

T-1784-12

STATEMENT OF CLAIM

Action

FEDERAL COURT

PROPOSED CLASS PROCEEDING

BETWEEN:

Chief Richard HORSEMAN and the Horse Lake First Nation

PLAINTIFFS

- AND -

Attorney General of Canada

DEFENDANT

STATEMENT OF CLAIM TO THE DEFENDANT

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

IF YOU WISH TO DEFEND THIS PROCEEDING, you or a solicitor acting for you are required to prepare a statement of defence in Form 171B prescribed by the Federal Courts Rules serve it on the plaintiff's solicitor or, where the plaintiff does not have a solicitor, serve it on the plaintiff, and file it, with proof of service, at a local office of this Court, WITHIN 30 DAYS after this statement of claim is served on you, if you are served within Canada.

If you are served 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 for serving and filing your statement of defence is sixty days.

Copies of the Federal Court Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO DEFEND THIS PROCEEDING, judgment may be given against you in your absence and without further notice to you.

Vancouver, 25 September 2012.

Issued by:



Registry Officer

**AMANDA DUNN
REGISTRY OFFICER
AGENT DU GREFFE**

Address of local office:

Pacific Centre
P.O. Box 10065
701 West Georgia Street
Vancouver, British Columbia
V7Y 1B6

TO:

DEPUTY ATTORNEY GENERAL OF CANADA
284 Rue Wellington Street
Ottawa, ON
K1A 0H8

CLAIM

RELIEF CLAIMED

1. The Plaintiffs claims on their own behalf and on behalf of a Class, as defined below:
 - a. A declaration that the Class has a treaty right under the terms of various treaties known as the “Numbered Treaties”, namely Treaty No. 1 (1871), Treaty No. 2 (1871), Treaty No. 3 (1873), Treaty No. 4 (1874), Treaty No. 5 (1875), Treaty No. 6 (1876), Treaty No. 7 (1877), Treaty No. 8 (1899), Treaty No. 9 (1905), Treaty No. 10 (1906) and Treaty No. 11 (1921), and any amendments thereto, to the annual payment of an annuity to the individual beneficiaries (the “Annuity Payments”) from Her Majesty the Queen in Right of Canada that is adjusted annually to account for inflation and changes in purchasing power, in order to maintain a value equivalent to its buying power at the time the Treaty was made;
 - b. A declaration that Her Majesty the Queen in Right of Canada, by her agent the Minister of Aboriginal Affairs and Northern Development, owes a fiduciary duty to the Class in the administration of Annuity Payments under the Numbered Treaties to adjust the amount of Annuity Payments to account for changes in inflation and to preserve purchasing power, in order to maintain a value equivalent to the Annuity Payments’ buying power at the time the Treaty was made;
 - c. Damages and equitable compensation payable to the Class, in an amount equal to the present value of losses sustained by the individual beneficiaries as a result of the Defendant’s failure to adjust the Annuity Payments to account for changes in inflation and purchasing power;
 - d. Interest under the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50; and
 - e. Such further and other relief as this Honourable Court deems just.

THE PARTIES

2. The Plaintiff, Chief Richard Horseman, resides at Horse Lake, in the Province of Alberta. Chief Horseman is an aboriginal person within the meaning of s. 35 of the *Constitution Act, 1982*, an Indian within the meaning of s. 91(24) of the *Constitution Act, 1867*, a beneficiary of one of the Numbered Treaties, being Treaty No. 8, and an Indian within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5, as amended.
3. The Plaintiff is a member of the Horse Lake First Nation, a band within the meaning of the *Indian Act*.
4. The members of the Horse Lake First Nation are the descendants of the First Nation which adhered to Treaty No. 8 with Canada on July 6, 1899. The Horse Lake First Nation is a successor to the original signatory First Nation and holds treaty rights pursuant to the terms of Treaty No. 8.
5. The Plaintiff is entitled to receive Annuity Payments under the terms of Treaty No. 8 and currently receives Annuity Payments. He is registered with the Department of Aboriginal Affairs and Northern Development to receive Annuity Payments through the Indian Moneys Program.
6. The Plaintiff is the elected Chief and representative of the Horse Lake First Nation. He is duly authorized to act on behalf of the Horse Lake First Nation as Chief and is authorized to bring this action on behalf of the Horse Lake First Nation.
7. The Plaintiff brings this action on his own behalf as a person entitled to receive Annuity Payments under the terms of a Numbered Treaty, and on behalf of other persons similarly situated as beneficiaries under each of the Numbered Treaties.
8. In the alternative or in addition, the Horse Lake First Nation brings this action on its own behalf as a successor party to one of the Numbered Treaties, and on behalf of the

First Nations signatories and their successor *Indian Act* bands, to each of the Numbered Treaties.

9. The Defendant is Her Majesty the Queen in Right of Canada (the “Crown” or “Canada”), represented by Her Attorney General as required by s. 23 of the *Crown Liability and Proceedings Act*. Canada is the aspect of the Crown that entered into each of the Numbered Treaties and is primarily responsible for carrying out and implementation of their terms, including the performance of obligations associated with the Annuity Payments.
10. The Crown administers Indians and Indian treaty moneys through its agent the Minister of Aboriginal Affairs and Northern Development (the “Minister”).

THE CLASS

11. Chief Richard Horseman brings this claim on his own behalf, and on behalf of a class of persons defined as follows:

All persons entitled to receive Annuity Payments under the terms of each of the Numbered Treaties (the “Class”).

12. In the alternative or in addition, the Horse Lake First Nation brings this claim on its own behalf, and on behalf of a class of *Indian Act* bands defined as follows:

All *Indian Act* bands whose members are entitled to receive Annuity Payments under the terms of each of the Numbered Treaties (the “Class”).

THE TREATY CLAIMS

13. In the latter part of the 19th century and the early part of the 20th century, Canada became aware of both the potential value of the lands held by the various First

Nations and the need to secure substantial portions of those lands for settlement and development.

14. Over time, from approximately the 1860s until the 1920s, Canada deputed treaty commissioners into the area now covered by the Numbered Treaties to negotiate treaties with the First Nations.
15. The treaty commissioners recognized that the ancestors of the Class had rights, including Aboriginal title, to the lands subject to treaty.
16. The negotiations were conducted through interpreters, and the treaty documents were written in English. The signatory First Nations to the Numbered Treaties were dependent and relied upon the Crown's representatives to explain to them the terms of the Numbered Treaties.
17. The Crown's representatives did not inform the ancestors of the Plaintiff and the Class of the value of their lands during the negotiations for the Numbered Treaties.
18. In the written terms of each of the Numbered Treaties, the Crown agreed and undertook to provide for the payment of annuities to each individual beneficiary of each First Nation signatory to each of the Numbered Treaties, as partial consideration for the lands that passed into the control of the Crown.
19. Each of the Numbered Treaties contains an annuity provision as set out in Schedule A (collectively, the "Annuity Provisions"). The Annuity Provisions of the Numbered Treaties are substantially the same in their terms, entitling individual beneficiaries to the payment of an annuity of five (\$5) dollars per beneficiary per year, except for Treaty No. 9 which provides for four (\$4) dollars per beneficiary per year. Each of the Numbered Treaties further provides for twenty (\$20) or twenty-five (\$25) dollars per Chief per year, except for Treaty No. 9. Each of the Numbered Treaties further

provides for fifteen (\$15) dollars per headman, subordinate officer, minor chief or councillor per year, except for Treaties Nos. 1, 2 and 9.

20. The amount of the annuities set out in the Annuity Provisions of the Numbered Treaties and the purchasing power they represented was sufficient at the time the Treaties were concluded to make a significant contribution to the welfare of the individual members of each signatory First Nation.
21. The purpose of the Annuity Provisions was to provide the signatory First Nations to each of the Numbered Treaties, in exchange for the assumption of control over their lands by the Crown, with the certainty of annual payments from the Crown to the individual members of each First Nation, and their descendants in perpetuity, that would constitute a significant contribution to their welfare, as reflected by the purchasing power of the amounts set out in each of the Numbered Treaties at the time they were concluded.
22. The common intention and understanding of the parties at the time each of the Numbered Treaties was signed was that:
 - a. the Annuity Payments would continue to provide a significant contribution to the welfare of the individual beneficiaries of each of the Numbered Treaties in perpetuity; and
 - b. the individual beneficiaries of each of the Numbered Treaties would, through the receipt of Annuity Payments, continue to receive annually the value or purchasing power held by \$4, \$5, \$15, \$20 or \$25, respectively, at the time each of the Numbered Treaties was made.
23. It was not contemplated by the parties at the time each of the Numbered Treaties was signed that:

- a. over extended periods of time the value or purchasing power of the Canadian dollar would decrease; and/or
 - b. the Crown would cause and or permit the value or purchasing power of the Canadian dollar to decrease over extended periods of time.
24. Each of the Annuity Provisions, properly construed, provides for the right to receive an Annuity Payment that is adjusted annually to account for inflation and changes in purchasing power, in order to maintain a value equivalent to its buying power at the time each of the Numbered Treaties was made (the "Treaty Right"). The Treaty Right is constitutionally protected by s. 35(1) of the *Constitution Act, 1982*.
25. In addition or in the alternative, at all material times in their dealings, the signatory First Nations to the Numbered Treaties were particularly vulnerable to the inequality of bargaining power between themselves and Canada, and, in particular, had no understanding of the concept that the value of the Annuity Payments might be eroded over time if no provision were made for adjustment to the amount of those payments. If Canada understood that the value of the Annuity Payments could be so eroded over time, Canada failed to communicate that to the signatory First Nations in negotiating the Numbered Treaties and Canada is estopped or otherwise barred by the Honour of the Crown from taking the position that the Annuity Payments should not be adjusted annually to maintain their purchasing power over time.
26. The entitlement to an Annuity Payment under each of the Numbered Treaties vests anew each year.
27. Subsequent to the amendment of Treaties Nos. 1 and 2 in 1875 or the date of ratification for each of the other Numbered Treaties, the Crown has failed at any time to adjust the amount of the Annuity Payments to account for inflation and for changes in purchasing power.

28. The failure to adjust the amount of the Annuity Payments infringes, in an unjustifiable way, the Treaty Right of the individual beneficiaries and the Plaintiff to receive an annuity. This breach adversely affects the individual beneficiaries of each of the Numbered Treaties, including the Plaintiff.
29. The Crown is in ongoing breach of its treaty obligations. A new breach occurs with every annual payment in which the Annuity Payments are not adjusted for inflation and for changes in purchasing power.

THE FIDUCIARY DUTY CLAIM

30. The Plaintiff relies on the facts set out above in relation to the Treaty Right.
31. The Minister acts as the Crown's agent for the management of Indians and Indian moneys.
32. The Minister administers the payment of treaty moneys pursuant to the terms of treaties and the requirements of the *Indian Act* and related enactments. The Minister's responsibility to manage the Annuity Payments stems from the undertaking by the Crown through its agreement and ratification of each of the Numbered Treaties.
33. The Minister has established a scheme for the distribution of Annuity Payments through the Indian Moneys Program administered by the Department of Aboriginal Affairs and Northern Development. The "Treaty Payment System" permits eligible recipients to make a "Treaty Annuity Payment Request" to receive their annual Annuity Payment.
34. The payment of annuities under the terms of each of the Numbered Treaties falls within this administrative scheme. The Plaintiff and the Class are the beneficiaries of the scheme.

35. The Minister is responsible for setting the amount of the Annuity Payments and for distributing Annuity Payments. In exercising that power pursuant to the administrative scheme established, the Minister is under an obligation to the Plaintiff and the Class to adjust the amount of the Annuity Payments to account for changes in inflation and to preserve purchasing power.
36. The Class is peculiarly vulnerable to the exercise of the Minister's power, since they rely on him to unilaterally determine the amount of Annuity Payments and to ensure that the amount is sufficient to preserve the purchasing power of the Annuity Payments from year to year.
37. As a consequence of these facts, a fiduciary relationship exists between the Plaintiff and the Class, and the Minister. The Honour of the Crown is at stake in the implementation of the Annuity Provisions in each of the Numbered Treaties and, given that this right represents an explicit treaty promise and that Canada has no conflict of interest with other duties owed to particular Canadians in respect of the delivery of this right, the duties imposed on Canada in these circumstances rise to that of fiduciary duties.
38. Subsequent to the amendment of Treaties Nos. 1 and 2 in 1875 or the date of ratification for each of the other Numbered Treaties, the Minister has failed at any time to adjust the amount of the Annuity Payments to account for inflation and for changes in purchasing power. The amount of the Annuity Payments remains at the same level established at the time of ratification by each of the First Nations signatories and Canada. Canada, through its persistent failure to adjust the level of annuity payments over time has diminished the payments from the original significant level to a trivial amount.
39. The Minister is in ongoing breach of his fiduciary obligations. A new breach occurs with every annual payment in which the Annuity Payments are not adjusted for inflation and for changes in purchasing power.

40. As a result of the Minister's breach of fiduciary duty, the Plaintiff and the Class suffered a loss in that they have received less than the amount of the Annuity Payments to which they are entitled.

GENERAL

41. The amount of monetary relief claimed exceeds \$50,000.
42. The Plaintiff proposes that this action be tried at Vancouver, British Columbia.

DATED at Vancouver, British Columbia, Canada, this 25th day of September 2012.



Paul R. Bennett

Counsel for the Plaintiffs:
Paul R. Bennett, Mark W. Munteer
and Mathew P. Good (Hordo Bennett Munteer LLP),
and Allan Donovan (Donovan & Company)

Address for Service:

HORDO BENNETT MOUNTEER LLP
Barristers and Solicitors
1400 – 128 West Pender Street
Vancouver BC V6B 1R8

Tel: (604) 639-3680
Fax: (604) 639-3681
Email: mm@hbmlaw.com

TO: The Administrator of the Federal Court of Canada

AND TO: The Defendant

SCHEDULE A

1. The annuity provision in the text of Treaty No. 1 (1871) states:

“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 their 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 colours), 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.”

2. The annuity provision in the text of Treaty No. 2 (1871) states:

“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 ensuing 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 their 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 colours), 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.”

3. The revisions of Treaty No. 1 and Treaty No. 2 (1875) state:

“... the Government out of good feeling to the Indians and as a matter of benevolence is willing to raise the annual payment to each Indian under Treaties Nos. 1 and 2, from \$3 to \$5 per annum, and make payment over and above such sum of \$5, of \$20 each and every year to each Chief, and a suit of clothing every three years to each Chief and each Headman, allowing two Headmen to each band, on the express understanding, however, that each Chief or other Indian who shall receive such increased annuity or annual payment shall be held to abandon all claim whatever against the Government in connection with the so-called ‘outside promises,’ other than those contained in the memorandum attached to the treaty.”

4. The annuity provision in the text of Treaty No. 3 (1873) states:

“And further, that Her Majesty’s Commissioners 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 ensuing the date hereof at some period in each year, to be duly notified to the Indians, and at a place or places to be appointed for that purpose within the territory ceded, pay to each Indian person the sum of five dollars per head yearly.

...

It is further agreed between Her Majesty and the said Indians that each Chief, duly recognized as such, shall receive an annual salary of twenty-five dollars per annum, and each subordinate officer, not exceeding three for each band, shall receive fifteen dollars per annum; ...”

5. The annuity provision in the text of Treaty No. 4 (1874) states:

“As soon as possible after the execution of this treaty, Her Majesty shall cause a census to be taken of all the Indians inhabiting the tract hereinbefore described, and shall next year, and annually afterwards, forever, cause to be paid, in cash, at some suitable season to be duly notified to the Indians, and a place or places to be appointed for that purpose within the territory ceded; each Chief, twenty-five dollars;

each head man, not exceeding four to a band, fifteen dollars; and every other Indian, man, woman and child, five dollars per head; such payment to be made to the heads of families for those belonging thereto, unless for some special reason it be found objectionable.”

6. The annuity provision in the text of Treaty No. 5 (1875) states:

“And further, that Her Majesty’s Commissioners 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 ensuing the date hereof at some period in each year, to be duly notified to the Indians, and at a place or places to be appointed for that purpose within the territory ceded, pay to each Indian person the sum of five dollars per head yearly; ...

It is further agreed between Her Majesty and the said Indians that each Chief, duly recognized as such, shall receive an annual salary of twenty-five dollars per annum, and each subordinate officer, not exceeding three for each band, shall receive fifteen dollars per annum; ...”

7. The annuity provision in the text of Treaty No. 6 (1876) states:

“And further, that Her Majesty’s Commissioners 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 ensuing the date hereof at some period in each year, to be duly notified to the Indians, and at a place or places to be appointed for that purpose within the territory ceded, pay to each Indian person the sum of five dollars per head yearly; ...

It is further agreed between Her Majesty and the said Indians that each Chief, duly recognized as such, shall receive an annual salary of twenty-five dollars per annum; and each subordinate officer, not exceeding four to each band, shall receive fifteen dollars per annum; ...”

8. The annuity provision in the text of Treaty No. 7 (1877) states:

“Her Majesty also agrees that next year, and annually afterwards forever, she will cause to be paid to the said Indians, in cash, at suitable places and dates, of which the said Indians shall be duly notified, to each Chief, twenty-five dollars, each minor Chief or Councillor (not exceeding fifteen minor Chiefs to the Blackfeet and Blood Indians, and four to the Piegan and Sarcee bands, and five Councillors to the Stony Indian Bands) fifteen dollars, and to every other Indian of whatever age, five dollars ; the same, unless there be some exceptional reason, to be paid to the heads of families for those belonging thereto.”

9. The annuity provision in the text of Treaty No. 8 (1899) states:

“Her Majesty also agrees that next year, and annually afterwards for ever, She will cause to be paid to the said Indians in cash, at suitable places and dates, of which the said Indians shall be duly notified, to each Chief twenty-five dollars, each Headman, not to exceed four to a large Band and two to a small Band, fifteen dollars, and to every other Indian, of whatever age, five dollars, the same, unless there be some exceptional reason, to be paid only to heads of families for those belonging thereto.”

10. The annuity provision in the text of Treaty No. 9 (1905) states:

“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.”

11. The annuity provision in the text of Treaty No. 10 (1906) states:

“His Majesty also agrees that next year and annually thereafter for ever He will cause to be paid to the Indians in cash, at suitable places and dates, of which the said Indians shall be duly notified, to each chief twenty-five dollars (25), each headman fifteen (15) dollars, and to every other Indian of whatever age five (5) dollars.”

12. The annuity provision in the text of Treaty No. 11 (1921) states:

“His Majesty, also agrees that during the coming year, and annually thereafter, 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, to each Chief twenty-five dollars, to each Headman fifteen dollars, and to every other Indian of whatever age five dollars, to be paid only to heads of families for the members thereof, it being provided for the purposes of this Treaty that each band having at least thirty members may have a Chief, and that in addition to a Chief, each band may have Councillors or Headmen in the proportion of two to each two hundred members of the band.”