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# **HONOURING TREATY PROMISES AND EMPOWERING INDIVIDUALS**

**A Framework for Modernizing Treaty Annuities**

**BY JOSEPH QUESNEL**



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### **TABLE OF CONTENTS**

Introduction	4
Understanding Individual Annuities	5
Why Haven't Annuities Been Adjusted?	6
Court Rulings And Present Implications	8
Calculating A Modern Annuity In Modern Canada	9
Benefits Of A Modernized Annuity	10
Conclusion	11
Policy Recommendations	12
Endnotes	13

## INTRODUCTION

*"Scholars have clearly documented that First Nations negotiated for and worked to establish a variety of economic promises/clauses that they believed would ensure their right to a livelihood. First Nations understood that the right to make a living was a fundamental part of what was agreed to in the treaties."*

- Harold Cardinal and Walter Hildebrandt

Source: Treaty Elders of Saskatchewan: Our Dream is That Our Peoples Will One Day be Clearly Recognized as Nations, 2002.

The government just introduced another speech from the throne, outlining new spending and its legislative priorities for the coming session. When it comes to Indigenous policy, the speech included the usual increased funding for specific programs and services, often targeted at public agencies as well as Indigenous partners and organizations. It would be significant if next time the government outlined major direct aid to individuals and families as a show of true Indigenous reconciliation. The government can achieve this by announcing it was modernizing and adjusting annuity amounts contained in the historic treaties. This would both honour a promise and empower individual First Nations. In fact, it would achieve the economic goals of empowering Indigenous individuals and families and fighting poverty, while providing political clout to long-neglected average Indigenous people.

For many Indigenous people, their only experience of the treaty annuity payments is when their band holds Treaty Day events during which ceremonies are held to hand out five-dollar bills or when they line up in front of Indigenous Services Canada booths to collect payments. Beyond that, the issue is not often considered. However, many are unaware that annuities were intended historically as a means of modest livelihood support for treaty recipients, and more importantly, many are unaware they could be modernized to provide an appropriately modest livelihood support today.

For most of the historic treaty provisions, the federal government has come to interpret them in a modern context. For example, the "pestilence and famine" and the "medicine chest" clauses contained in Treaty 6 had long been considered to

mean federal social assistance and federal health care services for all First Nations communities. Despite no legal obligation, the federal government made that policy change. The one notable exception were the annuities paid to individuals. The federal government has never seen fit to modernize the annuities.

Scholars have come to understand that for these Indigenous communities, the annuities were one of two means to provide livelihood support for Indigenous communities undergoing rapid economic change in the 19th century. As far as the Robinson treaties go, the courts have begun to realize this point, although it is likely the federal government would have to make an explicit policy change for this modernization to happen. All it would take is the political will of the prime minister and the Cabinet. The Indian Act itself is silent on the valuing and distribution of annuities, so this is a policy decision on the part of the government. It can change course right now and it ought to. Ottawa should do this before the courts potentially start doing so.

A simpler, fairer solution is to modernize annuities across the board and extend them to all Status First Nations families from coast to coast to coast.

## UNDERSTANDING INDIVIDUAL ANNUITIES

Historically, Indigenous leaders at the time of treaty signing knew all too well that their traditional means of livelihood were changing with the arrival of settlers and the disappearance of the bison herds on the Prairies. They were realists who cared about their people. For millennia, Indigenous peoples had sustained themselves on hunting, fishing, trapping, and trading. In their treaty making, the Crown offered annuities to Indigenous communities that were ceding their land, rather than pay a substantial up-front cost. The idea of annual gifts was already a tradition within Indigenous communities and was politically useful for nurturing the relationship between the Crown and Indigenous peoples.

The first annuity payments were made in three treaties with the Mississaugas on Lake Ontario in 1818. This was a means for removing the burden off British taxpayers and offload it as an annual cost to the colonists.<sup>1</sup>

However, in 1850, the annuities in the Robinson Superior and Robinson Huron treaties changed from a fixed, lump-sum payment to a payment subject to change over time. The Crown negotiators knew they were clearing the way for resource development. The Anishinaabe chiefs and headmen countered with two key provisions to ensure the future livelihood of their people: 1) A promise of free access to fishing, hunting, and trapping on the ceded lands; and 2) An annuity for band members in perpetuity.<sup>2</sup> Apparently the Anishinaabe negotiators were familiar with higher annuities paid to tribes in the United States, so government commissioner William Robinson proposed an “escalator clause” in the treaties, whereby the payments would increase as the value of the ceded lands increased.<sup>3</sup>

The lump-sum annuity worked out to about \$5 a person. At the time of the treaties in 1850, this meant income for a family of five was about one-third to one-half of the wages for an unskilled labourer in Toronto or Montreal.<sup>4</sup> The annuity was livelihood assistance that families could build on through wage labour, farming, or other work. This

was part of the government’s policy of promoting economic integration for Indigenous families that were losing their old economy. At the time of the treaties this was settled agriculture, but today it is the vast array of economic opportunities open to Indigenous communities.

The eleven Numbered Treaties, signed between 1871 and 1921, included livelihood provisions, but did not include any kind of escalator or augmentation clause. There was pressure on government negotiators to keep the cost of annuities down,<sup>5</sup> but there were some increases in subsequent treaty amendments, but that quickly ceased. There were two times that the issue of annuity increases came to the forefront of the national agenda. The first was in a vote in the House of Commons in May 1878. Parliament approved an increase from 96 cents to \$4, for the year ending 1879.<sup>6</sup> The second occurrence was in 1895 when the Robinson treaties came before the Supreme Court of Canada where the annuity increase was not ever in doubt, but only over which level of government was responsible for paying annuity arrears prior to Confederation.<sup>7</sup>

After that, the issue was rarely re-evaluated until now.

## WHY HAVEN'T ANNUITIES BEEN ADJUSTED?

The simple answer to the question of why annuities were never adjusted is government choice and politics.

Although there was a clear expectation on both sides that the annuities were part of an effort to help them transition from a hunting and trapping economy to one of settled agriculture, this aspect was neglected and forgotten over time. The payments did not change as land values arose due to settlement and increased economic activity around them. There was no evidence that those involved were concerned with the steady erosion of buying power through inflation. Thus, for the signatories of the historic treaties, the annuity remained stuck at \$4 or \$5, which obviously through inflation today has been reduced to a trivial amount, not providing any sort of livelihood support whatsoever.

Instead of adopting a liberal and expansionist view of the treaty annuities, the Government of Canada very early on adopted a policy of nominalism.<sup>8</sup> So, the \$5 in 1880 would still be \$5 in 2080. Over time, the effect of inflation was such that the buying power of the annuity was absorbed by the First Nations and the reduction in benefits payable went to the Crown.<sup>9</sup>

Moreover, in 1929, the government amended the Indian Act to prevent Indigenous groups, band councils, and others from hiring lawyers to advance Indigenous claims against government policy. This prohibition would remain in place until 1951. So, this precluded any Indigenous political activity on the annuities issue.

However, over time, the collective-oriented benefits of the treaties would become modernized while the individual annuities were ignored. Obviously, the federal government does not send ammunition, nets, and clothes to First Nations in fulfillment of treaties, but interprets these provisions in modern monetary terms.

As the value of the annuity eroded over time, and as collective benefits were being modernized after the 1950s, the percentage of the Indian Affairs budget spent on livelihood support through annuities plummeted. In 1880, about 30 percent of the Indian Affairs branch budget was spent on annuities. By 1966-67, it had dropped to 4.0 percent, and by 2017-18, it accounted for little more than 0.01 percent. The sole treaty right for individuals and families has been overwhelmed by the benefits for the collective, and thus become largely irrelevant in Indigenous politics.

Treaty annuities affect about three-quarters of First Nations people in Canada (about 570,000 people), most living in Ontario, the Prairies, and the territories. Although a quarter of First Nations people are not eligible for annuities, non-treaty bands hold significant influence over the Assembly of First Nations (AFN), the federally funded organization designated to speak for First Nations people. The AFN leadership is elected by FN chiefs, about one-third of whom represent First Nations communities in British Columbia that are not involved in treaties with annuities. Similarly, First Nations communities in southern Quebec and the Maritimes do not receive annuities, making annuities a non-issue for them. As well, large areas of the Arctic and northern Quebec have signed onto modern treaties, none of which include annuities. Thus, individual annuities have fallen off the radar of national Indigenous politics.

Moreover, the political “voice” for First Nations people advocates for collective rights, not individual entitlements. Ordinary First Nations people do not elect AFN leaders; they are elected by First Nations chiefs. The AFN is a representative organization for chiefs, and chiefs advocate for collective interests. There are no federally-recognized Indigenous organizations with leaders elected by ordinary First Nations people to advocate in Ottawa for their individual rights.

As a result, individual annuities have only been raised in value once by the federal government (in the 19th century) and there is no one advocating for this change for individuals and families. Without legal mandate, the federal government would have to make the policy change, but this seems very unlikely given past government behaviour. The only external factor pushing for change is the judiciary. With the possibility that future courts may rule in favour of modernization, the federal government should decide to pre-emptively define the terms of modernization and act on policy change.

This research paper argues that for many reasons, the government should arrive at a modern annuity valuation sooner rather than later through discussion and debate. This benefit should be provided to all Status Indians, but at amounts determined by region.

## COURT RULINGS AND PRESENT IMPLICATIONS

The issue of individual annuities has received renewed interest in Canada's courts, underscoring the importance of dealing with this issue politically before the courts potentially create a patchwork of annuity amounts across Canada. This would likely create animosities between Indigenous communities and treaty areas, which would be not in the interests of anyone.

In December of 2018, the Ontario Superior Court of Justice ruled that the \$4 annuities paid to the members of the 21 bands signing the 1850 Robinson Huron and Robinson Superior treaties should have been increased in tandem with the growing prosperity of their Treaty Lands.<sup>10</sup> As mentioned above, the treaty language in the Robinson treaties was clearest in providing for an augmentation to the annuity amount over time. The ruling proceeded in phases, with the last being the determination of compensation. However, the judge was quite clear in the ruling that annuities needed to be updated, arguing that the principle of the honour of the Crown and the doctrine of fiduciary duty imposed on the Crown the obligation to implement the treaties' promise.<sup>11</sup> Or as Ontario Superior Court Justice Patricia Hennessy wrote in her judgment:

Since 1850, the Crown has acted with unfettered discretion in their interpretation and implementation of the treaties, in a way that has seriously undermined their duty of honour. This left the treaties' promise completely forgotten by the Crown.<sup>12</sup>

The judge involved found that treaties were not one-time transactions, as the government seemed to imply in its arguments before the court, but that they are an ongoing, long-term relationship. This reaffirmed finding may have implications for other cases dealing with the terms of the treaties.

Moreover, in 2015, attempts had been made by Numbered Treaty bands to declare in the Federal Court of Canada that the Crown had engaged in an ongoing breach of fiduciary obligations in not

adjusting treaty annuities to account for inflation and declining purchasing power.<sup>13</sup> The case was a class action suit filed by one British Columbia band on behalf of all the Numbered Treaty bands. This was a case potentially involving all 11 of the Numbered Treaties with obviously enormous implications for many people.

However, the Federal Court found that there was enough distinct about each specific Numbered Treaty to defeat a class proceeding and invited specific determination by each First Nation within specific Numbered Treaties. A year later, an appeal before the Federal Court of Appeal reaffirmed this finding.<sup>14</sup>

So, this would seem to invite litigation over each of the individual Numbered Treaties. However, as stated elsewhere, there is less incentive for First Nations band councils and representative organizations such as the Assembly of First Nations (AFN) to push for these cases. Therefore, the government, in representing First Nations individuals and families, can overcome this lack of incentive to act by making policy changes. Or alternatively, an individual MP or senator in either the government or opposition could introduce a private member's public bill to effect this change in government policy.

There is no need to offload decision-making on Treaty annuities onto the courts. By acting now, the government can avoid long and expensive adversarial litigation that will take years to resolve.

The current government made the right decision in moving away from an adversarial legal relationship with Indigenous parties when then Attorney General Jody Wilson-Raybould issued a directive to strive for reconciliation with Indigenous claimants, rather than pursue the usual adversarial course through the courts.<sup>15</sup> The directive also strived for arriving at solutions in public view. This is the right course for any government and moving forward on modernized annuities could be seen as pursuing this kind of direction in the spirit of positive Indigenous-state reconciliation.

## CALCULATING A MODERN ANNUITY IN MODERN CANADA

This study will draw upon the good work completed on this issue by the Treaty Annuity Working Group (TAWG) that included Jean Allard and Wayne Helgason. The working group was widely received because of its broad representation and that it included members from different political parties. The last time the working group tried to get on the government's radar in a significant way was during the Chretien Liberal government. It tried its best, but the government was quickly distracted with other legislative priorities in the Indigenous department. The group was not able to get sufficient attention from subsequent governments. This study argues it is time the government of the day listens to this working group and takes its recommendations seriously before implementing this necessary change.

The TAWG arrived at annuity valuation models that were estimated between \$6,500 to \$8,000 per person and were based on three fundamental points. A modernized annuity would be a) Based on livelihood support/sharing the land; b) Based on land-based GDP economic activity; and 3) Based on federal transfers to individuals.

In 2004, the working group recommended the following on modernizing the annuities:

- Increased from \$5 to \$5,000 for every man, woman, and child, based on increased land values, and extended to all Status First Nations people, wherever they live in Canada.
- Payable directly to recipients through a mechanism similar to the Canada Child Benefit that is outside of Indigenous Affairs (now Indigenous Services Canada) and band governments.
- Funded from current or planned allocation to Indigenous Affairs plus (Indigenous Services and all the federal co-partners) so that it is revenue neutral.<sup>16</sup>

This study will generally follow these recommendations and will loosely follow the central

thrust of the working group. However, this report will argue that politicians and policy makers should examine how local land values and local levels of prosperity would affect the modern valuation for annuities. In other words, the annuity increase would not necessarily be the same across Canada as the TAWG proposed.

So, by what means do we augment treaty annuities? The government – in consultation with Indigenous groups – needs to come up with some way for valuation today. The first model was developed by former NDP politician and Metis activist Jean Allard who became known for his impassioned advocacy of the augmented treaty annuity. He long argued that the annuity increases should be **based on land value increases over time**. His benchmark for annuity increase was that a \$5 annuity in Manitoba in 1880 would buy five acres of farmland.<sup>17</sup> The advantage, as he saw it, was that land values included inflation. Based on his formula and bearing in mind that the annuity was supposed to ensure that a family of five could have some security, he pegged the increase to \$5,000 per person. This meant that a family of five would have an annual income of \$25,000, a modest supplement to income.

The second form of valuation would be the **increased economic activity of the land**, or the increase in regional GDP. This would be honouring the intention behind the Robinson treaties. This speaks to the "escalator clause" in those treaties whereby the annuity payment would increase as the value of the ceded lands increased due to development and settlement. The augmented amount would be the amount "as Her Majesty may be graciously pleased to order," so it would be a political decision of the government of the day.

The government would need to work with its Indigenous partners in coming towards some sort of formula that would best reflect local economic activity. The most significant part of the plan occurs in determining the best valuation and formula moving forward.

## BENEFITS OF A MODERNIZED ANNUITY

The central argument will be that beyond providing this historic promise of livelihood support for Indigenous individuals and families, a modernized annuity would also represent a significant means of economic and even political empowerment for individuals living on reserve who often feel powerless and are often marginalized. Spending on collective benefits to reserves vastly outweighs any kind of funding for individuals and families. As a result, individuals and families are often ignored in favour of band councils, the Indigenous Affairs bureaucracy, and Indigenous political organizations. This needs to change.

Families in First Nations communities are often entirely dependent on the band government for social assistance, housing, employment, and many other areas. Gordon Gibson – a former BC politician and policy analyst – identified this unique Indigenous problem of one of “small governments with very large powers over the lives of reserve residents.”<sup>18</sup> This created an obvious power imbalance with these communities. A modernized annuity would go a long way towards tilting the power dynamics towards average band members and away from these overpowered governments. Ensuring accountable and transparent Indigenous governance has been a priority for the last few governments. There is a growing recognition that the governance structures and processes provided by the Indian Act created many of these problems by bringing out family-based factionalism and conflict over scarce government resources. Modernized annuities can help reduce these tensions within communities that play out in local band politics.

A modernized annuity would relieve many Indigenous families from social assistance dependency and serve to provide for families in danger of family services intervention. In fact, Indigenous activist Wayne Helgason has noted that 70 percent of Indigenous children taken into care suffer economic constraints at home.<sup>19</sup> An augmented annuity would help these families reduce their entanglements with child and family services.

For instance, a modernized annuity would immediately lift half of Indigenous children out of poverty.<sup>20</sup> For those also interested in taking the pressure off government expenditure, a modernized annuity to families will reduce pressures on other public service funding to Indigenous communities.

Journalist and author Sheilla Jones in her book *Let the People Speak* estimated that if the government had chosen to augment annuities to all Status Indians over the last 135 years, the result would have been the sharing of \$46 billion dollars of Canada’s wealth towards First Nations people.<sup>21</sup> This is a large expenditure, but it would have to be considered in light of expenditures on other Indigenous programs and services and the savings that would have come from reduced government dependency and economic empowerment. Also, it matters that these expenditures on augmented annuities go to individuals and families to spend and invest in the economy in their local communities, rather than sent off to bureaucracies to manage poverty through programs.

It would go without saying an agenda of modernized annuities be accompanied with an agenda of vastly improving the business and investment climate on reserves, as well as governance reforms. But fundamentally, committing to honouring the treaties now would go a very long way towards demonstrating Indigenous reconciliation in action and building goodwill with Indigenous partners.

## CONCLUSION

It is in the best interests of all Canadians to modernize individual treaty annuities in the historic treaties now. Adjusting these payments to reflect modern times honours the original intent of the treaties in providing annuities as a means of modest livelihood support as Indigenous peoples at the turn of the century were adapting to a new economy. It also makes little sense to modernize most treaty terms but decline to do so for individual annuities. The courts have started to delve into the issue of modernizing annuities with rulings favouring the Indigenous side. The most success has been seen with the Robinson treaties, but litigation has started with the Numbered Treaties, with the potential to see years of costly and divisive litigation, with the potential for uneven annuity amounts across the country. It is in the interests of Canada to intervene and arrive at a fair amount that reflects local realities.

First Nations politics and benefits tend to focus exclusively on the collective, ignoring the needs of individuals and families. The government bureaucracy, band councils, and Indigenous political organizations all focus on collective rights. Modernizing annuities would be one way to re-balance the power towards individuals. Thus, in a sense modernized annuities will help improve the state of Indigenous governance which is very lopsided in favour of government.

A modest annual income supplement would also help deal with First Nations poverty and provide some minimal assistance and lessen dependence on on-reserve public services.

This paper calls for the government to arrive at a valuation model for modernized annuities and demands that the federal government adopt a policy change of modernization. If not, either an MP or senator in the government or one of the opposition parties should introduce a private member's public bill to force policy change on the government. If we truly live in the time of Indigenous reconciliation, this is one very concrete change the government can make towards honouring past promises, empowering individuals and families, and tilting the government's Indigenous policy away from adversarial penny pinching towards open and friendly partnership.

## POLICY RECOMMENDATIONS

- 1) The federal government should raise the profile of the issue of modernized annuities, both through their education efforts. The federal government should also work with provincial and territorial education authorities in ensuring the issue receives attention in curricula and government publication. Canadians, in their treaty education, need to understand the significance of the individual annuities and their connection to providing modest livelihood support for treaty First Nations. Canadians need to first understand the history and rationale for such a large and different expenditure before the government embarks on this change.
- 2) In anticipation of policy or legislative change, Parliament – in consultation with Indigenous groups – should convene an all-party summit to arrive at an annual value of an annuity based on land values or on the prosperity generated by the lands. This summit will involve establishing a formula for calculating a modern annuity that incorporates adjustments for inflation and the market value, as well as, determining fair and equitable value for a modern annuity that reflects sharing of the prosperity of the land. This valuation will be based on local conditions for First Nations, including local cost of living and local land values. This means that annuity amounts will vary by region and will continually subject to change over time as cost of living and land values change.
- 3) The preferred course of action is the federal government adopting regulatory policy change away from a nominalist policy towards a modernized adjusted annuity policy that will affect all eligible Status First Nations people.
- 4) Absent a federal policy change, either a member of parliament or senator from either the governing party or an opposition party must introduce and get passed a private member's public bill that will change the official policy of the Government of Canada and will establish a national plan to determine a valuation model for modernized annuity and determine eligibility. The bill will grant statutory authority to the Canada Revenue Agency (CRA) to distribute the benefit to those deemed eligible. The bill should also require the government to report to parliament on its progress in implementing such a system within a specified time period.

## ENDNOTES

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15. Sheilla Jones, 207.
16. Sheilla Jones, 204.
17. Allard based his calculations on what his grandparents paid for their good agricultural land in the Red River Valley in 1871 as the benchmark for linking the annuity to land values. Compared to land values in other regions of Canada, the Red River Valley is somewhere in the middle.
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