BACKGROUNDER

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Treaty Annuity Right

The treaty right no one wanted to talk about. Until now.

Sheilla Jones

Introduction

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Autonomy for individuals and families was built into traditional Indigenous governance structures, and explicitly built into the historical treaties through an annuity payable directly to every man, woman and child in bands signing the treaties. However, since the early 1970s, individual rights in First Nations communities have been completely overwhelmed by the rapid expansion of collective rights to the point where individual empowerment barely exists at all.

An examination of the intent of the annuities at the time the treaties were signed reveals that First Nations headmen and negotiators intended the annuity to be linked to the value of the traditional lands ceded, and that the annuity would increase over time to provide livelihood assistance and give individuals and families a degree of autonomy and empowerment within the collective. However, the $5.00 annuity paid in cash to a Treaty individual in 1880 remains frozen in time, so that in 2018, annuity recipients are still receiving $5.00.

The Treaty Annuity Working Group brought the issue to light in 2002, questioning why the annuity—the single provision in the treaties intended to provide individual empowerment—remains the only key treaty benefit yet to be modernized. First Nations leaders, who had previously shown no interest in annuities, suddenly saw the potential of an increased, land-value based annuity as an opportunity to collect arrears through the courts—for the collective. This has led to a considerable confusion over whether annuities are an individual right or a collective right, with the federal Indigenous Affairs department declaring in 2017 that it is both. As ordinary First Nations people have no political voice to advocate for individual rights, the single provision for empowering individuals and families under the treaties risks being lost altogether, subsumed by the overwhelming power of the collective.

Historical Overview

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Prior to settler contact, individuals and families in First Nations communities had considerable autonomy within the collective. The community members relied on each other to survive and to thrive, and carefully chose wise leaders. A leader's success was measured by the number of followers in his band, and should he abuse his position or fail his followers, they were free to vote with their feet and move to a community with better leadership.[1] That freedom ended with the imposition of the *Indian Act* of 1876, and the regulation of reserves under the control of Indian Agents.

Annuities were not new to Indigenous communities. The annual gifts played an important role in early military and trade alliances between First Nations and the British, French and Dutch colonizing governments. The colonial leaders understood that the land belonged to the Indians, which put Indian leaders in a strong negotiating position on trade treaties in the fur-trade economy.[2] In the face of colonization and a changing landscape, wise First Nations leaders negotiated an annuity as part of the land surrender treaties. The Crown's motivation for negotiating land surrender treaties was straight-forward imperialist expansion; for Indian leaders, it was a means to ensure peace and negotiate assistance for future generations in the face of rapid change.[3]

In 1850, however, the role of the annuity changed significantly. The Robinson Superior and Robinson Huron treaties, covering lands from the Quebec border west to Fort William, explicitly linked the value of the annuity to the value of the land being ceded. The whole impetus for the Robinson treaties was to clear the way for mine development following significant discoveries of gold, iron and copper north of Huron and Superior lakes. The headmen for the bands bargained hard during the treaty-making process, and ensured that the livelihood of their people was secured by two key provisions: the "full and free privilege" to follow their usual vocations of hunting, fishing and trapping throughout the ceded lands (with some limitations),[4] and an annuity to be shared with every band member in perpetuity. The Huron and Superior negotiators pressed for, and won, an "escalator clause" whereby the annuity payment would increase as the value of the ceded lands increased due to development and settlement, and it would be increased by an amount "as Her Majesty may be graciously pleased to order".[5]

The eleven Numbered Treaties, signed between 1871 and 1921,[6] also included the livelihood provisions of the Robinson treaties, but called for an individual annuity payment of $4.00 or $5.00 (depending on the treaty) rather than a lump-sum payment to be divided by each band government among its members. 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.[7] 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. The Numbered Treaties did not, however, contain the "escalator clause" language.

In the 1874, the Huron bands triggered the escalator clause by demanding an increase in the individual annuity based on booming mining developments. Four years later, the Parliament of Canada approved an increase from 96 cents to $4.00 per person for both the Superior and Huron treaty bands.[8] The Supreme Court of Canada (SCC) affirmed the link between the value of the annuity and the value of the land in 1895,[9] with one of the judges noting that "the consideration to the Indians for the ceding of their rights was threefold, the cash payment, the fixed annuity, and the further annuity up to a certain amount depending on the proceeds of the land."[10]

That should have set in motion a periodic review of the annuities to reflect the increased value of the ceded lands and trigger increased payments. It did not.

Current Issues

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Treaty annuities have remained frozen in time, unchanged for the Huron and Superior treaty people since 1879, and unchanged for the Numbered Treaties as well. Nobody fought for it. No First Nations leaders championed it. Nobody wanted to talk about it.

The escalator clause in the Robinson treaties was referenced in 1996 in the final report of the Royal Commission on Aboriginal Peoples.[11] Further, the RCAP report notes. "Despite the wealth generated from these vast lands", annuities had become "token amounts" over time.[12]

Research by an Indigenous and Northern Affairs Canada (INAC) policy analysts concluded that the fact that the Robinson and Numbered Treaties "did not deliver on the original intention of providing livelihood assistance for future generations in exchange for land can be demonstrated simply by the socio-economic disparity that continues to exist today. This disparity is likely to continue, unless solutions are rooted in deep historical understanding of the treaty relationships."[13]

The non-partisan Treaty Annuity Working Group (TAWG),[14] a special committee of the Social Planning Council of Winnipeg formed in 2002, considered it odd that the individual annuity provision should stand alone as the only major element of the treaties that was still to be modernized. Even the "pestilence and famine clause" and the "medicine chest clause" in Treaty 6,[15] for instance, had been modernized to mean social assistance (about $1B for 2018)[16] and federal health care services (about $4.3B for 2018)[17] to all First Nations and Inuit communities, despite the clauses appearing only in the Treaty 6 text.[18] Since the 1970s, federal government policy appeared to be amenable to modernizing treaty provisions for the benefit of the collective but not for the individual.

TAWG studied the idea, and hosted a national conference to evaluate the implications for First Nations people on-reserve and off-reserve, and to the larger Canadian community. The resulting proposal was fairly straightforward:[19]

- The $5.00 annuity would buy five acres of fertile Red River Valley land in 1880; those same five acres would be worth about $5,000 in 2010.[20] Therefore, the annuity should be increased to about $5,000 per person.
- The annuity should be extended to all Status First Nations people (about 75 percent of whom are Treaty people), which would cost about $5B annually.
- The annuity should be paid on a monthly basis outside the control of the collective in a method similar to the Canada Child Benefit to limit interference or arbitrary actions by band governments representing the collective or by Indigenous Affairs.

The group also proposed that the modernized annuity be revenue neutral. However, TAWG lacked the resources to undertake the in-depth study necessary to make recommendations on how to reallocate expenditures within the vast Indigenous Affairs department.

TAWG warned that the issue was justiciable, and if not handled by politicians, it would end up before the courts again. In the midst of political turmoil in Ottawa in 2003 as Paul Martin took over the Prime Minister's Office from Jean Chretien and purged the sitting cabinet, the newly appointed Indian Affairs minister promptly rejected TAWG's proposal. "Treaty annuities are not viewed as part of a general livelihood right but rather as a fulfilment of a specific obligation identified in the treaty relationship. In addition, there are no provisions in the treaties for an increase in the amount of the annuities."[21]

The new minister was mistaken. The escalator clause in the Robinson Huron and Superior treaties was precisely a provision for increasing annuities as a means of livelihood assistance. Further, the Supreme Court of Canada ruled in 1999 that treaties "must not be interpreted in a static or rigid way. They are not frozen at the date of signature. The interpreting court must update treaty rights to provide for their modern exercise."[22]

TAWG was unable to persuade the IA minister of the legitimacy of a modernized annuity, but the idea sparked interest from a number of band chiefs. If the annuity should have been increased over time, even if allowing just for inflation, then significant arrears would also be due. If the $5.00 individual annuity was of no interest to First Nations leaders, the prospect of tens of billions of dollars in arrears—payable to the collective—certainly was.

What followed, beginning in 2009, was a series of failed attempts at certifying class action lawsuits to claim arrears by a number of First Nations chiefs,[23] and claims before the Special Claims Tribunal, a quasi-judicial arm of Indigenous Affairs. Cases brought by chiefs as individuals were denied based on annuities being a collective right; cases brought by chiefs on behalf of bands were denied based on annuities being an individual right. Indigenous Affairs added to the confusion of this Catch-22 situation by stating that annuities are both an individual and a collective right.[24]

The escalator clause is back under the judicial eye following a statement of claim filed by 21 chiefs of bands covered by the Robinson Huron treaty against Canada and Ontario,[25] for the failure to increase annuities since 1874. The case was then brought before the Ontario Supreme Court.[26] At the time of this writing, a ruling has no yet been made, but the Huron chiefs have already created a trust to manage the award,[27] should there be one—on behalf of the collective.

ENDNOTES

1. Jean Allard, 2002, Big Bear's Treaty: The Road to Freedom, *Inroads,* Issue No. 11, p 117.
2. Evaluation of Indian Moneys, Estates and Treaty Annuities, 2013, Aboriginal Affairs and Northern Development Canada, p 54.
3. Erik Anderson, 2013, *The Treaty Annuity as Livelihood Assistance and Relationship Renewal, Volume 7: A History of Treaties and Policies,* Aboriginal Policy Research Series, Thompson Educational Publishing, p 76.
4. Arthur J.Ray, 2013, *Shading a Promise, Interpreting the Livelihood Rights Clauses in Nineteenth-Century Canadian Treaties for First Nations, Volume 7: A History of Treaties and Policies,* Aboriginal Policy Research Series, Thompson Educational Publishing, p 64.
5. Treaty Texts: Robinson Superior and Robinson Huron treaties, https://www.aadnc-aandc.gc.ca/eng/1100100028978/1100100028982 (accessed June 18, 2018).
6. Treaty Texts, Indigenous and Northern Affairs Canada, https://www.aadnc-aandc.gc.ca/eng/1370373165583/1370373202340 (accessed June 18, 2018).
7. Report on the Royal Commission on Aboriginal Peoples, 1996, *Volume 2: Restructuring the Relationship,* p 76.
8. Journals of the House of Commons of Canada, *Vol. XII,* 2nd May 1878, p 246.
9. Indian Claims, 1895, The Province of Ontario v The Dominion of Canada and The Province of Quebec, May 15 and 16, 1895, *Supreme Court of Canada, Vol. XXV,* p 541.
10. SCC, *Ibid.,* p 546.
11. RCAP, Vol. 2, p 406.
12. RCAP, *Ibid.,* p 671.
13. Erik Anderson, 2009, Treaty Annuities and Livelihood Assistance: Re-imagining the Modern Treaty Relationship, *Canadian Diversity, Vol. 7,* No. 3, p 13.
14. Members of the non-partisan Treaty Annuity Working Group included, for instance: Métis activist and legislator Jean Allard, former legislative secretary to NDP Premier Ed Schreyer; Clayton Manness, former finance minister to Conservative Premier Gary Filmon; Ojibwa activist and Indigenous leader Wayne Helgason, former Manitoba Liberal candidate.
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17. Health Canada, Supporting Information on Lower-Level Programs 2017-18 Departmental Plan, Programs 3.1 First Nations and Inuit Primary Health Care; 3.2 Supplementary Health Benefits for First Nations and Inuit; and 3.3 Health Infrastructure Support for First Nations and Inuit, https://www.canada.ca/en/health-canada/corporate/transparency/corporate-management-reporting/report-plans-priorities/2017-2018-supporting-information-lower-level-programs.html#a3 (accessed June 14, 2018).
18. Treaty Texts: Treaty 6, https://www.aadnc-aandc.gc.ca/eng/1370373165583/1370373202340.
19. Modernizing Treaty Annuities, *Ibid.*
20. Historical Value Per Unit of Farmland and Buildings, Manitoba and Canada, https://www.gov.mb.ca/agriculture/markets-and-statistics/yearbook-and-state-of-agriculture/pubs/hist-value-farmland-bldgs.pdf (accessed June 14, 2018).
21. Andy Mitchell, Minister of Indian Affairs and Northern Development, in written correspondence with Wayne Helgason and Jean Allard, Social Planning Council of Winnipeg, March 26, 2004.
22. Supreme Court of Canada, *R v Marshall* [1999] 3 SCR 456, para 78.

23. Annuity-based cases include: *Soldier v. Canada* (Attorney General), [2009] 2 CNLR 362 (MCA) Manitoba Court of Appeal; *Horseman v Crown* [2015], Proposed Class Proceeding, Federal Court, Docket T-1784-12; *Beardy's & Okemasis Band #96 and #97 v Crown,* Special Claims Tribunal, File No. SCT-5001-11, May 6, 2015; Horse Lake First Nation annuity claim denied, Special Claims Tribunal, December 7, 2011.
24. Spokesperson, Indigenous and Northern Affairs Canada, email communication with author, September 8, 2017, "Annuities are both a collective and individual rights issue in that an individual annuitant is entitled to collect the annuity by virtue of being a member of a collective, a First Nation treaty signatory."
25. Statement of Claim, *Restoule et al v Canada and Ontario,* [2014] C-3512-14.
26. *Mike Restoule, et al. v. The Attorn, The Attorney General of Ontario and Her Majesty the Queen in Right of Ontario,* C-3512-14 and C-3512-14A.
27. Lynne Brown, The Robinson Huron Treaty of 1850. 167 years on, September 3, 2017, https://saultonline.com/2017/09/the-robinson-huron-treaty-of-1850-167-years-on/.

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Sheilla got a lively introduction to Indigenous politics while writing Canada's first book on Métis politics, *Rotten to the Core: The politics of the Manitoba Métis Federation* (101060, an imprint of J. Gordon Shillingford Publishing, Winnipeg, 1995). In 1998-2000, Sheilla served as researcher for Jean Allard's *Big Bear's Treaty: The Road to Freedom,* published in 2002 in the policy journal Inroads.

Sheilla is a former CBC-Radio Winnipeg reporter, news editor and news presenter who has garnered numerous journalism awards. She has been a senior television researcher for the CBC, and served as a political commentator on a variety of CBC national television and radio programs.

With a keen interest in quantum physics and cosmology, Sheilla pursued a graduate degree in theoretical physics (University of Alberta, 2004). She is the author of *The Quantum Ten: A story of passion, tragedy, ambition and science* (Thomas Allen Publishers, Toronto; Oxford University Press, New York, 2008) and co-author of *Bankrupting Physics: How today's top scientists are gambling away their credibility* (Palgrave Macmillan, New York, 2013).

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