy Lake First Nation;
- Slate Falls Nation;
- Taykwa Tagamou Nation (formerly New Post Band of Cree);
- Wahgoshig First Nation (formerly Abitibi-Ontario Band of Abitibi Indians);
- Wapekeka First Nation;
- Wawakapewin First Nation;
- Webequie First Nation;
- Weenusk First Nation (formerly Winisk Band of Cree);
- Whitewater Lake First Nation; and
- Wunnumin Lake First Nation.

8. 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 Bands 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 has, and had at all material times, fiduciary obligations to the Treaty 9 First Nations 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.

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

9. 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.
10. 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.

11. 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.
12. 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 in exchange for rights and interests to land.
13. 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 their agreement to cede their collective rights and interests to a vast area of land. 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.
14. 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.

15. Particularly instructive of the Crown's promise in relation to the Treaty benefits promise is the 1850 Robinson Treaties which informed the terms of the numbered treaties that followed thereafter.

Unity of the terms of the numbered Treaties

16. 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.
17. 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.
18. 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.*

19. 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

20. 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.
21. 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.
22. 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.
23. 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.
24. 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.”

25. 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.
26. 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.
27. 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.
28. 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.
29. 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.
30. 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.
31. 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.
32. 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.
33. 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

34. 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.
35. 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.
36. The written text of Treaty 9 states that it was entered 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 Ojibway, Cree and other Indians, inhabitants of the territory within the limits hereinafter defined and described”.
37. 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 to some but not all Bands, and distributed various goods and cash payments on behalf of the Crown.
38. 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).

39. 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.
40. 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.
41. The second expedition in 1906 went to:
- a. Abitibi Post (Abitiwinini 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).
42. 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.
43. 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 consent to the terms offered by the Crown.

44. 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*.
45. 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.
46. 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

47. 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.

48. According to the written text of the 1929 and 1920 adhesions, the Indians who adhered 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, ...

49. In total, the territory of Treaty 9 and its adhesions covers more than two-thirds of what is now the province of Ontario.
50. In exchange, Treaty 9 signatory Indian Bands 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.

51. 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.

52. 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

53. 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 net twice, chests of carpenters 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. Unlike its immediate predecessor and successor, 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 severality” was because populations were not as concentrated in the North.

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

54. In the years since the signing of Treaty 9, the relative value of the Annuity Payments has decreased due to inflation to the point of rendering the Annuity Payments virtually meaningless in terms of purchasing power.
55. 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.

LIABILITY

56. The Plaintiff claims that the federal Crown breached its Treaty, fiduciary, honourable, legal and 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 meet its ongoing obligation to increase the Annuity Payments, as promised by the Crown under the terms of Treaty 9, to maintain the real value of the Treaty Annuities over time;

- f. breached the terms of Treaty 9 by failing to increase the Treaty Annuities from time to time to maintain their real value and purchasing power of the Annuity Payments of \$4, the value of which has been seriously eroded due to inflation;
- g. failed to provide economic assistance in agriculture, stock-raising, or other work and an annual distribution of twine and ammunition to Treaty 9 Indians;
- h. breached the Honour of the Crown, fiduciary duties, Treaty 9 and the surrender provisions of the *Indian Act* 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

- 57. 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 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.
- 58. It is well-established at law that the Crown must conduct itself honourably in the making and diligent implementation of Treaties.
- 59. Further, where the Crown assumes discretionary control over a specific or “cognizable” Aboriginal interest (such as Aboriginal Title that existing prior to Treaty), 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.

60. The Plaintiff claims 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.
61. The Plaintiff claims 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.
62. The Plaintiff claims 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.
63. The Plaintiff claims 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 Annuities Payment

64. 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*.
65. 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.

66. The Treaty-making process and the promises arising therefrom, which resulted in the Crown's taking of lands held pursuant to Aboriginal Title in exchange for certain promises, necessarily requires an interpretation of the Treaty that maintains fidelity to the spirit and intent of the Treaty. The Annuity Payments 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.
67. The intention of the Annuity Payment term in Treaty 9 was clear: in exchange for the surrender of vast traditional territories and natural resource wealth, the Crown was, in part, to provide Annuity Payments to assist the Indians in offsetting the costs of the basic necessities they required to subsist. 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.
68. The Plaintiff claims that, when properly interpreted, Treaty 9 includes an implied promise to augment or increase the amount of the Treaty Annuities from time to time.
69. The Plaintiff claims that the Crown has an ongoing Treaty, fiduciary, and/or honourable obligation to increase the Annuity Payments, as promised by the Crown under the terms of Treaty 9, to maintain the real value of the Treaty Annuities over time.
70. The Plaintiff claims that the Crown has failed to fulfill its legal obligations to provide and to properly administer the Annuity Payments by failing to increase or index the annual payments to retain their purchasing power. In the years since the signing of Treaty 9, the relative value of the Annuity Payments has decreased due to inflation to the point of rendering the Annuity Payments virtually useless

in terms of purchasing power. The failure to index the Annuity Payments to account for inflation has resulted in the erosion of the value of the Annuity Payments to the point of being worthless.

Crown breaches give rise to liability for the payment of equitable compensation to the Treaty Bands

71. The Crown is liable to provide equitable compensation to the Treaty 9 First Nations for the losses they have suffered related to the Crown's breaches of its Treaty, legal, fiduciary, and honourable obligations.
72. On behalf of the Class, the Plaintiff claims declaratory and monetary relief and equitable compensation for breaches of Treaty 9 and for breach of the Honour of the Crown and fiduciary duty in the sum of \$10 billion or such other amount as the Honourable Court deems just.
73. The Plaintiff proposes that this action be tried in the City of Sudbury in the Province of Ontario.

Dated May 8, 2023



Ron S. Maurice
Ryan M. Lake
Geneviève Boulay

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Lawyers for the Plaintiff

Court File No. _____

***CHIEF JASON GAUTHIER, on behalf of the
MISSANABIE CREE FIRST NATION***
Plaintiff

v.

THE ATTORNEY GENERAL OF CANADA
Defendant

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Sault Ste. Marie

STATEMENT OF CLAIM

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Lawyers for the Plaintiff

This is **Exhibit “B”** to the Affidavit of
Bruce Archibald, sworn July 29, 2024.

Antonela Cicko

A Commissioner for Taking Affidavits

**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**

Defendant

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

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

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* adhesion 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 Plaintiff 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 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 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 failure to increase, augment or index the Annuity Payment has unjustly enriched the Defendant 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 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 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 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 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 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 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 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 breaches of Treaty 9, the Honour of the Crown, and the Defendant'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.

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

15. 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.

16. 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.
17. 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.
18. 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.
19. 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.

20. The Treaties were relational agreements that incorporated the concept of sharing the benefits of the land.
21. 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.
22. 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

23. 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.
24. 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.
25. 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.

26. 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

27. 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.
28. 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.
29. 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.
30. 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.
31. 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.”

32. 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.
33. 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.

34. 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.
35. 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.
36. 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.

37. 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.
38. 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.
39. 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.

40. 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

41. 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.
42. 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.
43. 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 Ojibway, Cree and other Indians, inhabitants of the territory within the limits hereinafter defined and described”.
44. 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.

45. 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).
46. 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.
47. 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.
48. 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).
49. 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.
50. 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.
51. 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*.
52. 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.
53. 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

54. 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.

55. 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, ...

56. In total, the territory of Treaty 9 and its adhesions covers more than two-thirds of what is now the province of Ontario.
57. 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.
58. 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.
59. 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

60. 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

- 61. 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.
- 62. 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.
- 63. 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

- 64. The Plaintiffs claim that the Defendant 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

65. 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.

66. It is also well-established at law that the Crown must conduct itself honourably in the making and diligent implementation of Treaties.
67. 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.
68. 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.
69. 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.
70. 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.
71. 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

72. 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*.
73. 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.
74. 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.
75. 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.
76. 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.
77. 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.

78. 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

79. 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.
80. The Plaintiffs claim, *inter alia*:
- a. 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 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 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 breaches of Treaty 9, the Honour of the Crown,
and the Defendant's fiduciary or other legal or equitable duties owing
to the Treaty 9 signatories;

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

Dated July 29, 2024



Ron S. Maurice
Ryan M. Lake
Geneviève Boulay

Maurice Law Barristers & Solicitors
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Lawyers for the Plaintiff

Court File No. _____

**CHIEF JASON GAUTHIER, on behalf of the
MISSANABIE CREE FIRST NATION**
Plaintiff

v.

THE ATTORNEY GENERAL OF CANADA
Defendant

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Sault Ste. Marie

STATEMENT OF CLAIM

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Lawyers for the Plaintiff

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
(Moving Parties)

- and -

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

Defendant
(Respondent)

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

AFFIDAVIT OF VERONIKA CRAWFORD

Sworn July 24, 2024

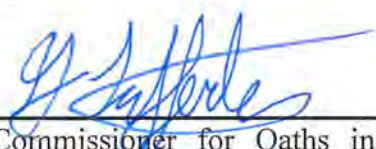
I, **VERONIKA CRAWFORD**, of the City of Calgary in the Province of Alberta, DO
SOLEMNLY AFFIRM THAT:

1. I am a legal assistant at Maurice Law, counsel for the Plaintiffs, and have reviewed the Plaintiffs' records relevant to this file. As such, I have personal knowledge of the facts and matters referred to herein, except where indicated to be based on information and belief and where so stated I verily believe them to be true.
2. I am informed by counsel for the Plaintiffs that, on May 8, 2023, a true copy of the Certified Statement of Claim issued on May 8, 2023, in the herein action was submitted for registration with the National Class Action Database of the

Canadian Bar Association. Attached hereto as **Exhibit "A"** is a true copy of the Certified Statement of Claim submitted for registration and available online at <https://cbaapps.org/ClassAction/Search>.

3. On May 10, 2023, the herein action was registered as a class action on the National Class Action Database of the Canadian Bar Association. Attached hereto as **Exhibit "B"** is a true copy of the National Class Action Database registration website at <https://cbaapps.org/ClassAction/Search> as of July 29, 2024.
4. I make this affidavit in support of the Plaintiffs' Motion for Certification of Class Proceedings and for no improper purpose.

AFFIRMED BEFORE ME at the City of)
Calgary in the Province of Alberta on July 29,)
2024.)
)
)
)
)
)
)


A Commissioner for Oaths in and for the
Province of Alberta

GARRETT P. LAFFERTY
Barrister, Solicitor, Notary Public
and a Commissioner for Oaths
in and for Alberta


Veronika Crawford

This is **Exhibit "A"** referred to in the
Affidavit of Veronika Crawford
Affirmed before me this 29th day of
July 2024



Commissioner for Oaths in and for
the Province of Alberta



Court File No. _____

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

**CHIEF JASON GAUTHIER, on behalf of the
MISSANABIE CREE FIRST NATION and on behalf of all
Treaty 9 First Nations in the Province of Ontario**

Plaintiff

-and-

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

Defendant

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

STATEMENT OF CLAIM

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

CLAIM

OVERVIEW

1. This claim is a proposed class proceeding challenging the Crown's failure to diligently implement the terms of the James Bay Treaty #9 ("Treaty 9") and the failure to honour the spirit and intent of the solemn Treaty relationship and promises made by the Crown with the Treaty 9 Bands.
2. From the time when Treaty 9 was entered into in 1905 and 1906, the Crown has declined or failed to augment or increase the annual payments of \$4 to each Indian person as set out in Treaty 9 for the purposes of offsetting the impacts of inflation and maintaining the purchasing power.
3. The Crown also breached other treaty obligations and failed to uphold the Honour of the Crown by entering into and implementing Treaty 9 on terms that were foolish, improvident, or otherwise amounted to exploitation of the Indians located within the boundaries of Treaty 9.

RELIEF SOUGHT

4. The Plaintiff, on behalf of the Class, 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;
 - b. A Declaration that the Defendant failed to act in good faith and that its conduct in the negotiation and implementation of Treaty 9 constitutes a breach of Treaty, the Honour of the Crown, fiduciary duty, and equitable fraud;
 - c. A Declaration that the Defendant has an ongoing obligation to increase the annual payment of \$4 payable to each Treaty Indian "for ever" (the "Treaty Annuities" or "Annuity Payments") as promised by the Crown under the terms of Treaty 9 to maintain the real value of the Annuity Payments and the effect of this promise to the Treaty 9 Indian Bands in exchange for the

taking of over approximately 218,320 square miles of land rich in natural resources, being over two-thirds of what is now the province of Ontario;

- d. A Declaration that the Defendant breached the Honour of the Crown and the terms of Treaty 9 by failing to increase the Treaty Annuities from time to time to maintain their real value and the purchasing power of the Annuity Payments of \$4, the value of which has been seriously eroded due to inflation;
- e. A Declaration that the Defendant breached the Honour of the Crown and fiduciary duty 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;
- f. 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;
- g. A Declaration that the Defendant breached its fiduciary duty to the Plaintiff and other Treaty 9 Indians when the Governor-in-Council approved and consented to Treaty 9 on terms which were foolish, improvident, and otherwise amounted to exploitation;
- h. A Declaration that the surrender and release in Treaty 9 should be set aside on the grounds that its terms were unconscionable, foolish, and improvident and the Crown failed to diligently implement the terms of Treaty 9 in a uniform and equitable manner for all Treaty 9 Bands;
- i. An Order that the Defendant is liable to pay damages for breach of Treaty 9 and for breach of the honour of the Crown and fiduciary duty in the sum of \$10 billion or such other amount as this Honourable Court deems fit to

account for the disparity of the terms of Treaty 9 compared to those Treaties which preceded and followed the signing of Treaty 9 in 1905;

- j. An Order that the Defendant is liable to pay punitive damages in such amount as this Honourable Court deems just;
- k. Equitable compensation, or pre- and post-judgment interest pursuant to the provisions of the *Courts of Justice Act*, R.S.O. 1990, c. C-43, as amended;
- l. Costs of this action on a substantial or full indemnity basis, including costs of notice and class administration;
- m. Such further and other relief as counsel may advise and this Honourable Court deem just.

FACTS

The Parties

- 5. The Plaintiff is the Chief of the Missanabie Cree First Nation, which has been a party to Treaty 9 since 1906. The Plaintiff is an “Indian” and the Missanabie Cree First Nation is an “Indian Band” within the meaning of the *Indian Act*, R.S.C. 1985, c. 1-5, as amended.
- 6. The Plaintiff brings this claim on behalf of Missanabie Cree First Nation and on behalf of all Treaty 9 First Nations in the province of Ontario. While Treaty Annuities are paid to individuals, the promise to provide Treaty Annuities was a promise made to “bands” as the rights-bearing collectives recognized under Treaty 9. Treaty Annuities 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.
- 7. The proposed class for this action includes forty-nine (49) First Nations which are collectively the successors to the signatories and adherents of Treaty 9:

- Aroland First Nation;

- Attawapiskat First Nation (formerly Attawapiskat Band of Cree);
- Bearskin Lake First Nation;
- Beaverhouse First Nation;
- Brunswick House First Nation (formerly New Brunswick House Band of Ojibway);
- Cat Lake First Nation;
- Chapleau Cree First Nation (formerly Chapleau Community of Moose Factory Band of Cree);
- Chapleau Ojibwe First Nation (formerly Chapleau Band of Ojibway);
- Constance Lake First Nation (formerly English River Band of Oji-Cree);
- Deer Lake First Nation;
- Eabametoong First Nation (also known as Fort Hope First Nation);
- Flying Post First Nation (formerly Flying Post Indians);
- Fort Albany First Nation (formerly Fort Albany Band of Cree);
- Fort Severn First Nation;
- Ginoogaming First Nation (formerly Long Lake Band of Ojibway);
- Hornepayne First Nation;
- Kasabonika Lake First Nation;
- Kashechewan First Nation;
- Keewaywin First Nation;
- Kingfisher Lake First Nation;
- Koocheching First Nation;
- Lac Seul First Nation;
- Long Lake #58 First Nation;
- McDowell Lake First Nation;
- Marten Falls First Nation (formerly Marten Falls Band of Oji-Cree);

- Matachewan First Nation (formerly Matchewan Indians);
- Mattagami First Nation;
- Mishkeegogamang First Nation (formerly known as New Osnaburgh First Nation);
- Missanabie Cree First Nation;
- Mocrebec Council of Cree Nation
- Moose Cree First Nation (formerly Moose Factory Band of Cree);
- Muskrat Dam First Nation;
- Neskantaga First Nation (also known as Lansdowne House First Nation);
- Nibinamik First Nation (also known as Summer Beaver First Nation);
- North Caribou Lake First Nation;
- North Spirit Lake First Nation;
- Pikangikum First Nation;
- Poplar Hill First Nation;
- Sachigo Lake First Nation;
- Sandy Lake First Nation;
- Slate Falls Nation;
- Taykwa Tagamou Nation (formerly New Post Band of Cree);
- Wahgoshig First Nation (formerly Abitibi-Ontario Band of Abitibi Indians);
- Wapekeka First Nation;
- Wawakapewin First Nation;
- Webequie First Nation;
- Weenusk First Nation (formerly Winisk Band of Cree);
- Whitewater Lake First Nation; and
- Wunnumin Lake First Nation.

8. 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 Bands 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 has, and had at all material times, fiduciary obligations to the Treaty 9 First Nations 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.

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

9. 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.
10. 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.

11. 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.
12. 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 in exchange for rights and interests to land.
13. 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 their agreement to cede their collective rights and interests to a vast area of land. 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.
14. 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.

15. Particularly instructive of the Crown's promise in relation to the Treaty benefits promise is the 1850 Robinson Treaties which informed the terms of the numbered treaties that followed thereafter.

Unity of the terms of the numbered Treaties

16. 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.
17. 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.
18. 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.*

19. 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

20. 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.
21. 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.
22. 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.
23. 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.
24. 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.”

25. 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.
26. 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.
27. 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.
28. 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.
29. 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.
30. 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.
31. 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.
32. 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.
33. 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

34. 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.
35. 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.
36. The written text of Treaty 9 states that it was entered 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”.
37. 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 to some but not all Bands, and distributed various goods and cash payments on behalf of the Crown.
38. 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).

39. 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.

40. 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.

41. The second expedition in 1906 went to:

- a. Abitibi Post (Abitiwinni 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).

42. 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.

43. 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 consent to the terms offered by the Crown.

44. 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*.
45. 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.
46. 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

47. 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.

48. According to the written text of the 1929 and 1920 adhesions, the Indians who adhered 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, ...

49. In total, the territory of Treaty 9 and its adhesions covers more than two-thirds of what is now the province of Ontario.
50. In exchange, Treaty 9 signatory Indian Bands 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.
51. 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.
52. 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

53. 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 net twice, chests of carpenters 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. Unlike its immediate predecessor and successor, 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 severality” was because populations were not as concentrated in the North.

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

54. In the years since the signing of Treaty 9, the relative value of the Annuity Payments has decreased due to inflation to the point of rendering the Annuity Payments virtually meaningless in terms of purchasing power.
55. 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.

LIABILITY

56. The Plaintiff claims that the federal Crown breached its Treaty, fiduciary, honourable, legal and 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 meet its ongoing obligation to increase the Annuity Payments, as promised by the Crown under the terms of Treaty 9, to maintain the real value of the Treaty Annuities over time;

- f. breached the terms of Treaty 9 by failing to increase the Treaty Annuities from time to time to maintain their real value and purchasing power of the Annuity Payments of \$4, the value of which has been seriously eroded due to inflation;
- g. failed to provide economic assistance in agriculture, stock-raising, or other work and an annual distribution of twine and ammunition to Treaty 9 Indians;
- h. breached the Honour of the Crown, fiduciary duties, Treaty 9 and the surrender provisions of the *Indian Act* 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

- 57. 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 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.
- 58. It is well-established at law that the Crown must conduct itself honourably in the making and diligent implementation of Treaties.
- 59. Further, where the Crown assumes discretionary control over a specific or “cognizable” Aboriginal interest (such as Aboriginal Title that existing prior to Treaty), 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.

60. The Plaintiff claims 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.
61. The Plaintiff claims 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.
62. The Plaintiff claims 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.
63. The Plaintiff claims 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 Annuities Payment

64. 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*.
65. 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.

66. The Treaty-making process and the promises arising therefrom, which resulted in the Crown's taking of lands held pursuant to Aboriginal Title in exchange for certain promises, necessarily requires an interpretation of the Treaty that maintains fidelity to the spirit and intent of the Treaty. The Annuity Payments 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.
67. The intention of the Annuity Payment term in Treaty 9 was clear: in exchange for the surrender of vast traditional territories and natural resource wealth, the Crown was, in part, to provide Annuity Payments to assist the Indians in offsetting the costs of the basic necessities they required to subsist. 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.
68. The Plaintiff claims that, when properly interpreted, Treaty 9 includes an implied promise to augment or increase the amount of the Treaty Annuities from time to time.
69. The Plaintiff claims that the Crown has an ongoing Treaty, fiduciary, and/or honourable obligation to increase the Annuity Payments, as promised by the Crown under the terms of Treaty 9, to maintain the real value of the Treaty Annuities over time.
70. The Plaintiff claims that the Crown has failed to fulfill its legal obligations to provide and to properly administer the Annuity Payments by failing to increase or index the annual payments to retain their purchasing power. In the years since the signing of Treaty 9, the relative value of the Annuity Payments has decreased due to inflation to the point of rendering the Annuity Payments virtually useless

in terms of purchasing power. The failure to index the Annuity Payments to account for inflation has resulted in the erosion of the value of the Annuity Payments to the point of being worthless.

Crown breaches give rise to liability for the payment of equitable compensation to the Treaty Bands

71. The Crown is liable to provide equitable compensation to the Treaty 9 First Nations for the losses they have suffered related to the Crown's breaches of its Treaty, legal, fiduciary, and honourable obligations.
72. On behalf of the Class, the Plaintiff claims declaratory and monetary relief and equitable compensation for breaches of Treaty 9 and for breach of the Honour of the Crown and fiduciary duty in the sum of \$10 billion or such other amount as the Honourable Court deems just.
73. The Plaintiff proposes that this action be tried in the City of Sudbury in the Province of Ontario.

Dated May 8, 2023



Ron S. Maurice
Ryan M. Lake
Geneviève Boulay

Maurice Law Barristers & Solicitors
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Lawyers for the Plaintiff

Court File No. _____

**CHIEF JASON GAUTHIER, on behalf of the
MISSANABIE CREE FIRST NATION**
Plaintiff

v.

THE ATTORNEY GENERAL OF CANADA
Defendant

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Sault Ste. Marie

STATEMENT OF CLAIM

Ron S. Maurice – LSO 36428D
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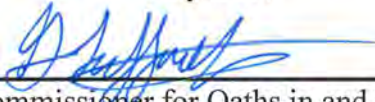
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Lawyers for the Plaintiff

This is **Exhibit "B"** referred to in the
Affidavit of Veronika Crawford
Affirmed before me this 29th day of
July 2024

A handwritten signature in blue ink, appearing to read 'D. J. [unclear]', is written over a horizontal line.

Commissioner for Oaths in and for
the Province of Alberta



National Class Action Database

Keywords

Title

File
Number

CV-23-00029205-00CP

Jurisdiction

All Jurisdictions ▼

Subject

All Subjects ▼

Start Date

All Years ▼

End Date

All Years ▼

Search

1 record(s) returned.

Date received	Date posted	Date registered	Subjects	Title	PDF
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May 8
2023

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2023

Aboriginal
Crown
Liability
Other

CHIEF JASON GAUTHIER, on behalf of the
MISSANABIE CREE FIRST NATION and on behalf of all
Treaty 9 First Nations in the Province of Ontario v. HIS
MAJESTY THE KING IN RIGHT OF CANADA as
represented by the ATTORNEY GENERAL OF CANADA

Document
([PDF.aspx?id=22045](#)).

Related
document(s)

Status: Not certified

Province/Territory: ON

Class Group

The proposed class for this action includes forty-nine (49) First Nations which are collectively the successors to the signatories and adherents of Treaty 9, being:

- Aroland First Nation;
- Attawapiskat First Nation (formerly Attawapiskat Band of Cree);
- Bearskin Lake First Nation;
- Beaverhouse First Nation;
- Brunswick House First Nation (formerly New Brunswick House Band of Ojibway);
- Cat Lake First Nation;
- Chapleau Cree First Nation (formerly Chapleau Community of Moose Factory Band of Cree);
- Chapleau Ojibwe First Nation (formerly Chapleau Band of Ojibway);
- Constance Lake First Nation (formerly English River Band of Oji-Cree);
- Deer Lake First Nation;
- Eabametoong First Nation (also known as Fort Hope First Nation);
- Flying Post First Nation (formerly Flying Post Indians);
- Fort Albany First Nation (formerly Fort Albany Band of Cree);
- Fort Severn First Nation;
- Ginoogaming First Nation (formerly Long Lake Band of Ojibway);
- Hornepayne First Nation;
- Kasabonika Lake First Nation;
- Kashechewan First Nation;
- Keewaywin First Nation;
- Kingfisher Lake First Nation;
- Koocheching First Nation;
- Lac Seul First Nation;
- Long Lake #58 First Nation;
- McDowell Lake First Nation;
- Marten Falls First Nation (formerly Marten Falls Band of Oji-Cree);
- Matachewan First Nation (formerly Matchewan Indians);
- Mattagami First Nation;
- Mishkeegogamang First Nation (formerly known as New Osnaburgh First Nation);
- Missanabie Cree First Nation;
- Moccreebec Council of Cree Nation
- Moose Cree First Nation (formerly Moose Factory Band of Cree);
- Muskrat Dam First Nation;
- Neskantaga First Nation (also known as Lansdowne House First Nation);
- Nibinamik First Nation (also known as Summer Beaver First Nation);
- North Caribou Lake First Nation;
- North Spirit Lake First Nation;
- Pikangikum First Nation;
- Poplar Hill First Nation;
- Sachigo Lake First Nation;
- Sandy Lake First Nation;
- Slate Falls Nation;
- Taykwa Tagamou Nation (formerly New Post Band of Cree);
- Wahgoshig First Nation (formerly Abitibi-Ontario Band

of Abitibi Indians);

- Wapekeka First Nation;
- Wawakapewin First Nation;
- Webequie First Nation;
- Weenusk First Nation (formerly Winisk Band of Cree);
- Whitewater Lake First Nation; and
- Wunnumin Lake First Nation.

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 the MISSANABIE CREE FIRST NATION and on behalf of all
members of TREATY 9 FIRST NATIONS**

Plaintiffs
(Moving Parties)

- and -

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

Defendant
(Respondent)

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

AFFIDAVIT OF J.R. MILLER

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Counsel for the Respondent

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

**CHIEF JASON GAUTHIER, on behalf of the
MISSANABIE CREE FIRST NATION and on behalf of all
Treaty 9 First Nations in the Province of Ontario**

Plaintiff
(Moving Party)

- and -

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

Defendant
(Respondent)

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

AFFIDAVIT OF J.R. MILLER

July 24, 2024

I, **JAMES R. MILLER**, of the City of Saskatoon in the Province of Saskatchewan, DO
SOLEMNLY AFFIRM THAT:

1. I am an Author and former Professor of History at the University of Saskatchewan. I was retained by Maurice Law Barristers & Solicitors to provide expert evidence in this matter.
2. I prepared a report dated August 8, 2023, a copy of which is attached to this affidavit as Exhibit "A". My curriculum vitae as well as my signed Form 53 are enclosed to my report.

- Sworn before me at the City of Saskatoon in the)
Province of Saskatchewan on July 24, 2024.)

A Commissioner for Oaths in and for the
Province of Saskatchewan
Being a Lawyer


J.R. Miller



This is **Exhibit "A"** referred to in the
Affidavit of J.R. Miller Affirmed
before me this 24th day of July 2024



Commissioner for Oaths in and for
the Province of Saskatchewan
Being a Lawyer

J.R. Miller
Author-Historian
806 10th Street East
Saskatoon, SK S7H 0H3
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j.r.miller@usask.ca

August 8, 2023

Ryan Lake
MauriceLaw
via email

Dear Mr. Lake

Re: your email message of July 21, 2023

I am writing in response to your message of July 21, 2023 in which you asked me to respond to three questions arising from litigation involving the Missanabi Cree First Nation and other Treaty 9 First Nations.

Expertise

I have carried out research and published articles, chapters, and books on government and church policies towards Indigenous peoples in Canada - and on the response of Indigenous peoples to such policies - for forty years. This research has included examinations of residential schooling for First Nations and Metis, treaty-making, First Nations political and military leadership, the evolution of relations between Indigenous peoples and the rest of the Canadian population, and the movement towards reconciliation between Indigenous peoples and the rest of the Canadian population. This research has included archival and oral history investigation, as well as interrogation of published primary (i.e. contemporary) documents. My research has involved all geographic regions of Canada and all time periods since European contact on the Atlantic coast in the sixteenth century.

I have published refereed articles, chapters in refereed books, and refereed books disseminating the results of the research referred to above. (A summary *curriculum vitae* follows this memo.) Specifically, I have published twelve books, twenty-nine articles in refereed journals, and thirty-four chapters in refereed books. (Another chapter in a refereed book is in press now.) I have held numerous Standard Research Grants and Strategic Grants from the Social Science and Humanities Research Council of Canada

since the late 1970s. My work has been recognized with the award of the Dafoe Prize (1997), the Founders' Prize of the Canadian Association of Foundations of Education (1998), the Social Sciences and Humanities Research Council of Canada Gold Medal for Achievement in Research (2010), the Killam Prize in the Humanities (2014), and the Queen Elizabeth II Platinum Jubilee Medal (2022). I received the Saskatchewan Order of Merit in 2013 and was made an Officer of the Order of Canada in 2014 "for even-handed and definitive scholarship." I have been honoured by serving as the President of the Canadian Historical Association in 1996-97, and by appointment as the Saskatchewan representative on the Historic Sites and Monuments Board of Canada, 2014-19.

I have read the Amended Statement of Claim and understand "the Crown's failure to diligently implement the terms of the James Bay Treaty #9" to mean that Canada did not fulfil the oral and written promises it made during treaty negotiations in 1905, 1906, 1929, and 1930. In preparing this report I have assumed that the facts set out in the amended statement of claim are true.

Question 1: Is there some evidentiary basis in fact that the Crown failed to maintain the real value of the Annuity Payments of all Treaty 9 signatories and adherents other than the Missanabie Cree First Nation? If yes, how did the crown fail to maintain the real value of Annuity Payments to all Treaty signatories and adherents?

Yes, there is evidence that the Crown failed to maintain the real value of the Annuity Payments of all Treaty 9 signatories and adherents. It will be recalled that the relevant section of the 1905 Treaty 9 said:

His Majesty also agrees that next year, and annually afterwards forever, 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.¹

The same clause appeared in the 1906 version of Treaty 9.

In 1908, an adhesion to deal with Treaty 9 First Nation claims within the boundaries of Quebec was made by the Crown with "the owners of the Abitibi Indian Reserve in the Province of Ontario, Dominion of Canada, as represented by their Chief, Councillors and principal men; hereinafter called the Parties of the First Part; and the Abitibi Band of the Province of Quebec and Dominion of Canada, as represented by their Chief, Councillors and principal men, hereinafter called the parties of the Second Part." This 1908 adhesion, said: "And the said parties of the Second Part hereby agree to accept the several benefits

¹ The James Bay Treaty, Treaty No. 9; in John S. Long, *Treaty No. 9: Making the Agreement to Share the Land in Far Northern Ontario in 1905*, (Montreal and Kingston: McGill-Queen's University Press [hereafter MQUP], 2010), 318.

accorded by the Treaty aforesaid, payment of annuity at the rate of \$4.00 per capita (the same payment not to be retroactive)... "2

Further, adhesions to Treaty 9 were made in 1929 at Big Trout Lake, and in 1930 at Wendigo River, Trout Lake, Fort Severn, and Winisk, that contain this commitment by the First Nation representatives:

And we, the said Ojibeway, Cree and other Indian inhabitants, represented herein by our Chiefs and Councillors presented as such by the Bands, do hereby agree to accept the several provisions, payments and other benefits, as stated in the said Treaty, and solemnly promise and engage to abide by, carry out and fulfil all the stipulations, obligations and conditions therein on the part of the said Chiefs and Indians therein named, to be observed and performed, and in all things conform to the articles of the said Treaty as if we ourselves had been originally contracting parties thereto.³

The Crown did not increase the amount of annuity paid to each First Nation person who was a party to Treaty 9 from 1931 to the present. As a consequence of the Crown's failure to augment the value of the annuity to offset inflation, the buying power of the Treaty's \$4.00 annuity has eroded over time. According to the Bank of Canada's Inflation Calculator, the amount that would be needed in 2023 to buy the same goods that \$4.00 would have bought in 1930 is \$68.35. The change in value between 1930 and 2023 is 1608.73%.⁴ Of course, the erosion of the value of the Treaty 9 annuity as paid in 1905 and today would be substantially greater.

In sum, the Crown failed to maintain the real value of annuity payments to all Treaty 9 signatories and adherents by not increasing the amount of the annuity to keep pace with inflation.

Question 2: Is there some evidentiary basis in fact that the Crown failed to provide economic assistance in agriculture, stock-raising or other work and an annual distribution of twine and ammunition to all Treaty 9 signatories and adherents other than the Missanabie Cree First Nation? If yes, how did the crown fail to provide economic assistance in agriculture, stock-raising or other work and an annual distribution of twine and ammunition to all Treaty 9?

Yes, there is evidence that the Crown failed to provide economic assistance in agriculture, stock-raising or other work to all Treaty 9 signatories and adherents other

² The 1908 adhesion to Treaty 9; in John S. Long, *Treaty No. 9. Making the Agreement to Share the Land in Far Northern Ontario in 1905*, (Montreal and Kingston: MQUP, 2010), 323-4.

³ The 1929 and 1930 adhesions to Treaty 9; in John S. Long, *Treaty No. 9. Making the Agreement to Share the Land in Far Northern Ontario in 1905*, (Montreal and Kingston: MQUP, 2010), 325.

⁴ www.bankofcanada.ca/rates/related/inflation-calculator/ accessed Aug. 1, 2023. Two American sources gave values for longer elapsed time periods. US Calculator (calculator.net/inflation-calculator.html [accessed Aug. 2, 2023]) revealed that \$4.00 in 1913 dollars is now worth \$123.28. Another American source (www.in2013dollars.com [accessed Aug. 2, 2023]) informed that \$4.00 in 1905 is worth \$138.69 in 2023.

than the Missanabie Cree First Nation. In contrast to earlier numbered treaties (Treaty 1, Treaty 2, Treaty 3, Treaty 4, Treaty 6, Treaty 7, and Treaty 8⁵), Treaty 9 did not include Crown commitments to provide seed, implements, and agricultural instruction to signatories and adherents of Treaty 9.

Similarly, all the numbered treaties from 1873 onward made provision for the support of continuing fishing and hunting by committing the Crown to supply the treaty bands with ammunition and twine. Members of Treaty 3 were to receive \$1500 per year for ammunition and twine; those in Treaty 4 \$750 per year; in Treaty 5 \$500 per year; in Treaty 6 \$1500 per year; Treaty 7 \$2000 per year; and Treaty 8 "for such Bands as prefer to continue hunting and fishing, as much ammunition and twine for making nets annually as will amount in value to one dollar per head of the families so engaged in hunting and fishing."⁶ These amounts were not augmented by the Crown later to compensate for the dollar's loss of buying power as a result of inflation over time.

Exacerbating the difficulties created for the Treaty 9 bands by the Crown's failure to augment the amounts provided for ammunition and twine were Ontario and federal legislation and policies that interfered with and deterred the ability of Treaty 9 First Nations to continue to hunt and fish as the treaty had promised. The Ontario provincial government's encroachment on First Nations gathering rights had begun early, for example with a Fishery Act in 1857 that defined Indigenous fishing methods as barbarous and privileged supposedly 'civilized' practices. So, spearing fish was made illegal, and supposedly 'civilized' techniques such as employment of line, hook, or fly only were permitted. This colonial statute, in the words of a historian who studied the topic closely, "became the basis to Canadian fishery laws when it was revised in 1858 and 1865[,] and following Confederation in 1867, became the *Fishery Act* of [the Dominion of] Canada in 1868."⁷

Privileging the interests of recreational fishers and hunters over the Aboriginal or treaty rights of First Nations would become a pattern with Ontario, including in its treatment of Treaty 9 First Nations. Between 1899 and 1909, the Ontario Game Act was amended four times in ways that increasingly restricted First Nation gathering rights, and consistently the federal Department of Indian Affairs did not exert itself to defend First Nations rights

⁵ Re Treaty 1 and Treaty 2, Order in Council of 30 April 1875; and Alexander Morris, *The Treaties of Canada with the Indians*, Fifth House edition, (Saskatoon: Fifth House 1992; 1st ed. Toronto: Rose Belfords, 1880) [hereafter Morris, *Treaties*], 338-42; re Treaty 3, Morris, *Treaties*, 324; re Treaty 4, Morris, *Treaties*, 332-3; re Treaty 6, Morris, *Treaties*, 354; re Treaty 7, Morris, *Treaties*, 371; re Treaty 8, see Treaty 8, www.naai11c-cimac.gc.ca/eng/1100100028813/15811293624572, accessed Aug. 1, 2023.

The Order in Council concerning outside promises in Treaty 1 and Treaty 2 is available at the Library and Archives Canada website, specifically LAC's order in council database: central.bac-lac.gc.ca/itern/?id=e002249380&app=OrdinCou&op=img (accessed Aug. 8, 2023).

⁶ Alexander Morris, *The Treaties of Canada with the Indians*, Fifth House edition, (Saskatoon: Fifth House, 1992; 1st ed. Toronto: Rose Belfords, 1880) [hereafter Morris, *Treaties*], 324 (Treaty 3); Morris, *Treaties*, 332 (Treaty 4); Morris, *Treaties*, 346 (Treaty 5); Morris, *Treaties*, 354 (Treaty 6); and Morris, *Treaties*, 371 (Treaty 7); www.rcaanc-cimac.gc.ca/eng/1100100028813/15811293624572/chp4 (Treaty 8) accessed Aug. 2, 2023.

⁷ J. Michael Thoms, "Ojibwa fishing grounds: a history of Ontario fisheries law, science, and the sportsmen's challenge to Aboriginal treaty rights, 1650-1900," (Ph.D. dissertation, University of British Columbia, 2004), 199.

against provincial encroachment.⁸ Dr. David Calverley has characterized the interaction of province, federal government, and First Nations over treaty gathering rights succinctly:

Ontario thought any attempt by Indian Affairs to secure the Objibwa an exemption from the [1892] *Game Act*, even though the legislation contained this provision, was unwarranted Dominion interference in an area of provincial jurisdiction... It simply refused to compromise the *Game Act* for the sake of 'uncivilized' Indians who refused to give up the chase and adopt White ideas and behaviour. Similarly, Indian Affairs was not questioning Ontario's *Game Act* in its entirety, merely its application to Natives with treaty hunting rights. However, even in this limited capacity Indian Affairs was not willing to risk Queen's Park's displeasure for both political and policy reasons. Senior bureaucrats at Indian Affairs and the Department of Justice did not want to antagonize Ontario for the sake of some Indians who [sic] Indian Affairs was trying to acculturate and have give up hunting and trapping.

... Ontario's position in this matter was firm despite the letters it received from Indian Affairs: no exceptions would be made for Natives regardless of any treaty they might have with the Dominion Government...⁹

According to Dr. David Calverley, the federal Department of Indian Affairs' unwillingness to confront Ontario over its enforcement of the Game Act despite treaty guarantees of continuing gathering rights was attributable to two factors. First, the Department of Indian Affairs [DIA], which was not considered a prestigious part of the federal government by federal bureaucrats and politicians, lacked the confidence to combat an aggressive government such as Ontario's. Constitutional battles between the federal government and Ontario in the 1870s and 1880s, which contests the province won consistently in the courts, left the federal government lacking confidence and will to take on the Ontario government. Secondly, the influence of Duncan Campbell Scott, who served as deputy minister of the DIA from 1913 to 1932, was important. Scott's interest in protecting the continuing treaty right to fish and hunt in the northern Ontario treaties was limited by his adherence to a notion of "the transitional Indian." What this concept meant was that Scott believed that First Nations were part of the way along a path of acculturation to Euro-Canadian ways and values that would eventually end in their

⁸ David Calverley, "Who Controls the Hunt? Ontario's *Game Act*, the Canadian Government and the Objibwa, 1800-1940," (Ph.D. dissertation, University of Ottawa, 1999), 185-8. Although Calverley's analysis is focused on the Robinson Treaties regions, his description and analysis of Ontario legislation and policy are relevant to Treaty 9 areas, too, as is his depiction of federal government attitudes and response to Ontario's aggressiveness.

Dr. Calverley has published a revised version of his dissertation (*Who Controls the Hunt? First Nations, Treaty Rights, and Wildlife Conservation in Ontario, 1783-1939*, [Vancouver: University of British Columbia Press, 2018]). The published version, however, is much abbreviated from the dissertation version, lacking the richness of detail that characterized the dissertation. For that reason, I have used Calverley's dissertation rather than the later monograph.

⁹ David Calverley, "Who Controls the Hunt? Ontario's *Game Act*, the Canadian Government and the Objibwa, 1800-1940," (Ph.D. dissertation, University of Ottawa, 1999), 146-7.

assimilation. As such, Scott had no objection in principle to provincial measures that would curb First Nation hunting practices and turn them towards agriculture and tourism employment. Accordingly, his willingness to confront Ontario over application of its Game Act to treaty First Nations was qualified and half-hearted. "Ontario's Department of Game and Fisheries," Dr. Calverley dryly observes, suffered no similar crisis of confidence."¹⁰ With a timorous Department of Indian Affairs and its equivocal deputy minister lacking the will to confront a determined provincial government confident of what it thought were its rights, the treaty right of Treaty 9 First Nations to continue to practise their gathering economy had no chance of success. As historical geographer Dr. Frank Tough has written: "In effect, Indian Affairs capitulated to Ontario's assault on Indian hunting - it would not pay lawyers to appeal cases and it dissuaded people from hiring their own lawyers. Rather than force the legal issues, department officials wrote provincial authorities asking for special consideration for particular convictions ... The original recognition of Aboriginal hunting rights in 1892 had been reduced, by 1913, to the discretionary policies of provincial officials, after which, the combined effects of changes to the act and increased prosecutions amounted to a criminalization of Indian hunting."¹¹

For its part, the federal government contributed to the impoverishment of Treaty 9 gathering rights by its own policies. In response to pressure from the growing conservation movement in both the United States and Canada, the two countries entered into a Migratory Birds Convention that resulted in the Canadian Migratory Birds Convention Act of 1917. The statute authorized the federal government to declare "close seasons" in which hunters could not lawfully take birds and establish "game officers for carrying out this Act and the regulations, and may authorize such game officers to exercise the powers of Justice of the Peace or the powers of a Police Constable."¹² To First Nation hunters who objected that the statute violated their treaty rights, deputy minister Duncan Campbell Scott argued that "the Migratory Birds Act superseded the treaties and would have to be obeyed."¹³ It is not clear if Scott recognized that his government's position on the Migratory Birds Convention Act in relation to First Nation

¹⁰ David Calverley, "Who Controls the Hunt? Ontario's *Game Act*, the Canadian Government and the Ojibwa, 1800-1940," (Ph.D. dissertation, University of Ottawa, 1999), 261. The concept of "the transitional Indian" is discussed *ibid.*, 260-1 and 287-9.

¹¹ Frank J. Tough, "Powerless to Protect: Ontario's Game Protection Legislation, Unreported and Indetermined Case Law, and the Criminalization of Indian Hunting in the Robinson Treaty Territories, 1892-1931," Myra Rutherdale, Kerry Abel, and P. Whitney Lackenbauer, eds., *Roots of Entanglement: Essays in the History of Native-Newcomer Relations*, (Toronto: University of Toronto Press, 2018), 269, 271. As with the Calverley doctoral dissertation, Tough's comments are relevant to Treaty 9 because provincial laws and policies applied to both the Robinson Treaties region and Treaty 9.

¹² The Migratory Birds Convention Act (7-8 George V, chap. 18, Aug. 29, 1917); in Dave De Brou and Bill Waiser, eds., *Documenting Canada: A History of Modern Canada in Documents*, (Saskatoon: Fifth House, 1992), 239-40.

¹³ E. Brian Tittley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada*, (Vancouver: University of British Columbia Press, 1986), 55; Arthur J. Ray, *Have I Lived Here Since the World Began: An Illustrated History of Canada's Native People*, (Toronto: Key Porter Books, 1996), 280. Scott was responding to a protest from a First Nation in the North West Territories.

treaty rights was identical to the position of the government of Ontario on the province's Game Act.

Ontario contributed again to the process of whittling down First Nation treaty rights to gather in 1925 when it created the Chapleau Game Preserve. The regulated area disrupted the practices of both Robinson Treaty and Treaty 9 bands. In the case of the latter, one of the Treaty 9 First Nations, the New Brunswick House band, had its reserve in the centre of the game reserve. Moreover, a Robinson Superior band located at Michipicoten on Lake Superior was accustomed to hunting in the region that was now a preserve. And, perhaps most important of all, the Missanaibi River that ran through the Chapleau Game Preserve was the main water route for travel between James Bay and Lake Superior. The waterway was used by many Treaty 9 First Nations.¹⁴ First Nations, including especially the New Brunswick House Ojibwe, "could not hunt, trap or even carry firearms or traps through the preserve or their own reserve."¹⁵ The 'solution' that the federal and provincial governments worked out was for Ottawa to sell the New Brunswick House reserve to the government of Ontario and to create a new reserve for the New Brunswick House Ojibwe outside the game preserve. The New Brunswick House band did get a new reserve - eventually - in 1947. The band at Michipicoten received no consideration, and individual First Nation hunters, trappers, and simply travelers through the Game Preserve continued to be arrested by Ontario game officials.¹⁶

Treaty 9 First Nations, like all the northern treaty nations in Ontario, also suffered from another provincial policy: a designated individual trapping grounds program that was introduced in the early 1930s. Ojibwe and Cree had always acted on ideas of family trapping routes and rights, but the governmental scheme was different. For one thing, the motivation behind it was the government's desire to protect the interests of "hunting, fishing, and conservation clubs and tourist operators."¹⁷ In other words, the Ontario government was elevating the interests of non-Native recreational hunters and fishers above the rights of the First Nations. Second, although traditionally a trapping route was associated with an individual First Nation person, a trapping ground was recognized as a family possession; the government's scheme linked a registered trapping route solely with an individual. For First Nations, the change in the assumptions of the trapping ground policy - from family right to individual right - was highly disorienting. Finally, while the right to a specific trapping ground had been enduring, held for a long term, the government's trap lines program was annual in operation. An individual had to apply for a government trap line each year, and he might not get a route that had traditionally been in his family. He might not get the trap line he had registered for the year before. The consequence of the disruptive government scheme was that there was little incentive to continue First Nations' game conservation practices.

¹⁴ David Calverley, "The Dispossession of the Northern Ojibwa and Cree: The Case of the Chapleau Game Preserve," *Ontario History*, 101, no. 1, spring 2009, 98-100. The New Brunswick House band is now known as the Brunswick House First Nation. Statement of Claim, para 7.

¹⁵ David Calverley, "The Dispossession of the Northern Ojibwa and Cree: The Case of the Chapleau Game Preserve," *Ontario History*, 101, no. 1, spring 2009, 201-2.

¹⁶ David Calverley, "The Dispossession of the Northern Ojibwa and Cree: The Case of the Chapleau Game Preserve," *Ontario History*, 101, no. 1, spring 2009, 101-3.

¹⁷ David Calverley, "Who Controls the Hunt? Ontario's *Game Act*, the Canadian Government and the Ojibwa, 1800-1940," (Ph.D. dissertation, University of Ottawa, 1999), 350.

One thing that did not change when the provincial trap lines program was introduced was the government of Ontario's attitude towards treaty gathering rights: "the treaties were still considered as irrelevant agreements" by Ontario.¹⁸ The result for treaty First Nations was that the provincial trapping ground program was disruptive of traditional gathering practices and did not create any benefit for them, either as individuals or as groups.

In sum, then, the Crown not only failed to support First Nations' economic activity by implementing treaty provisions that would have provided aid, as earlier numbered treaties had, but it also took legislative and policy steps after negotiation of Treaty 9 that had the effect of exacerbating the economic disadvantages under which Treaty 9 First Nations laboured. The Crown did not provide agricultural assistance, nor did it support the continuation of hunting by supplying ammunition and twine that were used to shoot game and to make fishing nets. Moreover, both the provincial and federal governments after 1905 made the economic lot of Treaty 9 First Nations worse by creating stringent provincial game acts and failing to represent First Nations effectively when they fell afoul of such measures. The federal government and parliament encroached on Treaty 9 gathering rights when it concluded the Migratory Birds Convention with the United States, and enacted the convention's terms in a federal statute in 1917. The Province of Ontario continued to make inroads on First Nations' treaty rights with the creation in 1925 of the Chapleau Game Preserve. Again, as was the case with the provincial Game Act, the federal government declined to fight hard to ensure that the province's initiative did not have an adverse effect on some First Nations' treaty rights. In the 1930s, the province's creation of registered trapping grounds similarly had a disruptive effect on First Nations' practices. The province's trapping ground measure paid no attention to the existing - and effectively operating - First Nations' practices of family-based trapping grounds, substituting its own annually administered program for individuals. These policies and legislation of the federal and provincial governments worked cumulatively to enhance the negative impact on First Nations. From the perspective of Treaty 9 First Nations, both the two governments' administration of Treaty 9 and their legislation and policies that interfered with traditional First Nations' economic activity, worked much to the detriment of their well-being.

Question 3: When entering Treaty 9, all other Treaty 9 signatories were disadvantaged or possessed inequality in bargaining power? If yes, what led to that disadvantage and what characterized the inequality of bargaining power to all Treaty 9 signatories?

Yes, when all Treaty 9 signatories and adherents entered Treaty 9, some were more advantaged than others. In other words, there was inequality in bargaining power among the Treaty 9 First Nations that was caused by several factors.

A major reason for the inequality in bargaining power among Treaty 9 First Nations was a difference in their familiarity with Euro-Canadians and their ways. Most

¹⁸ David Calverley, "Who Controls the Hunt? Ontario's *Game Act*, the Canadian Government and the Objiwa, 1800-1940," (Ph.D. dissertation, University of Ottawa, 1999), 359.

First Nations in the region had learned to interact effectively with fur traders, particularly the Hudson's Bay Company, who had adapted their methods to some degree to Indigenous practices. In the fur-trade setting, there was bargaining between First Nation supplier and fur company buyers, but this bargaining was imbued with First Nations cultural values and practices.¹⁹ Government negotiators did not have this cultural knowledge and approached treaty negotiations in a different way from the manner in which fur traders interacted with Indigenous fur providers. Some First Nations also had experience dealing with Christian missionaries, specifically the Roman Catholic Oblates of Mary Immaculate and the Anglicans' missionary organization. But other First Nations, in areas most remote from economic activity by Euro-Canadians, would have had almost no experience and knowledge of Euro-Canadians in general, much less of their governments. The First Nations who entered Treaty 9 had little experience of government and its agents. Their formative contacts had been mainly with fur traders or, in some cases, missionaries or prospectors.

Duncan Campbell Scott, the chief federal treaty negotiator in 1905 and 1906, exaggerated the gulf in outlook between the First Nations and governmental negotiators in a magazine article he published following the 1905 treaty negotiations:

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 simple 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 ...²⁰

Scott's patronizing depiction of Treaty 9 negotiations exaggerated the gulf of understanding between the two sets of negotiators, but there was something to what he said. First Nations leaders might not have been knowledgeable about the ruling of the Judicial Committee of the Privy Council in the *St. Catherines Milling* case, but they were familiar with other aspects of Euro-Canadian civilization. They knew about commercial practices from participation in the fur trade, of course, and they also had come to know something about Euro-Canadians' technology from the railway that had traversed part of the Treaty 9 territory in the 1880s. But it is true that both principal parties to Treaty 9 came to treaty negotiation with different mindsets based on different worldviews. Given

¹⁹ Arthur J. Ray and Donald B. Freeman, *"Give Us Good Measure": an economic analysis of relations between the Indians and the Hudson's Bay Company before 1763*, (Toronto: University of Toronto Press, 1978), 55-7; and Arthur J. Ray, Jim Miller, and Frank J. Tough, *Bounty and Benevolence: A History of Saskatchewan Treaties*, (Montreal and Kingston: MQUP, 2000), 5-10. The trade protocols that are outlined in these two works were in place throughout subarctic Canada until well into the twentieth century, the common link between geographic regions and time periods being the Hudson's Bay Company.

²⁰ D.C. Scott, "The Last of the Indian Treaties," *Scribner's Magazine*, 40, 1906, 573-83; in John S. Long, *Treaty No. 9: Making the Agreement to Share the Land in Far Northern Ontario in 1905*, (Montreal and Kingston: MQUP, 2010), 292-3. The complete article is reproduced *ibid.*, 289-98.

the power of the governments, the difference in outlook put the First Nations at a disadvantage.

Historical consultant James Morrison in his account of the making of Treaty 9, put a lot of emphasis on the impact of the coming of the railway. He stated "that a band's interest in treaty relations with the government was, by 1901, generally proportional to its proximity to the railway line and the newcomers who were arriving with it."²¹ The railway, particularly the Canadian Pacific Railway, had brought with it a means for independent fur traders and prospectors to explore regions that hitherto had been difficult to access in search of new sources of wealth. In the process their presence both began to familiarize First Nations with Euro-Canadian ways and sow concern among them about strangers' exploitation of the resources that they relied upon for sustenance and income. Inequality of familiarity with Euro-Canadians and their governments' ways informed these differing responses to treaty-making.

The unequal awareness about Euro-Canadians between First Nation groups can be detected in the attitudes that First Nations leaders manifested during the treaty talks, particularly in 1905 and 1906. It was noticeable how First Nation treaty negotiators differed in their attitudes towards non-Natives that the First Nations demonstrated in negotiations. On July 19, 1905, at Fort Hope, Commissioners Stewart noted: "Very full explanations were asked by the Indians present, they being very much concerned as to what they were expected to give up for the benefits they were to receive. It required some time to convince them that there was not something behind the terms of the agreement set for in the treaty,... " and Commissioner MacMartin observed that the chief, "Monias, said, I should like to consult with my Aunts and cousins. if I buy as small an article as a needle I have to pay for same. you come here offering money we have not asked for I do not understand ...",²² And at Marten Falls on July 25, 1905, for example, Commissioner Stewart noted that, "Some of the Indians seemed to think that there would be something behind the offer of the Govt of which they were not aware. It seemed to them that an offer was being made to give them something for which they were not expected to make any return." At the same treaty stop, Commissioner MacMartin, noted that: "Chief White head then delivered an oration, in wh he said, pointing up and down the river that they were being cornered by not being allowed both banks of the River per miles to fish and hunt on but that they must accept what was offered from these who had given them presents and provided a feast for them,... " ²³ Chief Whitehead's comments about being obliged to accept an unappealing offer concerning a reserve were based on the First

²¹ James Morrison, "Treaty Research Report. Treaty Nine (1905-1906): The James Bay Treaty," (Ottawa: Treaties and Historical Research Centre, Indian and Northern Affairs Canada, 1986), 17.

²² Stewart diary, July 19, 1905, and MacMartin diary, July 19, 1905 (Chief Monias); both in John S. Long, *Treaty No. 9: Making the Agreement to Share the land in Far Northern Ontario in 1905*, (Montreal and Kingston: MQUP, 2010), 180 (Stewart) and 183 (MacMartin).

²³ Stewart diary, July 25, 1905 (some were suspicious) and MacMartin diary, July 25, 1905; both in John S. Long, *Treaty No. 9: Making the Agreement to Share the land in Far Northern Ontario in 1905*, (Montreal and Kingston: MQUP, 2010), 196 (Stewart) and 197 (MacMartin).

Nation tradition of making kin of strangers in order to conduct business with them, a direct product of exchanges in the fur-trade environment.²⁴

On the other hand, some First Nation leaders were positive about non-Natives and the treaty. As Ontario's treaty negotiator, George MacMartin, recorded events on July 12, 1905, at Osnaburgh:

Massabay the blind chief, moving up and down on the plank walk crossing part of ground delivered an oration to wh. the Band listened attentively, the pith of his speech, being that the white men were their friends, were good, had assisted them giving money and lands for their benefit, that the H[udson's] B[ay Company] was good to them and they could not get along without the white men & they could only expect help by proving them- selves good...²⁵

The most likely explanation for the difference in attitude towards the government negotiators and their offers is different degrees of familiarity with non-Natives and their ways.

Inequality of condition was made worse after treaty by a number of factors, in particular government schooling policy. Allusion has already been made in response to question 2 that the provincial government implemented restrictions on First Nations gathering that had a negative economic impact on Treaty 9 First Nations and that the federal government through its Department of Indian Affairs did little to mitigate or to block those harmful provincial measures.²⁶ The negative impact of the provincial statutes and policies fell unevenly on First Nations in Treaty 9. As well, it will be recalled that Treaty 9 promised: "Further His Majesty agrees to pay such salaries of teachers to instruct the children of said Indians and also to provide such school buildings and educational equipment as may seem advisable to His Majesty's Government of Canada."²⁷ When Treaty 9 was implemented, the Department of Indian Affairs sometimes chose to respond to its treaty commitment on schooling by providing only residential schools that were usually located far from the home territories of the First Nations whose children attended them. The individual schools relevant to the children of the Treaty 9 First Nations were Shingwauk Home in Sault Ste Marie, founded in the 1870s; Chapleau residential school, created in 1907; McIntosh school, 1925; and two schools near Moosonee that been established in 1906 (the Anglicans' school on Moose

²⁴ Chief Whitehead's suggestion that he and his band were compelled to accept an uncongenial reserve because the government treaty negotiators had "given them presents and provided a feast for them" was an allusion to the fact that the government negotiators had made ascribed kin of them and created an obligation on the part of the First Nation to the government donors. On ascribed kinship and treaty negotiations, see J.R. Miller, *Compact, Contract, Covenant: Aboriginal Treaty Making in Canada*, (Toronto: University of Toronto Press, 2007), 22-5.

²⁵ MacMartin diary, July 12, 1905; in John S. Long, *Treaty No. 9: Making the Agreement to Share the land in Far Northern Ontario in 1905*, (Montreal and Kingston: MQUP, 2010), 168.

²⁶ *Supra*, pp 4-6.

²⁷ Treaty 9; in John S. Long, *Treaty No. 9: Making the Agreement to Share the land in Far Northern Ontario in 1905*, (Montreal and Kingston: MQUP, 2010), 318.

Island, and the Roman Catholic Sainte Anne at Fmi Albany). Some children in Treaty 9 whom the Department of Indian Affairs classified as Anglican might also have attended the Pelican Lake school near Sioux Lookout.²⁸

Wherever located and no matter which Christian denomination operated them, the residential schools failed their students badly. The purpose of the schools when they were established in and after 1883 was to enable their graduates to take their place in or alongside the majority Euro-Canadian population.²⁹ At their inception, these custodial schools constituted both industrial schools, which were large, pedagogically ambitious and usually located far from reserves, and smaller boarding schools, which were less ambitious and often located near or even on First Nation reserves. One sign that these schools did not perform as anticipated was that government policy regulating them kept changing. In 1892, the government changed the financing system from an accountable- cost basis to a per diem rate basis.³⁰ In 1910, the Superintendent of Education, D.C. Scott, wrote in the department's annual report that the schools now aimed "'to develop the great natural intelligence of the race and to fit the Indian for civilized life in his own environment.'"³¹ Finally, the Department of Indian Affairs faced up to the fact that there no longer much difference between its "industrial" and "boarding" schools, and in 1923 it folded them into a single category that henceforth was labelled "residential schools."³²

The final report of the Truth and Reconciliation Commission (TRC) in 2015 laid bare the many failings of the residential school system. In addition to the well-publicized problems with poor living conditions, excessive punishment, physical and sexual abuse, and lack of effective oversight by both governmental and church bodies who were responsible for them, the residential schools failed massively at both academic and vocational instruction.³³ It could hardly have been otherwise, given the structural problems that both students and their teachers and instructors faced. First, they were operating in a cross-cultural environment where teachers and students often failed to comprehend each other, in no small part, often, because of language differences. Second, until the later 1950s, the residential schools operated on the "half-day system" in which students spent half the day in a classroom, and the other in supposedly instructional work in the kitchen, laundry, workshop, barn, or fields. Residential school students were expected to master in half the time the academic education students in non-Native

²⁸ www.nctr.ca/map.php.int.search.myway.com, map of residential schools (accessed August 7, 2023). nctr in the map's URL stands for National Centre for Truth and Reconciliation.

²⁹ J.R. Miller, *Shingwauk's Vision: A History of Native Residential Schools*, (Toronto: University of Toronto Press, 1996), 102-3.

³⁰ J.R. Miller, *Shingwauk's Vision: A History of Native Residential Schools*, (Toronto: University of Toronto Press, 1996), 126-8.

³¹ Library and Archives Canada, Department of Indian Affairs Annual Report for 1910, *Canada Sessional Papers* (27) 1911, 273 (on line - accessed Aug. 7, 2023).

³² J.R. Miller, *Shingwauk's Vision: A History of Native Residential Schools*, (Toronto: University of Toronto Press, 1996), 141.

³³ The Truth and Reconciliation Commission of Canada, *Final Report. Volume 1: The History, Part 1*, (Ottawa: MQUP, 2015), chapters 19 (diet), 21 (discipline), 23 (victimization of students), and 22 (covering up abuse); and *ibid.*, *The History, Part 2, 1939-2000*, chapters 36 (health), 37 (nutrition), 40 (discipline), 41 (abuse), 42 (student victimization of students).

schools had to acquire that knowledge. As the TRC summarized the results for the period after 1940:

... the schools failed to provide Aboriginal children with the educational supports they needed to progress through the school system at a rate similar to that of non-Aboriginal children. A significant percentage of teachers lacked qualifications; the curriculum contained material that was either irrelevant to, or offensive in its treatment of, Aboriginal people; Aboriginal languages were suppressed and demeaned; and the views of parents were discounted or ignored. After 1970, Aboriginal students were transferred in increasing numbers to public school systems that had little knowledge of their rights and heritage, and little interest or ability meeting their specific needs.³⁴

Inadequate instruction from the schools that the federal government provided was a major impediment to Treaty 9 First Nations' ability to advance economically and socially.

Conclusion

First Nations entering Treaty 9 did so from varied backgrounds and with differing levels of knowledge about the people with whom they now had to deal. In particular, the attitudes and responses of the provincial government proved hard and enduring. Ontario's position on First Nation gathering rights, even in light of the language in the printed version of Treaty 9, was restrictive and unchanging. As late as the early twenty-first century the Province of Ontario adopted an interpretation of Treaty 9's clause dealing with gathering rights that severely limited First Nations' economic activity. Nor has Ontario's position changed. On a provincial website the government of Ontario still says: "Generally, if you belong to an Indigenous community with established Aboriginal or treaty hunting rights in Ontario, you can hunt without a licence when you're hunting:

- within your traditional or treaty area
- for food, social or ceremonial purposes."³⁵

³⁴ The Truth and Reconciliation Commission of Canada, *Final Report. Volume 2: The History Part 2*, (Ottawa: MQUP, 2015), 146.

³⁵ www.ontario.ca/m1gc/hunting-licence-ontario-residents accessed Aug. 7, 2023.

Curriculum vitae

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Education

- 1966 (Hons.) B.A., Modern History, University of Toronto
- 1967 M.A., Canadian History, University of Toronto
- 1972 Ph.D., University of Toronto. dissertation: "The Impact of the Jesuits' Estates Act on Canadian History" (supervisor: Donald G. Creighton)

Employment

- 1970-75 Assistant Professor of History, University of Saskatchewan
- 1975-79 Associate Professor of History, University of Saskatchewan
- 1979-2014 Professor of History, University of Saskatchewan
 - 1982-83 Visiting Professor of Canadian Studies in Japan
 - 2001-14 Canada Research Chair (Tier 1) in Native-Newcomer Relations

Honours

- Queen Elizabeth II Platinum Jubilee Medal, 29 Sept. 2022
- Officer of the Order of Canada "for even-handed and definitive scholarship," Dec. 2014
- Killam Prize in the Humanities, Canada Council for the Killam Trusts, Feb. 2014
- Historic Sites and Monuments Board of Canada, Saskatchewan Member, P.C. 2014-52, Jan. 2014-Jan. 2019
- Queen Elizabeth II Diamond Jubilee Medal "for contribution to the discipline of History and The Canadian Historical Association," May 2012
- Royal Society of Canada, Governor General's Lecture Series, Sept. 2011-Feb. 2012
- Social Sciences and Humanities Research Council of Canada Gold Medal for Achievement in Research, Dec. 2010
- Commemorative Medal for the Centennial of Saskatchewan, Feb. 2006
- Founders' Prize of the Canadian History of Education Association for *Shingwauk's Vision*, Oct. 1998
- Certificate of Merit from The Canadian Association of Foundations of Education for *Shingwauk's Vision*, June 1998
- Elected Fellow of the Royal Society of Canada, May 1998
- Appointed to Council of the Social Sciences and Humanities Research Council of Canada P.C. 1998-610, April 1998 (served 1998-2006)
- Distinguished Researcher Award, Spring Convocation 1997, University of Saskatchewan
- Dafoe Prize, Dafoe Foundation, Winnipeg, for *Shingwauk's Vision*, May 1997

Various graduate and undergraduate scholarships and fellowships, 1965-1970

Publications-Books

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"Honore Mercier, la minorite protestante, et l'Acte pour le reglement des Biens des Jesuites," *Revue d'histoire de l'Amerique franaise*, 27, 4, mars 1974

"'Equal Rights for All': The E.R.A. and the Ontario Election of 1890," *Ontario History*, 65, 4, Dec. 1973

"D'Alton McCarthy, Equal Rights and the Origins of the Manitoba Schools Question," *Canadian Historical Review*, 54, 4, Dec. 1973

Non-refereed Publications

"How First Nations View the Crown," *Ottawa Citizen*, 12 January 2013; reprinted in *The StarPhoenix* (Saskatoon), and *Montreal Gazette*, 12 January 2013

"Time for mature treaty discussion," Op-ed, *The StarPhoenix* (Saskatoon), 4 Nov. 2011

"'We Are Sorry': The Canadian Government Apology for Residential Schooling," *The Ecumenist: A Journal of Theology, Culture, and Society*, 46, no.2, spring 2009

"Which 'Native' History? By Whom? For Whom?" Association for Canadian Studies, *Canadian Issues*, Fall 2008

"The next residential schools chapter: No truth, no reconciliation," *Globe and Mail*, 27 June 2008

"Truth, reconciliation initiative overdue," *The StarPhoenix* (Saskatoon), 1 May 2008,

"Aboriginal Treaties," Library and Archives Canada, *Forum on Democracy* (on line), 11 December 2007

(with Myra Rutherdale), "Indians on Display," The Winnipeg Free Press, 14 August 2006

"The East and Pre-Nineteenth Century Wars: His Majesty's Indian Allies," *Journal of the Indian Wars*, 2, no. 1, 2001

"The Mythology of Oka," *Literary Review of Canada*, 1, 4, April 1992

"Ladies! Dante is Dead: Reflections on the Prospects for the Humanities in the 1990s. *Scrutiny*, September 1990; reprinted in Canadian Federation for the Humanities, *Bulletin*, 18, 2 & 3, Spring & Summer 1990

"A History of Residential Schooling for Native Children," *Bulletin of the Western Oblate History Project*, No. 12, April 1990

"A Bag of Steaks, Chivas Regal and a Great Big Teddy Bear," *NeWest Review*, April 1986

"History, Myth and Louis Riel," *NeWest Review*, Jan. 1984

"What's in a Word? or How I learned to stop worrying about Education and love Japanese Bureaucracy," *NeWest Review*, March 1983

"Fiscal Federalism, 1982 Style," *NeWest Review*, January 1982

Consulting

2021 Parks Canada. Re Government House, Charlottetown, "Fast Talk Exercise: "Talking about Confederation"

2020 Natural Resources Canada. Book Club session

2020 Consulting re class actions on behalf of Indigenous peoples for KoskieMinsky LLP

2018-19 Consulting for two ongoing Indigenous law cases for Duboff, Edwards, Haight & Schachter; and for MauriceLaw

2017 Testifying as an expert witness on the history of Native-newcomer relations (Jan. 31, 2017) and on treaties (March 28, 2017), Senate Standing Committee on Aboriginal Peoples. See the Interim Report of the committee: *Lessons from the past: Towards a new relationship between Indigenous peoples and Canada* (2019).

2003 Castle Mountain/Siksika. Mandell, Pinder (Vancouver). Report on timber limits and timber reserve policy

2002 Ochapowace Ski Resort Inc. et al. Phillips & Milen, Regina. Report on Ochapowace First Nation

2000 Ermineskin/Samson v Her Majesty the Queen. Blake, Cassels & Graydon (Calgary office). Report on context of treaty-making with particular attention to Treaty 6

1998 Johnson et al v Her Majesty the Queen et al. Swinton & Company, Vancouver. Report on federal government residential school policy

1997 Chippewas of Sarnia. Lerner and Associates (now Lerner LLP) (Toronto). Report on history of federal Indian policy and legislation

Book Reviews

Over my career I have published 225 book reviews in outlets ranging from scholarly journals in history, political studies, social work, and sociology to local and national newspapers.

Public Service

Since 2015, I have served as the Presiding Official at forty citizenship ceremonies at which landed immigrants become Canadian citizens.

May 16, 2024

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

**CHIEF JASON GAUTHIER, on behalf of the
MISSANABIE CREE FIRST NATION and on behalf of all
Treaty 9 First Nations in the Province of Ontario**

Plaintiff

- and -

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

Defendant

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

ACKNOWLEDGMENT OF EXPERT'S DUTY

1. My name is James R. Miller. I live at Saskatoon, in the province of Saskatchewan.
2. I have been engaged by or on behalf of the Plaintiff, Chief Jason Gauthier, on Behalf of the Missanabie Cree First Nation and on behalf of all Treaty 9 First Nations in the Province of Ontario to provide evidence in relation to the above-noted court proceeding.
3. I acknowledge that it is my duty to provide evidence in relation to this proceeding as follows:
 - (a) to provide opinion evidence that is fair, objective and non-partisan;
 - (b) to provide opinion evidence that is related only to matters that are within my area of expertise; and
 - (c) to provide such additional assistance as the court may reasonably require, to determine a matter in issue.
4. I acknowledge that the duty referred to above prevails over any obligation which I may owe to any party by whom or on whose behalf I am engaged.

Date July 24, 2024.


Signature

NOTE: This form must be attached to any expert report under subrules 53.03(1) or (2) and any opinion evidence provided by an expert witness on a motion or application.

This is **Exhibit "B"** referred to in the
Affidavit of J.R. Miller Affirmed
before me this 24th day of July 2024



Commissioner for Oaths in and for
the Province of Saskatchewan
Being a Lawyer

J.R. Miller
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November 13, 2023

Ryan Lake
MauriceLaw
via email

Dear Mr. Lake

Re: your email message of November 2, 2023

I am writing in response to your message of November 2, 2023 in which you asked me to respond to three questions arising from litigation involving the Missanabi Cree First Nation and other Treaty 9 First Nations.

Expertise

I have carried out research and published articles, chapters, and books on government and church policies towards Indigenous peoples in Canada – and on the response of Indigenous peoples to such policies – for forty years. This research has included examinations of residential schooling for First Nations and Métis, treaty-making, First Nations political and military leadership, the evolution of relations between Indigenous peoples and the rest of the Canadian population, and the movement towards reconciliation between Indigenous peoples and the rest of the Canadian population. This research has included archival and oral history investigation, as well as interrogation of published primary (i.e. contemporary) documents. My research has involved all geographic regions of Canada and all time periods since European contact on the Atlantic coast in the sixteenth century.

I have published refereed articles, chapters in refereed books, and refereed books disseminating the results of the research referred to above. (A summary *curriculum vitae* follows this memo.) Specifically, I have published twelve books, twenty-nine articles in

refereed journals, and thirty-four chapters in refereed books. (Another chapter in a refereed book is in press now.) I have held numerous Standard Research Grants and Strategic Grants from the Social Science and Humanities Research Council of Canada since the late 1970s. My work has been recognized with the award of the Dafoe Prize (1997), the Founders' Prize of the Canadian Association of Foundations of Education (1998), the Social Sciences and Humanities Research Council of Canada Gold Medal for Achievement in Research (2010), the Killam Prize in the Humanities (2014), and the Queen Elizabeth II Platinum Jubilee Medal (2022). I received the Saskatchewan Order of Merit in 2013 and was made an Officer of the Order of Canada in 2014 "for even-handed and definitive scholarship." I have been honoured by serving as the President of the Canadian Historical Association in 1996-97, and by appointment as the Saskatchewan representative on the Historic Sites and Monuments Board of Canada, 2014-19.

Your questions

Question 1: Did the Crown provide seed, implements, agricultural instruction, or any other economic assistance in agriculture, stock-raising, or other work to Treaty 9 signatories and adherents?

No, the Crown did not provide seed, implements, agricultural instruction, or any other economic assistance in agriculture, stock-raising, or other work to treaty 9 signatories and adherents. The text of Treaty 9, in contrast with many of the earlier Numbered Treaties, is silent on the topic of agricultural assistance.

The reason for the omission of agricultural assistance from Treaty 9 appears to be that the treaty commissioners believed that the region covered by Treaty 9 was unsuitable for agriculture and that Treaty 9 bands would continue to sustain themselves economically principally by hunting, gathering, and trading furs for goods. At Fort Hope, for example, the commissioners noted that "it was explained that none of these issues ["cattle, implements, seed-grain and tools"] were to be made, as the band could not hope to depend upon agriculture as a means of subsistence; that hunting and fishing, in which occupations they were not to be interfered with, should for very many years prove lucrative sources of revenue."³⁶ And, again, in the conclusion to their 1905 final report the commissioners said, "While it is doubtful whether the Indians will ever engage in agriculture, these reserves, being of a reasonable size, will give a secure and permanent interest in the land which the indeterminate provision of a larger tract could never carry."³⁷

Despite what the Treaty 9 Commissioners said about the unsuitability of tracts in the territory covered by Treaty 9 for supporting agriculture, individual commissioners noted the existence of gardens at sites within the Treaty 9 territory. At English River,

³⁶ *The James Bay Treaty – Treaty No. 9 – November 6, 1905*, online (accessed Nov. 7, 2023).

Unfortunately, the online version of the Commissioners' report that I used was not paginated. However,, James Morrison, "Treaty Research Report – Treaty No. 9 (1905-1906)," (Ottawa: Indian and Northern Affairs Canada, 1986), 35, says that this passage appeared on p 6 of the Commissioners' report.

³⁷ *The James Bay Treaty – Treaty No. 9 – November 6, 1905* (unpaginated online version; accessed Nov. 7, 2023).

Commissioner Stewart commented on a garden with potatoes at the Hudson's Bay Company post.³⁸ At Fort Albany, Commissioner MacMartin noted that "Cattle are kept by the H[u]ds]on Bay people, potatoes, rhubarb and vegetables grown in the garden."³⁹ And at Marten Falls Commissioner MacMartin observed of the lands at the Hudson's Bay Company post, "The Soil at this Post is the most fertile I have seen on the whole route, being a mixture of dark mucky soil and white clay, the Garden at the post is cultivated well and shows potatos [sic] and onions well advanced."⁴⁰

In spite of what the commissioners said about the unsuitability of treaty 9 territory for the pursuit of agriculture, some First Nations did indicate an interest in agriculture. Historical geographer Arthur J. Ray says that in the region near Lake Osnaburgh, during earlier negotiation of Treaty 3, the Ojibwe had "wanted the government to help them in the development of gardens, which they believed would help them reduce the risk of suffering from periodic food shortages."⁴¹

And soon after Treaty 9 was negotiated a number of treaty First Nations indicated a desire for lands suitable for agriculture. The Marten Falls band in 1907 sought new reserve lands because of the unsuitability of the assigned lands for agriculture.⁴² In 1908, the "Osnaburgh Band petitioned for new lands to the southwest of Lake Joseph because, they said, the original reserve was useless for farming, mining or lumbering."⁴³ At French Creek, the band in 1912 applied for a new reserve, saying:

When the treaty was made with us, a reserve on French Creek was given us, about 7 miles south of Moose Fort. We find on examination that the above reserve is a poor one, not suitable for wood or farming. The wood has been largely cut down or destroyed and the land is too stony for agricultural

purposes. Besides there is very poor hunting there. The arrangements were too hurriedly made and did not give us time to investigate. We much prefer and do hereby apply for a reserve extending from North Bluff to [W]avy Creek about nine miles N.W. from Moose Fort along the coast towards Albany. This is most suitable for all purposes – for farming and hunting and wood supply. Though rather swampy further back, it is far ahead of French

³⁸ Commissioners Stewart's diary reproduced in J. Long, *Treaty No. 9: Making the Agreement to Share the Land in Far Northern Ontario in 1905*, (Montreal and Kingston: McGill-Queen's University Press, 2010), 208.

³⁹ Commissioner MacMartin's diary reproduced in J. Long, *Treaty No. 9: Making the Agreement to Share the Land in Far Northern Ontario in 1905*, (Montreal and Kingston: McGill-Queen's University Press, 2010), 221.

⁴⁰ Commissioner MacMartin's diary reproduced in J. Long, *Treaty No. 9: Making the Agreement to Share the Land in Far Northern Ontario in 1905*, (Montreal and Kingston: McGill-Queen's University Press, 2010), 197.

⁴¹ Arthur J. Ray, *The Canadian Fur Trade in the Industrial Age*, (Toronto: University of Toronto Press, 1990), 33.

⁴² James Morrison, "Treaty Research Report – Treaty No. 9 (1905-1906)," (Ottawa: Indian and Northern Affairs Canada, 1986), 45.

⁴³ J. Morrison "Treaty Research Report – Treaty No. 9 (1905-1906)," (Ottawa: Indian and Northern Affairs Canada, 1986), 45. Morrison cites as his source correspondence in the Hudson's Bay Archives.

Creek Reserve. The hunting is especially good and we could leave our old and infirm there while the hunters are away in the winter, and they would be comfortable – there being also good fishing in the various creeks and streams.⁴⁴

And in 1913, the Moose Factory band similarly sought new reserve lands for a similar reason: the unsuitability of the reserve the Treaty 9 commissioners had assigned earlier for either farming or timber harvesting.⁴⁵

In sum, the Crown did not provide seed, implements, agricultural instruction, or any other economic assistance in agriculture, stock-raising, or other work to Treaty 9 signatories and adherents, even though there is some evidence that some lands in Treaty 9 were suitable for agriculture and that some Treaty 9 bands were interested in pursuing farming.

Question 2: Did the Crown provide support to Treaty 9's signatories and adherents to continue hunting and fishing, for example by providing ammunition, twine, netting, or other hunting and fishing supports?

The Crown did not provide support to treaty 9's signatories and adherents to continue hunting and fishing, even though Treaty 9 contained the following recognition of Treaty 9 First Nations' continuing right to hunt and fish:

And His Majesty the King hereby agrees with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time be made by the government of the country, acting under the authority of His Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.⁴⁶

Moreover, during treaty negotiations the treaty commissioners reassured First Nations leaders that the treaty would not interfere with their pursuit of their accustomed gathering rights. At Osnaburg, for example:

Missabay, the recognized chief of the band, then spoke, expressing the fears of the Indians that, if they signed the treaty, they would be compelled to reside upon the reserve to be set apart for them, and would be deprived of the fishing and hunting privileges which they now enjoy.

⁴⁴ Anderson (Ontario Ministry of Nature Resources) to J.D. McLean of DIA, 2 Oct. 1912. McLean indicated to Ontario officials that the DIA had no objection to accommodating the band's request, but the Ontario official rejected the suggestion. J. Long, *Treaty No. 9: Making the Agreement to Share the Land in Far Northern Ontario in 1905*, (Montreal and Kingston: McGill-Queen's University Press, 2010), 448-9n80.

⁴⁵ James Morrison, "Treaty Research Report – Treaty No. 9 (1905-1906)," (Ottawa: Indian and Northern Affairs Canada, 1986), 46.

⁴⁶ "James Bay Treaty – Treaty No. 9," in (online) Treaty Document(s), 1905 and 1906, Treaty No. 9 (accessed Nov. 7, 2023).

On being informed that their fears in regard to both these matters were groundless, as their present manner of making their livelihood would in no way be interfered with, the Indians talked the matter over among themselves, and then asked to be given till the following day to prepare their reply. This request was at once acceded to and the meeting adjourned.

The next morning the Indians signified their readiness to give their reply to the commissioners, and the meeting being again convened, the chief spoke, stating that full consideration had been given the request made to them to enter into treaty with His Majesty, and they were prepared to sign, as they believed that nothing but good was intended...⁴⁷

The silence of the government text of Treaty 9 as to support for hunting, trapping, and fishing was in marked contrast to the commitments in all of the earlier Numbered Treaties.

In Treaty 1, the Stone Fort Treaty of 1871, the Crown committed to supply annuities, in some cases in the form of items used for fishing and hunting:

Her Majesty's Commissioner shall, as soon as possible after the execution of this treaty, cause to be taken an accurate census of all the Indians inhabiting the district above described, distributing them in families, and shall in every year ensuing the date hereof, at some period during the month of July in each year, to be duly notified to the Indians, and at or near the respective reserves, pay to each Indian family of five persons the sum of fifteen dollars Canadian currency, or in like proportion for a larger or smaller family, such payment to be made in such articles as the Indians shall require of blankets, clothing, prints (assorted colors), twine or traps at the current cost price in Montreal, or otherwise, if Her Majesty shall deem the same desirable in the interests of Her Indian people, in cash.⁴⁸

And again, in Treaty 2, the Manitoba Post Treaty of 1871, the Crown made the same commitment:

And further, that Her Majesty's Commissioner shall, as soon as possible after the execution of this treaty, cause to be taken an accurate census of all the Indians inhabiting the tract above described, distributing them in families, and shall in every year ensuring the date hereof, at some period during the month of August in each year, to be duly notified to the Indians, and at or near the respective reserves, pay to each Indian family of five persons, the sum of fifteen dollars, Canadian currency, or in like propor-

⁴⁷ Treaty Commissioners' 1905 report, in (online) Treaty Document(s), 1905 and 1906, Treaty No. 9 (accessed Nov. 7, 2023).

⁴⁸ Treaty Number One (1871), in Alexander Morris, *The Treaties of Canada with the Indians* reprint edition, (Toronto: Belfords, Clarke & Co, 1880; reprint Fifth House Publishers, 1991), 315-16.

tion for a larger or smaller family; such payment to be made in such articles as the Indians shall require of blankets, clothing, prints (assorted colors), twine or traps, at the current cash price in Montreal, or otherwise if Her Majesty shall deem the same desirable in the interest of her Indian people, in cash.⁴⁹

In Treaty 3, the North West Angle Treaty of 1873, the hunting and fishing commitments were more detailed and more specific:

Her Majesty further agrees with her said Indians, that they, the said Indians, shall have the right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by her government of her Dominion of Canada, and saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering or other purposes, by her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefor by the Government.

It is further agreed between Her Majesty and the said Indians, that the sum of fifteen hundred dollars per annum shall be yearly and every year expended by Her Majesty in the purchase of ammunition, and twine for nets for the use of the said Indians.⁵⁰

And Treaty 4, the Qu'Appelle Treaty of 1874, promised:

In view of the satisfaction with which the Queen views the ready response which Her Majesty's Indian subjects have accorded to the invitation of her said Commissioners to meet them on this occasion; and also in token of their general good conduct and behavior, she hereby, through Her Commissioners, makes the Indians of the bands here represented, a present – For each Chief of twenty-five dollars in cash, a coat, and a Queen's silver medal; for each head man, not exceeding four in each band, fifteen dollars in cash, and a coat; and for every other man, woman and child, twelve dollars in cash; and for those here assembled some powder, shot, blankets, calicoes and other articles.

Her Majesty also agrees that each Chief, and each head man, not to exceed four in each band, once in every three years during the term of their office, shall receive a suitable suit of clothing, and that yearly and every year, she will cause to be distributed among the bands included in the limits of this treaty, powder, shot, ball and twine, in all to the value of seven hundred and fifty dollars; and each Chief shall receive hereafter, in recognition

⁴⁹ Treaty Number Two (1871), in Alexander Morris, *The Treaties of Canada with the Indians* reprint edition, (Toronto: Belfords, Clarke & Co., 1880; reprint Fifth House Publishers, 1991), 319.

⁵⁰ Treaty Number Three (1873), in Alexander Morris, *The Treaties of Canada with the Indians* reprint edition, (Toronto: Belfords, Clarke & Co., 1880; reprint Fifth House Publishers, 1991)), 323-4.

of the closing of the treaty, a suitable flag.

...

And further, Her Majesty agrees that her said Indians shall have right to pursue their avocations of hunting, trapping and fishing throughout the tract surrendered subject to such regulations as may from time to time be made by the Government of the country acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining or other purposes under grant, or other right given by Her Majesty's said Government.⁵¹

In Treaty Number Five, the Lake Winnipeg Treaty (1875):

Her Majesty further agrees with her said Indians that they, the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by her Government of her Dominion of Canada, and saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering or other purposes by her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefor by the said Government of the Dominion of Canada.

...

It is further agreed between Her Majesty and the said Indians that the sum of five hundred dollars per annum shall be yearly and every year expended by Her Majesty in the purchase of ammunition and twine for nets for the use of the said Indians, in manner following, that is to say: - In the reasonable discretion as regards the distribution thereof among the Indians inhabiting the several reserves or otherwise included herein, of Her Majesty's Indian Agent having the supervision of the this treaty;⁵²

In Treaty Number Six, the Treaty of Fort Carlton and Fort Pitt (1876):

Her Majesty further agrees with her said Indians that they, the said Indians, shall have the right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by her Government of her Dominion of Canada, and saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering or other purposes by her said Government of the Dominion of Canada, or by any of the subjects thereof, duly authorized therefor, by the said Government;

...

It is further agreed between Her Majesty and the said Indians that the sum of

⁵¹ Treaty Number Four (1874), in Alexander Morris, *The Treaties of Canada with the Indians* reprint edition, (Toronto: Belfords, Clarke & Co., 1880; reprint Fifth House Publishers, 1991), 332, 333.

⁵² Treaty Number Five (1875), in Alexander Morris, *The Treaties of Canada with the Indians* reprint edition, (Toronto: Belfords, Clarke & Co., 1880; reprint Fifth House Publishers, 1991), 346.

of fifteen hundred dollars per annum, shall be yearly and every year expended by Her Majesty in the purchase of ammunition and twine for nets for the use of the said Indians, in manner following, that is to say: - In the reasonable discretion as regards the distribution thereof, among the Indians inhabiting the several reserves, or otherwise included herein, of Her Majesty's Indian Agent having the supervision of this treaty;⁵³

In Treaty 7 (the Blackfoot Treaty), 1877:

And Her Majesty the Queen hereby agrees with her said Indians, that they shall have right to pursue their vocations of hunting throughout the tract surrendered as heretofore described, subject to such regulations as may, from time to time, be made by the Government of the country, acting under the authority of Her Majesty; and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, trading or other purposes by her Government of Canada, or by any of her Majesty's subjects duly authorized therefor by the said Government.

...
Further, Her Majesty agrees that the sum of two thousand dollars shall hereafter every year be expended in the purchase of ammunition for distribution among the said Indians; provided that if at any future time ammunition became comparatively unnecessary for said Indians, her Government, with the consent of said Indians, or any of the bands thereof, may expend the proportion due to such band otherwise for their benefit.⁵⁴

And, finally, in Treaty 8 (1899-1900):

And Her Majesty the Queen hereby agrees with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.

...
... The aforesaid articles, machines and cattle to be given once for all for the encouragement of agriculture and stock raising; and for such bands as prefer to continue hunting and fishing, as much ammunition and twine for making nets annually, as will amount in value to one dollar per head of the families so engaged in hunting and fishing.⁵⁵

⁵³ Treaty Number Six (1876), in Alexander Morris, *The Treaties of Canada with the Indians* reprint edition, (Toronto: Belfords, Clarke & Co., 1880; reprint Fifth House Publishers, 1991), 353, 354.

⁵⁴ Treaty Number Seven (1887), in Alexander Morris, *The Treaties of Canada with the Indians* reprint edition, (Toronto: Belfords, Clarke & Co, 1880; reprint Fifth House Publishers, 1991), 369, 370.

⁵⁵ www.rcaanc-cirnac.gc.ca/eng/1100100028813/1581293624572 (accessed Nov. 8, 2023).

Question 3: By comparison, did the Crown provide support for assistance in agriculture, stock-raising, or other work, or for fishing and hunting to the signatories and adherents to the other Numbered Treaties?

In contrast to most of the earlier Numbered Treaties (Treaty 1, Treaty 2, Treaty 3, Treaty 4, Treaty 6, Treaty 7, and Treaty 8⁵⁶), Treaty 9 did not include a Crown commitment to provide seed, implements, and agricultural instruction to signatories and adherents of Treaty 9.

In Treaty 1 and Treaty 2, both of which were supplemented after the initial negotiations in 1871 with an Order in Council in 1875 that incorporated so-called ‘outside promises’ into the agreement. These commitments included: “As each Indian settled down upon his share of the Reserve and commenced the cultivation of his land he was to receive a plough and harrow; each Chief was to receive a cow, and a male and female of the smaller kinds of animals [raised?] upon a farm. There was to be a Bull for the general use of each Reserve.”⁵⁷

In the case of Treaty 3:

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

⁵⁶ Re Treaty 1 and Treaty 2, Order in Council of 30 April 1875; and Alexander Morris, *The Treaties of Canada with the Indians* reprint edition, (Toronto: Belfords, Clarke & Co, 1880; reprint edition Fifth House Publishers, 1992) [hereafter Morris, *Treaties*], 338-42; re Treaty 3, Morris, *Treaties*, 324; re Treaty 4, Morris, *Treaties*, 332-3; re Treaty 6, Morris, *Treaties*, 354; re Treaty 7, Morris, *Treaties*, 371; re Treaty 8, see Treaty 8, www.rcaanc-cirnac.gc.ca/eng/1100100028813/1581293624572, (accessed Aug. 1, 2023).

The Order in Council concerning outside promises in Treaty 1 and Treaty 2 is available at the Library and Archives Canada website, specifically LAC’s order in council database: central.bac-lac.gc.ca/item?id=e002249380&app=OrdinCou&op=img (accessed Aug. 8, 2023).

⁵⁷ This wording is found in a memorandum of the Department of the Interior, dated 27 April, 1875, which was incorporated into the Order in Council by reference. The wording concerning the farm animals that were to be supplied was a bit different in the case of Treaty 2. Library and Archives Canada, Order in Council database: central.bac-lac.gc.ca/item?id=e002249380&app=OrdinCou&op=img (accessed Aug. 8, 2023).

for the encouragement of the practice of agriculture among the Indians.⁵⁸

In Treaty 4:

It is further agreed between Her Majesty and the said Indians that the following articles shall be supplied to any band thereof who are now actually cultivating the soil, or who shall hereafter settle on these reserves and commence to break up the land, that is to say - two hoes, one spade, one scythe, and one axe for every family so cultivating; and enough seed, wheat, barley, oats and potatoes to plant such lands as they have broken up; also one plough and two harrows for every ten families so cultivating as aforesaid; and also to each Chief, for the use of his band as aforesaid, one yoke of oxen, one bull, four cows, a chest of ordinary carpenter's tools, five hand-saws, five augers, one cross-cut saw, one pit saw, the necessary files, and one grindstone; all the aforesaid articles to be given once for all, for the encouragement of the practice of agriculture among the Indians.⁵⁹

The commitment to agricultural assistance in Treaty 5 was similar to the one in Treaty 4:

It is further agreed between Her Majesty and the said Indians that the following articles shall be supplied to any band of the said Indians thereof who are now cultivating the soil, or who shall hereafter commence to cultivate the land, that is to say - Two hoes for every family actually cultivating; also one spade per family as aforesaid; one plough for every ten families as aforesaid; five harrows for every twenty families as aforesaid; one scythe for every family as aforesaid, and also one axe; and also one cross-cut saw, one hand saw, one pit saw, the necessary files, one grindstone, and one auger for each band; and also for each Chief, for the use of his band, one chest of ordinary carpenter's tools; also, for each band, enough of wheat, barley, potatoes and oats to plant the land actually broken up for cultivation all the aforesaid articles to be given *once for all* for the encouragement of the practice of agriculture among the Indians.⁶⁰

In Treaty 6:

It is further agreed between Her Majesty and the said Indians that the following articles shall be supplied to any band of the said Indians who are now cultivating the soil, or who shall hereafter commence to cultivate the land, that is to say: - Four hoes for every family actually cultivating,

⁵⁸ Treaty 3, in A. Morris, *The Treaties of Canada with the Indians* reprint edition, (Toronto: Belfords, Clarke, 1880; reprint Fifth House Publishers, 1992), 324.

⁵⁹ Treaty 4, in A. Morris, *The Treaties of Canada with the Indians* reprint edition, (Toronto: Belfords, Clarke, 1880; reprint Fifth House Publishers, 1992), 332-3.

⁶⁰ Treaty 5, in A. Morris, *The Treaties of Canada with the Indians* reprint edition, (Toronto: Belfords, Clarke, 1880; reprint Fifth House Publishers, 1992), 346-7. (emphasis in the original)

also two spades per family as aforesaid; one plough for every three families as aforesaid, one harrow for every three families as aforesaid; two scythes, and one whetstone and two hayforks and two reaping-hooks for every family as aforesaid; and also two axes and also one cross-cut saw, and also one hand-saw, one pit-saw, the necessary files, one grindstone and one auger for each band; and also for each Chief, for the use of his band, one chest of ordinary carpenter's tools; also for each band, enough of wheat, barley, potatoes and oats to plant the land actually broken up for cultivation by such band; and also for each band, four oxen one bull and six cows, also one boar and two sows, and one handmill when any band shall raise sufficient grain therefor; all the aforesaid articles to be given *once for all* for the encouragement of the practice of agriculture among the Indians;⁶¹

Treaty 7's provisions for agricultural assistance were different:

Further, Her Majesty agrees to supply each head and minor Chief, and each Stony Chief, for the use of their bands, ten axes, five handsaws, five augers, one grindstone, and the necessary files and whetstones.

And further, Her Majesty agrees that the said Indians shall be supplied as soon as convenient, after any band shall make due application therefor, with the following cattle for raising stock, that is to say: for every family of five persons, and under, two cows; for every family of more than five persons, four cows; and every head and minor Chief, and every Stony Chief, for the use of their bands, one bull; but if any band desire to cultivate the soil as well as raise stock, each family of such band shall receive one cow less than the above mentioned number, and in lieu thereof, when settled on their reserves and prepared to break up the soil, two hoes, one spade, one scythe, and two hay forks, and for every three families, one plough and one harrow, and for each band, enough potatoes, barley, oats, and wheat (if such seeds be suited for the locality of their reserves) to plant the land actually broken up. All the aforesaid articles to be given, once for all, for the encouragement of the practice of agriculture among the Indians.⁶²

Treaty 8 provided:

Further, Her Majesty agrees each Band that elects to take a reserve and cultivate the soil, shall, as soon as convenient after such reserve is set aside and settled upon, and the Band has signified its choice and is prepared to break up the soil, receive two hoes, one spade, one scythe, and two hay

⁶¹ Treaty 6, in A. Morris, *The Treaties of Canada with the Indians* reprint edition, (Toronto: Belfords, Clarke, 1880; reprint Fifth House Publishers, 1992), 354. (emphasis in the original)

⁶² Treaty 7, in A. Morris, *The Treaties of Canada with the Indians* reprint edition, (Toronto: Belfords, Clarke, 1880; reprint Fifth House Publishers, 1992), 371.

forks for every family so settled, and for every three families one plough and one harrow; and to the Chief for the use of his Band, two horses or a yoke of oxen, and for each Band potatoes, barley, oats and wheat (if such seed be suited to the locality of the reserve), to plant the land actually broken up and provisions for one month in the spring for several years while planting such seeds; and to every family one cow, and every Chief one bull, one mowing-machine and one reaper for the use of his Band when it is ready for them; for such families as prefer to raise stock instead of cultivating the soil, every family of five persons, two cows, and every Chief two bulls and two mowing-machines when ready for their use, and a like proportion for smaller or larger families. The aforesaid articles, machines and cattle to be given once for all for the encouragement of agriculture and stock raising;⁶³

In sum, all the Numbered Treaties previous to Treaty 9 contained provisions for agricultural assistance.

So far as gathering rights were concerned, although Treaty 9 contained a clause recognizing the First Nations signatories' continuing right to hunt, trap, and fish, it did not contain a commitment to provide annual assistance with hunting, trapping, and fishing.⁶⁴

In contrast, all the earlier Numbered Treaties from 1873 onward made provision for the support of continuing fishing and hunting by committing the Crown to supply the treaty bands with ammunition and twine. (For more detail, see above in answer to Question 2.)

Members of Treaty 3, the North-West Angle Treaty (1873) were to receive \$1500 per year for ammunition and twine.⁶⁵ Those in Treaty 4 were promised \$750 per year; in Treaty 5 \$500 per year; in Treaty 6 \$1500 per year; Treaty 7 \$2000 per year; and Treaty 8 "for such Bands as prefer to continue hunting and fishing, as much ammunition and twine for making nets annually as will amount in value to one dollar per head of the families so engaged in hunting and fishing."⁶⁶ These amounts were not augmented by the

⁶³ Treaty 8, www.rcaanc-cirnac.gc.ca/eng/1100100028813/1581293624572 (accessed Aug. 1, 2023).

⁶⁴ "And His Majesty the King hereby agrees with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country acting under the authority of His Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes." Treaty 9 in J.S. Long, *Treaty No. 9: Making the Agreement to Share the Land in Far Northern Ontario in 1905*, (Montreal and Kingston: McGill-Queen's University Press, 2010), 317-18.

⁶⁵ Treaty 3, in A. Morris, *The Treaties of Canada with the Indians*, reprint edition, (Toronto: Belfords, Clarke, 1880; reprint Fifth House Publishers, 1992), 324.

⁶⁶ Alexander Morris, *The Treaties of Canada with the Indians*, reprint edition, (Toronto: Belfords, Clarke & Co., 1880; reprint Fifth House Publishers, 1992), [hereafter Morris, *Treaties*], 324 (Treaty 3); Morris, *Treaties*, 332 (Treaty 4); Morris, *Treaties*, 346 (Treaty 5); Morris, *Treaties*, 354 (Treaty 6); and Morris, *Treaties*, 371 (Treaty 7); www.rcaanc-cirnac.gc.ca/eng/1100100028813/1581293624572#chp4

Crown later to compensate for the dollar's loss of buying power as a result of inflation over time.

Exacerbating the difficulties created for the Treaty 9 bands by the Crown's failure to augment the amounts provided for ammunition and twine were Ontario and federal legislation and policies that interfered with and deterred the ability of Treaty 9 First Nations to continue to hunt and fish as the treaty had promised. The Ontario provincial government's encroachment on First Nations gathering rights had begun early, for example with a Fishery Act in 1857 that defined Indigenous fishing methods as barbarous and privileged supposedly 'civilized' practices. So, spearing fish was made illegal, and supposedly 'civilized' techniques such as employment of line, hook, or fly only were permitted. This colonial statute, in the words of a historian who studied the topic closely, "became the basis to Canadian fishery laws when it was revised in 1858 and 1865[,] and following Confederation in 1867, became the *Fishery Act* of [the Dominion of] Canada in 1868."⁶⁷

Privileging the interests of recreational fishers and hunters over the Aboriginal or treaty rights of First Nations would become a pattern with Ontario, including in its treatment of Treaty 9 First Nations. Between 1899 and 1909, the Ontario Game Act was amended four times in ways that increasingly restricted First Nation gathering rights, and consistently the federal Department of Indian Affairs did not exert itself to defend First Nations rights against provincial encroachment.⁶⁸ Dr. David Calverley has characterized the interaction of province, federal government, and First Nations over treaty gathering rights succinctly:

Ontario thought any attempt by Indian Affairs to secure the Ojibwa an exemption from the [1892] *Game Act*, even though the legislation contained this provision, was unwarranted Dominion interference in an area of provincial jurisdiction... It simply refused to compromise the *Game Act* for the sake of 'uncivilized' Indians who refused to give up the chase and adopt White ideas and behaviour. Similarly, Indian Affairs was not questioning Ontario's *Game Act* in its entirety, merely its application to Natives with treaty hunting rights. However, even in this limited capacity Indian Affairs was not willing to risk Queen's Park's displeasure for both political and policy reasons. Senior bureaucrats at Indian Affairs and the

(Treaty 8) (accessed Aug. 2, 2023).

⁶⁷ J. Michael Thoms, "Ojibwa fishing grounds: a history of Ontario fisheries law, science, and the sportsmen's challenge to Aboriginal treaty rights, 1650-1900," (Ph.D. dissertation, University of British Columbia, 2004), 199.

⁶⁸ David Calverley, "Who Controls the Hunt? Ontario's *Game Act*, the Canadian Government and the Ojibwa, 1800-1940," (Ph.D. dissertation, University of Ottawa, 1999), 185-8. Although Calverley's analysis is focused on the Robinson Treaties regions, his description and analysis of Ontario legislation and policy are relevant to Treaty 9 areas, too, as is his depiction of federal government attitudes and response to Ontario's aggressiveness.

Dr. Calverley has published a revised version of his dissertation (*Who Controls the Hunt? First Nations, Treaty Rights, and Wildlife Conservation in Ontario, 1783-1939*, [Vancouver: University of British Columbia Press, 2018]). The published version, however, is much abbreviated from the dissertation version, lacking the richness of detail that characterized the dissertation. For that reason, in this report I have used Calverley's dissertation rather than the later monograph.

Department of Justice did not want to antagonize Ontario for the sake of some Indians who [sic] Indian Affairs was trying to acculturate and have give up hunting and trapping.

... Ontario's position in this matter was firm despite the letters it received from Indian Affairs: no exceptions would be made for Natives regardless of any treaty they might have with the Dominion Government...⁶⁹

According to Dr. David Calverley, the federal Department of Indian Affairs' unwillingness to confront Ontario over its enforcement of the Game Act despite treaty guarantees of continuing gathering rights was attributable to two factors. First, the Department of Indian Affairs, which was not considered a prestigious part of the federal government by federal bureaucrats and politicians, lacked the confidence to combat an aggressive government such as Ontario's. Constitutional battles between the federal government and Ontario in the 1870s and 1880s, which contests the province won consistently in the courts, left the federal government lacking both confidence and will to take on the Ontario government. Secondly, the influence of Duncan Campbell Scott, who served as deputy minister of the DIA from 1913 to 1932, was important. Scott's interest in protecting the continuing treaty right to fish and hunt in the northern Ontario treaties was limited by his adherence to a notion of "the transitional Indian." What this concept meant was that Scott believed that First Nations were part of the way along a path of acculturation to Euro-Canadian ways and values that would eventually end in their assimilation. As such, Scott had no objection in principle to provincial measures that would curb First Nation hunting practices and turn them towards agriculture and tourism employment. Accordingly, his willingness to confront Ontario over application of its Game Act to treaty First Nations was qualified and half-hearted. "Ontario's Department of Game and Fisheries," Dr. Calverley dryly observes, suffered no similar crisis of confidence."⁷⁰ With a timorous Department of Indian Affairs and its equivocal deputy minister lacking the will to confront a determined provincial government confident of what it thought were its rights, the treaty right of Treaty 9 First Nations to continue to practise their gathering economy had no chance of success. As historical geographer Dr. Frank Tough has written: "In effect, Indian Affairs capitulated to Ontario's assault on Indian hunting – it would not pay lawyers to appeal cases and it dissuaded people from hiring their own lawyers. Rather than force the legal issues, department officials wrote provincial authorities asking for special consideration for particular convictions... The original recognition of Aboriginal hunting rights in 1892 had been reduced, by 1913, to the discretionary policies of provincial officials, after which, the combined effects of changes to the act and increased prosecutions amounted to a criminalization of Indian hunting."⁷¹

⁶⁹ David Calverley, "Who Controls the Hunt? Ontario's *Game Act*, the Canadian Government and the Ojibwa, 1800-1940," (Ph.D. dissertation, University of Ottawa, 1999), 146-7.

⁷⁰ David Calverley, "Who Controls the Hunt? Ontario's *Game Act*, the Canadian Government and the Ojibwa, 1800-1940," (Ph.D. dissertation, University of Ottawa, 1999), 261. The concept of "the transitional Indian" is discussed *ibid.*, 260-1 and 287-9.

⁷¹ Frank J. Tough, "'Powerless to Protect': Ontario's Game Protection Legislation, Unreported and Indetermined Case Law, and the Criminalization of Indian Hunting in the Robinson Treaty Territories, 1892-1931," Myra Rutherdale, Kerry Abel, and P. Whitney Lackenbauer, eds., *Roots of Entanglement: Essays in the History of Native-Newcomer Relations*, (Toronto: University of Toronto Press, 2018), 269,

For its part, the federal government contributed to the impoverishment of Treaty 9 gathering rights by its own policies. In response to pressure from the growing conservation movement in both the United States and Canada, the two countries entered into a Migratory Birds Convention that resulted in the Canadian Migratory Birds Convention Act of 1917. The statute authorized the federal government to declare “close seasons” in which hunters could not lawfully take birds and establish “game officers for carrying out this Act and the regulations, and may authorize such game officers to exercise the powers of Justice of the Peace or the powers of a Police Constable.”⁷² To First Nation hunters who objected that the statute violated their treaty rights, deputy minister Duncan Campbell Scott argued that “the Migratory Birds Act superseded the treaties and would have to be obeyed.”⁷³ It is not clear if Scott recognized that his government’s position on the Migratory Birds Convention Act in relation to First Nation treaty rights was identical to the position of the government of Ontario on the province’s Game Act.

Ontario contributed again to the process of whittling down First Nation treaty rights to gather in 1925 when it created the Chapleau Game Preserve. The regulated area disrupted the practices of both Robinson Treaty and Treaty 9 bands. In the case of the latter, one of the Treaty 9 First Nations, the New Brunswick House band, had its reserve in the centre of the game reserve. Moreover, a Robinson Superior band located at Michipicoten on Lake Superior was accustomed to hunting in the region that was now a preserve. And, perhaps most important of all, the Missanaibi River that ran through the Chapleau Game Preserve was the main water route for travel between James Bay and Lake Superior. The waterway was used by many Treaty 9 First Nations.⁷⁴ First Nations, including especially the New Brunswick House Ojibwe, “could not hunt, trap or even carry firearms or traps through the preserve or their own reserve.”⁷⁵ The ‘solution’ that the federal and provincial governments worked out was for Ottawa to sell the New Brunswick House reserve to the government of Ontario and to create a new reserve for the New Brunswick House Ojibwe outside the game preserve. The New Brunswick House band did get a new reserve – eventually – in 1947. The band at Michipicoten received no consideration, and individual First Nation hunters, trappers, and simply travelers through the Game Preserve continued to be arrested by Ontario game officials.⁷⁶

271. As with the Calverley doctoral dissertation, Tough’s comments are relevant to Treaty 9 because provincial laws and policies applied to both the Robinson Treaties region and Treaty 9.

⁷² The Migratory Birds Convention Act (7-8 George V, chap. 18, Aug. 29, 1917); in Dave De Brou and Bill Waiser, eds., *Documenting Canada: A History of Modern Canada in Documents*, (Saskatoon: Fifth House, 1992), 239-40.

⁷³ E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada*, (Vancouver: University of British Columbia Press, 1986), 55; Arthur J. Ray, *I Have Lived Here Since the World Began: An Illustrated History of Canada’s Native People*, (Toronto: Key Porter Books, 1996), 280. Scott was responding to a protest from a First Nation in the North West Territories.

⁷⁴ David Calverley, “The Dispossession of the Northern Ojibwa and Cree: The Case of the Chapleau Game Preserve,” *Ontario History*, 101, no. 1, spring 2009, 98-100. The New Brunswick House band is now known as the Brunswick House First Nation. Statement of Claim, para 7.

⁷⁵ David Calverley, “The Dispossession of the Northern Ojibwa and Cree: The Case of the Chapleau Game Preserve,” *Ontario History*, 101, no. 1, spring 2009, 201-2.

⁷⁶ David Calverley, “The Dispossession of the Northern Ojibwa and Cree: The Case of the

Treaty 9 First Nations, like all the northern treaty nations in Ontario, also suffered from another provincial policy: a designated individual trapping grounds program that was introduced in the early 1930s. Ojibwe and Cree had always acted on ideas of family trapping routes and rights, but the governmental scheme was different. For one thing, the motivation behind it was the government's desire to protect the interests of "hunting, fishing, and conservation clubs and tourist operators."⁷⁷ In other words, the Ontario government was elevating the interests of non-Native recreational hunters and fishers above the rights of the First Nations. Second, although traditionally a trapping route was associated with an individual First Nation person, a trapping ground was recognized as a family possession; the government's scheme linked a registered trapping route solely with an individual. For First Nations, the change in the assumptions of the trapping ground policy – from family right to individual right – was highly disorienting. Finally, while the right to a specific trapping ground had been enduring, held for a long term, the government's trap lines program was annual in operation. An individual had to apply for a government trap line each year, and he might not get a route that had traditionally been in his family. He might not get the trap line he had registered for the year before. The consequence of the disruptive government scheme was that there was little incentive to continue First Nations' game conservation practices. One thing that did not change when the provincial trap lines program was introduced was the government of Ontario's attitude towards treaty gathering rights: "the treaties were still considered as irrelevant agreements" by Ontario.⁷⁸ The result for treaty First Nations was that the provincial trapping ground program was disruptive of traditional gathering practices and did not create any benefit for them, either as individuals or as groups.

In sum, then, the Crown not only failed to support First Nations' economic activity by implementing treaty provisions that would have provided aid, as earlier numbered treaties had, but it also took legislative and policy steps after negotiation of Treaty 9 that had the effect of exacerbating the economic disadvantages under which Treaty 9 First Nations laboured. The Crown did not provide agricultural assistance, nor did it support the continuation of hunting by supplying ammunition and twine that were used to shoot game and to make fishing nets. Moreover, both the provincial and federal governments after 1905 made the economic lot of Treaty 9 First Nations worse by creating stringent provincial game acts and failing to represent First Nations effectively when they fell afoul of such measures. The federal government and parliament encroached on Treaty 9 gathering rights when it concluded the Migratory Birds Convention with the United States, and enacted the convention's terms in a federal statute in 1917. The Province of Ontario continued to make inroads on First Nations' treaty rights with the creation in 1925 of the Chapleau Game Preserve. Again, as was the case with the provincial Game Act, the federal government declined to fight hard to ensure that the province's initiative did not have an adverse effect on some First Nations' treaty rights. In the 1930s, the

Chapleau Game Preserve," *Ontario History*, 101, no. 1, spring 2009, 101-3.

⁷⁷ David Calverley, "Who Controls the Hunt? Ontario's *Game Act*, the Canadian Government and the Ojibwa, 1800-1940," (Ph.D. dissertation, University of Ottawa, 1999), 350.

⁷⁸ David Calverley, "Who Controls the Hunt? Ontario's *Game Act*, the Canadian Government and the Ojibwa, 1800-1940," (Ph.D. dissertation, University of Ottawa, 1999), 359.

province's creation of registered trapping grounds similarly had a disruptive effect on First Nations' practices. The province's trapping ground measure paid no attention to the existing – and effectively operating – First Nations' practices of family-based trapping grounds, substituting its own annually administered program for individuals. These policies and legislation of the federal and provincial governments worked cumulatively to enhance the negative impact on First Nations. From the perspective of Treaty 9 First Nations, both the two governments' administration of Treaty 9 and their legislation and policies that interfered with traditional First Nations' economic activity, worked much to the detriment of their well-being.

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

**CHIEF JASON GAUTHIER, on behalf of the
MISSANABIE CREE FIRST NATION and on behalf of all
Treaty 9 First Nations in the Province of Ontario**

Plaintiff

- and -

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

Defendant

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

ACKNOWLEDGMENT OF EXPERT'S DUTY

5. My name is James R. Miller. I live at Saskatoon, in the province of Saskatchewan.
6. I have been engaged by or on behalf of the Plaintiff, Chief Jason Gauthier, on Behalf of the Missanabie Cree First Nation and on behalf of all Treaty 9 First Nations in the Province of Ontario to provide evidence in relation to the above-noted court proceeding.
7. I acknowledge that it is my duty to provide evidence in relation to this proceeding as follows:
 - (d) to provide opinion evidence that is fair, objective and non-partisan;
 - (e) to provide opinion evidence that is related only to matters that are within my area of expertise; and
 - (f) to provide such additional assistance as the court may reasonably require, to determine a matter in issue.
8. I acknowledge that the duty referred to above prevails over any obligation which I may owe to any party by whom or on whose behalf I am engaged.

Date July 24, 2024.


Signature

NOTE: This form must be attached to any expert report under subrules 53.03(1) or (2) and any opinion evidence provided by an expert witness on a motion or application.

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 the MISSANABIE CREE FIRST NATION and on behalf of all
members of TREATY 9 FIRST NATIONS**

Plaintiffs
(Moving Parties)

- and -

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

Defendant
(Respondent)

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

AFFIDAVIT OF DAVID J. HUTCHINGS

July 23, 2024

I, **DAVID J. HUTCHINGS**, of the City of Montreal in the Province of Quebec, DO
SOLEMNLY SWEAR THAT:

1. I am a Managing Principal at Groupe d'analyse (Analysis Group, Inc.). I was retained by Maurice Law Barristers & Solicitors to provide expert evidence in this matter.
2. I prepared a report dated May 31, 2024, a copy of which is attached to this affidavit as Exhibit "A". My curriculum vitae as well as my signed Form 53 are enclosed to my report.

[Signature page follows]

Sworn remotely by David J. Hutchings of the)
City of Montreal in the Province of Quebec)
before me at the City of Bathurst in the)
Province of New Brunswick on July 23, 2024,)
in accordance with O.Reg. 431/20,)
Administering Oath or Declaration Remotely.)
)
)



A Commissioner for Oaths in and for the
Province of Ontario

David Hutchings
David Hutchings (Jul 23, 2024 11:48 EDT)

David J. Hutchings

This is **Exhibit “A”** referred to in the Affidavit of David Hutchings, sworn before me this 23rd day of July 2024



Commissioner for Oaths in and for
the Province of Ontario

Geneviève Boulay

**ONTARIO
SUPERIOR COURT OF JUSTICE**

CHIEF JASON GAUTHIER, on behalf of the
MISSANABIE CREE FIRST NATION and on
behalf of all Treaty 9 First Nations in the Province
of Ontario,

Plaintiff,

v.

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

Defendant.

Case No. CV-23-00029205-00CP

**EXPERT REPORT OF DAVID J. HUTCHINGS
MAY 31, 2024**

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I. INTRODUCTION AND QUALIFICATIONS

A. Qualifications

1. I am a Managing Principal at Groupe d'analyse (Analysis Group, Inc.), a consulting firm headquartered in Boston, Massachusetts with offices throughout North America, Europe, and China. Analysis Group specializes in providing economic, financial, statistical, and business strategy consulting to law firms, corporations, and government agencies. My business address is 1190 avenue des Canadiens-de-Montreal, Tour Deloitte, Suite 1500, Montreal, QC, H3B 0G7.
2. I have an M.A. in Economics from the University of Toronto and an S.B. in Economics and an S.B. in Mathematics from the Massachusetts Institute of Technology. I also have a J.D. with Distinction from the University of Toronto Faculty of Law. My curriculum vitae, which includes my publications, prior expert reports, and testifying experience, is attached as **Appendix A**. My work in this matter is ongoing and I reserve the right to revise or supplement my opinions as new information becomes available to me. I have been assisted by staff at Analysis Group in preparing my responses to the questions posed by counsel, but all opinions are my own and I am the sole author of this report.
3. Attached to this report is Form 53 from the *Courts of Justice Act* where I acknowledge my overriding duty to the Court. I have read and have abided by Rule 4.1 of the Ontario *Rules of Civil Procedure*. I acknowledge my overriding duty to the Court to be independent and to assist the Court, and my report has been prepared in conformity with Rule 4.1 of the Ontario *Rules of Civil Procedure*. If I am called on to give oral or written testimony, I will give such testimony in conformity with that duty.

B. Assignment

4. Maurice Law, as legal counsel for the Class First Nations, asked me to answer the following questions:
5. **Question 1:** Assuming that the allegations made in the Statement of Claim are true, is there evidence that two or more of the proposed Class First Nations suffered compensable harm arising from the Crown's breach of Treaty, fiduciary, equitable and legal duties:
 - a. When it failed to meet its ongoing obligation to increase the Annuity Payments, as promised by the Crown under the terms of Treaty 9, to maintain the value of the Treaty Annuities over time;

- b. When it failed to provide economic assistance in agriculture, stock-raising, or other assistance and an annual distribution of twine and ammunition to Treaty 9 Indians;
 - c. When it granted 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*.
6. **Question 2:** If yes, is there a plausible methodology or methodologies to calculate damages from the compensable harm suffered?
 7. **Question 3:** If no, could a plausible methodology or methodologies be created to calculate damages from the compensable harm suffered?
 8. **Question 4:** If a plausible methodology exists or could be created, would that methodology provide a realistic prospect of establishing loss on a class-wide basis?
 9. I understand that Question 1 will be addressed by a historical fact expert(s); my responses are therefore focused on responding to Questions 2 through 4, as they relate to each of the three sub-items in Question 1. In the remainder of this report, I provide my answers to the above questions. The materials I relied on in preparing this report are cited in the footnotes and listed in **Appendix B**. My instructions from counsel are attached to this report as **Exhibit 1**.

II. CASE BACKGROUND

10. The representative Plaintiff is Chief Jason Gauthier, acting on behalf of the Missanabie Cree First Nation. Chief Gauthier is also acting on behalf of the proposed Class in this matter which includes all Treaty 9 First Nations in the Province of Ontario.¹ The Missanabie Cree First Nation has been a signatory of Treaty 9 since 1906.² The proposed Class in this matter as stated in the Statement of Claim includes 49 First Nations that “are collectively the successors to the signatories and adherents of Treaty 9.”³

¹ Statement of Claim, *Chief Jason Gauthier, on behalf of the Missanabie Cree First Nation and on behalf of all Treaty 9 First nations in the Province of Ontario, v. His Majesty The King In Right of Canada as represented by the Attorney General of Canada*, Case No. CV-23-00029205-00CP, Ontario Superior Court of Justice, May 8, 2023 (“Statement of Claim”).

² Statement of Claim at para 5.

³ Statement of Claim at para 7.

11. The Defendant is His Majesty the King in Right of Canada as represented by the Attorney General of Canada (“the Crown”).⁴ The Crown entered into Treaty 9 with the legal predecessors of the proposed Class.⁵
12. Treaty 9 is one of the eleven post-Confederation treaties between First Nations in Canada and the Crown, with the stated purpose to “promote quiet settlement and colonization and to forward the construction of railroads and highways.”⁶ Signed in 1905 and 1906, with additional adhesions in 1929 and 1930, Treaty 9 covers the majority of what is now Ontario.⁷ At the time of signing in 1905 and 1906, approximately 3,000 individuals were covered under Treaty 9, with 2,000 more coming under Treaty 9 with the adhesions.⁸ As of 2016, there were approximately 17,000 individuals living on reserve in the Treaty 9 area, as defined by Statistics Canada.⁹

III. RESPONSES TO QUESTIONS

13. To organize my responses, I address each of the topics identified in the sub-items of Question 1 in sequence.

A. Annuity Payments

1. *Question 1(a): Is there evidence that two or more of the proposed Class First Nations suffered compensable harm arising from the Crown’s breach of Treaty, fiduciary, equitable and legal duties when it failed to meet its ongoing obligation to increase the Annuity Payments, as promised by the Crown under the terms of Treaty 9, to maintain the value of the Treaty Annuities over time?*

14. Under Treaty 9, members of signatory First Nations were promised a one-time gratuity payment of \$8 per person, as well as the Annuity Payments of \$4 per person per year.¹⁰ The Annuity Payment

⁴ Statement of Claim at para 8.

⁵ Statement of Claim at para 8.

⁶ Statement of Claim at para 32.

⁷ *The Canadian Encyclopedia*, “Treaty 9,” (November 10, 2020).

⁸ *The Canadian Encyclopedia*, “Treaty 9,” (November 10, 2020).

⁹ Statistics Canada, Aboriginal Population Profile, 2016 Census, Treaty 9 – Ontario [Historic treaty area].

The specific reserves included in the Historic Treaty Area can be found in Statistics Canada, “List of historic treaty areas and the census subdivisions they include”, About the data, Aboriginal Population Profile, 2016 Census, <https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/abpopprof/about-apropos/tabhistoric-historique.cfm?LANG=E>.

¹⁰ Crown-Indigenous Relations and Northern Affairs Canada, “Treaty Texts: Treaty No. 9,” <https://www.rcaanc-cirnac.gc.ca/eng/1100100028863/1581293189896>.

has remained at \$4 per person to today. The failure to increase the payment is a quantifiable and compensable harm.

2. *Question 2: If yes, is there a plausible methodology or methodologies to calculate damages from the compensable harm suffered? / Question 3: Could a plausible methodology or methodologies be created to calculate damages from the compensable harm suffered?*

15. There are well-established methodologies to calculate damages arising from the Crown's failure to increase the Annuity Payment over time, by indexing the cash annuities to economic indicators. I discuss three plausible indices here, as well as the methodology for accounting for foregone interest income on the unpaid annuities. The methodology is straightforward: calculate what the annuity would have been had it been increased in proportion to the index to calculate the unpaid amounts, multiply the unpaid amounts by the number of individuals in each year who should have been paid, and then adjust for the time value of money.

a. Potential Data Series for Indexing Annuities

16. One can easily and reliably calculate what the Annuity Payment would have been had it increased at the rate of inflation. Economists and governments have long studied inflation, the process by which prices for goods and services increase over time. Understanding inflation allows us to assess the purchasing power of money over time: \$1 in 1905 could buy many more goods and services than \$1 could buy in 2023.
17. Some scholarship has examined the question of increasing the annuities paid under the Numbered Treaties to maintain their purchasing power over time.¹¹ Statistics Canada provides many data series that allow us to understand how prices have changed since 1905.¹² These data can be used to estimate the path of the Annuity Payment had it maintained the same purchasing power: if \$4 in 1905 could buy X amount of goods and services, then, to adjust for inflation, the annuity in 2023 would be the dollar value necessary to buy the same X amount of goods and services at 2023 prices.

¹¹ Robert Metcs, (2008) "The Common Intention of the Parties and the Payment of Annuities Under the Numbered Treaties: Who Assumed the Risk of Inflation?" *Alberta Law Review* 46 (1): 41-76; Erik Anderson, (2010) "The Treaty Annuity as Livelihood Assistance and Relationship Renewal," *Aboriginal Policy Research Consortium International (APRCi)*.

¹² Datasets that include various price indices include, e.g., Statistics Canada. Table 18-10-0005-01: Consumer Price Index, annual average, not seasonally adjusted; Statistics Canada. Table 36-10-0229-01: Long-run provincial and territorial data; Statistics Canada. Table 36-10-0212-01: Long run real income estimates.

Past scholarly work has performed similar analyses to adjust the annuities paid under the Numbered Treaties for inflation.¹³

18. However, inflation alone will not fully compensate for the harms suffered. A better and more economically appropriate measure would be to maintain the value of the annuity through indexing to increases in the standard of living, as reflected by increases in incomes or land values, so that a certain relative standard of living can be maintained.
19. The Annuity Payments could be increased at a rate that reflects the growth in living standards experienced by settlers in the Treaty area, as measured by incomes and related measures. Incomes have generally grown at a rate greater than inflation: settlers today can purchase more goods and services with their earnings than they could in the past. If the Treaty promise underlying the Annuity Payment were understood to include a promise to maintain a certain *relative* standing to the settlers,¹⁴ a methodology can be applied to assess damages by estimating what the Annuity Payments would have been using data on incomes in the area.¹⁵
20. The Annuity Payments could also be increased at a rate that reflects the growth in the value of the lands surrendered in Treaty 9. The undeveloped value of land is a useful and economically sensible reference point for increasing the Annuity Payments. First, the price of land will capture increases in the costs of living in an area, as the price of land is directly relevant to the cost of housing and will be affected by the rise of the overall price level. Second, land values are a good indicator of the state

¹³ Erik Anderson, (2010) "The Treaty Annuity as Livelihood Assistance and Relationship Renewal," *Aboriginal Policy Research Consortium International (APRCi)* 74.

¹⁴ Anderson (2010) examines the Numbered Treaties discusses how signatories to the Numbered Treaties conceptualized of the annuity: "It is clear that the Aboriginal treaty signatories viewed the annuity as a significant economic benefit, and had expectations that the treaty terms, including the annuity amount, would be sufficient ongoing government livelihood support in exchange for land. As historian Jean Friesen put it: 'The only price which could balance the loss of such property was the assurance of full economic security.'" [Erik Anderson, (2010) "The Treaty Annuity as Livelihood Assistance and Relationship Renewal," *Aboriginal Policy Research Consortium International (APRCi)*.at 79, citing Jean Friesen, "Magnificent Gifts: The Treaties of Canada with the Indians of the Northwest 1869-76," in Richard Price, ed., *The Spirit of the Alberta Indian Treaties* (University of Alberta Press, 1999)]. Jones (2018) also contextualizes the annuity payments by reference to incomes, in addition to purchasing power: "At the time of treaty-writing, the five-dollar annuity was the equivalent to about one-third of the annual wage of an unskilled labourer. The \$25 for a family of five was enough for outfitting a hunter with ammunition, nets, lines, traps, knives and other goods, with some left over for tea and tobacco, and other comforts for the family." [Sheilla Jones, (2018) "Treaty Annuity Right: The Right No One Wanted to Talk About. Until Now," *Frontier Backgrounder*, No. 124 at 3.]

¹⁵ Data provided by Statistics Canada provide information on long-run incomes in Ontario and Canada. [See Statistics Canada, Table 36-10-0229-01: Long-run provincial and territorial data; Statistics Canada, Table 36-10-0212-01: Long run real income estimates.]. These can be supplemented with data more specific to the Treaty 9 through the analysis of historical data on incomes available at varying levels of geographic granularity at the sub-provincial level from the Census of Canada. [Data from the most recent census is available via Statistics Canada, Census of Canada, 2021, <https://www12.statcan.gc.ca/census-recensement/index-eng.cfm/>]

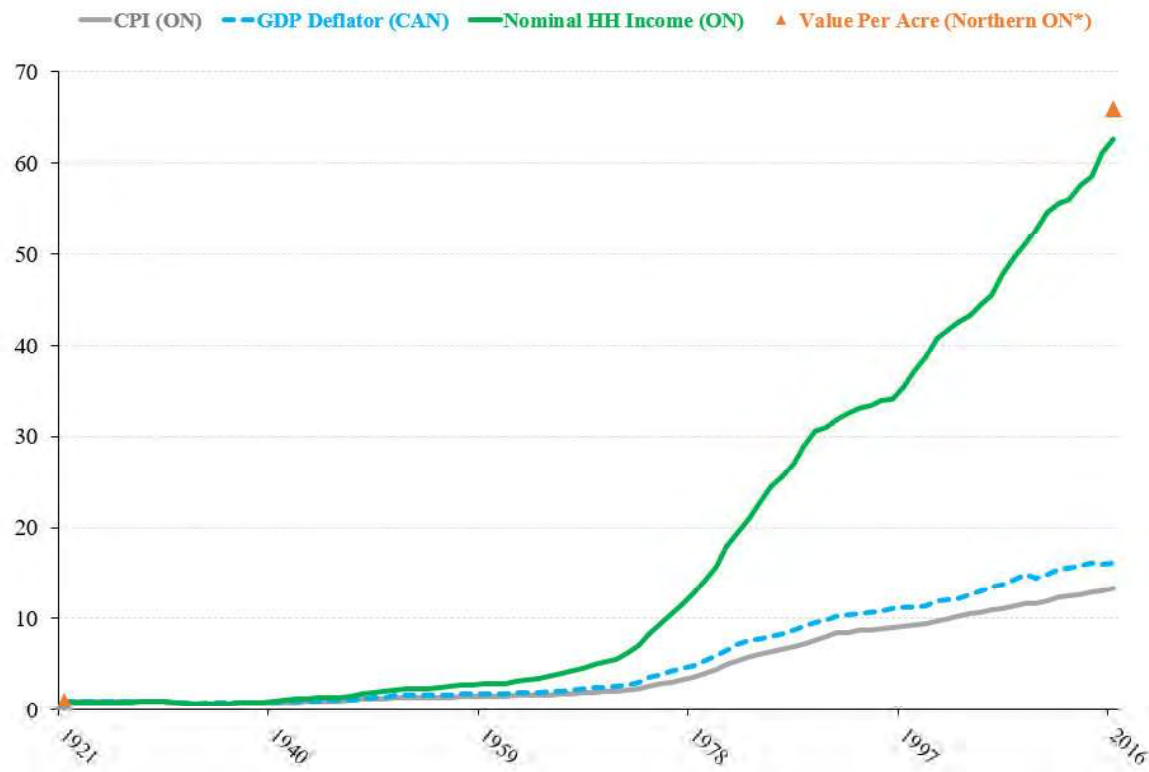
of the economy in an area – similar to incomes, land values have tended to increase at a rate higher than inflation, reflecting the rise in economic productivity that has contributed to the rise in living standards over time, and indexing to land values will maintain relative living standards (while indexing only to inflation will not). Available data on land values and economic activity in the area can be used to estimate the path of the Annuity Payment over time.¹⁶

21. Figure 1 below provides an illustration of the data that can be used to estimate how the Annuity Payments would have increased under the various alternatives that I have discussed. It shows the increase in two measures of inflation,¹⁷ as well as nominal household incomes and land values in an illustrative section of Northern Ontario. The data for illustrative purposes show the period 1921-2016; in the calculation of damages, all data series could be extended back to 1905 and forward to today. The graph shows the availability of the data and the significant per-person harm (which over the 95 years plotted on the chart show more than a ten-fold increase based on the consumer price index, and over 65-fold increase based on the value per acre of northern Ontario land, with two other indexes in between).

¹⁶ Historical data on land values for the provinces and sub-provincial regions are available through statistical programs like the Census of Agriculture, which is carried out by Statistics Canada, as well as other sources. The most recent Census of Agriculture was undertaken in 2021. [See Statistics Canada, Guide to the Census of Agriculture, 2021 (Release date: April 14, 2022), <https://www150.statcan.gc.ca/n1/pub/32-26-0002/322600022021001-eng.htm>] Historical censuses are available through to the 19th century. In my illustrative chart, I utilize data from the 1921 Census. [Dominion Bureau of Statistics, *Sixth Census of Canada, 1921*, Volume V: Agriculture, https://publications.gc.ca/collections/collection_2017/statcan/CS98-1921-5-1925.pdf]. Provincial agencies also provide relevant data on land values over time. [See, e.g., Annual Report of the Bureau of Industries for the Province of Ontario, 1905, Part I: Agricultural Statistics, at 42, showing values of farmland per acre]. Such data can be combined with geographical information to construct estimates of the value of land that are specific to the Treaty 9 area.

¹⁷ Specifically, it shows the change in the Consumer Price Index (“CPI”), which measures the change in the price of a consistent set of consumer goods and services; and the GDP Deflator, which measures the change in prices in the overall economy, reflecting the changes in the composition of the economy.

Figure 1: Illustration of change in measures over time, 1921-2016 (Indexes, 1921 = 1)



Sources and notes: Statistics Canada.¹⁸

* Change in land value per acre in “Northern Ontario” shown for 1921 and 2016 Census districts most overlapping with the Treaty 9 area; in the calculation of damages, additional analyses can tailor these estimates to be more specific to the Treaty 9 area.¹⁹

b. Adjusting for the time value of money

22. Whichever index (or blend of indexes) is chosen, one must calculate interest on the portion of the Annuity Payments that were not made over the last 120 years by “bringing forward” historical harms into present-day dollars, reflecting that unpaid annuities would have been spent or invested in ways

¹⁸ CPI per Statistics Canada, Table 18-10-0005-01: Consumer Price Index, Annual Average, Not Seasonally Adjusted. Data for Ontario are available until 1979, extended back to 1921 using the inflation rate for Canada. GDP Deflator per Statistics Canada, Table 36-10-0212-01: Long run real income estimates. Household income via Statistics Canada, Table 36-10-0229-01: Long-run provincial and territorial data. Land values for 1921 via Dominion Bureau of Statistics, *Sixth Census of Canada, 1921*, Volume V: Agriculture, using data for the Census districts of Timiskaming, Algoma, Thunder Bay and Kenora, which roughly correspond to the current Census Divisions of Kenora and Cochrane. 2016 land values for these Divisions from Statistics Canada, *Census of Agriculture, 2016*.

¹⁹ Land values for 1921 via Dominion Bureau of Statistics, *Sixth Census of Canada, 1921*, Volume V: Agriculture, using data for the Census districts of Timiskaming, Algoma, Thunder Bay and Kenora, which roughly correspond to the current Census Divisions of Kenora and Cochrane. 2016 land values for these Divisions from Statistics Canada, *Census of Agriculture, 2016*.

that would bring greater present-day values. As a standard economic text describes: “[a] dollar today is worth more than a dollar tomorrow, because the dollar today can be invested to start earning interest immediately.”²⁰ One can substitute yesterday for today and today for tomorrow in the quote to understand why past losses are worth more today. Interest rates provide a useful metric for assessing the time value of money. This adjustment is standard in economics for calculating “present values” or the value of lost opportunities in the past in present-day dollars (or future costs and benefits in today’s dollars).

23. Compensation in today’s dollars should reflect the opportunity cost of funds, sometimes called the opportunity cost of capital by economists, and therefore should be based on what an economic actor in the position of the annuity recipients could reasonably have done with the funds had they been received in a timely fashion.²¹
24. At least three plausible alternatives for the proposed Class First Nations are:
 - a. The funds would have been invested at the same rates as would have been paid had the Crown held the money in trust, consistent with Section 61(2) of the *Indian Act*.²² The government of Canada provides data on Band Trust Account rates, which are the rates the Crown pays on monies held in trust for First Nations, from Confederation (July 1, 1867) to the present day.
 - b. A scenario in which the funds would have been invested in a diversified portfolio of equities and fixed-income securities, with the mix of such securities reflecting the advisable composition for an investor with a similar long-term horizon to First Nations.

²⁰ Richard A. Brealey, Stewart C. Myers, and Franklin Allen, *Principles of Corporate Finance*, (10th ed.), (New York: McGraw-Hill Irwin, 2011) at 39.

²¹ See Richard A. Brealey, Stewart C. Myers, and Franklin Allen, *Principles of Corporate Finance*, (10th ed.), (New York: McGraw-Hill Irwin, 2011) at 8, describing the opportunity cost of capital in the context of a corporation investing in new projects: “As long as a corporation’s proposed investments offer higher rates of return than its shareholders can earn for themselves in the stock market (or in other financial markets), its shareholders will applaud the investments and its stock price will increase. But if the company earns an inferior return, shareholders boo, stock price falls, and stockholders demand their money back so that they can invest on their own. [...] **[The] minimum rate of return is called a hurdle rate or cost of capital. It is really an opportunity cost of capital, because it depends on the investment opportunities available to investors in financial markets.** Whenever a corporation invests cash in a new project, its shareholders lose the opportunity to invest the cash on their own. Corporations increase value by accepting all investment projects that earn more than the opportunity cost of capital.” [Emphasis added]

²² Aboriginal Affairs and Northern Development Canada, *Manual for the Administration of Band Moneys*, (2012), <https://www.sac-isc.gc.ca/eng/1100100032353/1581870508698>.

Financial markets are well studied, and data are generally available back to the early part of the 20th century and reliably extended to the early 19th century.²³

- c. A scenario in which the money could be invested in readily available participating life insurance plans. Life insurance providers have offered “participating” policies in Canada since at least 1871,²⁴ whereby policyholders’ premium payments are pooled into the “participating account” and the life insurance firm invests the funds in the participating account to ensure it is able to meet its guarantees and commitments to policyholders.²⁵ If the participating account generates earnings in excess of what it needs to meet its obligations, policyholders can share, or “participate”, in those earnings by receiving dividends.²⁶
25. To summarize the algebra of the methodology for calculating damages arising from the Crown’s failure to increase the Annuity Payment over time: for each year from 1906 to today, calculate the annuity based on one more of the indexes plotted in Figure 1 and subtract \$4; multiply that shortfall by the population eligible for annuities in that year; and multiply that quantity by the present-value factor calculated using the opportunity cost of capital. The sum of that quantity in each year is the compensation owing today.
3. *Question 4: If a plausible methodology exists or could be created, would that methodology provide a realistic prospect of establishing loss on a class-wide basis?*
26. The methodology for assessing how the Annuity Payment would have increased using any of the measures discussed would be substantially the same for all proposed Class First Nations, relying on the same data sources and approach. So too would the methods for bringing forward past harms to present-day dollars. Many of the data sources are at the national and provincial level, while others are at a more granular, sub-provincial level. To the extent that any geographic adjustment would be made to reflect, for instance, the difference in prices experienced by remote communities, this

²³ See, e.g., Laurence Booth, (2019) “Estimating the Equity Risk Premium and Expected Equity Rates of Return: The Case of Canada,” *Journal of Applied Corporate Finance*, 31(1): 113-125; Jeremy J. Siegel, (2005) “Perspectives on the Equity Risk Premium,” *Financial Analysts Journal*, 61(6):– 61-73; Sidney Homer and Richard Sylla, *A History of Interest Rates*, (4th ed.) (New Jersey: Wiley, 2005); and Statistics Canada, Table 10-10-0122-01: Financial market statistics, last Wednesday unless otherwise stated, Bank of Canada, <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1010012201>.

²⁴ Sun Life, *Sun Life Participating Account* (2012) at 1. [“Since 1871, many changes have occurred in the economy and Sun Life’s participating (par) account has remained and continues to remain stable, compared to other financial investment vehicles.”]

²⁵ Canada Life, *2022 Financial facts – Canada Life combined open participating account*, (2022) at 10

²⁶ Canada Life, *2022 Financial facts – Canada Life combined open participating account*, (2022) at 10

analysis would be similar for all First Nations in the proposed Class, as these factors are similar across the area covered by Treaty 9.

B. Economic Assistance

1. *Question 1(b): Is there evidence that two or more of the proposed Class First Nations suffered compensable harm arising from the Crown's breach of Treaty, fiduciary, equitable and legal duties when it failed to provide economic assistance in agriculture, stock-raising, or other assistance and an annual distribution of twine and ammunition to Treaty 9 Indians?*

27. Except for Treaty 9, the Numbered Treaties generally offered First Nations signatories offered multiple avenues of economic support, such as assistance in agriculture, assistance in stock-raising, assistance in other work, assistance in earning a livelihood through wage labour, farming implements, cattle, chests of carpentry tools, and yearly distribution of twine, net, and ammunition.²⁷ The academic literature discusses the importance placed upon these support provisions by the signatories to those treaties.²⁸ Some Numbered Treaties, such as Treaty 7, provided flexibility in choosing agricultural activities that First Nations identified as best suited to the area.²⁹
28. Treaty 9, by contrast, did not include any such provisions for economic assistance to First Nations. Because these supports have economic value, the lack of economic assistance to the Treaty 9 signatories is a quantifiable and compensable harm.

1. *Question 2: If yes, is there a plausible methodology or methodologies to calculate damages from the compensable harm suffered? / Question 3: Could a plausible methodology or methodologies be created to calculate damages from the compensable harm suffered?*

29. Plausible methodologies exist to quantify the compensate harm suffered. I address two specific harms here to demonstrate how such methodologies can be applied to two common supports. I will refer to them as the “agricultural support” harm and the “ammunition and twine” harm.

²⁷ Statement of Claim at para 53.

²⁸ See Erik Anderson, (2010) “The Treaty Annuity as Livelihood Assistance and Relationship Renewal,” *Aboriginal Policy Research Consortium International (APRCi)*. The extent to which such support was provided is a separate issue. See, e.g., Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (2nd ed.) (McGill-Queen's University Press, 2019).

²⁹ For example, Treaty 7 states: “Her Majesty agrees that the said Indians shall be supplied as soon as convenient, after any Band shall make due application therefor, with the following cattle for raising stock [...] but if any Band desire to cultivate the soil as well as raise stock, each family of such Band shall receive [...]” See Crown-Indigenous Relations and Northern Affairs Canada, “Treaty Texts: Treaty and Supplementary Treaty no. 7,” <https://www.rcaanc-cirnac.gc.ca/eng/1100100028793/1581292336658>.

a. Agricultural support

30. To calculate damages arising from the lack of agricultural support provided to the Treaty 9 First Nations, there are at least two methodologies that can be applied:
- a. Estimation of the initial capital and equipment costs required to start a farm in the present day, as a measure of the present-day equivalent value of the promise provided to the Treaty 9 First Nations to enable them to establish farms.
 - b. Analysis of the historical incomes earned by settlers engaged in agriculture in the area to capture the historical income disparity between settlers and the Treaty 9 First Nations.
31. First, interpreting the agriculture support provision as providing for sufficient resources and support to establish farms to provide sustenance, the Treaty 9 signatories suffered a loss of the ability to provide themselves sustenance from agriculture. The method to estimate these harms is what the costs would be to establish such sustenance-providing farms today. One can estimate the costs of establishing an equivalent agricultural operation in the present day (reflecting the basic understanding that the specific implements that would have been used in 1905 are generally obsolete, but we want to achieve those same goals as what the implements in 1905 would have provided).
32. A farm, ranch, or other agricultural operation requires capital investments in equipment, structures, livestock, and more. Data on such costs can be used to estimate the modern equivalents of the supports promised under other Numbered Treaties.³⁰ Data from the Census of Agriculture and other programs can be used to account for the viable forms of agricultural activity undertaken in the Treaty 9 area. More specifically, data from the 2021 Census of Agriculture provide information on the land use in Ontario by Census Agricultural Regions (CAR) and Census Divisions (CD).³¹ The Northern

³⁰ The Census of Agriculture provides data on farms according to several dimensions, including size of farm (by annual farm sales), which allows one to tailor the analysis to farms equivalent to the ‘start-up’ size that is economically most comparable to the farming contemplated by the support provisions. [See Statistics Canada, Guide to the Census of Agriculture, 2021 (Release date: April 14, 2022), <https://www150.statcan.gc.ca/n1/pub/32-26-0002/322600022021001-eng.htm>] Other Statistics Canada programs provide annual estimates of relevant variables which can supplement the Census data, which is collected every 5 years. [E.g., Statistics Canada, Surveys and statistical programs: Value of Farm Capital, <https://www23.statcan.gc.ca/imdb/p2SV.pl?Function=getSurvey&Id=1517114>; Statistics Canada, Table 32-10-0049-01: Farm Operating Expenses and Depreciation Charges (x 1,000)]

³¹ Statistics Canada, Guide to the Census of Agriculture, 2021 (Release date: April 14, 2022), <https://www150.statcan.gc.ca/n1/pub/32-26-0002/322600022021001-eng.htm>.

Ontario Region (Ontario CAR 5) and Census Divisions of Cochrane and Kenora (CDs 56 and 60) comprise much of the area covered by Treaty 9.³²

33. Second, compensation can be informed by an analysis of the historical incomes earned by settlers engaged in agriculture in the area: if the agricultural support provision is understood to have been a promise to provide the necessary support to earn a living engaged in such activities, then the historical income disparity between settlers engaged in such activities and Treaty 9 First Nations is a relevant economic consideration, because the supports would be expected to make signatories as effective as settlers.³³ Without the support, the Treaty 9 First Nations were denied the opportunity to realize these earnings, and it is a readily estimable harm.

b. Ammunition and Twine Provision

34. Compensation for damages arising from the Crown's failure to provide ammunition and twine as it did in other Numbered Treaties can be determined as comprising two elements.
- a. First is the actual provision of the ammunition and twine. An analysis of the provisions made in other Numbered Treaties can determine the extent of what would reasonably be expected to have been provided for Treaty 9.³⁴
 - b. Second is the economic substance of the ammunition and twine provision: the materials themselves are of little utility if the Treaty 9 First Nations did not have sufficient game and fish to hunt, trap, and catch using ammunition and twine.
35. Therefore, economic principles can be applied to estimate the value of the coincident land requirements to maintain sufficient stocks of game and fish to support an economically meaningful understanding of the ammunition and twine provision. Prices paid by conservancy groups like

³² For an illustration of the boundaries of these areas, see Statistics Canada, Census of Agriculture: Reference Maps, 2021, "Ontario Map 1 - 2021 census agricultural regions and census divisions," <https://www150.statcan.gc.ca/n1/pub/95-630-x/95-630-x2022001-eng.htm>

³³ Incomes for First Nations can be obtained from the Census, other programs by Statistics Canada, and, historically, from the reports of the Department of Indian Affairs. Incomes for settlers can be determined from data provided by Statistics Canada and similar resources, including the Census.

³⁴ Treaty 7 is of particular interest, as it provides for flexibility to exchange the ammunition and twine for other expenditures, depending on the utility to the First Nations: "Further, Her Majesty agrees that the sum of two thousand dollars shall hereafter every year be expended in the purchase of ammunition for distribution among the said Indians; *Provided that if at any future time ammunition become comparatively unnecessary for said Indians, Her Government, with the consent of said Indians, or any of the Bands thereof, may expend the proportion due to such Band otherwise for their benefit.*" [Emphasis added] Crown-Indigenous Relations and Northern Affairs Canada, "Treaty Texts: Treaty and Supplementary Treaty no. 7," <https://www.rcaanc-cirnac.gc.ca/eng/1100100028793/1581292336658>.

Nature Conservancy Canada can provide benchmarks for the value of lands maintained in a relatively undisturbed state necessary to support such game populations.³⁵

36. Further, other Numbered Treaties such as Treaty 4 include a monetary value commitment under the Ammunition and Twine Provision.³⁶ An analysis of how such a monetary commitment would have increased over time for the Treaty 9 First Nations similar to other Numbered Treaties can lay out the harm caused by the failure of the Crown to provide economic assistance for the provision of ammunition and twine.³⁷ This is a readily estimable quantity with reliable methodologies similar to the indexing methods described above for the cash annuities.
37. One can reasonably assume that the Treaty 9 First Nations would have pursued a livelihood through hunting, trapping, and fishing if the land requirements to maintain sufficient stocks of game and fish had been implemented and the Crown had provided monetary assistance for the provision of ammunition and twine. Therefore, considering the two above elements to estimate the damages from the Crown's failure to provide ammunition and twine is necessary to estimate the harm caused to the Treaty 9 First Nations, and data are available to implement a reliable methodology.

2. *Question 4: If a plausible methodology exists or could be created, would that methodology provide a realistic prospect of establishing loss on a class-wide basis?*

38. As with the analysis of the Annuity Payments, the methodology for determining loss here could be applied to all proposed Class First Nations, relying on the same data sources and analysis, and establish loss across the entire proposed Class.

C. Mineral Rights

1. *Question 1(c): Is there evidence that two or more of the proposed Class First Nations suffered compensable harm arising from the Crown's breach of Treaty, fiduciary, equitable and legal duties when it granted Ontario a one-half interest in all mineral rights in Indian reserves within the Province of Ontario in 1924 pursuant to An Act*

³⁵ For example, the Nature Conservancy of Canada recently bought 1,450 square kilometres of forest near Hearst, Ontario for a reported \$46 million in 2022. [Global News, "Swath of boreal forest twice the size of Toronto to be protected in northern Ontario," (April 22, 2022) <https://globalnews.ca/news/8778440/boreal-forest-hearst-northern-ontario-protected/>.

³⁶ Treaty 4 includes the following "Ammunition and Twine" provision: "[Her Majesty] will cause to be distributed among the different bands included in the limits of this treaty powder, shot, ball and twine, in all to the value of seven hundred and fifty dollars." Crown-Indigenous Relations and Northern Affairs Canada, "Treaty Texts: Treaty 4," <https://www.rcaanc-cirnac.gc.ca/eng/1100100028689/1581293019940>.

³⁷ Treaty 4 includes the following "Ammunition and Twine" provision: "[Her Majesty] will cause to be distributed among the different bands included in the limits of this treaty powder, shot, ball and twine, in all to the value of seven hundred and fifty dollars." Crown-Indigenous Relations and Northern Affairs Canada, "Treaty Texts: Treaty 4," <https://www.rcaanc-cirnac.gc.ca/eng/1100100028689/1581293019940>.

for the Settlement of Certain Questions between the Governments of Canada and Ontario respecting Indian Reserve Lands?

39. Historical evidence supports the existence of mining activity on the reserves of Treaty 9 First Nations after 1924. The 1946 Report of the Indian Affairs Branch of the Department of Mines and Resources mentions “hard rock mining” in “Fort Hope Reserve, Ontario,” the reserve of Eabametoong First Nation, a Treaty 9 First Nation.³⁸ The 1947 notes that “40 claims were recorded in Abitibi Reserve No. 70, Township of Kehoe, Province of Ontario.” Abitibi Reserve No. 70 is the reserve of Apitipi Anicinapek Nation, a Treaty 9 First Nation, formerly known as Wahgoshig First Nation.³⁹ Reports of the Department of Indian Affairs discuss the applicability of the 1924 Act in discussing the yet-to-be-surveyed reserves for Treaty 9 First Nations at the time of the 1929 and 1930 adhesions.⁴⁰ Given the existence of mining activity, which is valuable, the one-half interest in the rights given to the Ontario government in 1924 conveyed value to Ontario at the expense of the Treaty 9 First Nations – i.e., there is a compensable harm.
40. Further archival research could establish the full extent of the harms to Treaty 9 First Nations. Ontario maintains a database of mineral occurrences that extends back to 1890.⁴¹ For illustrative purposes, the map below shows all entries in the database within 25 kilometres of the most-recent boundaries of reserves within the Treaty 9 area, to demonstrate the significant mineral interests in Treaty 9.

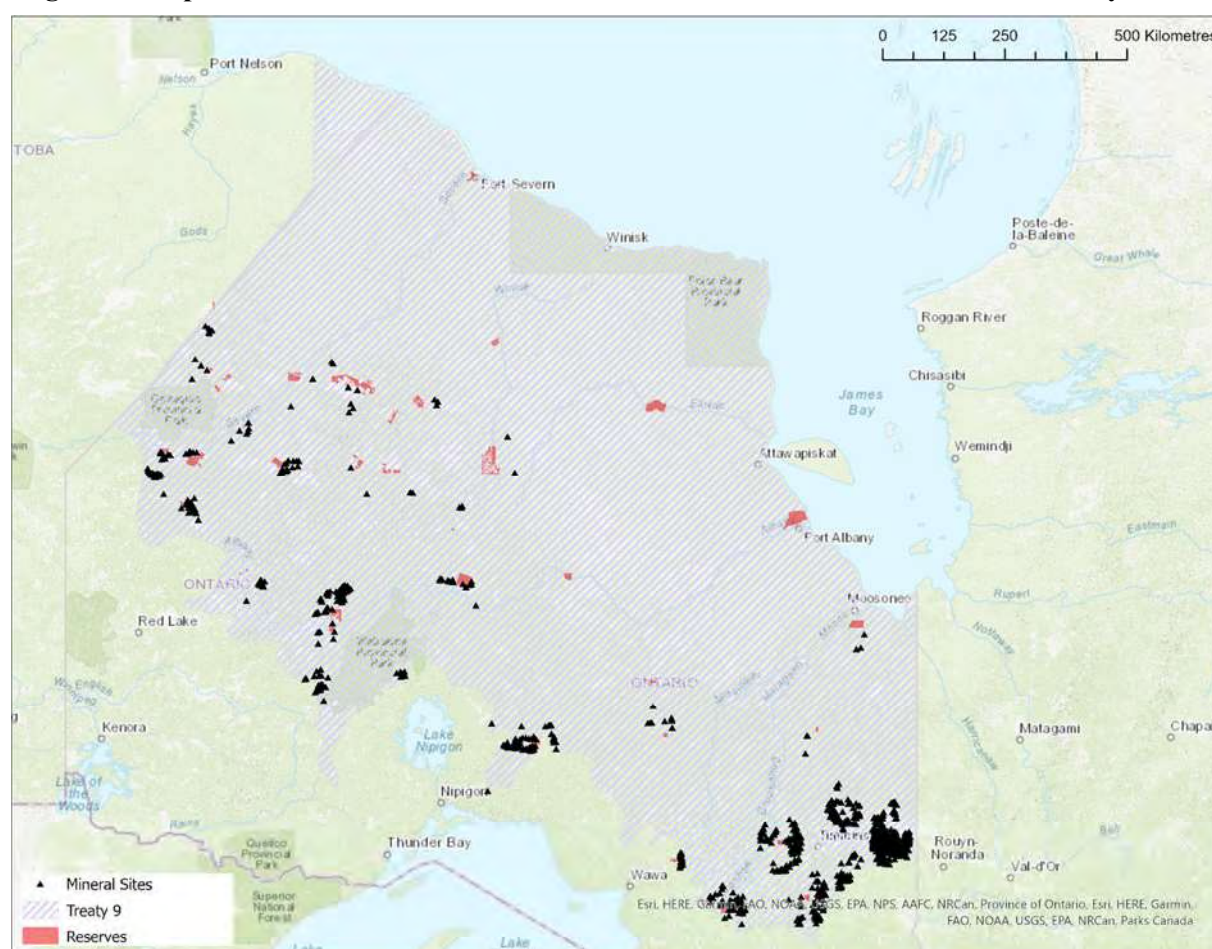
³⁸ Annual Report of the Department of Mines and Resources, Indian Affairs Branch, 1946, R1-91-1946-eng, at electronic page 32.

³⁹ See Apitipi Anicinapek Nation, “About us,” <https://apitipi.ca/about-us/>.

⁴⁰ See, e.g., Annual Report of the Department of Indian Affairs, 1930, R1-90-1930-eng, at electronic page 52.

⁴¹ Ontario Data Catalogue, “Ontario Mineral Inventory,” <https://data.ontario.ca/dataset/mineral-deposit-inventory-of-ontario>.

Figure 2: Map of Mineral Occurrences Within 25 km of Current Boundaries of a Treaty 9 Reserve



Sources: Natural Resources Canada;⁴² Ontario Mineral Inventory;⁴³ Native Land Digital⁴⁴

2. *Question 2: If yes, is there a plausible methodology or methodologies to calculate damages from the compensable harm suffered? / Question 3: Could a plausible methodology or methodologies be created to calculate damages from the compensable harm suffered?*

41. To determine damages for this harm, there are two methodologies that can be applied. First, one can estimate the revenues that were collected by Ontario because of the 1924 Act, which would have

⁴² Natural Resources Canada, "Aboriginal Lands of Canada Legislative Boundaries," (Published 2017), http://geo.scholarsportal.info/#r/details/_uri@=2071748791.

⁴³ Ontario Data Catalogue, "Ontario Mineral Inventory," <https://data.ontario.ca/dataset/mineral-deposit-inventory-of-ontario>.

⁴⁴ Treaty 9 area via Native Land Digital, "James Bay Treaty No.9 (Adhesions in 1905 and 1906)," <https://native-land.ca/maps/treaties/james-bay-treaty-no-9-adhesions-in-1905-and-1906/>; and Native Land Digital, "James Bay Treaty No.9 (Adhesions in 1929 and 1930)," <https://native-land.ca/maps/treaties/james-bay-treaty-no-9-adhesions-in-1929-and-1930/>. My use of the boundaries is for illustrative purposes only, and I do not offer any opinion as to the accuracy of the boundaries for any other purpose.

been for the benefit of the First Nations without the Act. These data are readily available from the Public Accounts of Ontario on a province-wide basis and can be reliably allocated to the areas of interest using data in other provincial reports, such as the Annual Reports of the Bureau of Mines, which provides sub-provincial data.⁴⁵

42. Second, the full value of any such mining activity can be estimated using the well-established framework of economic rents.⁴⁶ The First Nations, being in the position to benefit in a similar fashion to a “landowner” would be with regard to their reserves, would expect to receive the full benefit of the mines, not simply the revenues that the Crown collected under its royalty policies regarding mining on reserves.
43. In the course of my research in other matters, I have applied both methodologies to mining activity in Ontario and know from personal experience that the data exist to undertake these analyses. This includes submitting similar expert evidence in the Ontario Superior Court of Justice in the matters of *Restoule et al. v Canada (Attorney General), et al.* and *Red Rock First Nation and Whitesand First Nation v Canada (Attorney General), et al.*

⁴⁵ For instance, the Annual Reports of the Bureau of Mines (and its predecessors/successors) provide data on various revenues by mining district, which can be combined with maps to allocate such revenues geographically [E.g. “Mineral Map of the Province of Ontario,” Province of Ontario Department of Mines, Geology Ontario, Map No. 1953-A, <http://www.geologyontario.mndmf.gov.on.ca/mndmfiles/pub/data/imaging/M1953A/M1953A.pdf>] Ontario has collected a variety of levies on mining historically, including taxes on profits, acreage, leases, and royalties. For additional historical background, see, e.g., H. V. Nelles, *Politics of Development: Forests, Mines, and Hydro-Electric Power in Ontario, 1849-1941*, (The Macmillan Company of Canada Ltd., 1974); Warren James Jestin, (1977) “Provincial Policy and the Development of the Metallic Mining Industry in Northern Ontario: 1845-1920,” Thesis, Department of Political Economy, University of Toronto]

⁴⁶ The United Nations System of Environmental-Economic Accounting (SEEA) Central Framework, the international statistical standard underlying Statistics Canada’s approach to environmental-economic accounts, relies on the concept of rent to define returns on environmental assets: “In the SEEA, returns are defined using the concept of economic rent. Economic rent is best considered to be the surplus value accruing to the extractor or user of an asset calculated after all costs and normal returns have been taken into account.” [United Nations, *System of Environmental-Economic Accounting 2012—Central Framework* (2014) at 152. Statistics Canada, Methodological Guide: Canadian System of Environmental-Economic Accounting, <https://www150.statcan.gc.ca/n1/pub/16-509-x/16-509-x2016001-eng.htm> (“The Canadian System of Environmental-Economic Accounting describes Statistics Canada’s implementation to date of the United Nations System of Environmental-Economic Accounting (SEEA).”)]


The academic study of rents can be traced to foundational texts in economics, including Adam Smith’s *Inquiry into the Nature and Causes of the Wealth of Nations*. [Adam Smith, Book I, Chapter XI: Of the Rent of Land, *An Inquiry into the Nature and Causes of the Wealth of Nations*, (1776) MetaLibri Digital Edition: 2007 at 117-210]. Rents remain a relevant and important concept in contemporary economic studies in many areas, including public economics and public finance. See, for example, Robin Boadway, (2015) “Tax Policy for a Rent-Rich Economy,” *Canadian Public Policy* 41(4): 253-264.

3. *Question 4: If a plausible methodology exists or could be created, would that methodology provide a realistic prospect of establishing loss on a class-wide basis?*

44. The methodology to identify and value any mining activity on reserves would be the same for all proposed Class First Nations.

IV. CONCLUSION

45. I reaffirm that I have read the guidance from the Court on my duties to the Court to be impartial and provide my best objective evidence and that I have abided by that duty, in conformity with Rule 4.1 of the Ontario *Rules of Civil Procedure* and Rule 53.03 of the *Courts of Justice Act*. My opinions are based on the data and information available to me and subject to the limitations noted in the report.



David J. Hutchings

May 31, 2024

Appendix A
Curriculum Vitae

[See attached]

DAVID J. HUTCHINGS
Managing Principal

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Mr. Hutchings' economics expertise spans a wide array of topics, including tax and transfer pricing, securities and finance, valuation and damages, and antitrust. Deeply experienced in litigation, international arbitration, and investigations, he has led case teams, conducted economic and financial analyses, estimated damages and liability, and performed valuation analyses in complex matters across many jurisdictions, including the US, Canada, the UK, the EU, Latin America, and Australia.

In tax controversy and transfer pricing matters, he has assisted expert witnesses and attorneys for both taxpayers and taxing authorities in jurisdictions around the world, provided expert testimony, and authored expert reports on dispute and planning issues. In addition, Mr. Hutchings has been involved in securities disputes arising out of US financial crises related to residential mortgage-backed securities (RMBS), credit ratings, and financial guaranty insurance.

In antitrust and competition matters, Mr. Hutchings has analyzed anticompetitive effects, evaluated potential remedies, examined the economics of platform markets, and assisted in the preparation of analysis and testimony before courts and government regulators, such as the US Federal Trade Commission (FTC).

In addition, he has quantified harms and foregone benefits, and valued natural resources and treaty entitlements, in several disputes between Canadian First Nations and the Crown, both testifying at trial and consulting to reach pre-dispute resolutions. He has also quantified damages arising from tortious interference, breach of contract, and other contractual and extra-contractual remedies, and provided valuation analyses in numerous commercial disputes.

EDUCATION

J.D., University of Toronto Faculty of Law

M.A., economics, University of Toronto

B.S., mathematics, and B.S., economics, Massachusetts Institute of Technology

PROFESSIONAL EXPERIENCE

2023–Present Analysis Group, Inc.
Managing Principal

2009–2023 The Brattle Group
Interim President (2022–2023)
Principal (2019–2023)
Senior Associate (2016–2019)
Associate (2014–2016)
Research Analyst (2010–2013)
Research Analyst Intern (2009)

SELECTED EXPERT CASE WORK

- ***Red Rock First Nation and Whitesand First Nation v. Canada (Attorney General), et al.***
Ontario Superior Court of Justice
 Provided reports and trial testimony.
- ***Restoule, et al. v. Canada (Attorney General), et al.***
Ontario Superior Court of Justice
 Provided reports.
- ***In re: Baker Hughes, a GE Company, Derivative Litigation***
Court of Chancery, State of Delaware
 Provided deposition.
- **Confidential matter at Internal Revenue Service (IRS) appeals**
 Provided report.
- **Confidential matter at IRS appeals**
 Provided report and interview.
- ***In the Matter of Securitized Asset Backed Receivables LLC Trust 2007-BR2 and Securitized Asset Backed Receivables LLC Trust 2007-BR3***
Superior Court, State of California, County of Orange, Probate Division
 Provided reports and depositions.

SELECTED CONSULTING EXPERIENCE

Tax Controversy

- **Veolia Environnement S.A. dispute with IRS over worthless stock deduction**
 Analyzed a worthless stock deduction claim in a long-running IRS appeal for Veolia that was ultimately resolved favorably for the client in 2019. Developed a contract-by-contract analysis of profitability and other financial analyses to rebut IRS claims and support valuation and ultimate deduction. The IRS conceded the matter in full.
- ***Athene USA Corporation v. United States of America***
US District Court, Southern District of Iowa
 Investigated hedging policies of a large insurance firm in a dispute with the IRS over the tax treatments of hedging strategies. Managed a team of that evaluated derivative products and reconciled varying state and federal regulations. Case settled favorably for the client.
- ***Philip Morris USA Inc. v. US Department of Treasury***
US Court of Claims, Michigan
 Led a team on behalf of Altria Group, Inc. that advised the taxpayer on the taxation of extraterritorial investment gains. The team worked closely with counsel and the finance team to undertake a detailed

functional analysis and prepare an analysis on the unitary nature of the businesses at issue. The state tax authority conceded the matter in full.

- Authored a report and provided an interview to the IRS on behalf of a large financial services provider regarding entrepreneurial risk. The matter was resolved favorably for the taxpayer.
- ***American International Group v. United States of America***
US District Court, Southern District of New York
Supported Nobel laureate and Columbia University Professor Joseph Stiglitz in his testimony for the US Department of Justice (DOJ) regarding a series of transactions between US and foreign financial institutions that were alleged to have created improper claims of tax benefits. Provided consulting support to attorneys, including those new to the case, and extensive collaboration with Professor Stiglitz on the cash flows and structures of the transactions. The matter settled favorably before trial.
- ***Cross Refined Coal, LLC and USA Refined Coal, LLC, Tax Matters Partner v. Commissioner of Internal Revenue***
US Tax Court
Provided consulting support to a taxpayer in developing expert strategy and supported testifying economist. Developed economic and financial analyses to model risk exposure to partnership and individual investors to assess the substance of the transaction. The client prevailed in a rare bench opinion.
- ***Reddam v. Commissioner of Internal Revenue***
Blum v. Commissioner of Internal Revenue
US Tax Court
Performed extensive analyses of two Offshore Portfolio Investment Strategy (OPIS) transactions in support of an expert's reports and testimony for the IRS. Investigated the pre-tax profitability and non-tax business purposes of these transactions and provided consulting support to the attorneys and expert through trial and appeal. Involved valuing a number of exotic options using analytic and simulation methods, comparing the transactions to alternative investment strategies, and reconciling transaction documents. Both cases were decided for the IRS in US Tax Court and upheld by two different circuit courts.
- ***AD Global FX Fund v. United States of America***
AD Equity Investment Fund LLC v. United States of America
AD Global 2001 Fund LLC v. United States of America
US District Court, Southern District of New York
Analyzed a series of different tax-motivated transactions, including a Son of BOSS structure to offset significant income on taxpayers' tax returns. Provided consulting support to DOJ attorneys on valuing options, evaluating the economic substance, and identifying economic similarities among a wide set of transactions. Worked with an expert to develop testimony and prepare for deposition. The matter settled favorably before trial.
- ***RERI Holdings I, LLC and Harold Levine, Tax Matters Partner v. Commissioner of Internal Revenue***
US Tax Court
Supported an expert in the preparation of testimony in US Tax Court regarding the valuation of residual interests in a long-running dispute with the IRS. The analysis turned on assessing the different risks of near-term and long-term cash flows and how to properly apportion value. The matter was decided favorably for the IRS with heavy reliance on the expert's opinions.
- ***Exelon Corporation v. Commissioner of Internal Revenue***
US Tax Court
Provided support to MIT Sloan School of Management Professor Stewart Myers in his testimony for

Exelon in its tax dispute regarding Section 1031 like-kind exchanges and Exelon's purchase of coal-fired electrical plants. Analysis involved extensive financial analysis of leases, options, and assets.

Transfer Pricing

- For a large Canadian financial institution in a transfer pricing dispute with the Canadian Revenue Agency, developed evidence regarding the proper bargaining framework for allocating losses.
- ***Eaton Corporation and Subsidiaries v. Commissioner of Internal Revenue***
US Tax Court
Involved in analyzing all aspects of Eaton's transfer pricing policies in its dispute with the IRS regarding cancelled advance pricing agreements. Worked with a team to coordinate the testimony of six experts, with primary responsibility for the main transfer pricing economist's report, testimony, and trial preparation. Collaborated closely with the trial team before and at trial to craft an effective direct testimony presentation and provide real-time support for redirect testimony and cross-examination topics for opposing experts. The matter was decided favorably for the client.
- ***The Coca-Cola Company and Subsidiaries v. Commissioner of Internal Revenue***
US Tax Court
Analyzed The Coca-Cola Company's transfer pricing policies in its dispute with the IRS involving over \$9 billion in proposed adjustments. Involved in detailed functional and transfer pricing analysis of the best method.
- Developed rebuttal testimony to IRS expert testimony in a major transfer pricing dispute regarding the manufacture of medical devices. Analysis required novel valuation techniques for in-process R&D, a detailed functional analysis of the industry, and adjustments to accounting statements to properly measure economic profit for a system profit-style analysis. The matter settled favorably before trial.
- Supported an industry expert in credit analysis in forming an opinion on the reasonableness of an intercompany debt guarantee between a US parent and its Australian subsidiary in a dispute with the Australian taxing authority.
- Provided consulting support to counsel on various intercompany financing arrangements. This included analyzing the creditworthiness of several corporate subsidiaries in support of an academic expert, formerly of a major credit rating agency, providing analysis and opinion as to the implied credit rating of each as independent entities.

Commercial Damages

- Provided consulting support in valuing and evaluating valuation issues, including the reliability with which damages might be measured, in disputes involving pharmaceutical products, biopharmaceutical products, nascent technology, platforms, patents, natural resources, and trade secrets.
- ***Jicarilla Apache Nation f/k/a Jicarilla Apache Tribe v. United States of America***
US Court of Federal Claims
Provided expert support in a successful dispute over the US government's imprudent management of tribal funds. Involved benchmarking the performance of a fixed-income portfolio strategy over time, constructing alternative portfolios and simulating their performance, and rebutting the government experts' claims regarding the prudent time horizon for investment and the liquidity requirements of the fund. The Nation prevailed in its Phase I claims and settled with the government on favorable terms before trial for Phase II.
- ***Confidential Arbitration***
Netherland Arbitration Institute

Led a team that analyzed the financial performance of a major consumer-goods manufacturer and its relationships with distributors in Eastern Europe in defending a claim for breach of contract and tortious interference. Assessed whether damages could be reliably estimated. Involved detailed review of financial statements, assessing the reasonableness of forecasted future earnings, proper allocation of overhead costs, and conceptual issues of perpetual growth and the use of ex ante and ex post data in damages estimates. The arbitral panel ultimately decided favorably for the client.

- Provided expert support in preparing testimony on irreparable harm for a global human resources company defending itself against a competitor's efforts to obtain a preliminary injunction that would have barred the client from selling certain software products.
- Analyzed a failed Latin American merger at the center of an arbitration dispute over whether the merger was improperly prevented by one of the parties. Provided expert support in estimating the value of the potential merger based on market reactions and the erosion of the value over time. As part of the work, reviewed proposal documents to demonstrate why certain analyses by the other party's advisors that had been used to conclude the merger was ill-advised rested on faulty assumptions. The matter settled favorably before the hearing.
- ***Abaclat and Others v. Argentine Republic***
International Centre for Settlement of Investment Disputes
For an international arbitration proceeding related to the Argentine Republic's handling of the sovereign debt crisis of the early 2000s, aided an expert in developing testimony analyzing the appropriateness of sovereign responses to the crisis and critiquing opposing reports that the actions taken were inappropriate. In particular, examined the value of then-novel GDP-indexed bonds, compared their returns to other holdings, and analyzed how their use contributed to economic recovery.
- ***Meda AB v. 3M Company, 3M Innovative Properties Company, and Riker Laboratories, Inc.***
US District Court, Southern District of New York
Part of a team that developed testimony and analysis quantifying damages for a Fortune 500 firm involved in a dispute over whether it had disclosed a regulatory pricing restriction when it sold its pharmaceuticals division. As part of the analysis, assessed the degree to which information had already been encompassed in disclosures made during the acquisition process.
- In a securities class action arising from alleged manipulation by a US cosmetics company involving unique hybrid securities, assisted an expert in advising counsel on the range of damages to plaintiffs using event-study methodology and derivative pricing.

Securities and Finance

- ***Ambac Assurance Corporation v. EMC Mortgage LLC f/k/a EMC Mortgage Corporation, J.P. Morgan Securities LLC f/k/a Bear, Stearns & Co. Inc., and JPMorgan Chase Bank, N.A.***
Ambac Assurance Corporation and The Segregated Account of Ambac Assurance Corporation v. Countrywide Home Loans, Inc., Countrywide Securities Corp., Countrywide Financial Corp., and Bank of America Corp.
Ambac Assurance Corporation and the Segregated Account of Ambac Assurance Corporation v. Countrywide Home Loans, Inc., Countrywide Securities Corp., Countrywide Financial Corp., and Bank of America Corp.
Ambac Assurance Corporation and The Segregated Account of Ambac Assurance Corporation v. First Franklin Financial Corporation, Bank of America, N.A., Merrill Lynch, Pierce, Fenner & Smith Inc., Merrill Lynch Mortgage Lending, Inc., and Merrill Lynch Mortgage Investors

MBIA Insurance Corporation v Credit Suisse Securities, DLJ Mortgage Capital, and Select Portfolio Servicing

Supreme Court of the State of New York, County of New York

Supported Nobel laureate and Columbia University Professor Joseph Stiglitz in developing testimony for financial guaranty insurers in a series of disputes against mortgage banks related to alleged breaches of representations and warranties regarding the quality of mortgage assets in RMBS and allegedly fraudulent activity. Additionally, led the team that developed econometric analyses around RMBS securitizations. Involved in all phases of case development and preparation with attorneys, including in-person deposition and cross-examination support of both sides' experts, working on summary judgment motions, and trial preparation for relevant matters.

- ***Abu Dhabi Commercial Bank, et al. v. Morgan Stanley & Co., et al.***

US District Court, Southern District of New York

In a matter related to the collapse of a structured investment vehicle (SIV) during the 2008 financial crisis, developed direct and rebuttal reports on behalf of named plaintiffs on the structure of the SIV market, the importance of credit rating agencies, and the impact of misrepresentations by credit rating agencies on the plaintiffs. This work involved extensive analysis of documents, review of relevant literature, and critiquing opposing experts' claims. The matter settled favorably before trial.

- Provided historic valuations for the acquirer of a fund that failed during the 2008 credit crisis for the purpose of making whole the investors in the fund that had alleged imprudent management. Securities analyzed and valued included a variety of mortgage-backed securities, collateralized debt obligations, and other asset-backed securities.

Regulation and Public Policy

- ***Kelsey Cascadia Rose Juliana, et al., v. United States of America, et al.***

US District Court, District of Oregon

Supported, pro bono, Professor Joseph Stiglitz in his expert testimony regarding the economics of climate change and consulted with counsel on economic and remedy issues.

- ***In the Matter of Certain Microprocessors, Components Thereof, and Products Containing Same***

US International Trade Commission

Working on behalf of respondents Intel, Hewlett-Packard, and Apple in a Section 337 investigation at the US International Trade Commission (ITC), prepared testimony and rebuttal testimony for Nobel laureate and Columbia University Professor Joseph Stiglitz demonstrating that an ITC exclusion order preventing the importation of the respondents' accused products was adverse to the public interest and should not issue. Provided pre-trial and trial support to Professor Stiglitz and attorneys. This work involved the estimation of market impacts and the economic effects of injunctions on markets and the economy as a whole. The investigation was ultimately decided for the respondents.

- ***Dellway, et al. v. National Asset Management Agency, Ireland and the Attorney General***

High Court of Ireland

In a case challenging the legitimacy of the Irish government's response to that country's banking crisis, prepared testimony demonstrating that the government's seizure of a multibillion-dollar loan portfolio secured by the properties of Paddy McKillen, a leading Irish investor, was economically inappropriate given Irish economic conditions and the quality of the loans themselves. In addition to a review of the economic literature and best practices for such restructuring, this work required a thorough analysis of the history of the banking sector in Ireland, an in-depth study of Mr. McKillen's companies' operations, and contrasting the stated goals of the government's response with the likely outcomes in this specific case. The matter made its way to the Supreme Court of Ireland, where the testimony of experts was favorably cited, and the matter concluded successfully for Mr. McKillen.

- ***United Airlines, Inc. and American Airlines, Inc. v. City of Chicago***
US Circuit Court, State of Illinois, County of Cook, Chancery Division
For a matter in which United Airlines and American Airlines sought to enjoin the City of Chicago from commencing an extensive expansion program at Chicago O'Hare International Airport, provided consulting support for attorneys on behalf of the City, demonstrating that the airlines failed to meet the economic criteria for obtaining a preliminary injunction. This work involved assessing the welfare gains from more efficient airport operations, analyzing the effect of major construction during an economic downturn, and investigating the impact on airlines' operations due to the expansion. This case was successfully resolved with a settlement that allowed the City of Chicago's construction plans to proceed.
- Part of the team that supported Professor Joseph Stiglitz in preparing an amicus brief submitted to the Supreme Court of the United States in *Kiobel*, related to the economics of the Alien Tort Statute and the Torture Victim Protection Act.

Antitrust and Competition

- ***Epic Games, Inc. v. Apple, Inc.; Epic Games, Inc. v. Google LLC, et al.***
US District Court, Northern District of California
Led a team that supported the experts in the *Epic v. Apple* litigation, including trial expert report development, rebuttal reports, and deposition and trial support to attorneys.
- Provided consulting support in an expedited matter before the FTC involving leading health care software providers. Prepared analysis and potential testimony for a number of experts on industry structure, technology interfaces, allegedly anticompetitive acts, and the implications for general public welfare, especially in light of changing regulations in the health care market (e.g., the Affordable Care Act, ICD-10). Focused particularly on developing analyses that estimated the magnitude of the welfare impact. Assisted attorneys in crafting their initial complaint and subsequent briefings with the FTC, after which the matter was resolved favorably for the client.
- Analyzed potential anticompetitive effects of transactions for clients considering merger in Canada. Considered potential remedies that the Canadian Competition Bureau could require.
- ***US Airways, Inc. v. Sabre Holdings Corp.***
US District Court, Southern District of New York
Led a team that investigated the allegedly anticompetitive behavior of a major travel technology firm, supporting experts in reports, deposition, and trial. The analysis focused on the economics of platform markets, understanding the flows of commissions and fees between firms, and the willingness of consumers to pay for certain services.
- On behalf of a leading producer of pulp and paper products, supported an expert in the development of testimony rebutting claims that the firm had exercised monopsony power against lumber harvesters. The analysis involved the economics of the lumber industry supply chain and demonstrated that the client did not possess monopsony power over the plaintiffs.

ARTICLES AND PUBLICATIONS

"The Proper Measure of Profits for Assessing Market Power," with Michael Cragg, Patrick Holder, and Bin Zhou, *Antitrust* (March 21, 2023)

"An Economic Framework for Identifying the Tested Party," with Michael I. Cragg, *Tax Notes* (November 30, 2015)

Public Disclosure versus Confidentiality in Liquid Fuel Markets, with Evan Cohen, Michael Cragg, and Bin Zhou, The Brattle Group (January 2015)

Can the U.S. Congressional Ethanol Mandate be Met?, with Metin Celebi, Evan Cohen, Michael Cragg, and Minal Shankar, The Brattle Group (May 2010)

PRESENTATIONS AND SPEAKING ENGAGEMENTS

“Undoing Colonial Behaviour in the Modern Era: An Economic Approach to Indigenous Property Rights,” 80 years of Joseph Stiglitz: An economy for a just, free, and prosperous society (May 24, 2023)

“Transfer Pricing Amid COVID-19: Trends, Developments and Practical Guide,” with Jamie Eagan, Robin Hart, and Michael Cragg, The Knowledge Group (October 8, 2020)

“Joint Venture Products and Distribution: The Case of the NFL Sunday Ticket Challenge,” with Michael Cragg (July 6, 2020)

“Transfer Pricing Regulation in the 2020 Landscape: Maximizing Opportunities and Overcoming Challenges,” with Robin Hart, The Knowledge Group (March 13, 2020)

“Virtual PE Challenge,” with Bin Zhou and Jehan deFonseka, National Association for Business Economics Transfer Pricing Symposium (July 18, 2018)

“Recent Trends and Developments on the Organization for Economic Cooperation and Development’s (OECD) Transfer Pricing Guidelines: What You Need to Know,” with Evan Cohen, OECD (February 15, 2018)

“Global Transfer Pricing Litigation: Trends and Developments Explored,” with Christine Polek, The Knowledge Group (August 17, 2017)

Appendix B

Materials Relied Upon

Academic Literature

Adam Smith, Book I, Chapter XI: Of the Rent of Land, *An Inquiry into the Nature and Causes of the Wealth of Nations*, (1776) MetaLibri Digital Edition: 2007.

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Warren James Jestin, (1977) "Provincial Policy and the Development of the Metallic Mining Industry in Northern Ontario: 1845-1920," Thesis, Department of Political Economy, University of Toronto.

Case Documents

Statement of Claim, *Chief Jason Gauthier, on behalf of the Missanabie Cree First Nation and on behalf of all Treaty 9 First nations in the Province of Ontario, v. His Majesty The King In Right of Canada as represented by the Attorney General of Canada*, Case No. CV-23-00029205-00CP, Ontario Superior Court of Justice, May 8, 2023.

Geographic Data Sources

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<http://www.geologyontario.mndmf.gov.on.ca/mndmfiles/pub/data/imaging/M1953A/M1953A.pdf>.

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Statistics Canada, Table 18-10-0005-01: Consumer Price Index, Annual Average, Not Seasonally Adjusted.

Statistics Canada, Table 32-10-0049-01: Farm Operating Expenses and Depreciation Charges (x 1,000).

Statistics Canada, Table 36-10-0212-01: Long run real income estimates.

Statistics Canada, Table 36-10-0229-01: Long-run provincial and territorial data.

Ryan Lake
Direct Line: (403)266-1201
Email: rlake@mauricelaw.com

“Privileged and Confidential”

July 17, 2023

The Brattle Group Canada ULC
40 King Street West
Scotia Plaza, Suite 3301
Toronto, ON M5H 3Y2

Attention: David Hutchings

Dear Sir:

RE: Missanabie Treaty 9 Class Action
Our File: 583.09

The purpose of this letter is to retain you to provide an expert report in respect to the above referenced claim.

In preparing your expert report, please respond to the following questions.

Question 1: Assuming that the allegations made in the Statement of Claim are true, is there evidence that two or more of the proposed Class First Nations suffered compensable harm arising from the Crown's breach of Treaty, fiduciary, equitable and legal duties:

- a) When it failed to meet its ongoing obligation to increase the Annuity Payments, as promised by the Crown under the terms of Treaty 9, to maintain the real value of the Treaty Annuities over time;
- b) When it failed to provide economic assistance in agriculture, stock-raising, or other assistance and an annual distribution of twine and ammunition to Treaty 9 Indians;
- c) When it granted 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*.

Question 2: If yes, is there a plausible methodology or methodologies to calculate damages from the compensable harm suffered?

Question 3: If no, could a plausible methodology or methodologies be created to calculate damages from the compensable harm suffered?

Question 4: If a plausible methodology exists or could be created, would that methodology provide a realistic prospect of establishing loss on a class-wide basis?

If you wish to be engaged on these matters, please advise if this will conflict with any other work you are doing at present.

I trust the foregoing is in order, but if you have any other questions, please contact myself or my Legal Assistant, Veronika Crawford at vcrawford@mauricelaw.com.

Sincerely,

MAURICE LAW

A handwritten signature in black ink, appearing to read "R. Lake", positioned above a horizontal line.

Ryan Lake

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**CHIEF JASON GAUTHIER, on behalf of the MISSANABIE
CREE FIRST NATION**

Plaintiff

-and-

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

Defendant

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

ACKNOWLEDGMENT OF EXPERT'S DUTY

1. My name is David Hutchings. I live at Mount Royal..... (city), in the
Province..... (province/state) of Quebec
..... (name of province/state).
2. I have been engaged by or on behalf the Plaintiff, Chief Jason Gauthier, on behalf of the
Missanabie Cree First Nation, to provide evidence in relation to the above-noted court
proceeding.
3. I acknowledge that it is my duty to provide evidence in relation to this proceeding as follows:
 - (a) to provide opinion evidence that is fair, objective and non-partisan;
 - (b) to provide opinion evidence that is related only to matters that are within my area of expertise;
and
 - (c) to provide such additional assistance as the court may reasonably require, to determine a matter
in issue.
4. I acknowledge that the duty referred to above prevails over any obligation which I may owe to
any party by whom or on whose behalf I am engaged.

Date May 31, 2024

David Hutchings
David Hutchings (Jul 23, 2024 11:48 EDT)

Signature

NOTE: This form must be attached to any expert report under subrules 53.03(1) or (2) and any opinion
evidence provided by an expert witness on a motion or application.

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, and 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)

SUPPLEMENTAL AFFIDAVIT OF CHIEF JASON GAUTHIER
July 31, 2025 (Filed in support of Motion for Certification)

I, JASON GAUTHIER, of Missanabie Cree First Nation in the Province of Ontario,
DO SOLEMNLY AFFIRM THAT:

1. I am a member of and the Chief of the proposed representative plaintiff in this action: Missanabie Cree First Nation (“Missanabie”). I swore an affidavit in this matter on July 29, 2024. This affidavit supplements and corrects information provided in my first affidavit.
2. I have personal knowledge of the facts and matters set out in this Affidavit, except where they are stated to be based upon information and belief. Where I have been informed of facts, I have stated the source of my information and I hereby confirm that I believe such facts to be true.
3. The Claim is no longer being advanced on behalf of a subclass with myself as the representative plaintiff of the subclass. Rather the Claim is advanced on behalf of Missanabie Cree First Nation on behalf of “Any First Nation who is a successor in interest to the bands that signed or adhered to Treaty 9.” However, I am aware that individuals receive Annuity Payments directly from the Crown. To account for this, the class action, if certified, will include a protocol that permits distribution of settlement proceeds or any award following a trial directly to individuals who are alive as of the date of settlement or award and are entitled to receive an Annuity Payment on account of being a member of a First Nation that is part of the Class.
4. Missanabie Cree First Nation continues to collaborate with Elders throughout Treaty 9 to gain their input on the convening of an Elder Oral History Hearing. To this end we continue to consult with our fellow Treaty 9 First Nations during the development of the Oral History Protocol. A draft Oral History Protocol has been tabled with Canada and Ontario for review, and our aim is to reach an agreement prior to the next Case Management Conference in late October 2025.

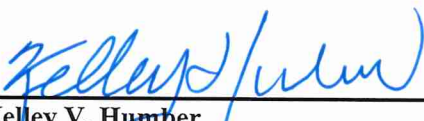
Retainer Agreement

5. On February 5, 2025, Missanabie executed a Contingency Fee Retainer Agreement with Maurice Law respecting fees and disbursements (the “Retainer Agreement”). Pursuant to the Retainer Agreement, Counsel will only be paid if they are successful at obtaining a judgment or settlement with the defendants and Maurice Law will cover any costs awarded against Missanabie in the event that the Claim is dismissed. From the total amount of settlement, award, compensation, or damages

recovered for the class, counsel's fee will be 6% of the total compensation including any costs recovered for the class through a negotiated settlement with the defendants or 8% of the total compensation including any costs recovered for the class after the completion of trial or earlier resolution through the courts, including without limitation, a motion for summary judgment. The contingency fee is subject to a cap of \$100 million. The Retainer Agreement executed on February 5, 2025 replaces any and all prior Retainer Agreements between Missanabie and Maurice Law respecting this matter.

6. I make this Affidavit in support of a motion for an Order that this lawsuit be certified as a class proceeding and for no other purpose.

Affirmed remotely by **Chief Jason Gauthier**
stated as being located in the City of Toronto
in the Province of Ontario, before me at the
City of Calgary in the Province of Alberta on
31 day of July 2025, in accordance with O.
Reg 431/20, Administering Oath or
Declaration Remotely.


Kelley V. Humber
A Commissioner of Oaths in the Province of
Alberta (LSA: #26777) and Ontario (LSO
#89406W)


CHIEF JASON GAUTHIER
Chief of Missanabie Cree Nation

Kelley V. Humber
Commissioner for Oaths in
and for the Province of
Ontario

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

Defendant

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

LITIGATION PLAN
Draft last update July 31, 2025

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DEFINITIONS

1. The definitions below will be used throughout this Litigation Plan. Any term defined in the Statement of Claim (as amended from time to time) that is also used in this Litigation Plan has the same meaning as that included in the Statement of Claim or as otherwise defined by the Court. The definitions are as follows:

- (i) **Equitable Compensation Distribution Process** means the system directed by the Court for the **Class Action Administrator** to distribute equitable compensation to Approved Class Members and Approved Individual Treaty 9 Indians;
- ~~(ii) **Approved Class Member(s)** means Approved First Nation Class Member(s)~~
- ~~(iii) **Approved Subclass Member(s)** means Approved Treaty 9 Members Subclass Member~~
- (iv) **Approved First Nation Class Member(s)**- means a First Nation ~~under Treaty 9 Class Member~~ who has been approved by the **Class Action Administrator** as meeting the criteria for being a Treaty 9 First Nation Class Member and whose approval as a ~~Treaty 9 First Nation Class Member~~ and whose approval as an Approved Class Member has not been successfully challenged;
- ~~(v) **Approved Treaty 9 Members Subclass Member(s)** means an individual under Treaty 9 Members Subclass who has been approved by the **Class Action Administrator** as meeting the criteria for being a Treaty 9 Members Subclass member and whose approval has not been successfully challenged;~~
- (vi) **Approved Individual Treaty 9 Indian** means those individual persons who have been approved by the Class Action Administrator as meeting the criteria for being an Individual Treaty 9 Indian and whose approval as such has not been challenged;
- (vii) **Certification Notice** means ~~the information set out in Schedule A to this Litigation Plan, Notice to be determined as may be subsequently~~

~~amended~~ and approved by the Court;

- (viii) **Claim Form** means the form set out in ~~Schedule C to this Litigation Plan~~ to be determined and approved by the Court used by the First Nation Class Members ~~and Treaty 9 Members Subclass Members~~ to submit a claim, as may be subsequently amended and as approved by the Court;
- ~~(ix)~~ **Class Action Administrator** means any settlement administrator or other appropriate firm appointed by the Court to assist in the administration of the class proceeding; ~~the Plaintiff proposes that the Class Action Administrator be [REDACTED] and this Litigation Plan assumes same;~~
- (x) **Class Counsel** means the consortium of law firms acting as Co-Counsel in this class proceeding, with the firm of Maurice Law Barristers & Solicitors and Rochon and Genova ~~and Howie, Sacks & Henry;~~
- (xi) **Class Member(s)** means the thirty-seven (37) First Nations which are the beneficiaries of the James Bay Treaty # 9, collectively the successors to the signatories and adherents of Treaty 9 ~~as pleaded in the Fresh As Amended Statement of Claim and as approved by the Court;~~
- ~~(xii) **Subclass Member(s)** means the members of the thirty seven (37) First Nations which are the beneficiaries of the James Bay Treaty # 9 who receive Annuity Payments;~~
- (xiii) **Common Issues** means the issues listed in the Notice of Motion for Certification, or as found by the Court, as may be subsequently amended, and as approved by the Court;
- (xiv) **Common Issues Notice** means the information set out in the notice regarding the **Common Issues** to be certified by the Court at Certification, as may be subsequently amended, and as approved by the Court;
- ~~(xv) **Crown Class Member Information** means information to be provided by the Crown, at the request of the Plaintiffs and/or as ordered by the Court, to the **Class Action Administrator** and/or **Class Counsel** regarding the names and last known contact information of all individuals who meet the criteria of Class~~

~~Members and Subclass Members as set out in the Fresh As Amended Statement of Claim or as otherwise defined by the Court, including: (a) a list of all known Class Members' and Subclass Members' names and last known addresses using the information in the Crown's possession or under its control.~~

(xvi) **Indigenous Services Canada Information** means information to be provided by the Crown, via Indigenous Services Canada to the Class Action Administrator and/or Class Counsel, which includes but is not limited to:

- a. the last known contact information of all Treaty 9 First Nations who meet the criteria of the First Nations Class as set out in the Statement of Claim (as amended from time to time) or as otherwise defined by the Court, and
- b. a list of the last known contact information for all persons who have received a Treaty Annuity under the terms of Treaty 9 and the status of their recognition by Indigenous Services Canada as a member of a First Nations Class Member as set out in the Statement of Claim (as amended from time to time) or as otherwise defined by the Court.

(xvii) **Individual Treaty 9 Indian** means an individual person who is living as of the date of award or settlement and is entitled to receive an Annuity Payment under the terms of Treaty 9 being an "Indian" person under the *Indian Act*, R.S.C. 1985, c. I-5, as amended, and recognized by Indigenous Services Canada as a member of the First Nations Class Member. For certainty, an Approved Individual Treaty 9 Indian is not themselves a "Class Member" and is so defined for the sole purpose of distributing specific compensation to these individual persons.

(xviii) **Notice Program** means the process, set out in the Litigation Plan, for communicating the **Certification Notice** and/or the **Common Issues Notice** to **Class Members and Subclass Members**, as may be subsequently amended and as approved by the Court;

(xix) **Opt Out Form** means the form set out in Schedule B to this Litigation Plan to be determined and approved by the Court used by Class Members ~~and Subclass Members~~ to opt out of the class proceeding, as may be subsequently amended, and as approved by

the Court;

- (xx) **Opt Out Period** means the deadline, proposed by the Plaintiff as 180 days ~~post Certification~~ after the Certification Notice is provided to the Class Members, or as determined by the Court, to opt out of the class proceeding;
- (xxi) **Opt Out Procedures** means the procedures, set out in the Litigation Plan, for Class Members ~~and Subclass Members~~ to opt out of this class proceeding, as may be subsequently amended and as approved by the Court; ~~and~~
- (xxii) **Representative Plaintiff or Plaintiff** means Missanabie Cree First Nation; and
- (xxiii) **Special Opt Out Procedures** means the procedures, set out in the Litigation Plan, for Class Members ~~and Subclass Members~~ who have already commenced a civil proceeding in Canada or who are known by the Crown to have already retained legal counsel to opt out of this class proceeding, as may be subsequently amended, and as approved by the Court.

OVERVIEW

2. This Claim ~~is about~~ seeks damages for the Crown's failure to diligently implement the terms of *James Bay Treaty* or *Treaty No. 9* ("**Treaty 9**"), and to honour the spirit and intent of the solemn Treaty relationship and promises made by the Crown arising thereof. ~~with a special focus on the failure to implement the promise of an annual payment (or "annuity") to each member of the signatory Bands and other adherents.~~ In particular this claim relates to the Crown's failure to:

- a. increase, index or augment the amount of the annual payment under Treaty 9 (the "**Annuity Payment**");
- b. the failure to provide for agricultural benefits and assistance in the terms of Treaty 9 ("**Agricultural Benefits**"); and

c. the failure to protect the Treaty 9 First Nations' mineral rights.

3. The Bands who signed or adhered to Treaty 9 in 1905 and subsequent years were promised a number of benefits by Canada and Ontario on behalf of the Crown, including an annual payment of \$4 per person “for ever”. However, the impacts of inflation have significantly eroded the value and purchasing power of the \$4 annual payment ever since and the value of the lands and resources derived from Treaty 9 have increased exponentially. Despite this fact, the Crown has never augmented or increased the annual payment in order to offset the impacts of inflation.

4. The Plaintiff claims that when properly interpreted, the promise to pay the Annuity Payment required the Crown to increase, index or augment the corresponding dollar amounts to offset the impacts of inflation, maintain the real value thereof and/or to share in the value of the economic benefits derived by the Crown from the territory covered by Treaty 9.

5. In the alternative, and in the event that the Crown was not required to increase, index, or augment 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. 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. Accordingly, the Crown breached its fiduciary duty and/or the honour of the Crown, and/or Treaty 9 is invalid.

6. Further, the written text of Treaty 9 provided for far less benefits than the

other numbered Treaties. In particular, Treaty 9 provided for a smaller gratuity payment (only \$8/person instead of the \$12 provided under Treaties 3 and 5), a smaller annuity payment (only \$4/person instead of the \$5 provided under Treaties 3 and 5), and provided for no agricultural or other economic benefits whatsoever (unlike the other numbered Treaties, which provided for farming implements, cattle, assistance in earning a livelihood through wage labour, etc).

~~7. This Claim seeks damages for the Crown's failure to increase the annual payments on the basis of breach of treaty, breach of fiduciary duty and on the principles of equitable compensation, and unjust enrichment.~~

8. This Litigation Plan is advanced as a workable method of advancing the proceeding on behalf of the Class ~~and Subclass~~ and of notifying Class Members ~~and Subclass Members~~ as to how the class proceeding is progressing, pursuant to section 5(1)(e)(ii) of the *Class Proceedings Act*, 1992, S.O. c. 6, as amended (the “*Act*”). The Litigation Plan is modelled on the various class and CHRTC proceedings with respect to First Nations Child Welfare.¹

9. This Litigation Plan sets out a detailed plan for the common stages of this litigation, and sets out, on a without prejudice basis, an early plan for how the individual stage of the action may progress. Given the early stage of the litigation, the plan is necessarily subject to substantial revisions as the case progresses.

PRE-CERTIFICATION PROCESS

¹ See [Moushoom v. Canada \(Attorney General\)](#), 2021 FC 1225

A. The Parties

i. The Plaintiffs and Proposed Class and Subclass

10. The Plaintiff is Missanabie Cree First Nation. The proposed class for this action consists of the First Nations who are the beneficiaries to the James Bay Treaty # 9. There are thirty-seven (37) putative members of the class.

~~11. The Plaintiff is Chief Jason Gauthier. The proposed subclass is all of the individuals who are members of the First Nations that constitute the Class and who receive Annuity Payments pursuant to Treaty 9. The number of individuals in the subclass is unknown but is estimated to be in the tens of thousands.~~

The Defendant

12. The defendants is are His Majesty the King in Right of Canada as represented by the Attorney General of Canada ~~and His Majesty the King in Right of Ontario as represented by the Attorney General of Ontario.~~ Collectively the Defendants are referred to as the “Crown”.

B. The Pleadings

i. Statement of Claim

~~13.~~ The Plaintiff has served the Statement of Claim on the Attorney General of Canada on May 10, 2023, a Fresh-As-Amended Statement of Claim on July 29, 2024, an Amended Fresh-As-Amended Statement of Claim on October 31, 2024. The Plaintiffs intend to serve and file a further Amended Statement of Claim on July 31, 2025. ~~Fresh As Amended Statement of Claim on July 29, 2024.~~

ii. Statement of Defence

14. On, the Attorney General of Canada served their Notice of Intent to Defend on June 29, 2023. The Attorney General of Canada advised the Plaintiff that it would file its Statement of Defence after the Plaintiff delivers its Certification Record and the parties have conferred with respect to the common issues. Ontario was added as a Defendant at the request of Canada by amendment to the Fresh-As-Amended Statement of Claim filed October 31, 2024. Ontario has not filed a Defence to the Claim.

iii. Third Party Claim

15. ~~The Attorney General of Canada Defendants has have not issued a Third Party Claim. However, the Plaintiff anticipates that the Attorney General of Canada will bring a motion pursuant to Rule 5.03 to add the Government of Ontario as a necessary party to the action.~~

C. Preliminary Motions

16. The Plaintiff proposes that any preliminary motions be dealt with at or after the Motion for Certification or as directed by the Court. The Plaintiff also proposes that all Motions, References, Questions of Law, or Determinations of Issues that may be heard in chambers or by case conference are done so accordingly to preserve judicial economy and case efficiency.

~~17. The proposed class proceeding alleges, *inter alia*:~~

~~(a) The Crown has failed to augment or increase the annual payments of \$4 to each Indian person as set out in Treaty 9 for~~

~~the purposes of offsetting the impacts of inflation and maintaining the purchasing power; and~~

~~(b) The Crown has failed to uphold its honourable obligations by entering and implementing a Treaty with such disparity in terms when compared to the Treaties which precede and succeed it.~~

D. Class Counsel

18. Maurice Law Barristers & Solicitors (“Maurice Law”) ~~and is working with Howie, Sacks & Henry~~ Rochan Genova (“Rochon”) are counsel for the Class (collectively “Class Counsel”) ~~in a co-counsel arrangement.~~

E. Pre-Certification Communication Strategy

i. Responding to Inquiries from Putative Class Members

~~19.~~ The Proposed Class Co-Counsel expect to receive many communications from Treaty 9 First Nations’ governments consisting of Chiefs and Councils, who are the representatives of the Class Members ~~and Subclass Members~~ affected by this Class Action. Maurice Law ~~and Howie, Sacks, & Henry LLP~~ will be responsible for responding to inquiries and communicating with Class Members. ~~and Subclass Members.~~

~~20. Maurice Law is responsible for the prosecution of the Class Action.~~

21. With respect to each inquiry, the inquiring government’s information individual’s name, address, email, and telephone number will be added to a confidential database. Class Members ~~and Subclass Members~~ will be asked to register on the websites of Maurice Law ~~Barristers & Solicitors or Howie, Sacks, &~~

~~Henry LLP~~, including either its own website or an established specific website for this Class Action. Once registered, they will receive regular updates on the progress of the Class Action ~~in English and French~~. Any individual Class Members ~~and Subclass Members~~ who contacts ~~Proposed Class Co-Counsel~~ are will be responded to in their preferred official language.

ii. Pre-Certification Status Reports

22. In addition to responding to individual inquiries, Class ~~Co-Counsel~~ will create a webpage concerning the class proceeding in English and French. The most current information on the status of the class proceeding ~~is~~will be posted and ~~is~~ updated regularly ~~in English and French~~.

23. Copies of the publicly filed court documents and court decisions will be accessible from the dedicated webpage and downloadable in PDF format. Links to any decisions that are posted on CanLII will also be posted on the dedicated Class Counsel webpage ~~provide~~. Phone numbers and emails for Class Counsel in Alberta and Ontario will be provided.

24. Class Counsel will send update reports by e-mail to Class Members ~~and Subclass Members~~ who have provided their contact information and have indicated an interest in being notified of further developments in the class proceeding.

iii. Pre-Certification Outreach

25. ~~Proposed Class Counsel will present the proposed class action to Individual Class Members and Subclass Members and/or through umbrella political territorial organizations like the Assembly of First Nations, Nishnabek Aski Nation,~~

Muskegowuk Council, among others. Class Counsel have spent the previous year engaging with Treaty 9 First Nation governments individually and through trial organizations such as Muskegowuk Council and Nishnabek Aski Nation (“NAN”). The Representative Plaintiff has secured support from a number of Treaty 9 First Nations and engagement with Treaty 9 First Nation governments is ongoing.

F. Settlement Conference

i. Pre-Certification Procedures

26. The Plaintiff proposes that the Class Action proceed in accordance with Superior Court of Justice’s published *Best Practices Guide for Class Actions in Ontario* (<https://www.ontariocourts.ca/scj/civil/resources/guide-class-actions/>).

27. Additionally, the Plaintiff and Attorney General of Canada propose that the Class Action proceed in accordance with the Notice to Profession – Toronto Region – G – Class Actions (February 16, 2022) (https://www.ontariocourts.ca/scj/notices-and-orders-covid-19/notice-to/#G_Class_Action_Matters) notwithstanding that the Class Action may proceed outside the Toronto Region.

28. ~~The Plaintiff and the Attorney General of Canada have agreed to jointly draft a request for case management and to file same with the Superior Court of Justice. The Plaintiff commenced the Class Action at the Sault Ste Marie Courthouse. However, the Plaintiff and Attorney General of Canada expect and propose that the claim will be managed by the Toronto Region Class Actions Team. The Plaintiff will propose that the parties jointly request approval from the Team Lead, Class Actions,~~

~~Toronto Region for Out of Town case management with the Toronto Region Class Actions Team.~~

~~29. The Plaintiff and the Attorney General of Canada have agreed to meet and confer with respect to the common issues and to take a principled approach in resolving same. The Plaintiff also proposes that it and the Attorney General of Canada agree to a plan to resolve the various steps contained in the *Best Practices Guide for Class Action in Ontario* at the meet and confer.~~

~~30. After the meet and confer, should a formal pre-Certification Settlement Conference be required to resolve any outstanding issues, the Plaintiff proposes that a pre-Certification Settlement Conference be conducted at least one month after the Motion for Certification and responding materials, if any, have been filed with the Court.~~

~~31. After the meet and confer, if all or most of the issues are resolved, the Plaintiff proposes that a pre-Certification Settlement Conference be conducted within one month after the Motion for Certification and responding materials, if any, have been filed with the Court.~~

G. Timetable

i. Plaintiff's Proposed Timetable for the Pre-Certification Process

32. The Plaintiff proposes that the pre-Certification process timetable set out below be imposed by Court Order at an early case conference.

	Deadline
Plaintiff's Certification Motion Record	Date of Serving and Filing the Notice of Motion for Certification and Motion Record ("DOF")
Respondent's Motion Record, if any	Within 90 days from DOF
Plaintiff's Reply Motion Record, if any	Within 120 days from DOF
Cross-examinations, if any, to be completed	Within 150 days from DOF
Undertakings answered	Within 180 days from DOF
Motions arising from cross examinations, if any, heard	Within 120 days from DOF
Further cross-examinations, if necessary, completed by	Within 230 days of DOF
Plaintiff's Factum	Within 250 days from DOF
Respondent's Factum	Within 280 days from DOF
Plaintiff's Reply, if any	Within 300 days from DOF
Motion for Certification and all other Motions commencing	Within 310 days from DOF

33. The parties agree that they will file the information required under Rule 37.10.1 of the *Rules* and as further described in Part B – Section 6 of the *Best Practices Guide For Class Actions in Ontario* in advance of the Certification Motion and any other preliminary motions. Notwithstanding the time prescribed by Rule 37.10.1, the parties agree that they will the information required no later than 10 days before the hearing of the Certification Motion.

POST-CERTIFICATION PROCESS

A. Timetable

i. *Plaintiff's Timetable for the Post-Certification Process*

34. The Plaintiff intends to proceed to trial on an expedited basis. The Plaintiff intends to proceed to a Trial under ~~Rule 52~~ Rule 12 of the *Rules of Civil Procedure, R.R.O., 1990, Reg 194* (the “Rules”) and applicable rules for trial. However, if appropriate, and the parties consent or the Court directs, the parties may proceed to a Summary Trial.

35. The Plaintiff proposes that the following post-Certification process timetable, as explained in detail below, be imposed by the Court upon Certification:

Certification Notice to Class Members commences	Upon Certification <u>At a date to be determined by the Court upon Certification (“Notice Date”)</u>
Exchange Affidavits of Documents within	30 days <u>after Notice Date</u>
Motions for Production of Documents, Multiple Examinations of Crown representatives or for Examinations of Non-Parties to be conducted within	60 days <u>after Notice Date</u>
Examinations for Discovery to be conducted within	90 days <u>after Notice Date</u>

Certification Notice to Class Members completed within	90 days
Trial Management Conference re: Expert Evidence	100 days <u>after</u> <u>Notice Date</u>
Motions arising from Examinations for Discovery within	120 days <u>after</u> <u>Notice Date</u>
Undertakings answered within	135 days <u>after</u> <u>Notice Date</u>
Further Examinations, if necessary, within	150 days <u>after</u> <u>Notice Date</u>
Common Issues Pre-Trial to be conducted	150 days <u>after</u> <u>Notice Date</u>
Opt Out Period deadline	180 90 days <u>after</u> <u>Notice Date</u>
Common Issues Trial or Hybrid Trial to be conducted within	240 days <u>after</u> <u>Notice Date</u>

B. Certification Notice, Notice Program and Opt Out Procedures

i. Certification Notice

36. ~~The Certification Notice and all other notices to Class Members and Subclass Members provided by the Plaintiff will, once finalized and approved by the Court, be translated into French. On motion for Certification, the Plaintiff will ask that the Court settle the form and content for the Notice of Certification of this class action (“Notice of Certification”), the timing and manner of providing Notice of Certification (“Notice Program”) and set out an opt-out date as ninety (90) days after some form of~~

notice is first published, or such other date as the Court may order (“Opt-Out Period”).

The Notice of Certification will be translated into French.

37. The Plaintiff will explore whether it will be necessary to translate the Certification Notice and/or other notices and documents provided to Class Members ~~and Subclass Members~~ into some First Nations languages spoken within Treaty 9 Territory, subject to Court approval.

38. The Certification Notice will, subject to any amendments, be in the form ~~set out in Schedule A hereto,~~ determined and approved by the Court.

ii. Notice Program

39. The Plaintiff proposes to communicate the Certification Notice to Class ~~and Subclass Members~~ through the below described Notice Program.

40. The Plaintiff will provide Certification Notice to Class Members ~~and Subclass Members~~ by arranging to have the Certification Notice (and its translated versions where applicable) communicated or published in the following media within 90 days of Certification, as frequently as may be reasonable or as directed by the Court under section 17 of the *Act*. In particular, the Plaintiff proposes the following means of providing Certification Notice:

(a) A press release within 15 days of the Certification order
being issued;

(b) Direct communication with Class Members ~~and~~

~~Subclass Members:~~

- i. By the Class Administrator distributing the Certification Notice to the Band Offices of all the Treaty 9 First Nations that make up the Approved First Nations Class;
 - ii. By the Class Administrator to any Class Member who requests the Certification Notice;
 - ~~iii. by email or regular mail to the last known contact information of Class Members and Subclass Members provided by the Crown (i.e., Crown Class Member Information);~~
 - ~~iv. by email or regular mail to all Class Members and Subclass Members who have provided their contact information to Class Counsel, including through the Class Proceeding's webpage;~~
- (c) Distribution to the Assembly of First Nations for circulation to its membership of First Nations bands across Treaty 9, and to all regional Councils of Chiefs within Treaty 9, including without limitation Mushkegowuk Council and Nishnawbe Aski Nation.
- (d) Circulation through the following media:

- i. Aboriginal newspapers/publications APTN National News;
- ii. radio outlets, such as Aboriginal radio CBC National, CBC Regional, and CBC North; ~~and/or,~~
- iii. television outlets, such as CBC/ICI Television and The Aboriginal Peoples Television Network; and/or
- iv. Social media outlets, such as Facebook and Instagram.

iii. Opt Out Procedures

~~41. The Plaintiff proposes Opt Out Procedures for Class Members and Subclass Members who do not wish to participate in the class proceeding.~~

42. The Certification Notice will include information about how to Opt Out of the class proceeding and will provide information about how to obtain and submit the appropriate Opt Out Forms to the Class Action Administrator and/or Class Counsel. Only the recognized government (Chief and Council) may opt-out a First Nation from the Class Action. In order for an opt-out to be valid, a Band Council Resolution must be passed by a quorum of Chief and Council opting the First Nation out of the Class Action.

43. There will be one standard Opt Out Form for all Class Members ~~and Subclass Members~~. Class Members ~~and Subclass Members~~ will be required to file the Opt Out Form with the Class Action Administrator and/or Class Counsel within the Opt Out Period, proposed by the Plaintiff as ~~60~~ 90 days after the Certification Notice is provided to the Class Members post-Certification or as directed by the

Court.

The Class Action Administrator or Class Counsel shall, within 30 days after the expiration of the Opt Out Period, deliver to the Court and the Parties an affidavit listing the names of all ~~persons~~ Treaty 9 First Nations who have opted out of the Class Action.

C. Identifying and Communicating with Class Members

i. Identifying Class Members

44. As stated above, the Plaintiff intends to rely on the Class Member information provided by the Crown. ~~request the Crown Class Member Information.~~

ii. Database of Class Members

45. Class Counsel will maintain a confidential database of all Class Members ~~and Subclass Members~~ who contact Class Counsel. The database will include contact information for each Chief and Council of each First Nation, including Class Member's and Subclass Member's name, address, telephone number, and email address where available.

iii. Responding to Inquiries from Class Members

46. Class Counsel and their staff will respond to each inquiry by Class Members ~~and Subclass Members~~.

47. Class Counsel will have a system in place to allow for responses to inquiries by Class Members ~~and Subclass Members~~ in their official language of their choice, and where necessary ~~and approved~~, a First Nations language spoken by a First Nation band within Treaty 9 Territory.

iv. Post Certification Status Reports

48. In addition to responding to individual inquiries, Class Counsel will continually update the webpage dedicated to this class action with information concerning the status of the class proceeding.

49. Class Counsel will send update reports to Class Members ~~and Subclass Members~~ who have provided their contact information. These update reports will be sent as necessary as determined by Class Counsel or as directed by the Court.

D. Documentary Production

i. Affidavit/List of Documents

50. The Plaintiff will be required to deliver an Affidavit of Documents within 30 days after Certification. The Attorney General of Canada will similarly be required to deliver a List of Documents within 30 days after the date on which the Notice of Certification is provided to Class Members ~~Certification~~.

51. The Parties are expected to serve Supplementary Affidavits (or Lists) of Documents as additional relevant documents are located in accordance with the regular laws and Rules with respect to ongoing discovery and disclosure.

ii. Production of Documents

52. All Parties are expected to provide, at their own expense, electronic copies of all Schedule “A” productions at the time of delivering their Affidavit of Documents. All productions are to be made in electronic format.

iii. Motions for Documentary Production

53. Any motions for documentary production shall be made within 60 days of the date on which the Notice of Certification is provided to Class Members of Certification.

iv. Document Management

54. The Parties will each manage their productions with a compatible document management system, or as directed by the Court. All documents are to be produced in OCR format. The Plaintiff and the Crown Attorney General of Canada will coordinate compatibility with each of their respective eDiscovery and document management systems.

55. All productions should be numbered and scanned electronically to enable quick access and efficient organization of documents. The Plaintiff and the ~~Attorney General of Canada~~ Crown will create a unified document index and bates numbering systems.

E. Examinations for Discovery

56. Examinations for Discovery will take place within 90 days after ~~Certification~~ the date on which the Certification Notice is provided to Class Members.

57. The Plaintiff expects to request the Crown's consent to examine more than one Crown representative. In the event that a dispute arises in this regard, the Plaintiff proposes to resolve the matter at a case management conference, failing which, the Plaintiff will bring a motion within 60 days after the date on which the Certification Notice is provided to Class Members. ~~Certification.~~

58. The Plaintiff anticipates that the Examination for Discovery of a properly selected and informed officer of the Crown will take approximately 10 days, subject to refusals and undertakings.

59. The Plaintiff anticipates that the Examination for Discovery of the representative Plaintiff will take approximately two days, subject to refusals and undertakings.

F. Interlocutory Matters

i. Motions for Refusals and Undertakings

60. Specific dates for motions for undertakings and refusals that arise from the Examinations for Discovery will be requested upon Certification. Motions for refusals and undertakings will be heard within 120 days of the date on which the Certification Notice is provided to Class Members. ~~Certification.~~

ii. Undertakings

61. Undertakings are to be answered within 135 days of the date on which the Certification Notice is provided to Class Members. ~~35 days of Certification.~~

iii. Re-Attendances and Further Examinations for Discovery

62. Any re-attendances or further Examinations for Discovery required as a result of answers to undertakings or as a result of the outcome of the motions for refusals and undertakings should be completed within 150 days of the date on which the Certification Notice is provided to Class Members. ~~Certification.~~

G. Expert Evidence

i. Identifying Experts and Issues

63. A Trial Management Conference will take place following Examinations for Discovery at which guidelines for identifying experts and their proposed evidence at trial will be determined. The Experts may or may not include those experts that were retained by either the Plaintiff or the ~~Attorney General of Canada~~ Crown for the purposes of the Motion for Certification.

64. The Plaintiff has identified the following initial experts that are required:

- (a) An expert to testify to a plausible methodology for the calculation of damages.
- (b) An expert to testify to the ~~factual basis~~ historical record as it relates to for the common issues between Class Members.

65. The parties will identify further experts as the matter progress and as they become necessary.

66. factors and will be determined at the Trial Management Conference

H. Reception of Elders' Oral History Evidence

i. Elder Oral History Evidence

67. Within 120 days after Certification, the parties will conclude an Oral History Hearing Protocol and schedule a Special Hearing to receive the oral history evidence of the Approved Class Member First Nations.

I. Determination of the Common Issues

ii. Pre-Trial of the Common Issues

68. Upon Certification, the Court will be asked to assign a date for a Pre-Trial relating to the Common Issues trial.

69. The Plaintiff expects that two full days will be required for a Pre-Trial and will request that the Pre-Trial be held 150 days after ~~Certification~~ the date on which the Certification Notice is provided to Class Members and, in any event, at least 90 days before the date of the Common Issues trial.

iii. Trial of the Common Issues

70. Upon Certification, the Court will be asked to assign a date for the Common Issues trial.

71. The Plaintiff proposes that the trial of the Common Issues be held 240 days after the date on which the Certification Notice is provided to Class Members.
~~Certification.~~

72. The length of time required for the Common Issues trial will depend on many factors determined at the trial management conference.

73. POST COMMON ISSUES DECISION PROCESS

A. Timetable

i. Plaintiff's Timetable for the Post-Common Issues Decision Process

74. The Plaintiff proposes that the following timetable be imposed by the Court following the Court's judgment on the Common Issues:

Common Issues Notice provided	Within 90 days of Common Issues decision
Individual Issue Hearings, if any, begin	120 days after decision
Individual Damage Assessments, if any, begin	240 days after decision
Deadline to Submit Claim Forms (as of right)	Within 1 year of decision
Deadline to Submit Claim Forms (as of right in prescribed circumstances or with leave of the Court)	1 year after decision

75. Given the nature of the Class Action, the parties do not expect there to be any Individual Issues. However, if this changes the parties will amend the Litigation Plan to include a procedure with respect to Individual Issues in accordance with section 25 of the *Act*.

B. Common Issues Notice

i. Notifying Class Members ~~and Subclass Members~~

76. The Common Issues Notice will, subject to further amendments, be substantially in the form approved by the Court at the Common Issues trial. The Common Issues Notice may contain, amongst others, information on any aggregate damages awarded and any issues requiring individual determination, as approved by the Court.

77. The Plaintiff proposes to circulate the Common Issues Notice within 90 days after the Common Issues judgment.

78. The Common Issues Notice will be circulated in the same manner as set out above dealing with the Certification Notice or as directed by the Court.

C. Claim Forms

i. Use of Claim Forms

79. The Court will be asked to approve under section 21(4)(6)(a) of the *Act* the use of standardized claims forms by Class Members ~~and Subclass Members~~ who may be entitled to a portion of the aggregate damage award or who may be entitled to individual specific compensation~~have an individual assessment~~.

ii. Obtaining and Filing Claim Forms

80. The procedure for obtaining and filing Claim Forms will be set out in the Common Issues Notice.

81. The Plaintiff proposes to use a single standard Claim Form, ~~substantially in the form attached as Schedule C, for all three classes,~~ subject to further amendments and as approved by the Court.

82. The Plaintiff proposes that support be made available to Class Members ~~and Subclass Members~~ in need of support and assistance when completing the Claim Forms. Where necessary, a process for appointing a guardian or trustee to assist the Class Members ~~and Subclass Members~~ will be developed.

83. Before completing a Claim Form, Class Members ~~and Subclass Members~~ will be able to review information about them in the possession of Canada relevant to their claim (the ~~Crown Class Member~~ Indigenous Services Canada Information).

84. Class Members ~~and Subclass Members~~ will be required to file the appropriate Claim Form with the Class Action Administrator ~~and/or Class Counsel~~ within the deadlines set out below or as directed by the Court.

85. The Class Action Administrator will be responsible for receiving all Claim Forms.

iii. Deadline for Filing Claim Forms

86. Class Members ~~and Subclass Members~~ will be advised of the deadline for filing Claim Forms in the Common Issues Notice.

87. The Plaintiff proposes that Class Members ~~and Subclass Members~~ be given one year, or such period as set out by the Court, after the Common Issues judgment to file Claim Forms as of right.

~~88. The Plaintiff proposes that Class Members and Subclass Members be entitled to file Claim Forms more than one year after the Court's judgment on the Common Issues in certain circumstances prescribed by the Court (i.e., lack of awareness of entitlement, etc.) or with leave of the Court (i.e., based on mental or physical health issues, etc.).~~

D. Determining ~~and Categorizing Class Membership~~ Approved Class Membership

i. Approving Class Members ~~and Subclass Members~~

89. The Class Action Administrator will determine whether a First Nation or ~~its individual members~~ submitting a Claim Form as a Class Member ~~or Subclass Member~~ properly qualifies as an Approved Class Member ~~or Subclass Member~~.

90. The Class Action Administrator will make these determinations by referring to the information set out in the Claim Form as well as the ~~Crown Class Member~~ Indigenous Services Canada Information.

ii. Notifying Class Members/~~Subclass Members~~, Challenging and Recording Decisions

91. Within 30 days of receipt of a Claim Form, the Class Action Administrator will notify the First Nation on whether the First Nation is an Approved Class Member. First Nations who are not approved as Approved Class Members will be provided with information on the procedures to follow to challenge the decision of the Class Action Administrator. The Plaintiff proposes that these procedures include an opportunity to resubmit an amended Claim Form with supporting documentation capable of verifying that ~~the individual~~ First Nation is a Class Member.

~~92. The same process applies for individuals who seek to be approved Subclass Members.~~

~~93. All interested parties will be provided with the ability to appeal a decision by the Class Action Administrator to the Court or in a manner to be prescribed. Proposed Class Counsel may challenge the decision on behalf of affected individuals.~~

94. The Class Action Administrator will keep records of all Approved Class Members (~~Subclass Members~~) and their respective Claim Forms and will provide this information to Class Counsel, ~~the Crown~~ and/or other interested parties on request ~~a monthly basis~~. Class Counsel and/or other interested parties will have 30 days after receiving this information to challenge the Class Action Administrator's decision by advising the Class Action Administrator and the other affected parties in writing of the basis for their challenge. The responding party will be given 30 days thereafter to respond in writing to the challenge at which time the Class Action

Administrator will reconsider its decision and advise all parties.

E. Determining Approved Treaty 9 Indians

i. Approving Individual Treaty 9 Indians

95. The Class Action Administrator will determine whether a person properly qualifies as an Approved Individual Treaty 9 Indian. The Class Administrator will make these determinations by referring to the information set out in the Claim Form as well as whether the person is listed within the Indigenous Services Canada Information as a recipient of Annuity Payments under the terms of Treaty 9 as a member of a First Nations Class Member.

96. For certainty, a determination by the Class Action Administrator as to the status of an Approved Individual Treaty 9 Indian as a member of a First Nations Class Member is for the sole purposes of the Aggregate Compensation Distribution Process. This determination shall not be construed so as to abrogate or derogate from any First Nation Class Members' Aboriginal, treaty, constitutional, statutory, or other rights to determine the composition of its membership.

ii. Notifying Class Members, Challenging and Recording Decisions

97. Within 30 days of receipt of a Claim Form by a Class Member and the necessary Indigenous Services Canada Information, whichever is later, the Class Action Administrator will notify the Approved Class Members of the list of persons it has deemed as an Approved Individual Treaty 9 Indian who are listed within the Indigenous Services Canada Information as recipients of Annuity Payments under the terms of Treaty 9 as members of the First Nation.

98. Within 30 days of receipt of a Claim Form by a Class Member and the necessary Indigenous Services Canada Information, whichever is later, the Class Action Administrator will notify the Individual Treaty 9 Indians of its decision to include them in the list of Approved Treaty 9 Indians who are listed within the Indigenous Services Canada Information as recipients of Annuity Payments under the terms of Treaty 9 as members of the First Nation.

99. Class Members or Individual Treaty 9 Indians who dispute the status of Approved Treaty 9 Indians will be provided with information on procedures to follow to challenge the decision of the Class Action Administrator.

100. All interested parties will be provided with the ability to appeal a decision by the Class Action Administrator to the Court in a manner to be prescribed.

101. The Class Action Administrator will keep records of all Approved Individual Treaty 9 Indians and their respective association with an Approved Class Member and will provide this information to Class Counsel, the Crown, and other interested parties upon request. Class Counsel and/or other interested parties will have 30 days after receiving this information to challenge the Class Action Administrator's decision by advising the Class Action Administrator and the other affected parties in writing of the basis for their challenge. The responding party will be given 30 days thereafter to respond in writing to the challenge at which time the Class Action Administrator will reconsider its decision and advise all parties.

F. Equitable Compensation Distribution Process

i. Distribution of Equitable Compensation

~~102. The Class Action Administrator will distribute the equitable compensation to all Approved Class Members and Subclass Members in the manner directed by the Court. The Class Action Administrator will be required to determine a method of distribution that ensures that each First Nation that is an Approved Class Member or Subclass Member will receive its proportionate share of the equitable compensation.~~

~~103. The Plaintiff will propose that Approved Class Members and Subclass Members be entitled to a proportion of the equitable compensation as determined by the Class Action Administrator based on factor to be approved by the Court for:: (a) the losses they have suffered related to the Crown's breaches of its Treaty, legal, fiduciary and honourable obligations by failing to increase or index the Annuity Payments as promised by the Crown under the terms of Treaty 9~~

~~104. The Class Action Administrator, upon advising Approved Class Members and Subclass Members of its decision on their membership as set out above, will within a reasonable period of time to be determined by the Court, advise the Approved Class Members and Subclass Members of the proportion of equitable compensation owing to each Approved Class Member or Subclass Member under the Distribution Process to be approved by the Court.~~

105. The Class Action Administrator will distribute the aggregate damages to all Approved First Nations Class Members in a manner directed by the Court.

106. The Plaintiff propose that the Approved First Nations Class Members are entitled to a proportion of the aggregate damage as determined by the Class Action Administrator based on factors to be approved by the Court, including but not limited

to those losses that they have suffered as a result of the Crown's:

- 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 Treaty 9 First Nations' mineral rights.

107. The Class Action Administrator, upon advising Approved First Nations Class Members of its decision on their membership as set out above, will within a reasonable period of time to be determined by the Court, advise the Approved First Nations Class Members of the proportion of aggregate damages owing to each Approved First Nations Class Member via the Aggregate Damages Distribution Process to be approved by the Court.

108. In addition, if applicable, the Class Action Administrator will provide Approved First Nation Class Members with a package of materials including: information on how to collect their aggregate damage awards, information on Class Members' ability to proceed through the Individual Compensation Assessment Process, copies of the Individual Compensation Assessment Form along with a guide on how to complete the form.

iii. Distribution of Compensation to Approved Individual Treaty 9 Indians

109. The Plaintiff proposes that the Approved Individual Treaty 9 Indians are entitled to a proportion of the aggregate damages determined by the Class Action

Administrator based on factors to be approved by the Court, including but not limited to the losses that they have suffered as a result of the Crown's failure to increase, index, or augment the amount of the Annuity Payment from time to time for the period of time they were so entitled to receive such Annuity Payments.

110. The Class Action Administrator, upon advising Approved Individual Treaty 9 Indians of its decision on their status as such, will within a reasonable period of time to be determined by the Court, advise the Approved Individual Treaty 9 Indians of the proportion of equitable compensation owing to each Approved Individual Treaty 9 Indians under the Distribution Process to be approved by the Court.

G. Class Proceeding Funding and Fees

i. Plaintiff's Legal Fees

111. The Plaintiff's fees are to be paid on a contingency basis, subject to the Court's approval under section 32(1) of the Act.

112. The agreement between the Representative Plaintiff and Class Counsel states that Class Counsel will be entitled from the total amount of settlement, award, compensation, or damages recovered for the Class, the following:

- a. 6% of the total compensation including any costs recovered for the Class through a negotiated settlement with the Crown, or
- b. 8% of the total compensation including any costs recovered for the Class after the completion of trial or earlier resolution through the courts, including without limitation, a motion for summary judgment.

2. The contingency fee is subject to a cap of \$100 million.

3. Disbursements for the Representative Plaintiff have been, and will continue to be, advanced through Class Counsel. Class Counsel will advise the Court if third-party funding is required and seek approval thereof.

~~113. The agreement between the representative Plaintiff and Class Counsel states that legal fees and disbursements to be paid to Class Counsel shall be on the following basis:~~

~~(a) Class damages recovery: 20% of the first two hundred million dollars (\$200,000,000) in recovery by settlement or judgment, plus 10% of any amounts recovered by settlement or judgment beyond the first two hundred million dollars; and~~

~~(b) Individual damages recovery: 25% of settlement or judgment.~~

ii. Funding of Disbursements

114. Funding of legal disbursements for the representative Plaintiff has been, and will continue to be, available through Class Counsel, unless the Plaintiff and Class Counsel subsequently deem it to be in the best interests of the Class to obtain third-party funding. Class Counsel will advise the Court of such third-party funding and seek approval thereof if required.

H. Settlement Issues

i. Settlement Offers and Negotiations

115. The Plaintiff will conduct settlement negotiations with the Crown from time to time with a view to achieving a fair and timely resolution.

ii. Mediation and Other Non-Binding Dispute Resolution Mechanisms

116. The Plaintiff will participate in mediation or other non-binding dispute resolution mechanisms, if and when appropriate, in an effort to try to resolve the dispute or narrow the issues in dispute between the Parties.

I. Review of the Litigation Plan

i. Flexibility of the Litigation Plan

117. This Litigation Plan will be reconsidered on an ongoing basis and may be revised under the continued case management authority of the Court before or after the determination of the Common Issues or as the Court sees fit.

July 31, 2025

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and on behalf of all members of MISSANABIE CREE FIRST NATION
and on behalf of all members of TREATY 9 FIRST NATIONS***

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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