

**SPECIFIC CLAIMS TRIBUNAL**

B E T W E E N:

BEARDY'S & OKEMASIS BAND #96 AND #97

SPECIFIC CLAIMS TRIBUNAL	
TRIBUNAL DES REVENDICATIONS PARTICULIÈRES	
July 11, 2011	
Guillaume Phaneuf	
Ottawa, ON	# 1

Claimant

v.

HER MAJESTY THE QUEEN IN THE RIGHT OF CANADA  
As represented by the Minister of Aboriginal Affairs and Northern Development

Respondent

---

**DECLARATION OF CLAIM**

Pursuant to Rule 41 of the  
*Specific Claims Tribunal Rules of Practice and Procedure*

---

This Declaration of Claim is filed under the provisions of the *Specific Claims Tribunal Act* and the *Specific Claims Tribunal Rules of Practice and Procedure*.

July 11, 2011  
\_\_\_\_\_

Guillaume Phaneuf  
Registry Officer

TO: Assistant Deputy Attorney General, Litigation, Justice Canada  
Bank of Canada Building 234 Wellington Street East Tower  
Ottawa, Ontario K1A 0H8  
Fax: (613) 954-1920

**I. Claimant (R. 41(a))**

1. The Claimant, the Beardy's & Okemasis Band #96 and #97 (hereinafter also referred to as the "First Nation") confirms that it is a First Nation within the meaning of s. 2(a) of the *Specific Claims Tribunal Act*, by virtue of being a "band" within the meaning of the *Indian Act*, R.S.C. 1985, c. 1-5, as amended, and within the meaning of *Treaty No.6* (hereafter "Treaty 6"). The First Nation is located near Duck Lake in the Province of Saskatchewan.

**II. Conditions Precedent (R. 41(c))**

2. The following conditions precedent as set out in s. 16(1) of the *Specific Claims Tribunal Act*, have been fulfilled:

**16(1)** A First Nation may file a claim with the Tribunal only if the claim has been previously filed with the Minister and

(a) the Minister has notified the First Nation in writing of his or her decision not to negotiate the claim, in whole or in part; ...

3. The First Nation originally filed a claim respecting various alleged breaches by Canada relating to the unlawful termination of treaty annuities from 1885–1889, as well as other breaches of Canada's treaty, legal, trust, fiduciary and equitable obligations with the Minister of Indian Affairs on December 6, 2001 (hereinafter referred to as the "Treaty Annuities Claim" or "Claim").
4. In a letter dated July 4, 2005, the Specific Claims Branch wrote the First Nation to advise that it had completed a report and document collection related to the Claim and that the Specific Claims Branch was conducting internal consultations with respect to the nature of the issues raised in the Claim.
5. In a letter dated June 17, 2008, the Specific Claims Branch informed the First Nation that Canada took the position that the Treaty Annuities Claim fell outside of the scope of the Specific Claims Policy on the grounds that the termination of treaty annuities and other losses were owed to individuals rather than the First Nation as a whole.
6. On November 13, 2008, Maurice Law replied to Canada's letter of June 17, 2008 on behalf of the First Nation outlining its position that the Treaty Annuities Claim fell within the scope of the Specific Claims Policy and seeking confirmation in writing that the Minister had rejected this claim so that it may be filed with the Specific Claims Tribunal.
7. By letter dated December 17, 2008 from the Specific Claims Branch to Maurice Law, Canada advised that it would not negotiate the Treaty Annuities Claim because the treaty annuities which were terminated were owed to individuals as opposed to the First Nation as a whole and, therefore, this claim fell outside of the scope of the Specific Claims Policy.

8. On February 10, 2010, Maurice Law wrote to the Specific Claims Tribunal and copied the Specific Claims Branch advising that the First Nation wished to file its claim before the Specific Claims Tribunal and to seek a hearing and decision pursuant to section 20 regarding compensation for losses arising from Canada's breach of its treaty obligations and termination of treaty annuities to the First Nation under Treaty 6.
9. According to the status report on the Specific Claims Branch's website on June 15, 2011, the Treaty Annuities Claim shows as "File Closed" and referred to the Specific Claims Tribunal on February 10, 2010.

**III. Claim Limit (Act, s. 20(1)(b))**

10. The First Nation does not seek compensation in excess of \$150 million for the Treaty Annuities Claim.

**IV. Grounds (Act, s. 14(1))**

11. The following are the grounds for the specific claim, as provided for in s. 14 of the *Specific Claims Tribunal Act*:

**14(1)** Subject to sections 15 and 16, a First Nation may file with the Tribunal a claim based on any of the following grounds, for compensation for its losses arising from those grounds:

(a) a failure to fulfil a legal obligation of the Crown to provide lands or other assets under a treaty or another agreement between the First Nation and the Crown;

(b) a breach of a legal obligation of the Crown under the *Indian Act* or any other legislation — pertaining to Indians or lands reserved for Indians — of Canada or of a colony of Great Britain of which at least some portion now forms part of Canada;

(c) a breach of a legal obligation arising from the Crown's provision or non-provision of reserve lands, including unilateral undertakings that give rise to a fiduciary obligation at law, or its administration of reserve lands, Indian moneys or other assets of the First Nation;...

**V. Allegations of Fact (R. 41(e))**

**(a) Treaty 6 and the Crown's Promise to Pay Treaty Annuities (1876)**

12. In 1876, the Crown and the Plains and Wood Cree Indians in what is now central Saskatchewan entered into Treaty 6. Among other things, the treaty provided for the surrender of aboriginal title to 121,000 square miles of land in exchange for various promises and benefits to be provided by the Crown, including the promise to pay an annuity of \$5 to every treaty Indian annually in perpetuity.
13. On August 28, 1876, *Kah-ma-wis-tah-wa-sit* (Beardy) and *Sas-way-pew* (Cut Nose) adhered to the terms of Treaty 6 entered into between Treaty Commissioners on behalf of Canada and various First Nations at Fort Carlton. Cut Nose was the predecessor of Okemasis who later became Chief of the band that assumed his name. The First Nation is the successor in interest to the Beardy's and Okemasis bands who respectively became parties to, and are therefore entitled to, the benefits of Treaty 6.

14. The collective treaty right to annuity payments represented the primary consideration given to the signatory First Nations for the surrender of their collective interest in the land; a fact which is not altered despite the Crown's evolved practice of distributing annuities to each individual band member in its efforts to ensure that none of those entitled were paid twice at separate locations.

**(b) *The 1885 Rebellion and Unlawful Termination of Annuity Payments (1885-1889)***

15. In March 1885, the Riel or Northwest Rebellion ("the 1885 Rebellion") broke out when the Métis declared a provisional government at Batoche, located in close proximity to the Beardy's Indian Reserve located near Duck Lake.

16. The Beardy's and Okemasis Bands were only marginally involved in the 1885 Rebellion. When the conflict broke out, Chief Beardy informed the NWMP that he wanted no part of Riel's movement and he remained on his reserve throughout. Although Chief Beardy pleaded with his members to remain neutral, some accounts of the 1885 Rebellion suggest a handful of members of the reserve participated in the battle which took place on the edge of the reserve. Although the 1885 Rebellion started near Beardy's reserve by sheer coincidence, Chiefs Beardy and Okemasis were stripped of their treaty medals and the bands were listed as "disloyal" by the Department of Indian Affairs.

17. Of the 44 Indians convicted of offences relating to the 1885 Rebellion, 11 were condemned to death and 8 were hanged. Neither Chiefs Beardy nor Okemasis were ever charged with any offence and not a single member of either band was ever convicted of an offence related to any alleged participation in the 1885 Rebellion.

18. Despite the absence of any evidence that the Beardy's & Okemasis Bands were guilty of any significant involvement in the 1885 Rebellion, Canada unlawfully withheld the payment of treaty annuities to virtually every member of the two "disloyal" bands, including men, women, children, and elders from 1885-1888, without the benefit of any trial or other due process to prove that any of the leaders or members of the Beardy's & Okemasis were involved in any way in the 1885 Rebellion.

19. From 1885-1889, a total of \$2,470 in annuity payments was withheld from the members of Beardy's Band, and \$1,805 was withheld from the members of Okemasis' Band. Specifically:

(a) In 1885, only 11 out of 144 members of Beardy's, and none of the 105 members of Okemasis were paid their annuities;

(b) in 1886, only 12 out of 144 members of Beardy's, and only 5 out of 105 members of Okemasis were paid their annuities;

(c) in 1887, only 10 out of 142 members of Beardy's, and only 11 out of 105 members of Okemasis were paid their annuities;

- (d) in 1888, 41 out of 133 members of Beardy's, and 24 out of 86 members of Okemasis were paid their annuities; and
  - (e) in 1889, treaty annuities were resumed and paid to all members of the two bands.
20. Additionally, Canada failed to pay annuities to the families attached to treaty annuity payroll ticket number 59 during the years of 1880-1882, 1884 and 1890 to the present. No explanation for this failure to pay appears on any of the Department's records.
21. By the end of the 1885 Rebellion, the Department of Indian Affairs implemented a plan for the "future management" of the Indians which included measures designed to punish and control the Indians. Canada violated the civil and human rights of the Beardy's and Okemasis Bands by the imposition of a "pass system" which unlawfully confined members of the Bands to their reserves despite an acknowledgement that the Department of Indian Affairs had no legal authority to do so.
22. Canada also punished the entire membership of both Bands as part of a larger plan by which the Department of Indian Affairs introduced a number of coercive measures in the absence of any legal authority to do so. These measures included the following:
- (a) confiscation of all guns, ammunition, horses, cattle, carts, wagons, harnesses, and even treaty medals from the Indians;
  - (b) an order that any Indian found with a rifle was "liable to be shot on sight";
  - (c) withholding of rations and relief during times of starvation and pestilence except to those Indians who worked for them;
  - (d) the unilateral breaking up and amalgamation of bands without their consent;
  - (e) the denial of the recognized Chiefs and Councillors (Headmen) of the Beardy's and Okemasis Bands from on or about 1885 until on or about 1936; and
  - (f) withholding the payment of salaries owed to the Chiefs and Councillors of the Beardy's and Okemasis Bands from on or about 1888 to on or about 1936.

**VI. The Basis in Law on Which the Crown is said to have failed to meet or otherwise breached a lawful obligation:**

23. The Treaty Annuities Claim is brought on the grounds that the Respondent breached its treaty, legal, trust, fiduciary and/or equitable obligations to the First Nation through the unlawful suspension and termination of the Beardy's & Okemasis First Nation's collective treaty right to annuity payments from 1885-1888.

**(a) *The Payment of Annuities Is A Collective Right Under Treaty 6***

24. Applying the legal principles relating to the interpretation of Indian treaties, the plain and ordinary meaning of the Annuity Clause in Treaty 6 confirms that the parties intended that the Crown would pay a \$5 annuity to every treaty Indian annually in perpetuity as the *quid pro quo* or consideration for the surrender of the Indians' collective interest in 121,000 square miles of land covered by Treaty 6. In the absence of any express limitations stating that treaty annuities could be terminated after a certain period of time or under certain circumstances, no such limitation can be implied. Nor did the treaty contain any wording that could be interpreted as granting any express or implied authority to Crown officials to terminate treaty annuities at their discretion in the event of an alleged breach of the treaty by the Indians. If the Crown had intended to place such limits or restrictions on the treaty right to annuities, such an intention should have been set out in clear and express terms in the treaty.
25. The First Nation submits that the Crown was not entitled to unilaterally terminate the payment of treaty annuities pursuant to the terms of Treaty 6, whether through the enactment of legislation, through executive action, pursuant to any residual prerogative power, or on the grounds that the First Nation allegedly breached the terms of the treaty.
26. In light of the tenor of the Treaty 6 negotiations, the solemn nature of the promises enshrined in the treaties, and the relationship between the Crown's officials and the Indian signatories at the time, it is not reasonable to suggest that the Indians would have agreed to surrender over 121,000 square miles of valuable land in exchange for rights that could be unilaterally terminated at the whim of the Crown or Indian Affairs officials. The unilateral decision to terminate treaty annuities without any legal authority to do so constitutes a breach of the treaty and a corresponding breach of the Crown's fiduciary duty.
27. The Crown itself has asserted that the treaty right to annuity payments is a collective right, not an individual right. Given that the Manitoba Court of Appeal held in *Soldier v. Canada* that treaty rights, including the right to annuities specifically, are collective rights based on Canada's arguments in that case, we assert that Canada is now estopped from taking a contrary position in relation to the interpretation of the Specific Claims Policy. Indeed, it would be contrary to the Honour of the Crown and a blatant contradiction for Canada to now take the position that treaty annuities are owed to individuals and are not collective rights. The *Soldier* decision is the law as established by the courts and the Crown is bound by the decision as part of its broader responsibility to respect and uphold the Rule of Law.

**(b) *No Right to Terminate Through the Enactment of Legislation Nor Through Unilateral Executive Action***

28. In addition to the Crown's strict fiduciary duty to fulfil its treaty obligations, the First Nation submits that the Crown did not have the power to unilaterally terminate treaty

annuities, whether by legislation or executive action, because the nature of the treaty right in question represented a solemn promise by the Crown to pay the Indians annuities in perpetuity in exchange for the surrender of Aboriginal title.

29. In the alternative, even if Parliament did have the authority to terminate annuity payments to individuals, entire bands, or all *signatories* to Treaty 6 (which is denied), we submit that the treaty right to annuities could only be terminated in exceptional and extenuating circumstances and then only in accordance with specific legislation enacted by Parliament expressing a clear and plain intention to extinguish or abrogate the treaty right to annuities.
30. The legislative record is clear that Parliament had both contemplated and codified certain limited restrictions to an Indian's unqualified right to annuities under Treaty 6, but none of the relevant legislation expresses a clear and plain intention that the Crown intended to terminate the treaty right to annuities, nor is there any suggestion in the historical record that Parliament had ever intended to authorize the suspension or termination of annuity payments to an entire band for participation in an uprising, or for any other reason whatsoever.
31. Although Section 71 of the 1876 *Indian Act* authorized the termination of annuity payments to individual Indians who were convicted of a criminal offence, it is clear that Parliament never saw fit to enact legislation authorizing the termination of annuity payments after the 1885 Rebellion. We submit that Parliament never intended to restrict or authorize the termination of the payment of annuities to entire bands under any circumstances.
32. As for the whether the right to annuity payments could be suspended or terminated through unilateral executive action, a treaty right cannot be unilaterally extinguished or abrogated by Cabinet as the executive branch of government (whether by Order in Council or any other means) because only Parliament has this power pursuant to its exclusive legislative jurisdiction over "Indians and lands reserved for Indians" under section 91(24) of the *Constitution Act, 1867*. If Parliament had intended to confer any such authority or discretion on the Governor in Council, the Superintendent General of Indian Affairs, or any other government official, it would have to pass legislation expressing such an intention in clear and plain terms, which it did not.
33. Consequently it is submitted that if Parliament had the power to authorize the unilateral termination of annuity payments, which is expressly denied for the foregoing reasons, any such power was never exercised, and therefore, the unilateral termination of treaty annuity payments represents a fundamental breach of the terms of Treaty 6, a corresponding breach of the Crown's trust, fiduciary, and equitable duties, and its actions in this regard stand diametrically opposed to the solemn nature of the Crown's treaty promises and the related principle that that the Honour of the Crown is always at stake in its dealings with Aboriginal peoples.

**(c) No Prerogative Power to Terminate**

34. The First Nation also asserts that the Crown did not have any residual prerogative power to extinguish, suspend, or terminate the treaty right to annuities. Any prerogative power enjoyed by the Crown prior to Confederation with respect to Indians and their lands was substantially narrowed by the granting of exclusive legislative jurisdiction respecting “Indians and Lands Reserved for Indians” to the Federal Parliament under section 91(24) of the *Constitution Act, 1867*.
35. Even if the Crown had retained a residual prerogative power to terminate treaty annuities after 1867, which is denied, the First Nation submits that any such power was entirely displaced by the time of the 1885 Rebellion through the enactment of the various provisions in the *Indian Act* regarding treaty annuities. Through the enactment of legislation delineating the circumstances in which the termination of annuity payments was justified, the First Nation submits that Parliament expressed a clear and plain intention to displace any residual prerogative power the Cabinet may have previously enjoyed.
36. In the alternative, even if the executive branch was clothed with a prerogative power to terminate the treaty right to annuities in the aftermath of the 1885 Rebellion, which is denied for the foregoing reasons, there is no evidence that any executive action was exercised or sanctioned by the Governor General in Council. Rather, the First Nation submits that the decision to terminate treaty annuities was made by Prime Minister John A. Macdonald solely in his capacity as the Superintendent General of Indian Affairs and Minister responsible for Indian Affairs, and his decision was neither formally sanctioned nor approved by Parliament or the Governor General in Council.
37. Principles of law and equity cannot countenance the unilateral termination of the treaty right to annuities on the basis of a ministerial direction alone; such an argument is entirely inconsistent with the Rule of Law and the principle of the Honour of the Crown.

**(d) No Right to Terminate Annuities Based on Bands’ Alleged Violation of Treaty 6**

38. The historical record indicates that the Department sought to justify the termination of treaty annuity payments on the grounds that the Indians violated the terms of the treaty through their alleged participation in the 1885 Rebellion. Even if an alleged violation of the terms of Treaty 6 could provide a legal justification for the termination of treaty annuities, which is expressly denied, there is a dearth of evidence to prove that Beardy, Okemasis, or the members of their bands committed any acts of violence sufficient to constitute a violation of the Treaty. Neither Chief was ever charged with treason, and of the 44 Indians convicted of offences in relation to the 1885 Rebellion, none were from either Beardy’s or Okemasis’ bands.
39. To the extent that any members of the Bands were accused of offences in relation to the 1885 Rebellion they were entitled to fair trials and to be dealt with in accordance with the law as individuals. If convicted, the *Indian Act* allowed the annuities owed to

that individual to be withheld. There is, however, absolutely no justification in law for punishing the entire band, including the elderly, women, and children who were completely innocent of any participation in the 1885 Rebellion whatsoever.

**VII. Relief Sought**

40. In light of the foregoing, the First Nation seeks compensation for:

- (a) Damages for the unilateral and unlawful termination of treaty annuity payments from 1885 to 1889;
- (b) Damages for the failure to pay annuities to the families attached to treaty annuity payroll ticket number 59 during the years of 1880-1882, 1884 and 1890 to the present;
- (c) Compensation for Canada's breach of its treaty, trust, fiduciary and equitable duties;
- (d) Equitable interest;
- (e) Such other damages or compensation as this Honourable Tribunal deems just.

Dated this 11<sup>th</sup> day of July, 2011 at the City of Calgary in the Province of Alberta.

**MAURICE LAW**



---

**Ron S. Maurice**  
Counsel for the Claimant

**Maurice Law Barristers & Solicitors**

800, 550-11th Ave SW  
Calgary, Alberta T2R 1M7  
Phone: (403) 266-1201  
Fax: (403) 266-2701  
Email: [rmaurice@mauricelaw.com](mailto:rmaurice@mauricelaw.com)  
Our File: 106.02