Procedural Injustice: Indigenous Claims, Limitation Periods, and Laches

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Procedural Injustice:
Indigenous Claims, Limitation Periods, and Laches
Kent McNeil and Thomas Enns*
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Abstract: When Indigenous peoples go to court to seek justice for the historical wrongs they have endured, the Crown often tries to prevent their claims from even being heard by pleading statutes of limitations and laches. The application of these barriers raises serious constitution issues that have been taken account of by the Supreme Court only in the context of declarations of constitutional invalidity. Arguments based on the constitutional division of powers and section 35(1) of the Constitution Act, 1982 have not been addressed by the Court. As a result, limitations statutes that vary from province to province have been applied ad hoc by lower courts, with inconsistent and unjust results. In addition to constitutional concerns, there are also convincing policy reasons why limitations statutes and laches should not be available to deny Indigenous claims in most cases. Access to justice has too often been denied to Indigenous peoples in the past through barriers such as sovereign immunity and federal legislation preventing First Nations from hiring lawyers to pursue their claims. Reconciliation is not promoted by time limits on legal action that perpetuate injustice by continuing to deny Indigenous people access to the courts.

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Indigenous claimants face substantial barriers when they seek to have their Aboriginal, treaty, and other rights validated and enforced by Canadian courts. They have to adapt to a foreign legal system and jump through the hoops created by the Supreme Court of Canada in order to establish their rights. Going back to the time of first contact with Europeans or Crown assertion of sovereignty, to have Aboriginal rights they must prove either practices, customs, or traditions integral to their distinctive cultures or exclusive occupation of land. Their oral history evidence, although admissible in court and supposedly entitled to the same kind of respect and weight as written history, is often denigrated by the Crown and the “experts” it puts on the witness stand. On top of all this, the Crown tries to place procedural barriers in the way of Indigenous claimants, such as lack of permission to sue the Crown in Calder v Attorney-General of British Columbia. Prominent among these barriers are statutes of limitations and laches which can prevent historical claims from even being litigated on their merits.

In this paper, we examine and critique the application of time limitations to prevent claims of Indigenous peoples from being considered by the courts. Relying on Canadian constitutional law, the sui generis nature of Indigenous rights and the goal of reconciliation, we argue against use of these limitations to bar Indigenous attempts to achieve justice through litigation that seeks remedies for historical wrongs. Other issues that arise only if courts decide to apply limitations statutes, such as discoverability of causes of action, will not be discussed.

1. The History and Purposes of Statutory Limitations and Laches

In the old English common law, a freeholder who had been wrongfully dispossessed of land (disseised, in the terminology of the day) could recover possession (seisin) either by entry (i.e., self-help) or action (either a possessory assize of novel disseisin or a proprietary writ of right). In the 13th century, the right of entry was lost if not exercised quickly, possibly after only four days. By the early 14th century, the right of entry had been extended, but would have been tolled 1 See R v Van der Peet, [1996] 2 SCR 507 [Van der Peet]; Delgamuukw v British Columbia, [1997] 3 SCR 1010 [Delgamuukw].


3 [1973] SCR 313 [Calder]. This requirement, based on a centuries-old doctrine of Crown immunity from suit, was subsequently removed by the Crown Proceeding Act, now RSBC 1996, c 89.


(terminated) by the death of the wrongdoer while in possession (seised) and the passage of the land to his or her heir (known as a descent cast). In 1623, an English statute of limitations limited rights of entry to 20 years. The main purposes of these limitations on rights of entry were to maintain the peace and protect longstanding possession. Disseised freeholders who did not exercise their right of entry quickly enough were required to bring a legal action to recover the land.

The assize of novel disseisin, possibly created during the reign of Henry II (1154-89), also had to be brought within a reasonably short time, as the name suggests, but the time was extended by the royal courts as the action became more popular. By the 16th century, the assize of novel disseisin had been largely replaced by the more convenient action of ejectment. The 1623 limitations statute that barred rights of entry after 20 years also barred the action of ejectment (which depended on a right of entry) after the same lapse of time, but that Act did not apply to the writ of right and did not affect title. The time period during which the more cumbersome writ of right could be brought had been set by statute in 1540 at 30 years for plaintiffs who relied on their own prior seisin and 60 years for those who relied on the seisin of an ancestor as proof of their title. In 1833, major reform in England was implemented by the Real Property Limitation Act, which abolished the writ of right and most other real actions and set the time limit for actions for recovering possession of land at 20 years, at which time the statute abolished title as well.

The time limit to bring actions regarding personal property, contract, and torts was generally set by the 1623 statute of limitations at six years, with certain exceptions: for assault, battery, and false imprisonment, the period was four years, and for slander, two years. The Civil Procedure

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9 21 Jac I, c 16. Note that this statute has been pleaded by defendants in Indigenous rights cases in Canada: see *Stoney Creek Indian Band et al. v Alcan Aluminum Limited*, 1999 BCCA 527 (CanLII) at paras 15, 37; *Chippewas of Sarnia Band v Canada (Attorney General)*, [1999] OJ No 1406 at paras 435, 445; *Tsilhqot’ín Nation v British Columbia*, 2007 BCSC 1700 (CanLII) at para 1308.
10 Sutherland, supra note 7 at 23, 37-38, 130-31.
13 32 Hen VIII, c 2.
14 3 & 4 Will IV, c 27. This statute was pleaded by British Columbia in *Tsilhqot’ín Nation* BCSC, supra note 9 at para 1308.
Act, 1833\textsuperscript{17} set a 20-year limitation period for actions to obtain payment of certain rents and debts, and six- and two-year periods for other obscure actions not covered by the 1623 Act.\textsuperscript{18}

The purposes behind these various limitations on rights of action are well known. At a time when most people in England were illiterate, proof of land rights depended more on the testimony of living persons than on written documents. Use of land and the harvesting of crops (taking esples) were activities that neighbours could observe as evidence of possession, which was (and is) a root of title.\textsuperscript{19} Until ways to avoid it were found, conveyance of freehold estates had to be by feoffment with livery of seisin, a ceremony involving the symbolic handing over of a clod of earth or a branch on the land in the presence of witnesses.\textsuperscript{20} As memories faded and people died, this evidence would be lost, making it more and more difficult to establish the factual basis for rights.\textsuperscript{21} In addition to this practical evidentiary matter, it was thought that, as a general rule, long, peaceful possession should not be disturbed. Expectations are created by possession, improvements made, third-party reliance implicated, and so on. Those with land claims should therefore act on them in a timely way, rather than neglectfully sleep on their rights.\textsuperscript{22} Social harmony as well as conceptions of justice thus militated in favour of barring rights, whether at common law or by statute, after reasonable periods of time.\textsuperscript{23}

In our history of limitations up to now, the focus has been on time limitations on enforcement of common law property rights. With the development of uses (now called trusts), equitable land rights were created that were not necessarily subject to common law or statutory limitation periods. Equity developed its own time bar to equitable actions and remedies, known as laches (from French, “lâche”, meaning slack or negligent). The emphasis in laches is more on the inaction of the person with the equitable right, in keeping with equity’s focus on the behaviour of the parties and on fairness, as opposed to strict legal rules. Judges deciding whether to grant equitable remedies have much more discretion than common law judges, as reflected in the flexible application of the doctrine of laches, compared with the strict time periods in statutes of limitations. However, in the exercise of their equitable jurisdiction judges can adopt and apply statutory limitation periods by analogy if there is a close resemblance between the equitable action before them and a common law action to which the statute applies.\textsuperscript{24} Again, in this

\begin{itemize}
\item \textsuperscript{17} 3 & 4 Will IV, c 42.
\item \textsuperscript{18} See Lightwood, \textit{Time Limit}, supra note 15 at 194-97.
\item \textsuperscript{19} See John M Lightwood, \textit{A Treatise on Possession of Land} (London: Stevens & Sons, 1894); McNeil, \textit{Common Law Aboriginal Title}, supra note 6 at 6-78.
\item \textsuperscript{20} See Simpson, supra note 6 at 119.
\item \textsuperscript{21} See Trustees of Dundee Harbour \textit{v} Dougall (1852) 1 Macq 317 (HL) at 321.
\item \textsuperscript{22} See \textit{Cholmondeley v Clinton} (1820) 2 Jac & W 1 at 140, 37 ER 527 at 577.
\end{itemize}
situation judges have discretion, as their authority to apply equitable limitation periods by analogy arises from the doctrine of laches.\(^{25}\)

The date at which English common law, statutes, and equity were received in Canada varies from province to province, depending on the manner and time of British colonization and reception statutes.\(^{26}\) For example, in Upper Canada (since Confederation, the province of Ontario), English law in relation to property and civil rights was statutorily received as of October 15, 1792.\(^{27}\) This means that the English limitations statute of 1623 would have been received on that date, whereas the *Real Property Limitation Act* of 1833 and the *Civil Procedure Act, 1833* would not. Conversely, in British Columbia the latter two Acts, the first of which superseded the 1623 statute, would have been received because English law was legislatively introduced as of November 19, 1858.\(^{28}\) In the three Prairie Provinces, the reception date set by statute is July 15, 1870, thereby incorporating the 1833 Acts.\(^{29}\) Of course, the provinces subsequently enacted their own statutes of limitations, which have often been replaced and amended.

Because statutes of limitations are generally provincial and vary across Canada,\(^{30}\) it will not be possible in this paper to assess and analyze the application of each statute to Indigenous claims. Instead, our focus will be on how statutes of limitations have been applied to those claims in selected judicial decisions. Particular attention will be paid to the nature of the claims to which the statutes have been applied, the impact of the federal division of powers, the constitutional protections for Aboriginal and treaty rights (especially section 35(1) of the *Constitution Act, 1982*\(^{31}\)), and the goal of reconciliation.

2. Leading Canadian Cases

(a) **Guerin v The Queen**

The cases involving application of statutes of limitations to Indigenous claims reveal a remarkable and disturbing lack of rigorous analysis on the part of the judges. An early example is *Guerin v The Queen*,\(^{32}\) decided by the Supreme Court of Canada in 1984. In that case, the Indian Affairs Branch of the federal government accepted a surrender of reserve lands from the

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\(^{25}\) See John Brunyate, *Limitation of Actions in Equity* (London: Stevens & Sons, 1932), 16, quoted with approval by La Forest J in *M.(K.) v M.(H.)*, *supra* note 23 at 74: “the substantial difference between cases where the Court acts in obedience to a Statute of Limitations and cases where it acts by analogy with the statute is that in the former the limitation is peremptory whereas in the latter it is but part of the law of laches.”


\(^{29}\) 38 Vict c 12 (Man); 51 Vict 33, s 1 (Can); 49 Vict, c 25, s 3 (Can); 4 & 5 Ed VII, c 3, s 16; 4 & 5 Ed VII, c 42, s 16. See Côté, *supra* note 26 at 89-91.


\(^{31}\) Being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

Musqueam Band in the 1950s and leased them to a golf club on terms substantially less beneficial to the Musqueam than those they had agreed to. The Federal Court trial judge found that the surrender had created a trust and that the Crown breached the trust when it leased the lands on terms other than those agreed to by the Musqueam. He awarded ten million dollars in equitable damages to the Musqueam, and this decision was upheld by the Supreme Court. Justice Wilson, for herself and two other members of the Court, agreed that a trust had been created, whereas Justice Dickson, for himself and three others, found that a trust had not been created. He upheld the damage award nonetheless on the basis of breach of the Crown’s fiduciary obligations.

The Crown had argued that the British Columbia statute of limitations barred the action because more than six years (the limitation period) had passed between the time of the lease and the commencement of the action. The trial judge found, and the Supreme Court agreed, that the limitation period had not run out because it did not start to run until the Musqueam obtained a copy of the lease. Prior to that, Crown officials had refused to give the Musqueam a copy and were guilty of equitable fraud, which prevented time from running. The Supreme Court also agreed with the trial judge that the Crown’s unconscionable conduct and the Musqueam’s lack of knowledge of the contents of the lease prevented the Crown from relying on the equitable doctrine of laches.

Although the trial judge and the Supreme Court rightly concluded that the Musqueam claim was not barred by the statute of limitations, the problem with this aspect of their judgments is that they provided no explanation of why a provincial statute could even apply to an allegation in Federal Court of a breach of fiduciary obligation by the Crown in right of Canada. While it is true that a provision of the Federal Court Act referentially incorporates into federal law limitation periods in the province where a cause of action arises, it is odd that none of the judges in the Guerin case mentioned or explicitly relied on this provision. Moreover, they seemed to take for granted that statutes of limitation apply to Indigenous claims, despite the sui generis nature of Indigenous peoples’ Aboriginal, treaty, and other rights and their special relationship with the Crown, as acknowledged in Guerin and numerous other cases. Also, the history of

33 [1982] 2 FC 385 [Guerin FC].
34 RSBC 1960, c 370; RSBC 1979, c 236.
35 Guerin SCC, supra note 32 at 389-90. The Federal Court Appeal did not deal with the application of the statute or with laches because it was of the opinion that the Crown did not owe equitable obligations in the circumstances: [1983] 2 FC 656 at paras 117-18.
36 Guerin FC, supra note 33 at 129-61; Guerin SCC, supra note 32 at 389-90.
37 Guerin FC, supra note 33 at 62-69; Guerin SCC, supra note 32 at 390.
38 SC 1970-71-72, c 1 (reproduced in RSC 1970 (2nd Supp), c 10), s 38(1), now the Federal Courts Act, RSC 1985, c F-7, s 39(1), which provides: “Except as expressly provided by any other Act, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings in the Federal Court of Appeal or the Federal Court in respect of any cause of action arising in that province.” Note also s 39(2), which would apply in the territories: “A proceeding in the Federal Court of Appeal or the Federal Court in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose.” Prior to the Federal Court Act, in force as of June 1, 1971, the Exchequer Court Act contained an equivalent provision: RSC 1927, c 34, s 32; RSC 1952, c 98, s 31.
39 Guerin SCC, supra note 32 at 382, 385, 387. See also Simon v The Queen, [1985] 2 SCR 387 at para 33 [Simon]; Delgamuukw, supra note 1, esp paras 3, 82, 112; R v Marshall, [1999] 3 SCR 456 at paras 44 (Binnie J), 78
colonial repression would have made it very difficult, if not impossible, for Indigenous people to be aware of and be able to bring their claims in Canadian courts. How were they to know or understand the procedural details of a foreign legal system expressed in languages (English and French) that most of them would have had little or no knowledge of until forced to learn them in residential schools? Moreover, when some First Nations in British Columbia did contemplate litigating their claims, a 1927 amendment to the Indian Act, in place until 1951, made it virtually impossible for them to do so because it made it illegal for anyone to raise money or pay legal counsel to pursue any “Indian” claim without the written permission of the Superintendent General of Indian Affairs.

The problem with this aspect of the Guerin case is that it created a precedent for the application of limitation periods to Indigenous claims. Perhaps the Supreme Court judges thought that, because they could avoid the application of the statute on the facts, they did not need to engage in an analysis of why it should apply as a matter of law. But surely the question of whether it was appropriate to apply the statute at all should have been considered and analyzed first.

(b) Blueberry River Indian Band v Canada

Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development) also involved a claim against the Crown in right of Canada for breach of its fiduciary obligations in the context of a surrender of reserve land. The Supreme Court decided that the Department of Indian Affairs (DIA) had breached the Crown’s fiduciary obligations to the First Nations in question by not reserving the mineral rights for them when it transferred the surrendered lands to the Director of The Veterans' Land Act, 1942 (DVLA), making the lands available for grant to veterans who had returned from World War II. The claim for that breach was barred by the British Columbia statute of limitations that placed a 30-year maximum limitation period on all claims. However, the Court held that the DIA, when it discovered that the mineral rights had been transferred to the DVLA in error, breached the Crown’s fiduciary
obligations again by not cancelling the transfer, as it had the authority to do under a provision of the Indian Act that was in force at the time.\(^\text{47}\) It retained this authority up to the time the lands were granted to veterans, which for about 22% of the lands had happened within the 30-year period.\(^\text{48}\) Moreover, even if the shorter six-year period in the statute of limitations applied,\(^\text{49}\) this was a situation where “material facts relating to the cause of action have been wilfully concealed,” in which case time does not start to run until a “reasonable man,” with knowledge of those facts and appropriate advice, would have known he had a cause of action that would have “a reasonable prospect of success.”\(^\text{50}\) Justice McLachlin, with whom the other members of the Court agreed on this point, said that “[t]his section [of the statute] and its equivalents elsewhere embrace a broad definition of discoverability…. The facts in the case at bar fall within it.”\(^\text{51}\) The First Nations were therefore awarded damages for breach of the Crown’s fiduciary obligations regarding the mineral rights transferred to veterans after the DIA became aware of its error in transferring those rights to the DVLA.

Unlike in Guerin, the Supreme Court relied explicitly on section 38(1) (now section 39(1)) of the Federal Court Act,\(^\text{52}\) which “adopts the limitations legislation in place in the province where the cause of action arose,”\(^\text{53}\) to explain how the BC statute of limitations could apply in the Federal Court where the Blueberry River litigation had been brought. In so doing, Justice McLachlin summarily dismissed concerns over applying limitations statutes to Indigenous claims: “Other arguments, neither presented nor considered below, were presented by the Bands and interveners in support of relaxing or not applying the limitation periods prescribed by the Limitation Act of British Columbia. I find them unpersuasive in the context of this case and consider them no further.”\(^\text{54}\) As Blueberry River, like Guerin, involved the Crown’s fiduciary obligations in the

\(^{47}\) RSC 1927, c 98, s 64.
\(^{48}\) Blueberry River, supra note 44 at paras 118-19.
\(^{49}\) Limitation Act, supra note 46, s 3(4).
\(^{50}\) Ibid, s 6(3)(e).
\(^{51}\) Blueberry River, supra note 44 at para 121, citing M.(K.) v. M.(H.), supra note 23. See also per Gonthier J at paras 1, 20-23.
\(^{52}\) Supra note 38. Section 39(1) was also applied in Ermineskin Indian Band and Nation v Canada, 2006 FCA 415 (CanLII), [2007] 3 FCR 245, at paras 323-24, affirmed [2009] 1 SCR 222, without reference to limitations issues.
\(^{53}\) Blueberry River, supra note 44 at para 107.
\(^{54}\) Ibid at para 122. In Blueberry River, one of the interveners made these arguments, as quoted by Justice Russell in Samson First Nation v Canada, 2015 FC 836 (CanLII) at para 132 [Samson First Nation]:

a. s. 39 of the Federal Courts Act is unconstitutional as it extinguishes constitutionally protected aboriginal and treaty rights and does not express a clear and plain intention to do so;
b. s. 39 is inconsistent with the fiduciary duties of the Crown towards aboriginal people;
c. a claim based on an aboriginal interest in land is not subject to a limitation period because the cause of action has not yet been finally extinguished, given an aboriginal interest in land is a sui generis collective right that accrues to members individually as they are born;
d. any limitation period should be postponed pursuant to discoverability provisions which postpone limitation periods until the claimant ought to have known they had a reasonable cause of action, on the basis that prior to the enactment of the Constitution in 1982 and the Supreme Court decisions in Guerin and Sparrow, the law surrounding First Nations was poorly understood and aboriginal people have been educationally disadvantaged and in a relationship of unquestioning dependence with the Crown;
context of surrender of reserve lands, this left open the possibly that arguments against the application of statutes of limitation might be accepted in other Indigenous claims contexts.

(c) *Wewaykum Indian Band v Canada*

The next significant case in which the application of limitation periods was considered, again in the context of the Crown’s fiduciary obligations to First Nations, was *Wewaykum Indian Band v Canada*. This case involved reserve creation rather than surrender of reserve lands. Two Indian bands on Vancouver Island each claimed that the Crown had improperly set aside land to which it was entitled as a reserve for the other band. The Supreme Court decided that, while fiduciary duties may be owed in the context of reserve creation, there had been no breach of the Crown’s fiduciary obligations to the bands in this instance. Moreover, even if breaches had occurred, the legal actions were barred by the passage of time.

The relevant statutes were the BC *Statute of Limitations*, which had been in force from 1897 to 1975, and BC *Limitations Act* of 1975 that replaced it, both of which were referentially incorporated into federal law by section 39(1) of the *Federal Court Act*. Justice Binnie, delivering the unanimous judgment of the Court, considered several arguments why the limitations statutes should not apply. First, it was argued that a provincial statute could not extinguish an Indian interest, as this is within the exclusive jurisdiction of Parliament. While acknowledging that “the B.C. *Limitations Act* provides for extinguishment of the cause of action,” Binnie J said, “it applies as federal law. Parliament is entitled to adopt, in the exercise of its exclusive legislative power, the legislation of another jurisdictional body, as it may from time to time exist…. This is precisely what Parliament did when it enacted what is now s. 39(1) of the

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56 RSBC 1897, c 123.

57 SBC 1975, c 37.

58 *Supra* note 38. See *Wewaykum*, supra note 23 at paras 125-32. See also *Tacan v Canada*, 2005 FC 385 [*Tacan*], applying *Wewaykum* and section 39(1) to claims by First Nation veterans based on breach of fiduciary obligations and fraudulent misrepresentation by the Crown.

59 *Wewaykum*, supra note 23 at para 115. The relevant provision is section 91(24) of the *Constitution Act, 1867*, 30 & 31 Vict, c 3 (UK). Binnie J appears to have accepted the argument, as he cited *Canadian Pacific Ltd. v Paul*, [1988] 2 SCR 654 at 673 [*Canadian Pacific*] as authority. For confirmation, see *Delgamuukw*, supra note 1 at paras 172-83.

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“As the extinguishment occurred before April 17, 1982, when section 35 of the Constitution Act, 1982 came into force, Binnie J did not have to consider the impact of that constitutional provision (discussed below).

The second argument was that sections 13 and 14 of the Federal Real Property Act prevented the BC statutes of limitations from applying because those sections prohibit the acquisition of federal real property, which would include reserve land, by provincial legislation or prescription. Justice Binnie gave two reasons for dismissing this contention. First, any acquisition of the reserve land would be by virtue of federal legislation, namely section 39(1) of the Federal Court Act, not provincial legislation. Secondly, the land in question remained federal real property, as defined in the Federal Real Property Act, because reserve land in British Columbia is vested in the Crown in right of Canada and the underlying title was not in dispute in this case.

The third argument was that section 39(1) of the Federal Court Act cannot apply to referentially incorporate provincial limitation periods because under the Indian Act the only way an Indian band can be divested of its reserve land is by a valid surrender. It was contended that the qualifying words, “Except as expressly provided by any other Act,” in section 39(1) would include this aspect of the Indian Act. Binnie J’s response was that those words refer “to another limitation or prescription period. The Indian Act does not establish any comprehensive scheme for the litigation and adjudication of disputes regarding reserves. The adjudication of such disputes is within the jurisdiction of the courts and in this case is governed by the Act constituting the Federal Court. There is thus no relevant statutory provision to the contrary.”

For present purposes, the fourth and final argument, that limitation periods “should not be allowed to operate as ‘instruments of injustice’,” is the most significant. In response, Justice Binnie fell back on standard justifications for limitations of actions: “Witnesses are no longer available, historical documents are lost and difficult to contextualize, and expectations of fair practices change.” This observation came from the same Supreme Court that had decided just six years earlier in Van der Peet that Aboriginal rights depend on proof of practices, customs, and traditions integral to distinctive Indigenous cultures at the time of first contact with Europeans, which can be as much as 400 years in the past. A year later, the Court decided in

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61 SC 1991, c 50.
62 Ibid, s 2.
63 Wewaykum, supra note 23 at paras 117-18, applied in Peter Ballantyne Cree Nation v Canada (Attorney General), 2016 SKCA 124 (CanLII) at para 217 [Peter Ballantyne CA], leave to appeal dismissed 2017 CanLII 38581 (SCC).
64 See also Peter Ballantyne CA, supra note 63 at paras 218-30, where this argument was addressed and dismissed.
65 Wewaykum, supra note 23 at para 120 (Binnie J’s emphasis).
66 Ibid at para 121.
67 Ibid.
68 Supra note 1.
69 See R v Adams, [1996] 3 SCR 101. Compare this with proof of customary rights in England, which must in theory have originated before 1189, but can in fact be proven by testimony of living witnesses that the custom has been
Delgamuukw\(^{70}\) that Aboriginal title depends on proof of exclusive Indigenous occupation of land at the time of Crown assertion of sovereignty, which occurred in 1713 in parts of the Maritime Provinces, 1763 in southern Quebec and Ontario, and 1846 in British Columbia.\(^{71}\) Living witnesses in Aboriginal rights and title cases? They do not exist. Historical documents? Indigenous peoples generally did not keep them. Expectations of fair practices? At the time of contact and assertion of Crown sovereignty before treaties were even negotiated, would there have been shared expectations?

Justice Binnie nonetheless emphasized the “need for repose”, pointing to the facts of the case:

… the bands had independent legal advice at least by the 1930s, and were aware at that time of the material facts, if not all the details, on which the present claims are based. While the feeling may not have been unanimous, each band membership elected not to disturb its neighbours. The conduct of each band between 1907 and 1936 suggests that not only was the other band’s open and notorious occupation of its reserve acknowledged, but such occupation was considered, as between the bands, to be fair and equitable.\(^{72}\)

While acknowledging that “[t]his is not to say that historical grievances should be ignored, or that injustice necessarily loses its sting with the passage of the years”,\(^{73}\) on the facts Justice Binnie did not think any injustice had been done in this instance: “Awareness of the availability of a claim in equity for financial compensation against the Crown [as a result of the Guerin decision] does not … turn what the band regarded as an equitable situation into an inequitable situation.”\(^{74}\)

Having determined that the BC statutes of limitations applied, Justice Binnie found that time had run out long before the litigation had been commenced. In so doing, he dismissed a contention that exclusion of the appellant bands from the reserve land they claimed was a “continuing breach”, giving rise to a new cause of action every day it continued:

Acceptance of such a position would, of course, defeat the legislative purpose of limitation periods. For a fiduciary, in particular, there would be no repose. In my view such a conclusion is not compatible with the intent of the legislation…. It was open to both bands to commence action no later than 1943 when the Department of Indian Affairs finally amended the relevant Schedule of Reserves. There was no

\(^{70}\) Delgamuukw, supra note 1.

\(^{71}\) Compare the requirements for proof of title to land by adverse possession, which, depending on the local statute, can be as short as ten years: e.g. see the Real Property Limitations Act, RSO 1990, c L15, ss 4 and 15.

\(^{72}\) Wewaykum, supra note 23 at paras 122-23.

\(^{73}\) Ibid at para 123.

\(^{74}\) Ibid at para 124.
repetition of an allegedly injurious act after that date. The damage (if any) had been done.\[75\]

Justice Binnie decided as well that any claims the appellant bands might have for breach of the Crown’s fiduciary obligations were also barred by the equitable doctrine of laches and acquiescence.\[76\] Their conduct in accepting the status quo regarding the reserve lands for several decades amounted to a waiver of any rights they may have had to claim compensation for loss of those lands. Additionally, each band had made improvements on the reserve land it occupied, on the reasonable understanding that the other band would make no claim to the land. “All of this,” Binnie J said, “was done with sufficient knowledge ‘of the underlying facts relevant to a possible legal claim’.”\[77\]

(d) **Canada (Attorney General) v Lameman**

The next Supreme Court decision to consider is *Canada (Attorney General) v Lameman*.\[78\] The case was brought in the Alberta Court of Queen’s Bench by individuals who claimed to be descendants of Papaschase Band members who had adhered to Treaty 6 in 1877.\[79\] Some of the band members “took scrip” in 1886,\[80\] and the reserve lands that had been set aside for the band were surrendered to the Crown in 1889. The members remaining in the band at that time joined the Enoch Band, but continued to be entitled to the money from the sale of the reserve lands that the Crown held in trust. The claimants alleged that the Crown had breached its treaty obligations by not providing all the reserve land the band was entitled to and by not providing farm implements and food during periods of famine. They also alleged that the consequences of taking scrip had not been explained and that the *Indian Act* requirements for surrender of reserve lands had not been followed. Breach of fiduciary duty for mismanaging the proceeds of sale of the reserve lands was also alleged.

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\[75\] *Ibid* at para 135. Justice Binnie does not appear to have been aware that, in 1943, First Nations were prohibited from raising money or hiring lawyers to pursue their claims without federal government permission: see note 41 *supra*.

\[76\] See also *Callihoo v Canada (Minister of Indian Affairs and Northern Development)*, 2006 ABQB 1 (CanLII) at paras 157-60 (*Callihoo*), where Hillier J, in *obiter*, likewise would have applied laches and acquiescence to dismiss the claims. The Alberta CA reversed because the decision had been based in part on a flawed affidavit: 2007 ABCA 59.

\[77\] *Ibid* at para 111, quoting from *M.(K.) v M.(H.)*, *supra* note 23 at 79.


\[79\] Proceedings against the Crown in right of Canada can generally be brought in either the Federal Court or in a provincial superior court. The *Crown Liability and Proceedings Act*, RSC 1985, c C-50, s 21(1), provides: “In all cases where a claim is made against the Crown, except where the Federal Court has exclusive jurisdiction with respect to it, the superior court of the province in which the claim arises has concurrent jurisdiction with respect to the subject-matter of the claim.”

\[80\] Scrip, a certificate that could be exchanged for a set amount of land or money, was distributed by the Crown to settle the land claims of some of the Métis: see Donald Purich, *The Metis* (Toronto: James Lorimer, 1988), 107-27; *Manitoba Metis Federation v Canada (Attorney General)*, [2013] 1 SCR 623 [*Manitoba Metis Federation SCC*] at paras 118-23. Apparently, the band members who took scrip gave up their Indian status and treaty rights.
The Crown brought a motion for summary judgment, alleging that the allegations did not disclose triable issues, that the plaintiffs lacked standing, and that the Alberta Limitations of Action Act and laches barred the action. On appeal from the motions judge and the Alberta Court of Appeal, the Supreme Court dealt only with the statute of limitations defence, which the Court unanimously held barred each of the claims, with the exception of the claim for an accounting of the proceeds of sale of the reserve lands, which the Court said is a continuing claim not caught by the statute. On the facts available, the other claims were known to the plaintiffs or discoverable by them by the exercise of reasonable diligence by the 1970s at the latest and so were barred by the six-year limitation period.

The Court relied upon the Wewaykum decision as authority that “the rules on limitation periods apply to Aboriginal claims.” However, we have seen that the BC statute of limitations applied in that case because the action had been brought in the Federal Court and what is now section 39(1) of the Federal Court Act referentially incorporated the statute into federal law. The action in Lameman had been brought, not in the Federal Court, but in the Alberta Court of Queen’s Bench. For this reason, the explanation for the application of the provincial statute in Wewaykum should not have applied in Lameman. However, as pointed out by the motions judge in Lameman, an equivalent provision in the federal Crown Liability and Proceedings Act, versions of which have been in force since 1886, allows the Crown in right of Canada to rely on the relevant provincial statute of limitations in any proceedings against it:

32. Except as otherwise provided in this Act or in any other Act of Parliament, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings by or against the Crown in respect of any cause of action arising in that province, and proceedings by or against

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82 The Alberta CA would have reversed the motions judge’s decision that the action was barred by the limitations statute and have allowed the case to proceed to trial: Lameman v Canada (Attorney General), 2006 ABCA 392.
83 Lameman, supra note 78 at para 12. See also the motion judge’s decision, Papaschase Indian Band (Descendants of) v Canada (Attorney General), [2005] 8 WWR 442 at paras 127, 225 [Papaschase Indian Band].
84 Lameman, supra note 78 at para 13. See McCallum v Canada (Attorney General), 2010 SKQB 42 (CanLII) at para 38 [McCallum], where this unqualified statement was applied to an action by Métis persons who alleged that the Crown had breached fiduciary and other obligations owed to them when it created the Cold Lake Weapons Range on lands they traditionally used for hunting, trapping and fishing. See also Athabasca Chipewyan First Nation v Alberta (Minister of Energy), 2011 ABCA 29 (CanLII) [Athabasca Chipewyan], where the Court applied Lameman to bar judicial review of an administrative decision allegedly made without consultation.
85 See Canadian Pacific, supra note 59 at 673; Chippewas of Sarnia SCJ, supra note 9 at paras 496-500. In Chief Stanley Thomas BCSC, supra note 41, Lysyk J distinguished between cases brought in the Federal Court, where section 39(1) applies, and cases brought in a provincial court, where it does not and where provincial limitations statutes cannot apply of their own force if they trench upon federal jurisdiction over “Indians, and Lands reserved for the Indians.” That case involved an action for trespass to reserve lands against the Crown in right of British Columbia and a private corporation. Lysyk J’s judgment was overturned on appeal without addressing the constitutional issues: Stoney Creek CA, supra note 9.
86 Supra note 79, s 32.
87 See Papaschase Indian Band, supra note 83 at para 134, referring to Petitions of Right Act, RSC 1886, c 136, s 8, and the Crown Liability Act, SC 1952-53, c 30, s 19.
the Crown in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose.

So although the Supreme Court was not wrong to conclude that provincial limitation periods can apply in actions against the Crown in right of Canada, it should have relied upon this statutory provision rather than Wewaykum. This is just one indication that the Court in Lameman was not prepared to give serious consideration to arguments that statutes of limitations may not apply to Indigenous claims in some circumstances.

Another problem is that the Court did not specify the precise date when the plaintiffs, exercising due diligence, should have been aware of the facts giving rise to the claims. It could have been in 1974 or 1979.88 If 1979, the six-year limitation period would not have run out in 1982 when section 35 of the Constitution Act, 1982 came into force.89 In R v Van der Peet and Mitchell v MNR,90 both decided before Lameman, the Supreme Court held that section prevented even Parliament from extinguishing Aboriginal rights unilaterally. This conclusion must apply to treaty rights as well because they were given the same constitutional protection by section 35. Not all of the plaintiffs’ claims in Lameman would have been to section 35 rights, but the claim for breach of treaty rights clearly would have been. So even though the Crown Liability and Proceedings Act would have incorporated the Alberta statute of limitations into federal law, the statute could not have applied to extinguish treaty rights that were still in existence when section 35 came into force.91 If the barring of the right of action by the Alberta legislation after that were held to be only an infringement rather than an extinguishment of rights,92 the Crown still would have had to justify the infringement under the Sparrow test by proving a valid legislative

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88 Lameman, supra note 78 at para 17.
89 Remarkably, the Court observed: “We note that no notice of a constitutional question was given, and that no constitutional challenges lie before the Court”: ibid at para 9. Why not? Counsel may not have raised the constitutional issue if they thought time began to run earlier than 1976, but shouldn’t the Court have taken note of the issue in deciding that time may only have begun to run in 1979? In Samson First Nation, supra note 54 at para 135, Russell J noted that “in Lameman SCC, above, the Supreme Court of Canada applied the applicable provisions of the Alberta limitations statute in force at the time. There was no discussion of the fact that limitations legislation could not apply to constitutionally-protected treaty or Aboriginal rights. I cannot accept that the Supreme Court of Canada would have applied legislation that was constitutionally inapplicable because it lacked a Notice of Constitutional Question.” However, in Samson First Nation the plaintiffs were challenging the constitutionality of the application of limitations statutes, and Russell J’s decision was affirmed on appeal: see supra note 54. See also LeCaine v Registrar of Indian and Northern Affairs, 2015 SKCA 43 (CanLII) at para 60, where Jackson J decided that “limitation periods apply equally to constitutionally-protected aboriginal rights claims (see Lameman at para 12).” However, she also stated at para 59 that, “[a]s a general rule, appellate courts do not hear constitutional arguments for the first time on appeal (see Wuttunee v Merck Frosst Canada Ltd., 2008 SKCA 125 at para 13, 314 Sask R 90). Further, no notice was given to the Attorney General or the other respondents. In such circumstances, the Court declines to consider this issue” (para 59). The issue was the constitutionality of section 14.2(1) of the Indian Act, RSC 1985, c I-5, setting a three-year limit to protest “the inclusion or addition of the name of a person in, or the omission or deletion of the name of a person from, the Indian Register, or a Band List.”
90 Van der Peet, supra note 1 at para 28; Mitchell v MNR, [2001] 1 SCR 911 at para 11 [Mitchell].
91 In R v Sparrow, [1990] 1 SCR 1075 [Sparrow] at 1091-93, the Court held that any Aboriginal or treaty rights not previously extinguished would have been existing rights recognized and affirmed by section 35(1).
92 Land rights apart (see Limitations of Action Act, supra note 81, s 44), the statute barred actions without explicitly barring rights.
objective, minimal impairment, consultation, and payment of compensation. Importantly, however, the Court noted “that no notice of a constitutional question was given, and that no constitutional challenges lie before the Court.” As constitutional issues were not raised, Lameman cannot be authority for excluding consideration of constitutional questions when statutes of limitations are pleaded as defences to Indigenous claims.

(e) Manitoba Metis Federation Inc. v Canada

The Supreme Court considered the application of statutes of limitations to Indigenous claims again in Manitoba Metis Federation Inc. v Canada (Attorney General). This case involved a claim by the Métis of Manitoba that the Crown in right of Canada had breached its fiduciary obligations and not acted in accordance with the honour of the Crown in implementing the provisions in the Manitoba Act, 1870 that relate to their land rights. The plaintiffs also alleged that certain provincial statutes relating to those provisions were ultra vires. As they were not requesting any remedies other than declarations, the Court had to decide whether limitations statutes and laches apply to actions for declarations that the Crown has not acted honourably.

In these contexts, the majority, in a judgment written by Chief Justice McLachlin and Justice Karakatsanis, decided that statutes of limitations and the doctrine of laches do not apply. The claim in this case was not for personal remedies that would be barred by limitation periods, but for declarations of constitutional invalidity not barred by the passage of time: “this Court has found that limitations of actions statutes cannot prevent the courts, as guardians of the Constitution, from issuing declarations on the constitutionality of legislation. By extension, limitations acts cannot prevent the courts from issuing a declaration on the constitutionality of the Crown’s conduct.” However, if the plaintiffs had been seeking personal remedies such as

93 Sparrow, supra note 91 at 1111-19. Compare Samson First Nation, supra note 54 at para 120, where Russell J stated: “In my view, Lameman SCC leaves no doubt that the Supreme Court of Canada felt there was no issue of constitutionality when it comes to applying limitations legislation to claims involving Aboriginal and treaty rights.” How can that be if the limitation period had not run out before section 35 provided constitutional protection to those rights? The answer given by Russell J (see paras 129-30, 213-30, 240) and by Smith J in Peter Ballantyne Cree Nation v Canada (Attorney General), 2014 SKQB 327 (CanLII) at paras 138-47 (Peter Ballantyne QB), was that, except in a conflicts of law context, limitations statutes are procedural rather than substantive and so do not even infringe rights: see discussion at notes 170-82 below.

94 Lameman, supra note 78 at para 9.

95 Kerry Wilkins has very helpfully pointed out to us that “The usual rule is that the SCC won’t hear and determine constitutional issues without a notice of constitutional question (NCQ). The current rule is in s. 33(2)-(4) of the Supreme Court of Canada Rules. Serving and filing a NCQ puts all federal and provincial attorneys general on notice that the appellant is challenging the constitutional validity or applicability of some piece of legislation. The court here probably thought it would have been unfair to decide this constitutional issue without proper notice to all the AGs” (personal communication). In light of this, one needs to question Russell J’s observation in Samson First Nation, supra note 54 at para 120, that “the Supreme Court of Canada [in Lameman] felt there was no issue of constitutionality when it comes to applying limitations legislation to claims involving Aboriginal and treaty rights” (see note 89 above).

96 Supra note 80. See Luk & Barrett, supra note 4 at 405-08.

97 The Court decided this claim was moot and did not need to be addressed, as the challenged statutes are no longer in force and could not have any future impact: Manitoba Metis Federation SCC, supra note 80 at paras 129-32.

98 Rothstein and Moldaver JJ dissented on these and other issues: ibid at paras 215-303.

99 Ibid at para 135. See Mew, supra note 30 at §18.55-56. On the distinction between declarations and other remedies, see also Callihoo, supra note 76 at paras 127-56. Compare Peepeekisis First Nation FCA, supra note 60,
Where Indigenous peoples are concerned, the need for reconciliation is another reason the majority gave why courts cannot be barred for ruling on the constitutionally of Crown actions, even if they occurred a long time in the past:

The unfinished business of reconciliation of the Métis people with Canadian sovereignty is a matter of national and constitutional import. The courts are the guardians of the Constitution and … cannot be barred by mere statutes from issuing a declaration on a fundamental constitutional matter. The principles of legality, constitutionality and the rule of law demand no less.

Chief Justice McLachlin and Justice Karakatsanis then explained that reconciliation is a fundamental goal that has to be taken into account in determining the application of statutes of limitations:

Contemporary limitations statutes seek to balance protection of the defendant with fairness to the plaintiffs…. In the Aboriginal context, reconciliation must weigh heavily in the balance. As noted by Harley Schachter:

The various rationales for limitations are still clearly relevant, but it is the writer’s view that the goal of reconciliation is a far more important consideration and ought to be given more weight in the analysis. Arguments that provincial limitations apply of their own force, or can be incorporated as valid federal law, miss the point when aboriginal and treaty rights are at issue. They ignore the real analysis that ought to be undertaken, which is one of reconciliation and justification.

Schachter was writing in the context of Aboriginal rights, but the argument applies with equal force here…. The point is that despite the legitimate policy rationales in
deciding that Manitoba Metis Federation does not apply to permit a declaration of breach of honour of the Crown in relation to reserve lands where an effective alternative recourse is available, namely a claim under the Specific Claims Tribunal Act, SC 2008, c 22.

100 Manitoba Metis Federation SCC, supra note 80 at para 134, citing Kingstreet Investments Ltd. v New Brunswick (Finance), [2007] 1 SCR 3 [Kingstreet Investments SCC] (see paras 59-61) and Ravndahl v Saskatchewan [2009] 1 SCR 181 [Ravndahl SCC]. In Ravndahl, the Court distinguished between in personam remedies (e.g. damages), which can be barred by limitation periods, and in rem remedies (e.g. declarations of constitutional invalidity) that cannot. See further discussion at notes 234-41 below. However, neither of these cases involved claims by Indigenous people. They involved Charter remedies under section 24(1) that are available only for violations of Charter rights. Because Indigenous rights, including section 35 rights, are not Charter rights, section 24(1) does not apply to them: see R v Desautel, 2017 BCSC 2389 at paras 24, 124, affirmed 2019 BCCA 151 at para 27, affirmed R v Desautel, 2021 SCC 17 [Desautel SCC], without reference to section 24(1); Kent Roach, Constitutional Remedies in Canada, 2nd ed (looseleaf) (Toronto: Canada law Book, 2013), §15.100 n8, §15.1720. It is therefore not obvious why case law involving section 24(1) should apply to Indigenous rights that are sui generis and differ greatly from Charter rights.

favour of statutory limitations periods, in the Aboriginal context, there are unique rationales that must sometimes prevail.102 McLachlin CJ and Karakatsanis J also found the doctrine of laches to be inapplicable in the circumstances.103 The two main considerations, they said, are whether the claimant acquiesced and whether the defendant’s position changed as a consequence of “reasonable reliance on the claimant’s acceptance of the status quo.”104 Taking the circumstances into account, they concluded: “In the context of this case – including the historical injustices suffered by the Métis, the imbalance in power that followed Crown sovereignty, and the negative consequences following delays in allocating the land grants – delay by itself cannot be interpreted as some clear act by the claimants which amounts to acquiescence or waiver.”105 Moreover, … in this rapidly evolving area of the law, it is rather unrealistic to suggest that the Métis sat on their rights before the courts were prepared to recognize those rights. As it is, the Métis commenced this claim before s. 35 was entrenched in the Constitution, and long before the honour of the Crown was elucidated in Haida Nation. It is difficult to see how this could constitute acquiescence in equity.106 These reasons for not invoking laches could also apply to statutes of limitations. Given that the Supreme Court did not acknowledge that the Crown can owe fiduciary duties to Indigenous peoples before the Guerin decision in 1984, and decided for the first time in Haida Nation v British Columbia107 in 2004 that the Crown has been constitutionally bound by the honour of the Crown since asserting sovereignty,108 how could statutes of limitations have applied to those kinds of claims before the viability of the claims was acknowledged by the Supreme Court? Discoverability should apply not just to the facts underlying a claim, but also to the availability of judicial remedies.109 Nor had the delay in the Métis case caused the Crown to alter its position in any way. Additionally, courts must consider the conscionability of the parties’ behavior in exercising their equitable jurisdiction. In this case the Crown did not act honourably and so could not rely on

103 For another Métis case holding that laches did not apply on the facts, see McCallum, supra note 84 at paras 50-57. For a recent decision applying Manitoba Metis Federation’s ruling on laches to aspects of an Aboriginal title and treaty claim, see Chippewas of Saugeen First Nation et al. v. The Attorney General of Canada et al., 2021 ONSC 4181 at paras. 1141-1200. See also Thomas and Saik’uz First Nation v Rio Tinto Alcan Inc., 2022 BCSC 15 at para 613 [Thomas and Saik’uz].
104 Manitoba Metis Federation SCC, supra note 80 at para 145.
105 Ibid at para 147.
106 Ibid at para 149.
107 [2004] 3 SCR 511 [Haida Nation].
108 See also Beckman v Little Salmon/Carmacks First Nation, [2010] 3 SCR 103 [Beckman] at para 42: “The honour of the Crown has thus been confirmed in its status as a constitutional principle.” Although the Court cited several earlier Supreme Court decisions in support of this principle, it was first held in Haida Nation that the honour of the Crown can give rise to enforceable legal obligations, such as the duty to consult.
laches. McLachlin CJ and Karakatsanis J also observed that “[i]t is difficult to see how a court, in its role as guardian of the Constitution, could apply an equitable doctrine to defeat a claim for a declaration that a provision of the Constitution has not been fulfilled as required by the honour of the Crown.”

The Court therefore issued a declaration that the constitutional obligation of the Crown to act honourably in its dealings with the Métis had been breached. However, as the Court had concluded that the Crown owed no fiduciary duties with regard to the implementation of the relevant sections of the Manitoba Act, 1870, it was “not concerned with an action for breach of fiduciary duty.” If it had been, McLachlin CJ and Karakatsanis J, relying on Wewaykum and Lameman, reiterated that limitation statutes apply to Indigenous claims for breach of fiduciary obligations where the administration of Indigenous property is concerned. So is it only in the context of challenges to the constitutionality of legislation or of Crown action that statutes of limitations and laches do not apply? How would Indigenous people have known before Guerin that the Crown has fiduciary obligations and can be liable for their breach? Apparently, though, the Court is reluctant to allow old claims to proceed that could cost the Crown, and thus Canadian taxpayers, a lot of money. The Court acknowledged that where Indigenous claims are involved, the usual policy considerations for limitation periods need to give way sometimes to other considerations, especially the need for reconciliation. Surely this goal should weigh in the balance for claims that involve potential payment of compensation as well as in constitutional challenges.

110 Manitoba Metis Federation SCC, supra note 80 at paras 150-53.
111 Ibid at para 153. See also Watson v Canada, 2020 FC 129 (CanLII) at paras 382-90 [Watson], deciding that a declaration that two bands had been unlawfully amalgamated by the federal government in the 1880s was not barred by laches and acquiescence.
112 Manitoba Metis Federation SCC, supra note 80 at para 139.
113 Ibid at para 138.
114 In Air Canada v British Columbia, [1989] 1 SCR 1161 [Air Canada], per La Forest J at paras 77-78, the Supreme Court took “protection of the treasury” and the need to avoid “fiscal chaos” into account in considering whether taxes paid under an unconstitutional statute could be recovered. Compare Wilson J's partial dissent, rejecting this rationale. Significantly, in Kingstreet Investments SCC, supra note 100 at paras 28-29, the Court unanimously preferred Wilson’s dissent on this point. For a disturbing example of a case involving Indigenous land rights in the United States where the potential cost to the government was clearly a reason – maybe even the main reason – why the Supreme Court ruled against the plaintiffs, see Tee-Hit-Ton Indians v United States, 348 US 272 (1955), esp 283 n17. For criticism, see Nell Jessup Newton, “At the Whim of the Sovereign: Aboriginal Title Reconsidered” (1980) 31 Hastings LJ 1215, esp 1248-49; Kent McNeil, “How the New Deal Became a Raw Deal for Indian Nations: Justice Stanley Reed and the Tee-Hit-Ton Decision on Indian Title” (2019) 44:1 Am Indian L Rev 1, especially at 11-13.
115 Parliament, in the Specific Claims Tribunal Act, supra note 99, s 19, has waved the application of limitation periods and laches, thereby acknowledging that time limits on Tribunal proceedings would not promote reconciliation, an express goal of the Act: “In deciding the issue of the validity of a specific claim, the Tribunal shall not consider any rule or doctrine that would have the effect of limiting claims or prescribing rights against the Crown because of the passage of time or delay.” Fiscal concerns are addressed in s 20(1)(b), which caps monetary compensation (the only remedy available: s 20(1)(a)) at 150 million dollars. On application of the Act, see Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development), [2018] 1 SCR 83.
Having examined the Supreme Court jurisprudence on the application of limitation periods and laches, we can now analyze some of the fundamental constitutional, policy, and justice issues in more depth.

### 3. Constitutional Issues

As Justice Binnie’s judgment in *Wewaykum* demonstrates, application of the doctrine of laches to equitable claims is driven by the facts, especially evidence of the conduct of the parties. If the plaintiff knowingly acquiesced in the status quo for a long time and the defendant was led to believe that no legal action would be brought, it would be unjust to allow the plaintiff to stir up dead coals. However, while application of the equitable doctrine of laches, including the use of limitation periods by analogy, is always discretionary, application of statutes of limitations, if pleaded, is not. But to apply legislation, judges first have to interpret it, and this does give them a fair amount of leeway.

#### (a) Statutory Interpretation and Colonial Authority

In fulfilling this interpretive role, the courts are guided to some extent by presumptions and conventions. One such presumption is against statutory taking or limitation of rights. While legislatures have the authority to infringe or extinguish rights that are not constitutionally protected, the intention to do so must be clear and plain. This presumption is a judicially created protection for legal rights. It applies to legislation, such as statutes of limitations, that restricts access to the courts.

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116 See note 24-25 and accompanying text above. However, courts may have inherent jurisdiction to extend limitation periods in the interests of justice: see *Ordon Estate v Grail*, 30 OR (3d) 643 (Ont CA) at paras 119-20, affirmed [1998] 3 SCR 437 [Ordon Estate SCC] without addressing this issue (see paras 121, 139). The Court of Appeal relied upon *Basarsky v Quinlan*, [1972] SCR 380, in which the Court exercised its discretion to grant leave to amend a statement of claim, even though the application to amend came after the expiration of the relevant limitation period. However, if the action is in the Federal Court, apparently discretion to extend limitation periods is absent, as that court’s jurisdiction is statutory rather than inherent: see *Tacan*, supra note 58 at paras 86-88; *Jim Shot Both Sides*, supra note 60 at paras 225-29. Also, see *Athabasca Chipewyan*, supra note 84 at para 3, suggesting that there is no discretion to extend the limitation period for judicial review in Alberta. In most jurisdictions, statutes of limitations must be pleaded to be relied upon (this can depend on applicable Rules of Court): see *Beardsley v Ontario* (2011) 57 OR (3d) 1 at paras 21-22; *Collins v Cortez*, 2014 ONCA 685 at para 10; Williams, *supra* note 24 at 18-19.


120 Statutes of limitation are interpreted strictly in favour of plaintiffs: *Ordon Estate SCC*, supra note 116 at paras 135-39, citing *Berardinelli v Ontario Housing Corp.*, [1979] 1 SCR 275 at 280, per Estey J: “[A limitations provision] being a restrictive provision wherein the rights of action of the citizen are necessarily circumscribed by its terms, attracts a strict interpretation and any ambiguity found upon the application of the proper principles of
In Indigenous contexts, another rule of statutory interpretation operates to protect the rights of Indigenous peoples from statutory interference as much as possible. In Nowegijick v The Queen, Justice Dickson, as he then was, stated:

… treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians…. In Jones v. Meehan, 175 U.S. 1 (1899), it was held that Indian treaties “must ... be construed, not according to the technical meaning of [their] words ... but in the sense in which they would naturally be understood by the Indians”.121

Commenting on this passage in Mitchell v Peguis Indian Band, Chief Justice Dickson said:

The Nowegijick principles must be understood in the context of this Court’s sensitivity to the historical and continuing status of aboriginal peoples in Canadian society…. It is Canadian society at large which bears the historical burden of the current situation of native peoples and, as a result, the liberal interpretive approach applies to any statute relating to Indians, even if the relationship thereby affected is a private one. Underlying Nowegijick is an appreciation of societal responsibility and a concern with remedying disadvantage, if only in the somewhat marginal context of treaty and statutory interpretation.122

This rule has since been consistently affirmed and applied by the Supreme Court.123 In R v Badger, Justice Cory added:

…the honour of the Crown is always at stake in its dealing with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises.124

In Restoule v Canada (Attorney General),125 the Nowegijick principles of statutory interpretation were applied to a statute of limitations that the Crown argued barred a treaty right claim. Justice Hennessy decided that the Ontario limitations statute in question did not contain provisions barring action for violation of treaty rights.126

Statutory interpretation should be resolved in favour of the person whose right of action is being truncated.” See also Sullivan, supra note 118 at §15.41, and other cases cited there, especially Ukrainian (Fort William) Credit Union Ltd. v Neshitt, Burns Ltd (1997) 36 OR (3d) 311 (CA); Des Champs v Conseil des écoles séparées catholiques de langue française de Prescott-Russell, [1999] 3 SCR 281, especially para 18.

122 Mitchell v Peguis Indian Band, [1990] 2 SCR 85 at 99 [Peguis]. See also La Forest J at 142-43.
123 E.g. see Simon, supra note 39 at para 27; R v Sioui, [1990] 1 SCR 1025 at 1035 [Sioui]; R v Horsemann, [1990] 1 SCR 901 at 906-08 (Wilson J, dissenting on other grounds), 930 (Cory J); Sparrow, supra note 91 at 1107-08; Van der Peet, supra note 1 at paras 24, 143, 188.
125 2020 ONSC 3932 (CanLII) at paras 202-38 [Restoule ONSC].
126 Ibid at paras 198-200. The Ontario CA, affirming the non-application of the limitations statute as a matter of statutory interpretation, decided that, as Justice Hennessy’s comments on the relevance of the Nowegijick principles were obiter, those principles did not have to be considered in disposing of the appeal: Restoule v Canada (Attorney General), 2021 ONCA 779 (CanLII) at paras 635-39 [Restoule ONCA].
The English statutes of limitations that were received at various times in Canada obviously could not have been intended to apply to Indigenous peoples when enacted. More importantly, these statutes were received only to the extent they were applicable to local circumstances. Relations between the Indigenous nations and the Crown were governed by unique constitutional documents such as the Royal Proclamation of 1763 and by treaties. The circumstances of those relations and the sui generis rights of the Indigenous peoples acknowledged by those documents should have been convincing reasons for not applying statutes of limitations to Indigenous claims. For example, it would have been inconsistent with the Royal Proclamation, which protected Indigenous lands that had not been purchased by the Crown from grant by governors or acquisition by settlers, for limitations statutes to apply to Indigenous claims. As Justice La Forest acknowledged in Peguis, “at least since the signing of the Royal Proclamation in 1763…, the Crown has always acknowledged that it is honour-bound to shield Indians from any efforts by non-natives to dispossess Indians of the property which they hold qua Indians, i.e., their land base and their chattels on that land base.”

Moreover, we have seen that, since Crown assertion of sovereignty in Canada, the honour of the Crown has been a fundamental constitutional principle guiding relations with the Indigenous peoples. Statutory limitation or extinguishment of Indigenous peoples’ legal rights would not have been consistent with the honour of the Crown, given that the Crown was honour-bound to protect those rights. Accordingly, application of English statutes of limitations in Indigenous contexts should have been excluded by these considerations.

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129 Peguis, supra note 122 at 131.

130 See notes 107-08 and accompanying text above.
Similarly, it is unlikely that colonial and provincial statutes of limitations were intended to apply to Indigenous claims.\(^{131}\) Prior to Confederation, relations with Indigenous peoples were generally regarded as an Imperial concern to be handled by London rather than local governments.\(^{132}\) Even if intended to apply to Indigenous claims, colonial statutes could only have done so if the legislature in question had been delegated authority to legislate in relation to Indigenous peoples. In the *Chippewas of Sarnia* case, Justice Campbell concluded that “the colonial legislatures that enacted [pre-Confederation limitations] statutes had no power to affect or extinguish either aboriginal or treaty rights as these were matters exclusively within the Imperial authority and beyond the colonial legislative power at the time.”\(^{133}\) The Ontario Court of Appeal affirmed most of his judgment for other reasons, so did not address this issue explicitly.\(^{134}\)

(b) Division-of-powers Issues

(i) Interjurisdictional Immunity

Since Confederation, “Indians, and Lands reserved for the Indians” have been within the exclusive jurisdiction of Parliament under section 91(24) of the *Constitution Act, 1867*.\(^{135}\) As a result, provincial statutes singling Indigenous people out for special treatment would be

\(^{131}\) See *Chippewas of Sarnia CA*, supra note 128 at paras 236-42, concluding that pre-Confederation statutes of limitations in what is now Ontario did not exhibit an intent to affect or extinguish Aboriginal title. Accord Ghislain Otis, “La revendication d’un titre ancestral sur le domaine privé au Québec” (2021) 62:1 *Cahiers de Droit* 277 at 291 n60.

\(^{132}\) *Chippewas of Sarnia CA*, supra note 128 at para 51.

\(^{133}\) *Ibid* at para 226; see *Chippewas of Sarnia SCJ*, supra note 9 at para 597. See also Kent McNeil, “Extinguishment of Aboriginal Title in Canada: Treaties, Legislation, and Judicial Discretion” (2001-2002) 33 *Ottawa L Rev* 301 at 318-22 [McNeil, “Extinguishment”]; Robert Hamilton, “After *Tsilhqot’in Nation*: The Aboriginal Title Question in Canada’s Maritime Provinces” (2016) 67 *UNBLJ* 58 at 84-92, 98-104; *Calder*, supra note 3 at 406-13 (Hall J, dissenting in relation to this matter by opining that the colonial government in British Columbia did not have this authority insofar as Aboriginal title was concerned).


\(^{135}\) *Supra* note 59. Note that, in this provision, the term “Indians” includes Inuit and Mètis: see *Reference as to whether “Indians” in s. 91(24) of the B.N.A. Act includes Eskimo inhabitants of the Province of Quebec*, [1939] SCR 104: *Daniels v Canada (Indian Affairs and Northern Development)*, [2016] 1 SCR 99. In the context of section 91(24), it is therefore synonymous with the term “Indigenous peoples” as used in this paper.
However, provincial laws of general application can apply to Indigenous people, even if the proportional impact on them is greater than on non-Indigenous people.  

Provincial statutes of limitations are undoubtedly laws of general application. It therefore must be asked whether they can apply of their own force to limit Indigenous peoples’ access to the courts to resolve their claims. Prior to the Supreme Court’s decision in *Tsilhqot’in Nation v British Columbia*, the doctrine of interjurisdictional immunity prevented provincial laws of general application from applying if they would impair the core of federal jurisdiction under section 91(24), even in the absence of federal law occupying the field. Until that decision in 2014, this core encompassed section 35 Aboriginal and treaty rights, but it was broader than that – it included exclusive jurisdiction over any matters relating to the status or capacity of Indigenous peoples, as well as over possession and use of section 91(24) lands. To the extent that provincial statutes of limitations would impair Indigenous status or capacity, they would have trenched upon the core of Parliament’s exclusive jurisdiction over “Indians, and Lands reserved for the Indians”, and so would have to be read down to prevent that result.

To what extent, then, did the *Tsilhqot’in Nation* case alter the law in this regard? In a unanimous judgment, Chief Justice McLachlin held that the doctrine of interjurisdictional immunity no longer protects Aboriginal and treaty rights from provincial infringement. She reasoned that these rights are now adequately protected by section 35 of the *Constitution Act, 1982*. In its

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136 See *Four B Manufacturing Ltd. v United Garment Workers*, [1980] 1 SCR 1031 [*Four B Manufacturing*] at 1048; *R v Sutherland*, [1980] 2 SCR 451; *Delgamuukw*, supra note 1 at para 179; *Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 SCR 146 at para 67 [*Kitkatla Band*]. This was recently affirmed in relation to section 35 rights in Newfoundland and Labrador (Attorney General) *v Uashaunnuat (Innu of Uashat and Mani-Utenam)*, 2020 SCC 4 [*Uashaunnuat*] at para 65: “the provinces have no legislative jurisdiction over s. 35 rights” (emphasis in original).


138 [2014] 2 SCR 257 [*Tsilhqot’in Nation SCC*]. In this case, the Supreme Court decided that the doctrine of interjurisdictional immunity, which protects the core of federal jurisdiction over some subject areas, no longer applies to the Aboriginal and treaty rights protected by section 35(1) of the *Constitution Act, 1982*; see Kent McNeil, “Aboriginal Title and the Provinces after *Tsilhqot’in Nation*” (2015) 71 SCLR (2d) 67 [McNeil, “Aboriginal Title and the Provinces”]; Kerry Wilkins, “Life Among the Ruins: Section 91(24) After *Tsilhqot’in and Grassy Narrows*” (2017) 55 Alta L Rev 91. See also *Grassy Narrows First Nation v Ontario (Natural Resources)*, [2014] 2 SCR 447 at para 53 [*Grassy Narrows*], affirming the application of this aspect of *Tsilhqot’in Nation SCC* to treaty rights.


140 See *Delgamuukw*, supra note 1 at para 181; *R v Morris*, [2006] 2 SCR 915 [*Morris*].

141 *Natural Parents v Superintendent of Child Welfare*, [1976] 2 SCR 751; *Dick*, supra note 139; *Derrickson*, supra note 139; *Delgamuukw*, supra note 1 at paras 174-76.


143 *Tsilhqot’in Nation SCC*, supra note 138 at paras 150-52.
recent decision in *R v Desautel*, the Supreme Court appeared willing to acknowledge that there may be common law Aboriginal rights that are not section 35 rights as defined in *Van der Peet* and other cases. This possibility is consistent with the doctrine of continuity, by which rights under a previous legal regime continue after Crown acquisition of sovereignty, as acknowledged by McLachlin CJ in *Mitchell* and by the majority in *Desautel*. If common law Aboriginal rights outside the scope of section 35 are within the core of section 91(24) jurisdiction, as they should be insofar as they involve Indigenous status or capacity, then they should still be protected against provincial infringement by interjurisdictional immunity.

Moreover, if interjurisdictional immunity protection for Aboriginal and treaty rights was made unnecessary by section 35, as the Court suggested, then the division-of-powers protection those rights enjoyed up to the enactment of that provision should not have been affected. Before April 17, 1982, provincial statutes of limitations that impinged on the Aboriginal and treaty rights within the core of federal section 91(24) would have had to be read down to avoid that effect. This follows from Chief Justice Lamer’s decision in *Delgamuukw*. When the Supreme Court in *Tsilhqot’in Nation* relied on section 35 to remove constitutionally-recognized Aboriginal and treaty right from the protection of interjurisdictional immunity, surely the it did not intend to reverse the earlier case law relied upon by Lamer CJ in *Delgamuukw*. Moreover, in *R v Morris* the Supreme Court had held that treaty rights are within section 91(24)’s core and

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145 *Supra* note 1.


147 *Supra* note 90 at paras 10, 62.

148 *Supra* note 100 at para 68.

149 We find it unacceptable that enactment of section 35, which was meant to provide additional constitutional protection to Aboriginal and treaty rights, could have taken away division-of-powers protection they enjoyed previously, but this is what the Court seems to have decided.


151 See references in note 139 above.

152 *Delgamuukw*, *supra* note 1 at para 181.

153 E.g. *Dick*, *supra* note 139 (the right to hunt at issue in *Dick* would very likely be regarded as a section 35 right post-*Van der Peet*). See also Derrickson, *supra* note 139, as well as lower court decisions such as *Surrey v Peace Arch Ent. Ltd* (1970), 74 WWR 380 (BCCA). The doctrine of interjurisdictional immunity was applied to “Lands reserved for the Indians” (reserved by a self-government agreement, so the lands were not part of a “reserve”, as defined in the *Indian Act*, *supra* note 89, s 2) in *Sechelt Indian Band v British Columbia (Manufactured Home Park Tenancy Act, Dispute Resolution Officer)*, 2013 BCCA 262 [Sechelt Indian Band], application for leave to appeal denied, 23 October 2014 (after *Tsilhqot’in Nation* SCC), 2014 CanLII 62242 (SCC), commented on by Nigel Bankes & Jennifer Koshan, “The Uncertain Status of the Doctrine of Interjurisdictional Immunity on Reserve Lands”, online: https://ablawg.ca/2014/10/28/the-uncertain-status-of-the-doctrine-of-interjurisdictional-immunity-on-reserve-lands/.
thus protected by interjurisdictional immunity against provincial infringement.\textsuperscript{154} In \textit{Tsilhqot’in Nation}, Chief Justice McLachlin said, in \textit{obiter},\textsuperscript{155} that, to “the extent that \textit{Morris} stands for the proposition that provincial governments are categorically barred from regulating the exercise of Aboriginal rights, it should no longer be followed.”\textsuperscript{156} The words we have italicized indicate a prospective direction for courts to abide by in the future, not a retroactive overruling of a previous decision, which would require more than \textit{obiter} remarks in a case involving different rights and different facts.\textsuperscript{157}

In conclusion, prior to the \textit{Tsilhqot’in Nation} decision, the doctrine of interjurisdictional immunity should have prevented provincial statutes of limitations from applying to free claims based on section 35 Aboriginal and treaty rights.\textsuperscript{158} Regardless of that

\begin{notes}
\item[154]\textit{Morris}, supra note 140, decided just eight years before \textit{Tsilhqot’in Nation} SCC, supra note 138, was unanimous on interjurisdictional immunity, though not in result; the majority decided that the accused had a treaty right to hunt at night using lights provided it was done safely, whereas the dissenting judges, including McLachlin CJ, thought hunting at night could never be safe.
\item[155]McLachlin CJ acknowledged that, given the province’s breach of its duties to consult and accommodate, the Court did not need to address the issue of provincial jurisdiction over Aboriginal title lands: \textit{Tsilhqot’in Nation} SCC, supra note 138 at paras 98-99.
\item[156]\textit{Ibid} at para 150 [our emphasis].
\item[157]Otherwise, the Court would be undermining the validity of its own decisions, which would hardly instill confidence in the judicial process. However, in \textit{Grassy Narrows}, supra note 138, decided just two weeks after \textit{Tsilhqot’in Nation} SCC, the Supreme Court stated at para 53: “The doctrine of interjurisdictional immunity does not preclude the Province from justifiably infringing treaty rights (\textit{Tsilhqot’in Nation v. British Columbia}, [2014] 2 S.C.R. 256). While it is unnecessary to consider this issue, this Court’s decision in \textit{Tsilhqot’in Nation} is a full answer.” For critical commentary, see Kent McNeil, “When Are Judicial Decisions Involving Indigenous Claims Retrospective?”, February 2022, soon to be posted on Osgoode Digital Commons.
\item[158]See \textit{Chief Stanley Thomas} BCSC, supra note 41, where Lysyk J, after an extensive review of the case law and arguments, concluded that a BC limitations statute could not bar a damage claim for trespass to reserve lands, beginning in 1951, because allowing the statute to extinguish the right of action would trench upon Parliament’s exclusive section 91(24) jurisdiction over “Lands reserved for the Indians.” Lysyk J’s judgment was overturned without consideration of the constitutional issue because the BC Court of Appeal found that he did not have an adequate factual basis to decide such an important question: \textit{Stoney Creek CA}, supra note 9 at para 38. Compare \textit{Peter Ballantyne} QB, supra note 93 at paras 105-16, where Smith J relied on \textit{Tsilhqot’in Nation} SCC, supra note 138, to decide that the doctrine of interjurisdictional immunity could not apply to prevent Saskatchewan statutes of limitations from barring claims originating from construction of dams from 1928 to 1942 (this case is discussed below at notes 170-82). This aspect of his judgment was affirmed by the Saskatchewan Court of Appeal: \textit{Peter Ballantyne CA}, supra note 63 at paras 247-62. Neither court explained how the Supreme Court’s decision on interjurisdictional immunity in \textit{Tsilhqot’in Nation} SCC, which was based mainly on the Court’s opinion that section 35 provides adequate protection for Aboriginal and treaty rights, could apply retroactively to a time before section 35 was enacted. Surprisingly, Smith J at paras 117-27 also applied the \textit{Sparrow} test for justifiable infringement of section 35 rights to a potential infringement by provincial limitations provisions that occurred in the 1930s before Aboriginal and treaty rights were accorded constitutional protection by section 35 (compare \textit{Peepeekisis Band v Canada}, 2012 FC 915 at para 35, concluding that section 35 could not apply to claims that had been “extinguished” before that provision came into force). Smith J concluded nonetheless that no infringement had take place: “The plaintiff was free to exercise the right of possession [of flooded reserve lands], or commence an action for infringement of this right. The limitations legislation itself does not limit the plaintiffs’ ability to do so, it merely bars the right to bring the claim and receive a remedy after the lapse of the prescribed limitation period” (para 126). How can the legislation bar his right to bring a claim and yet not infringe his right to do so? Perhaps Smith J thought it could do so because he viewed limitations statutes as procedural rather than substantive (at paras 138-47, purportedly in \textit{obiter}); see discussion at notes 162-82 below. See also \textit{Stoney Nakota Nations v Canada}, 2016 ABQB 193 (CanLII) at paras 87-100 (\textit{Stoney Nakota Nations} QB), where the application of interjurisdictional
\end{notes}
decision, claims involving Indigenous status or capacity that do not involve section 35 rights should still be protected by interjurisdictional immunity against application of their own force of provincial limitations statutes.

(ii) Provincial Powers and Extinguishment

Interjurisdictional Immunity is not the only division-of-powers argument against provincial limitations statutes applying of their own force. In addition, given section 91(24), ever since Confederation provincial legislatures have lacked constitutional authority to extinguish Aboriginal and treaty rights. They cannot do it directly because they cannot enact laws in relation to Indigenous people, especially if the legislation would impact them negatively.159 But they cannot do it indirectly either by enacting laws of general application, such as statutes of limitations.160 In Delgamuukw, Chief Justice Lamer explained why:

[A] law of general application cannot, by definition, meet the standard which has been set by this Court for the extinguishment of aboriginal rights without being ultra vires the province. That standard was laid down in Sparrow, supra, at p. 1099, as one of “clear and plain” intent. In that decision, the Court drew a distinction between laws which extinguished aboriginal rights, and those which merely regulated them. Although the latter types of laws may have been “necessarily inconsistent” with the continued exercise of aboriginal rights, they could not extinguish those rights. While the requirement of clear and plain intent does not, perhaps, require that the Crown “use language which refers expressly to its extinguishment of aboriginal rights” (Gladstone, supra, at para. 34), the standard is still quite high. My concern is that the only laws with the sufficiently clear and plain intention to extinguish aboriginal rights would be laws in relation to Indians and Indian lands. As a result, a provincial law could never, proprio vigore, extinguish aboriginal rights, because the intention to do so would take the law outside provincial jurisdiction.161

The question, then, is whether statutes of limitations that bar Indigenous claims in court extinguish the claimed rights.162 Behind this question is a debate over whether statutes of immunity was also rejected in the context of claims of trespass to and conversion of oil and gas located on reserve lands.

159 See cases cited supra in note 136.

160 See Otis, supra note 131 at 290-91; Townshend, supra note 150 at 481-82. For affirmation of the rule that governments cannot do indirectly what they are prohibited from doing directly, see Madden v Nelson and Fort Sheppard Ry., [1899] AC 626 at 627-28; Saskatchewan (Attorney General) v Canada (Attorney General), 1948 CanLII 317 (UK JCPC), [1949] 2 DLR 145 at 150; McKay v The Queen, [1965] SCR 798 at 806.

161 Delgamuukw, supra note 1 at para 180, citing Sparrow, supra note 91, and R v Gladstone, [1996] 2 SCR 723. See also Chippewas of Sarnia SCJ, supra note 9 at paras 571-75, for application of the “clear and plain” requirement to treaty rights, affirmed Chippewas of Sarnia CA, supra note 128 at paras 226-29, 236-41.

162 Limitations statutes that do this expressly have been held to be inapplicable to Indigenous lands. Regarding reserve lands, which like Aboriginal title lands are within Parliament’s exclusive section 91(24) jurisdiction, see Canadian Pacific, supra note 59 at 673, citing with approval The Queen v Smith, [1981] 1 FC 346 (see especially paras 94-110), overturned on other grounds, [1983] 1 SCR 554. In Chippewas of Sarnia SCJ, supra note 9 at paras 476-81, Campbell J relied on these cases in deciding that provincial statutes of limitations could not apply to Indigenous lands reserved by treaty. The Court of Appeal affirmed his decision on this issue: Chippewas of Sarnia CA, supra note 128 at para 24, noting as well at para 222 that this aspect of his decision had not been appealed. See
limitations are procedural or substantive, that is, do they just bar access to the courts or do they extinguish rights. Sometimes the statute in question makes this clear, but often it does not. In this context, distinctions need to be made between real property, choses in possession (chattels) and choses in action, and between in rem and in personam actions. Land and chattels can be possessed, so if the statute does not expressly extinguish the right, a claimant can in some situations get the land or chattel back by reacquiring possession, even after the time for bringing an action has run out. Choses in action, such as debts, cannot be possessed, as they do not exist physically, and so can only be recovered by legal action. So if legal action is statute barred, the right must be extinguished, as there is usually no possible way to recover or enforce it.

also Tsilhqot’in Nation BCSC, supra note 9 at para 1314, where Vickers J held, consistently with Delgamuukw, supra note 1 at paras 177-80, that provincial limitations statutes could not extinguish Aboriginal title.

E.g. see the Ontario Real Property Limitations Act, supra note 71, s 15: “At the determination of the period limited by this Act to any person for making an entry or distress or bringing any action, the right and title of such person to the land or rent, for the recovery whereof such entry, distress or action, respectively, might have been made or brought within such period, is extinguished.” This provision dates from an 1834 Upper Canada statute, An Act to Amend the Law Respecting Real Property, 4 Will IV, c 1, s 37 (UC): see Chippewas of Sarnia SCJ, supra note 9 at paras 448-53, 527-28. The Limitation Act, RSBC 1996, c 266, contains an equivalent provision regarding personal actions and rights: “9(1) On the expiration of a limitation period set by this Act for a cause of action to recover any debt, damages or other money, or for an accounting in respect of any matter, the right and title of the person formerly having the cause of action and of a person claiming through the person in respect of that matter is, as against the person against whom the cause of action formerly lay and as against the person’s successors, extinguished.” Although that Act was repealed and replaced by the Limitation Act, SBC 2012, c 13, the application of the former Act was preserved in part by section 2 of the latter Act, which provides: “(2) This Act does not apply to court proceedings based on existing aboriginal and treaty rights of the aboriginal peoples of Canada that are recognized and affirmed in the Constitution Act, 1982. (3) Court proceedings referred to in subsection (2) are governed by the law that would have been in force with respect to limitation of actions if this Act had not been passed.” In other words, insofar as Aboriginal and treaty rights are concerned, the former statute, including section 9(1), still applies in British Columbia, subject to constitutional restrictions. In Restoule ONSC, supra note 125 at paras 219-20, Justice Hennessy expressed the opinion that, due to equivalent provisions in the Limitations Act, 2002, SO 2002, c 24, Sch B, s 2(1) (e) and (f) and s 2(2), the replaced statute was no longer a statute of general application. It relates to “Indians” and so attracted the Nowegijick principles of statutory interpretation (see text at notes 121-26 above), though even without the 2002 statute she considered the earlier statute would bear upon treaty promises and so attract the Nowegijick principles. While finding it unnecessary to deal with the Nowegijick principles (see supra note 126), the Ontario CA noted: “The legislature chose not to reference Aboriginal treaties in the 1990 Limitations Act, although it did so in the 2002 Limitations Act. This is strongly suggestive of an intention not to impose a limitation period for claims based on a breach of an Aboriginal treaty.” Restoule ONCA, supra note 126 at para 662, Hourigan JA for the Court (see para 91) on the limitations issue.


An apparent exception is equitable set-off in an action to enforce a debt or other obligation. According to the Ontario Court of Appeal, a defendant can rely on a right that has been barred by statutory limitation as a defence, but not as a counterclaim, to an action in debt: see Canada Trustco Mortgage Co. v Pierce, 2005 CanLII 15706 (ON CA) at paras 37-46, leave to appeal refused, [2005] SCCA No 336; Grand Financial Management Inc v Solemio Transportation Inc, 2016 ONCA 175, 395 DLR (4th) 529, at paras 92-94, leave to appeal refused, [2016] SCCA No 183, 2016 CanLII 58416 (SCC). See also Eli Lilly and Company v Apotex Inc, 2009 FC 991 (CanLII) at para 631; Chevron Canada Resources v Canada, 2019 ABQB 418 (CanLII) at paras 173-76; Harvest Operations Corp v Obsidian Energy Ltd, 2020 ABQB 563 (CanLII) at para 68. Compare Karkut v Highway Traffic Board, 1969 CanLII 599 (SK QB) at para 10. The explanation for the exception is that, in exercising their equitable jurisdiction, courts
Similarly, constitutional contexts aside, in rem actions are usually designed to recover possession of physical property, and in that sense are rights against the world, whereas in personam actions are actions against persons (e.g., actions in tort or contract) for recovery of damages. Barring an in rem action would not necessarily bar the right to the thing, whereas barring an in personam action would effectively extinguish the right. In this context, the maxim, “where there is a right, there is a remedy,” can be flipped around and expressed negatively: where there is no remedy, there is no right. Or, as respected jurist Herbert Broom put it, “it is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal.”

Apart from the Manitoba Metis Federation case, the Supreme Court cases discussed above all involved claims to damages, so they were all in personam actions, albeit against the Crown, an abstract corporation sole. In each instance, the barring of actions for breach of fiduciary obligations meant the Indigenous claimants were left with no remedy. To conclude that their rights still existed, but were merely unenforceable, would be artificial, or “vain”, as Broom put it. The reality is that their rights were statutorily extinguished in each of those cases.

And yet, in Peter Ballantyne Cree Nation Justice Smith of the Saskatchewan Court of Queen’s Bench, in an action arising out of flooding caused by construction of hydroelectric dams on the Churchill River between 1928 and 1943, expressed the opinion that the Saskatchewan statute of limitations that he applied in the case is procedural rather than substantive. The case involved

will not allow limitation periods to bar defences, even though they bar claims and counterclaims. However, these decisions relied on English authority. In England, statutes of limitation are regarded as procedural rather than as substantive and so, in the absence of clear language to the contrary, they bar actions but not rights: see Tolofson v Jensen, [1994] 3 SCR 1022 at para 80 [Tolofson]. Query whether the apparently obiter remarks regarding equitable set-offs by the Ontario Court of Appeal are consistent with the Supreme Court’s decision in Tolofson (not cited in the set-off cases) that, in Canada, statutes of limitation are substantive: see below at notes 173-80. However, given that the Supreme Court refused leave to appeal, Chief Ronald Michel et al v Attorney General of Canada et al, 2017 CanLII 38581. See also Stoney Nakota Nations QB, supra note 158 at paras 67-70, where Jeffrey J referred to the uncertainty in the law on this issue without trying to resolve it. Instead, he relied on Blueberry River, supra note 44, Lameman, supra note 78, Wewaykum, supra note 23, and Manitoba Metis Federation SCC, supra note 80, to conclude that “the law is clear that claims for personal remedies brought by First Nations, such as the Trespass Related claims, are subject to time limitations legislation” (para 72). His judgment was
claims for declarations and damages for breach of honour of the Crown, breach of the Crown’s fiduciary obligations, and trespass to reserve lands. Relying on Saskatchewan Court of Appeal decisions that did not involve Indigenous claims, Smith J stated that in damage

… claims of this nature the limitation periods are procedural in that they merely act to bar the remedy sought, rather than extinguish the underlying right.

This conclusion is also consistent with cases like Lameman wherein the plaintiff claimed recovery due to breach of treaty rights but was barred by statute. This case makes clear that just because a limitation period effectively bars an Aboriginal group from a remedy it does not mean that the legislation infringes the right from which the claim may have arisen. The legislation merely limits the time in which the claim can be brought.

With all due respect, the Lameman decision did not decide that barring remedies does not infringe Indigenous rights. Moreover, the Supreme Court has held that statutes of limitations are substantive because they make rights unenforceable. In Tolofson v Jensen, the Court decided that a provision of a Saskatchewan statute limiting the time in which an action arising out of a vehicle accident could be brought is substantive. The decision was based in part on the fact the case involved conflict of laws, but the Court was clearly uncomfortable with the traditional English law position that statutes of limitations that do not explicitly extinguish rights are procedural. Justice La Forest, delivering the principal judgment, referred to “the rather mystical view that a common law cause of action gave the plaintiff a right that endured forever. A statute of limitation merely removed the remedy in the courts of the jurisdiction that had enacted the statute.” He contrasted this with the civil law position in continental Europe, where

… all statutes of limitation destroy substantive rights.

I must confess to finding this continental approach persuasive. The reasons that formed the basis of the old common law rule seem to me to be out of place in the modern context….

… So far as the technical distinction between right and remedy [is concerned], Canadian courts have been chipping away at it for some time on the basis of relevant policy considerations. I think this Court should continue the trend. It seems to be particularly appropriate to do so in the conflict of laws field….

affirmed on appeal without discussion of the procedural/substantive issue: Stoney Tribal Council v Canadian Pacific Railway, 2017 ABCA 432 (CanLII) at paras 18, 98 (Stoney Tribal Council CA).


173 Peter Ballantyne QB, supra note 93 at paras 146-47; see also paras 126-27. Smith J’s conclusion that limitations statutes do not infringe rights was applied in Stoney Nakota Nations QB, supra note 158 at para 98, affirmed on appeal, Stoney Tribal Council CA, supra note 171. For agreement that limitation statutes bar remedies without extinguishing rights, see Samson First Nation, supra note 54 at para 129; Jim Shot Both Sides, supra note 60 at para 221. Compare Restoule ONSC, supra note 125 at para 221 (application of the limitations statute would “entirely abrogate” the Crown’s treaty promises); see also para 231.

174 Tolofson, supra note 165 at paras 74-90.

175 Ibid at para 80.

176 Ibid at paras 81-82, 85.
Thus, although the decision in \textit{Tolofson} on this issue was made in the context of conflict of laws,\textsuperscript{177} the Court was clearly of the opinion that limitation statutes are substantive in general and not just for that purpose.\textsuperscript{178} If these statutes were substantive for some purposes and procedural for others, as Smith J seems to have thought, this would be illogical and create confusion in the law. More importantly, to cling to the notion that rights continue in some “mystical” form even though they are unenforceable is unrealistic. It would mean one could remove “in action” from “chose in action” and retain the chose (thing), which is absurd because the chose has no independent existence.\textsuperscript{179} Similarly, when \textit{in personam} rights become unenforceable, the rights themselves are meaningless and so cease to exist.\textsuperscript{180}

In conclusion, contrary to the views of Justice Smith in \textit{Peter Ballantyne} QB,\textsuperscript{181} provincial limitations statutes that bar Indigenous peoples from any action or remedy to enforce their rights effectively extinguish those rights and so should not apply of their own force to Indigenous claims.\textsuperscript{182}

\textbf{(iii) Referential Incorporation of Provincial Statutes of Limitations}

Even though, for division-of-powers reasons, provincial limitations statutes should not apply of their own force to extinguish Indigenous rights or, prior to the \textit{Tsilhqot’in Nation} decision in 2014, to infringe section 35 rights (due to section 91(24) and the doctrine of interjurisdictional immunity), we have seen that these statutes can apply as federal law if referentially incorporated

\textsuperscript{177} In \textit{Peter Ballantyne} QB, \textit{supra} note 93 at paras 139-46, Smith J, relying on Saskatchewan Court of Appeal decisions, distinguished \textit{Tolofson} on this basis.

\textsuperscript{178} See \textit{Castillo v Castillo}, [2005] 3 SCR 870 at para 7 [\textit{Castillo}]. At para 37, Bastarache J, concurring on this issue, stated: “The effects of limitation periods were made clear in \textit{Tolofson}: they cancel the substantive rights of plaintiffs to bring the suit, and they vest a right in defendants to be free from suit.” See also \textit{Michalski v Olson}, 1997 CanLII 2360 (MB CA), 123 Man R (2d) 101 at para 23: “the determination in the \textit{Tolofson} case that limitation laws are substantive, rather than procedural, cannot have come as a surprise. To say that a limitation provision is procedural because it bars a remedy rather than extinguishing a right is an exercise of semantic gymnastics that would baffle any rational observer outside the legal profession.”

\textsuperscript{179} In \textit{Markevich v Canada}, 2003] 1 SCR 94 [\textit{Markevich}], an action for collection of tax (a chose in action) that the Court held had been barred by a limitations statute, Major J, in his majority judgment at para 41, stated: “Limitation periods have traditionally been understood to bar a creditor’s remedy but not his or her right to the underlying debt. In my view, this is a distinction without a difference. For all intents and purposes, the respondent’s federal tax debt is extinguished.”

\textsuperscript{180} This may be why statutes of limitation that explicitly extinguish \textit{in rem} real property rights usually do not bother to extinguish \textit{in personam} rights, as the latter can have no meaningful existence if unenforceable in court.

\textsuperscript{181} It is remarkable as well that neither Smith J nor the Court of Appeal, in deciding that time began to run from 1939 or 1942 at the latest (see \textit{Peter Ballantyne} QB, \textit{supra} note 93 at para 149; \textit{Peter Ballantyne CA}, \textit{supra} note 63 at para 93), took account of the fact that section 141 of the \textit{Indian Act}, \textit{supra} note 41, effectively prevented First Nations from hiring lawyers to pursue their claims until that section was repealed in 1951. See Luk & Barrett, \textit{supra} note 4 at 397-98, 417-20, pointing out as well how the Department of Indian Affairs’ control over band funds and the power of Indian agents would have impeded the ability of First Nations to take their claims to court.

\textsuperscript{182} This was the conclusion Campbell J reached in relation to a limitations provision barring remedies without barring title in \textit{Chippewas of Sarnia} SCJ, \textit{supra} note 9 at paras 457-64. At para 462, he stated: “To bar the remedy of possession is to make hollow the secured right of ownership…. Without a remedy against the owners, the aboriginal land title means nothing and the treaty guarantee has no value. Aboriginal title cannot exist as a right in the air without a remedy for its vindication on the ground.” His decision on limitations issues was affirmed on appeal, \textit{Chippewas of Sarnia CA}, \textit{supra} note 128 at paras 220-42, leave to appeal refused by the SCC.
by Parliament, as held in *Blueberry River* and *Wewaykum*.183 Prior to the enactment of section 35 in 1982, federal laws that were clear and plain enough, including laws referentially incorporated, could extinguish Indigenous rights.184 However, post-section 35, even Parliament has been unable to extinguish the rights that are constitutionally protected by that section.185

Even if some limitations provisions only infringe Aboriginal or treaty rights, for the infringement to be constitutionally allowable after the enactment of section 35 it would have to be justified by the Crown in accordance with the *Sparrow* test.186 This test requires proof of a valid legislative objective and respect for the Crown’s fiduciary obligations by showing minimal impairment of the rights, consultation with the rights-holders, and payment of compensation when appropriate. While limitations statutes would probably have a valid legislative objective, it is extremely doubtful that the Crown could meet the other requirements for justifiable infringement.187 Moreover, payment of compensation might cost the Crown as much as settling the claim it sought to have barred by the statute.

In addition to the provisions in the *Federal Court Act*188 and the *Crown Liability and Proceedings Act*,189 section 88 of the *Indian Act,*190 added in 1951,191 referentially incorporates, with certain exceptions,192 provincial laws of general application that would not apply to “Indians” of their own force.193 However, if, as we have concluded, provincial limitations statutes extinguish rights (where rights in relation to land are concerned, most do so expressly), they would not be referentially incorporated into federal law by section 88 because, as decided by Chief Justice Lamer in *Delgamuukw*, “s. 88 does not evince the requisite clear and plain intent

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183 See supra notes 52-53, 56-60, 65 and accompanying text.
185 *Van der Peet*, supra note 1 at para 28; *Mitchell*, supra note 90 at para 11.
186 *Sparrow*, supra note 91 at 1111-19
187 Cases in which the Crown has succeeded in justifying an infringement are rare. We are aware of this example involving prohibition of use of live bait for fishing: *Constant c Québec (Procureur général)*, 2003 CanLII 47824 (QC CA), [2003] 2 CNLR 240, leave to appeal refused, [2003] SCCA No 110.
188 Supra note 36.
189 Supra note 79. See text following note 86, supra.
190 Supra note 89.
191 Then, section 87: SC 1951, c 29.
192 The incorporation of provincial laws is subject “to the terms of any treaty and any other Act the Parliament” and excludes laws that are “inconsistent with this Act or the *First Nations Fiscal Management Act*, or with any order, rule, regulation or law of a band made under those Acts, and except to the extent that those provincial laws make provision for any matter for which provision is made by or under those Acts” (the *First Nations Fiscal Management Act*, SC 2005, c 9, exception would, of course, apply only after that statute was enacted). For application of the treaty exception, see *R v White and Bob*, 1964 CanLII 452 (BC CA), affirmed 1965 CanLII 643 (SCC); *Simon*, supra note 39; *Sioui*, supra note 123; *Morris*, supra note 140.
to extinguish aboriginal rights.”\textsuperscript{194} Also, according Justice Lysyk in \textit{Chief Stanley Thomas},\textsuperscript{195} section 88 only referentially incorporates provincial laws that would trench upon federal jurisdiction over “Indians”, not laws that would interfere with federal jurisdiction over “Lands reserved for the Indians.”\textsuperscript{196} If this is correct,\textsuperscript{197} then even if provincial limitations statutes would only \textit{infringe} rather than \textit{extinguish} Indigenous rights, they could not apply by way of section 88 to claims relating to reserves, Aboriginal title lands, or other “Indian” lands.\textsuperscript{198} Moreover, though non-extinguishing statutes relating to other claims might apply by way of section 88,\textsuperscript{199} to the extent that those statutes infringe section 35 Aboriginal or treaty rights after enactment of that section, they would have to be justified under the \textit{Sparrow} test.

It is nonetheless worth repeating that, despite decisions such as \textit{Peter Ballantyne}, it is unrealistic and inconsistent with Supreme Court decisions\textsuperscript{200} to treat limitations statutes as though they do not extinguish rights without doing so explicitly. This is particularly so where choses in action and \textit{in personam} rights are concerned. Where \textit{in rem} rights to land are concerned, extinguishment is usually explicit.\textsuperscript{201} If the statute in question extinguishes the right in question, either expressly or by necessary implication, it cannot apply to Aboriginal and treaty rights, either of its own force or by referential incorporation into federal law, after the enactment of section 35.

\textbf{(c) Constitutional and Personal Remedies}

Recall that in \textit{Manitoba Metis Federation} the Supreme Court held that actions challenging the constitutionality of legislation or Crown action (or inaction) cannot be barred by limitation statutes. However, the Court suggested that, while a declaration of invalidity or breach of the honour of the Crown is available in this context, statutes of limitations can still bar damage remedies, even those arising out of the same unconstitutional legislation or dishonourable Crown

\begin{itemize}
  \item \textsuperscript{194} \textit{Delgamuukw}, supra note 1 at para 183. See also \textit{Chippewas of Sarnia SCJ}, supra note 9 at paras 489-90; \textit{Tsilhqot’in Nation SCC}, supra note 138 at paras 1318-29. For discussion, see Kent McNeil, “Aboriginal Title and Section 88 of the \textit{Indian Act}” (2000) 34 \textit{UBC L Rev} 159; Kerry Wilkins, “Still Crazy After All These Years: Section 88 of the \textit{Indian Act} at Fifty” (2000) 38:2 \textit{Alta L Rev} 458.
  \item \textsuperscript{195} \textit{Supra} note 41 at paras 27-40.
  \item \textsuperscript{196} The same conclusion was reached in \textit{Chippewas of Sarnia SCJ}, supra note 9 at paras 491-95, and \textit{Tsilhqot’in Nation BCSC}, supra note 9 at paras 1033-40.
  \item \textsuperscript{197} The issue was discussed but left open in \textit{Derrickson}, supra note 139 at paras 51-59.
  \item \textsuperscript{198} An example of other Indian lands to which provincial laws do not apply can be found in \textit{Sechelt Indian Band}, supra note 153.
  \item \textsuperscript{199} See \textit{Kruger}, supra note 137; \textit{Dick}, supra note 139. However, given the Supreme Court’s \textit{obiter} direction in \textit{Tsilhqot’in Nation SCC}, supra note 138, that the doctrine of interjurisdictional immunity no longer applies to section 35 rights, referential incorporation by way of section 88 may not be necessary for provincial infringement post-2014 to be justifiable.
  \item \textsuperscript{200} \textit{Tolofson}, supra note 165; \textit{Castillo}, supra note 178; \textit{Markevich}, supra note 179.
  \item \textsuperscript{201} E.g. see the \textit{Real Property Limitation Act}, RSO 1990, c L15, s 15; \textit{Limitation of Actions Act}, RSA 1980, c L-15, s 44, replaced by the \textit{Limitations Act}, RSA 2000, c L-12; \textit{The Limitation of Actions Act}, CCSM, c L150, s 53; \textit{Real Property Limitations Act}, RSNB 1973, c R-1.5, s 60; \textit{Limitation of Actions Act}, SNB 2009, c L-8.5, s 8.1(6); \textit{Real Property Limitations Act}, RSNS 1989, c 258, s 22; \textit{The Limitation of Actions Act}, RSS 1978, c L-15, s 46, replaced by \textit{The Limitations Act}, SS 2004, c L-16.1. Note that the fact some of these statutes have been repealed and replaced does not mean they are of no further effect. Where a limitation statute is relied upon, it is typically the one in force when the cause of action arose, which is not necessarily the one when legal proceedings were commenced: see \textit{Wewaykum}, supra note 24 at paras 125-29; \textit{Peter Ballantyne CA}, supra note 63 at para 179.
\end{itemize}
conduct. The Court relied on two of its previous decisions, *Kingstreet Investments Ltd. v New Brunswick (Finance)*\(^\text{202}\) and *Ravndahl v Saskatchewan*.\(^\text{203}\)

The *Kingstreet Investment* case involved a claim by taxpayers for restitution of taxes paid under a provincial statute held to be unconstitutional. The Supreme Court decided that the provincial statute of limitations applied, limiting repayment to the six-year limitation period. The Court dealt with the limitations issue in three short paragraphs, with scant explanation of why damage claims arising out of unconstitutional legislation should be subject to limitation statutes. Justice Bastarache, for the Court, stated simply that “[t]here is no reason why modern restitutionary claims ought not to be subject to s. 9”\(^\text{204}\) the relevant provision of the New Brunswick *Limitation of Actions Act*.\(^\text{205}\) He relied on and affirmed Justice Robertson’s Court of Appeal decision on this point, justified in part by the need for governments to be able to avoid fiscal chaos by placing time limits on claims for restitution of unconstitutional taxes.\(^\text{206}\)

*Ravndahl* involved a claim for reinstatement of the plaintiff’s widow’s pension she had been receiving after her husband’s death in 1975. When she remarried in 1984, her pension was terminated pursuant to a provision of the Saskatchewan workers’ compensation legislation. To support her claim for restoration of the pension and damages, she sought a declaration that the provision revoking her pension was unconstitutional because it violated her right to equality provided by section 15 of the Canadian *Charter of Rights and Freedoms*.\(^\text{207}\) In a unanimous decision delivered by Chief Justice McLachlin, the Supreme Court decided that the provincial statute of limitations applied, barring the claim to damages and reinstatement of her pension because her action had been commenced more than six years after section 15 came into force on April 17, 1985, which the Court found to be the time when her cause of action arose.\(^\text{208}\) The plaintiff’s claim for a declaration of constitutional invalidity, on the other hand, would not be barred because such a claim is not subject to limitations statutes. The case was sent to trial “to determine whether a declaration of invalidity should be granted, and if so, what remedies if any should be granted. Because the appellant’s personal claims are statute-barred, any remedies flowing from s. 52 [of the Constitution Act, 1982] would not be personal remedies, but would be remedies from which the appellant, as an affected person, might benefit.”\(^\text{209}\)

The Court noted that “[i]t is important to distinguish the appellant’s personal, or *in personam*, remedies, brought by her as an individual, from an *in rem* remedy flowing from s. 52.”

\(^{202}\) *Kingstreet Investments SCC, supra* note 100.
\(^{204}\) *Kingstreet Investments SCC, supra* note 100 at para 60.
\(^{205}\) RSNB 1973, c L-8.
\(^{206}\) *Kingstreet Investments Ltd. and 501638 N.B. Ltd v The Province of New Brunswick as represented by the Department of Finance and New Brunswick Liquor Corporation*, 2005 NBCA 56 (CanLII) at paras 39-42. See also *Air Canada, supra* note 114. However, in *Kingstreet Investments SCC, supra* note 100 at paras 28-29, Bastarache J agreed with Wilson J (dissenting in part) in *Air Canada* at 1215 that fiscal considerations should not be used to justify placing the burden of an unconstitutional tax on individual taxpayers rather than on taxpayers as a whole.
\(^{207}\) Part I of the Constitution Act, 1982 [Charter], *supra* note 31.
\(^{208}\) The Court “assume[d], without deciding, that a challenge to a pre-Charter denial of benefits would be a permissible application of the Charter”: *Ravndahl SCC, supra* note 100 at para 18.
\(^{209}\) *Ibid* at para 26. Section 52(1) provides: “The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.”
52 that may extend a benefit to the appellant and all similarly affected persons.”210 The Court explained that “[p]ersonal claims for constitutional relief are claims brought as an individual qua individual for a personal remedy”211 and, following Kingsstreet Investments, held that these claims are subject to limitations statutes.212 Ravndahl thus extended the application of this holding from division-of-powers invalidity to invalidity under section 15 of the Charter, despite section 24(1).213 It is surprising that the Court would do so without analysis, given that section 24(1) is supposed to provide courts with broad discretion to craft constitutional remedies that is not explicit in division-of-powers contexts and that should not be subject to override by legislation.214

In her motion judgment in Ravndahl, Queen’s Bench Justice Pritchard acknowledged the conflicting opinions in relation to personal remedies in court of appeal judgments.215 In Prete v Ontario (Attorney-General),216 the plaintiff, who had been acquitted of a murder charge, brought an action for malicious prosecution, alleging that his section 7 Charter “right to life, liberty and security of the person” had been violated. He claimed damages as a remedy under section 24(1) of the Charter. The Crown brought a motion to dismiss, based in part on the expiry of the six-month limitation period in the Public Authorities Protection Act.217 The Ontario Court of Appeal decided that the statutory limitation could not apply to a section 24(1) remedy. Carthy JA explained: “The purpose of the Charter, in so far as it controls excesses by governments, is not at all served by permitting those same governments to decide when they would like to be free of those controls and put their houses in order without further threat of complaint.”218 He added that “[t]he historic purposes of limitation periods are best served, when Charter remedies are sought, by the court refusing relief on the basis of laches in appropriate cases.”219 A laches approach would, at least, give judges discretion in applying time limitations to personal remedies for Charter violations so the justice of individual cases could be taken into account. Where limitations statutes are concerned, equivalent discretion does not exist, though superior courts may have inherent jurisdiction to extend limitation periods in the interests of justice.220

Prete can be compared with Nagy v Phillips221 and St-Onge v Canada.222 In Nagy, the plaintiff claimed damages for violation of her section 8 Charter right “to be secure against unreasonable

210 Ravndahl SCC, supra note 100 at para 27.
211 Ibid at para 16.
212 Ibid at para 17. See also McCallum, supra note 84 at paras 48-49.
213 Section 24(1) of the Charter, supra note 207, provides: “Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.” For discussion of section 24(1) and section 52(1) remedies, see Roach, supra note 100, especially chs 3 and 14. For a nutshell summary of the distinction between them, see ibid at §14.30-45. Note that section 15 has also been used by non-Indigenous claimants to challenge the constitutionality of limitations and notice provisions, with varying degrees of success: see Mew, supra note 30 at §18.29-48. Application of this argument to Indigenous claims is beyond the scope of this paper.
215 Ravndahl v Saskatchewan, 2004 SKQB 260 (CanLII) at paras 6-15.
216 16 OR (3d) 161 (ON CA) [Prete], leave to appeal refused, [1994] SCCA No 46.
217 RSO 1980, c 406, s 11(1).
218 Prete, supra note 216 at para 13.
219 Ibid.
220 See note 116 and accompanying text above.
221 1996 ABCA 280 (CanLII).
222 2001 FCA 308 (CanLII) [St-Onge FCA].
search and seizure”, arising out body searches conducted at Edmonton International Airport and a local hospital. In her unanimous judgment, Justice Hetherington simply stated: “The respondent’s claim under the Charter is … a claim for damages in respect of injuries arising out of a breach of a duty to refrain from breaching the Charter. That duty must arise from the Charter. Such a claim is clearly covered by s. 52 of the Limitations of Actions Act.” No further explanation was provided and neither Prete nor section 24(1) was mentioned in the Alberta Court of Appeal’s judgment.

St-Onge involved a claim against the Crown arising out of actions by employees at the Canada Employment Centre in Timmins, Ontario, that the plaintiff alleged violated his sections 15 and 20 Charter rights. On a motion to dismiss, Justice Hugessen stated:

In my view, there is absolutely no doubt that an action in tort based on delicts which are at the same time infringements of rights guaranteed by the Charter is subject to the prescription generally applicable to any action of a delictual nature. The Charter was adopted in a context which already included two well-developed systems of civil law with sophisticated rules of procedure and the appropriate courts to give effect to them. The Charter contains no purely procedural provisions and no rule governing prescription…

 Existing legislation and procedures continued to apply except where they were clearly inconsistent with the Charter itself. A prescription deadline which generally applies to all actions of the same nature and does not in any way discriminate against certain groups of litigants does not in any way contravene the Charter.

Hugessen J’s judgment was affirmed on appeal. Justice Noël, for the Federal Court of Appeal, stated that the relevant section of the Ontario statute of limitations “is an enactment of general application that applies to any civil liability action, irrespective of whether it is based on a violation of Charter rights.” Prete was apparently distinguished because it involved “the constitutional validity of short limitation periods when they preclude the exercise of a Charter right.”

More recently, the Ontario Court of Appeal itself distinguished Prete in Alexis v Darnley, an action for unlawful detainment in violation of the plaintiff’s Charter rights. Justice Rouleau, for the Court, observed:

The Prete decision does contain language that could be read as suggesting that the question of whether a s. 24(1) claim is time-barred should be governed by the doctrine of laches and not by statutory limitation periods: para. 13. However, read in context, these comments express the court’s preference for the laches approach over the limitation period set out in the Public Authorities Protection Act. They do not

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224 Section 20 provides a right to receive services in French or English from federal government employees.
225 St-Onge v Canada, 1999 CanLII 8991 (FC) at paras 4-5. See also Gauthier c Lambert, 1988 CanLII 266 (QC CA), leave to appeal refused, [1988] 1 SCR ix.
226 St-Onge FCA, supra note 222 at para 2.
227 Ibid at para 4.
228 2009 ONCA 847 (CanLII) [Alexis], application for leave to appeal refused, 2010 CanLII 21662 (SCC).
support the far broader proposition that s. 24(1) claims, brought by an individual and seeking personal remedies, cannot be subject to any statutory limitation period.229 He went on to point out that courts of appeal in other jurisdictions had not interpreted Prete as deciding that limitations statutes generally do not apply to section 24(1) remedies.230 They distinguished Prete because the limitation period there was short and benefited only the Crown. Relying also on Ravndahl,231 Rouleau JA rejected “the appellant’s submission that the Prete decision renders any statutory limitation period inapplicable to Charter claims brought as an individual for personal remedies.”232

Although limitations statutes of general application are available to any defendants in appropriate circumstances (unlike the Public Authorities Protection Act at issue in Prete which sheltered only public employees), section 24(1) remedies are generally only available against the Crown or government officials. The focus should therefore be on the scope of section 24(1), not the scope of the limitations statute. Surely Charter remedies are entitled to a different level of judicial respect than common law remedies that are subject to statutes of limitations. One would expect more probing interpretation and in-depth analysis of section 24(1) in the context of these statutes than has taken place in the cases we have examined.233

We have seen that the Supreme Court in Kingstreet and Ravndahl distinguished between in personam remedies under section 24(1) and in rem remedies under section 52(1) and applied this distinction in Manitoba Metis Federation.234 But recall that, in Kingstreet and Ravndahl, section 24(1) remedies were sought by individuals (two corporations in Kingstreet and one woman in Ravndahl), a fact relied upon in the latter case, and that section 24(1) does not apply to violations of Indigenous rights.235 The Manitoba Metis Federation case was brought by 17 individual Mètis persons and a corporate body (the Federation) on behalf of the approximately 100,000 to 130,000 Mètis of the province.236 So to rely on Kingstreet and Ravndahl to maintain that “claims for personal remedies flowing from the striking down of an unconstitutional statute are barred by the running of a limitation period,” as the Court did,237 does not take into account the sui generis,

229 Ibid at para 15.
230 St-Onge FCA, supra note 222; Zadworny v Manitoba (Attorney General) et al., 2007 MBCA 142 (CanLII) at para 13; Garry v. Canada, 2007 ABCA 234 (CanLII) at para 21.
231 Ravndahl SCC, supra note 100.
232 Alexis, supra note 228 at para 22. For critical commentary, see Roach, supra note 100 at §11.250-260.
233 On the relationship between sections 24(1) and 52(1), see R v Ferguson, [2008] 1 SCR 96 at paras 35, 58-66, addressing the issue of whether constitutional exemptions are available in the context of mandatory minimum sentences. See also R v Demers, [2004] 2 SCR 489 at paras 56-64, considering when section 24(1) remedies are available in addition to a section 52(1) declaration of invalidity. For discussion, see Roach, supra note 100, chs 3 and 14.
234 See also Shade v Canadian Pacific Railway Limited, 2017 ABQB 292 (CanLII) [Shade], especially paras 195-206, where this aspect of Manitoba Metis Federation was applied. For further treatment, see Horseman v Canada, 2016 FCA 252, 2017 TCC 198, 2018 FCA 119; Scow v Attorney General of Canada, 2021 BCSC 1110 (CanLII), especially paras 29-41.
235 See note 202-14 and quotations at notes 210 and 211 above.
236 Manitoba Metis Federation Inc. et al. v. Attorney General of Canada et al., 2007 MBQB 293 (CanLII) at paras 344-46.
237 Manitoba Metis Federation SCC, supra note 80 at para 134. See also at paras 138-39: “We agree, as the Court of Appeal held, that the limitation applies to Aboriginal claims for breach of fiduciary duty with respect to the
collective nature of Indigenous rights. As Chief Justice stated in *Delgamuukw*, which like *Manitoba Metis Federation* also involved land rights, “Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation.”

In the Supreme Court’s recent decision in *Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and Mani-Utenam)*, the majority held that, because Aboriginal rights are *sui generis* collective rights, it is inappropriate to classify them as either or personal (*in personam*) or real (*in rem*). The distinction between these kinds of rights therefore should not be used to deny Indigenous claimants remedies in addition to declarations under section 52(1). Both the unique nature of Indigenous rights generally and the specific rights in question in any given case should be taken into account.

The Court’s comments in *Manitoba Metis Federation* on the applicability of limitations statutes to fiduciary obligations relied on cases where constitutional issues either did not apply (*Wewaykum*, which did not concern section 35 rights and where the provincial statute of limitations applied as federal law) or were not raised (*Lameman*). Moreover, the comments were obiter because the plaintiffs were asking only for declarations of breach of constitutional duties by the Crown and constitutional invalidity of legislation under section 52(1); they were not seeking damages and other remedies. Despite these qualifications, the *Manitoba Metis Federation* decision has been applied by lower courts as if it had settled the constitutional issues around the application of statutes of limitation to Indigenous claims.

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238 In *Restoule* ONSC, supra note 125 at para 195, Hennessy J distinguished *Ravndahl* from *Wewaykum*, *Lameman* and *Manitoba Metis Federation* on the basis of the difference between individual and collective rights. See also Roach, supra note 100 at §15.1770. The Ontario CA, *Restoule* ONCA, supra note 126, did not address this issue or cite *Ravndahl*.

239 *Delgamuukw*, supra note 1 at para 115.

240 *Uashaunnuat*, supra note 136 at paras 25-36. The Court was divided on this issue, as the dissenting judges would have maintained a clearer distinction between personal and real *in rem* rights. Aboriginal title is nonetheless proprietary: see *Canadian Pacific*, supra note 59 at 677, where it was held that the First Nation interest in reserve land is only “personal” in the sense of being inalienable other than by surrender of the Crown. In other respects, it is a proprietary right that can “compete on an equal footing with other proprietary interests.” This holding was applied to Aboriginal title land by Lamer CJ in *Delgamuukw*, supra note 1 at para 113.

241 On remedies for violation of Indigenous rights generally, see Roach, supra note 100, ch 15.

242 In *R v Henry*, [2005] 3 SCR 609 at paras 52-59, the Supreme Court cautioned against treating all its obiter statements as authoritative: “All obiter do not have, and are not intended to have, the same weight. The weight decreases as one moves from the dispositive *ratio decidendi* to a wider circle of analysis which is obviously intended for guidance and which should be accepted as authoritative. Beyond that, there will be commentary, examples or exposition that are intended to be helpful and may be found to be persuasive, but are certainly not ‘binding’ in the sense the *Sellars* principle [*Sellars v The Queen*, [1980] 1 SCR 527] in its most exaggerated form would have it. The objective of the exercise is to promote certainty in the law, not to stifle its growth and creativity. The notion that each phrase in a judgment of this Court should be treated as if enacted in a statute is not supported by the cases and is inconsistent with the basic fundamental principle that the common law develops by experience” (para 57, Binnie J for the Court). Thanks to Kerry Wilkins for this reference.

243 E.g. see *Shade*, supra note 234; *Samson First Nation*, supra note 54 at paras 22, 112-17, 121-27, 136, 181; *Watson*, supra note 111 at paras 346-52. Compare *Restoule* ONSC, supra note 125 at para 184, where Hennessy J stated: “Nothing in this decision should be considered to be a comment or finding on the issue of the
issues have not been addressed sufficiently in any of the Supreme Court cases we have discussed for them to be considered as settled.

4. Third Party Rights

Up until now, virtually all the case law we have examined has involved reliance on statutes of limitations and laches by the Crown. However, a potentially larger issue involves the availability of these defences to private persons. It would require a paper at least as long as this one to treat this topic adequately, so all we can attempt is an overview of the main issues, starting with the division-of-powers issue discussed earlier.

We have seen that provincial statutes of limitation cannot apply of their own force to extinguish Indigenous rights that come within the ambit of section 91(24) of the Constitution Act, 1867. This has been true ever since Confederation, for division-of-powers reasons. Arguably, limitations statutes could not even infringe these rights prior to the Tsilhqot’in Nation decision in 2014. However, before enactment of section 35 of the Constitution Act, 1982, Parliament could not only infringe, but could also extinguish, any Indigenous rights, as long as it did so clearly and plainly. This could be done by referentially incorporating provincial limitations constitutionality of limitations legislation on Indigenous and treaty claims.” As the Ontario CA’s decision that the Ontario limitations legislation does not apply to treaty claims was based solely on statutory interpretation (Restoule ONCA, supra note 126 at paras 632-62), the constitutional application of limitations statutes to Aboriginal and treaty claims was not considered on appeal either.

Occasionally, however, corporate bodies have also been involved: e.g. see Peter Ballantyne QB, supra note 93. In Uashaunnuat, supra note 136 at para 293, Brown and Rowe JJ (dissenting) acknowledged, without referring to limitations issues, that “the interaction between Aboriginal title claims and third parties’ property rights remains unsettled.” As examples, they referred to Council of the Haida Nation v British Columbia, 2017 BCSC 1665 (seeking a “declaration of aboriginal title [that] includes all lands on Haida Gwaii, including private land held in fee simple and land subject to Crown granted tenures, permits and licences”: para 2) and Chippewas of Sarnia CA, supra note 128 (discussed below).


Our discussion focuses on the nine provinces where the common law applies. For an article discussing the distinct situation in Quebec where the Civil Code applies and the Charte des droits et libertés de la personne provides additional protection to Indigenous property rights, see Otis, supra note 131. A related topic is the impact on Indigenous land rights of provincial land registry and land titles legislation: see note 265 below. While this topic is beyond the scope of this paper, our discussion of division-of-powers issues and section 35 of the Constitution Act, 1982 is nonetheless relevant to it.

See text at notes 159-82 above.

See text at notes 138-42 above.

See cases cited in note 184 above.
statutes into federal law. So section 88 of the Indian Act, for example, could make provincial limitations statutes apply so as to infringe some rights of “Indians” (though probably not rights to “Lands reserved for the Indians”), even though that section is not sufficiently clear and plain to effect the extinguishment of these rights. If section 88 cannot result in extinguishment of these rights, even though it relates expressly to “Indians”, surely more general federal enactments referentially incorporating provincial limitations periods that do not refer to "Indians" or other Indigenous peoples, such as section 39(1) of the Federal Court Act and section 32 of the Crown Liability and Proceedings Act, would not be sufficiently clear to do so either.

Since enactment of section 35 in 1982, even Parliament cannot extinguish Aboriginal or treaty rights, so thereafter provincial statutes of limitations cannot be referentially incorporated by federal legislation if the effect would be to extinguish section 35 rights. If they infringe Aboriginal or treaty rights, the infringement has to be justified post-1982 under the Sparrow test. As discussed above, it is not obvious that this test could be met in this context.

We now need to apply this law on the applicability of limitations statutes to third party rights. In the interests of space, we will limit this discussion to rights relating to land, the context in which the issue usually arises. Adverse possession aside, private non-Indigenous land rights in Canada originate from Crown grants. In areas subject to historical land cession treaties (generally, Ontario and the Prairie Provinces), the Crown acted as though it had acquired the land by treaty and then granted fee simple estates and other interests. In non-treaty areas such

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251 See Kruger, supra note 137; Dick, supra note 139; and notes 195-98 and accompanying text above.
252 Delgamuukw, supra note 1 at para 183.
253 Quoted above in note 38.
254 Quoted in text following notes 86-86 above.
255 Van der Peet, supra note 1 at para 28; Mitchell, supra note 90 at para 11.
256 Recall that most provincial statutes extinguish land rights expressly, and in some instances other rights are also extinguished: see notes 163-64, 201, above.
257 See notes 186-87 above and accompanying text.
258 Other contexts in which the issue arises are in regard to personal property such as artifacts, cultural items, and art works in museums, and intellectual property, which can include traditional knowledge, songs, etc: see Catherine Bell & Val Napoleon, eds, First Nations Cultural Heritage and the Law: Case Studies, Voices, and Perspectives (Vancouver: UBC Press, 2008); Michael Halewood, Common Law Aboriginal Knowledge Protection Rights: Recognizing the Rights of Aboriginal Peoples in Canada to Prohibit the Use and Dissemination of Elements of Their Knowledge, D Jur dissertation, Osgoode Hall Law School, York University, May 2005 (unpublished).
260 As a result of Mikisew Cree First Nation v Canada (Minister of Canadian Heritage), [2005] 3 SCR 388 [Mikisew Cree 2005], the Crown has to consult sufficiently with First Nations before making grants that impact their treaty rights. See also Beckman, supra note 108; Grassy Narrows, supra note 138 at paras 51-53.
as most of British Columbia and the Atlantic Provinces, the Crown simply assumed it owned the land and was able to grant it. In those parts of the country, pre-Confederation colonial governments would have been unable to issue valid grants of Indigenous lands, both because the requisite authority probably would not have been delegated to them and because they would have been prohibited from doing so by the Royal Proclamation of 1763.

Post-Confederation provincial grants in non-treaty areas could not have extinguished the land rights of Indigenous peoples either, for two reasons. First, we have seen that, due to section 91(24) of the Constitution Act, 1867, provincial governments do not have the constitutional authority to extinguish Indigenous rights. Secondly, the provinces would be prevented from doing so by a fundamental common law rule, expressed by the Latin maxim nemo dat quod non habet (one cannot give what one does not have). This rule applies to the Crown just like everyone else.

The case law on private persons’ reliance on limitations statutes to bar Indigenous court actions is meagre, in part because Indigenous peoples usually do not include land held by private persons in their claims. An exception is Chippewas of Sarnia, decided by the Ontario Superior Court

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261 The treaties in the Atlantic Provinces are peace and friendship treaties that do not provide for cession of land: see Marshall, supra note 39 at paras 21, 74; R v Marshall; R v Bernard, [2005] 2 SCR 220, especially para 7; R v Sappier; R v Gray, [2006] 2 SCR 686, especially para 66.

262 See notes 131-34 and accompanying text above.

263 See notes 128-29 and accompanying text above. Note, however, that in Calder, supra note 3, the Supreme Court split three/three on the application of the Royal Proclamation in British Columbia.

264 See notes 159-61 and accompanying text above. Especially relevant are Delgamuukw, supra note 1 at paras 172-83; Tsilhqot’in Nation BCSC, supra note 9 at paras 996-98; Otis, supra note 131 at 291-92.

265 See Broom, supra note 167 at 470-74 (stating the rule and explaining exceptions relating to personal property such as negotiable instruments); Ziff, Property Law, supra note 23 at 458-60; Victor Di Castri, The Law of Vendor and Purchaser, looseleaf ed (Toronto: Carswell), vol 2, §522. Note, however, that where land is concerned the application of the nemo dat rule has been altered in some jurisdictions by land registry and Torrens system legislation: see Ziff at 471; Robert Megarry & William Wade, The Law of Real Property, 6th ed by Charles Harpum (London: Sweet & Maxwell, 2000), 87. As this legislation is provincial, by reason of the division of powers and section 35 of the Constitution Act, 1982 it cannot apply to extinguish Aboriginal title: see Chippewas of Sarnia SCJ, supra note 9 at paras 465-81. For a ruling that the nemo dat rule still applies to charges such as mortgages despite the BC Land Titles Act, RSBC 1996, c 250, see Gill v Bucholtz, 2009 BCCA 137, commented on by Douglas C Harris & Karin Mickelson, “Finding Nemo Dat in the Land Titles Act: A Comment on Gill v Bucholtz” (2012) 45:1 UBC L Rev 205. On how Indigenous land rights might be accommodated within land titles systems, see Nigel Bankes, Sharon Masher & Jonnette Watson Hamilton, “The Recognition of Aboriginal Title and Its Relationship with Settler State Land Titles System” (2014) 47:3 UBC L Rev 829.

266 See Bristow v Cormican (1878) 3 App Cas 641 (HL Ir). At 667, Lord Blackburn stated that, where the Crown has neither title nor possession, its patents must be dealt with “in the same way as if the grantor was a private individual.” See discussion and supporting cases cited in McNeil, Common Law Aboriginal Title, supra note 6 at 139 n25. See also Attorney-General for the Isle of Man v Mylchreest (1879) 4 App Cas 294 (PC) at 302: “the Lordship could only be granted [by the Crown] subject to the rights which the customary tenants might then have acquired by custom”. Compare Chippewas of Sarnia CA, supra note 128 at paras 292-95, opining that courts have discretion in deciding whether to apply the nemo dat rule to set aside a Crown grant. Note that the patent in question was issued in 1853, scarcely 25 years before Bristow and Mylchreest were decided.

267 E.g. see Tsilhqot’in Nation SCC, supra note 138 at para 9. Compare Uashaunnuat, supra note 136; Saik’uz First Nation and Stellat’en First Nation v Rio Tinto Alcan Inc, 2015 BCCA 154, leave to appeal dismissed 15 October 2015, SCC File No 36480. In the trial of the latter case, Thomas and Saik’uz, supra note 103 at paras 605-14, J decided, on the facts, that laches did not apply to the nuisance and riparian rights claims against a private corporation that had impaired the plaintiffs’ Aboriginal fishing rights by constructing a dam in the 1950s, but the
of Justice in 1999 and affirmed, with some variation, by the Court of Appeal in 2000. In 1827, the Chippewas entered into a treaty with the Crown, by which they reserved certain Aboriginal title lands in their traditional territory. In 1839, three of their chiefs sold part of one reserve (the land under dispute) to Malcolm Cameron, a private speculator, businessman and politician, without a surrender of the land to the Crown. The motions judge, Justice Campbell, held that the sale was null and void because it violated the prohibition on private purchases of Indian lands in the Royal Proclamation of 1763 and the common law; the Court of Appeal agreed that the sale was invalid, relying more on Crown practice and the common law inalienability of Aboriginal title than on the Proclamation.

In 1853, the Crown issued a patent granting the disputed lands to Cameron, who sold them to settlers. At the time of the legal proceedings, the lands, now located in the City of Sarnia, were occupied by more than 2000 individuals and corporations who were the successors in title of Cameron. The motions judge held that the “Cameron patent, because it was unauthorized and because it contravened the surrender requirements of the Royal Proclamation was, from the day it was issued, void ab initio and of no force or effect.” This put the private land holdings in jeopardy. Justice Campbell’s solution was to apply the equitable bona fide purchaser for value without notice rule, combined with a 60-year equitable limitation period, to bar the Chippewas’ claims to the lands themselves as of 1921, leaving the possibility of damage claims against the Crown open.

The Court of Appeal justices, in a decision by the Court, upheld Justice Campbell’s decision, but disagreed with aspects of it. Importantly, they decided that the Cameron patent was valid until set aside by a court and that judges have discretion to set aside Crown grants, irrespective of the nemo dat rule. Given the interests of the current innocent landholders and the fact that the provincial limitations statute could bar a claim for damages (which weren’t claimed); however, constitutional issues were not addressed in the limitations context. Note that the action against the corporate defendant in Uashaunnuat was terminated on agreement on 3 December 2020: see online:


Chippewas of Sarnia SCJ, supra note 9 at paras 393-96; Chippewas of Sarnia CA, supra note 128 at paras 185-201, 219.

Chippewas of Sarnia SCJ, supra note 9 at para 425. See also para 431.

Ibid at paras 680-769.

Chippewas of Sarnia CA, supra note 128 at paras 243-96. For criticism, see McNeil, “Extinguishment”, supra note 133 at 329-39; Reynolds, “Aboriginal Title”, supra note 270 at 111-13. See also John McGhee, ed, Snell’s Equity, 30th ed (London: Sweet & Maxwell, 2000) at 645-46 (common law remedies, unlike equitable remedies, are not discretionary). The Court of Appeal’s view that Crown grants are valid until set aside by a court is clearly wrong, as a simple example will illustrate. A holds fee simple title to Blackacre. The Crown grants Blackacre in fee simple to B. B enters and ousts A, relying on the Crown grant. If the grant was valid until set aside by a court, A’s only recourse would be to apply to a court to have the patent set aside, which would depend on the court exercising its discretion in her favour and might take months if not years. This outcome violates fundamental principles of the
Chippewas had acquiesced in the status quo for so long, the Court decided that it would be inequitable to invalidate the patent and dispossess the private landholders. The appeal judges agreed with the motions judge that the *bona fide* purchaser for value without notice rule applied but disagreed with him on the application of a 60-year equitable limitation period.273

For present purposes, our main interest in the *Chippewas of Sarnia* case involves the judicial treatment of the limitations and laches defences. A number of limitations statutes were pleaded to block the claim.274 Justice Campbell held that neither the pre-Confederation nor the post-Confederation statutes could apply to extinguish Aboriginal title.275 The pre-1867 statutes did not display the necessary clear and plain intent276 and post-1867 Ontario statutes could not apply of their own force because provincial legislatures do not have the constitutional authority to extinguish Aboriginal title.277 Referential incorporation of the Ontario statutes into federal law by section 88 of the *Indian Act* could not do that either because, once again, the requisite clear and plain intent to extinguish was lacking, and because section 88 only makes provincial laws of general application apply to “Indians”, not Indian lands.278 Campbell J decided as well that section 39 of the *Federal Court Act*279 did not apply because the action had not been brought in the Federal Court.280 The federal *Crown Proceedings and Liability Act*281 did not either as it only applies to actions by or against the Crown in right of Canada, and even though the federal Crown was a defendant it was not relying on limitation periods.282 For this reason, the private occupiers

common law, whereby property is protected against executive acts such as Crown grants, and longstanding case law: see cases cited in note 266 above; *Case of Alton Woods* (1600) 1 Co R 40b (KB); *Earl of Rutland’s Case* (1608), 8 Co R 55a (KB); *Alcock v Cooke* (1829) 5 Bing 340 (CP) at 348; *City of Vancouver v Vancouver Lumber Company*, [1911] AC 711 (PC); *Attorney-General for Ontario v McLean Gold Mines Ltd.* (1925) 58 Ont LR 64 (CA). In *In the matter of Islington Market Bill* (1835) 3 Cl & F 513 at 515, the House of Lords unanimously held that a Crown grant of a market “within the common law distance of an old market, *prima facie* is injurious to the old market, and therefore void.” Of these cases, the only one the Court of Appeal cited in *Chippewas of Sarnia* was *Alcock v Cooke*, which it misinterpreted: see *City of Vancouver v Vancouver Lumber Company* at 721; McNeil, “Extinguishment”, *supra* note 133 at 335 n207.

273 *Chippewas of Sarnia CA*, *supra* note 128 at paras 297-310.

274 See *Chippewas of Sarnia SCJ*, *supra* note 9 at para 445.

275 Campbell J provided a useful summary of his conclusions on the non-application of limitations statutes, *ibid* at paras 598-606.

276 *Ibid* at paras 594-96, 604. Although Campbell J also held that the colonial legislatures did not have the authority to extinguish Aboriginal title (paras 597, 605), if the requisite intent had been there, apparently the Upper Canada limitations statutes of 1834 and 1859 could have applied as continuing federal law by virtue of sections 91(24) and 129 of the *Constitution Act, 1867* (paras 529-33). Section 129 provides in part: “Except as otherwise provided by this Act, all Laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of Civil and Criminal Jurisdiction, and all legal Commissions, Powers, and Authorities, and all Officers, Judicial, Administrative, and Ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made…”.

277 *Chippewas of Sarnia SCJ*, *supra* note 9 at paras 448-81, confirming our discussion at notes 159-81 above.

278 *Ibid* at paras 482-95.

279 *Supra* note 38.

280 *Chippewas of Sarnia SCJ*, *supra* note 9 at paras 496-500.

281 *Supra* note 79.

282 *Chippewas of Sarnia CA*, *supra* note 128 at para 231.
could not rely on it, and, in any case, the Court found that it does not exhibit a clear and plain intent to extinguish Aboriginal title.\textsuperscript{283}

The Court of Appeal affirmed Justice Campbell’s decision on the non-applicability of limitations provisions.\textsuperscript{284} Importantly, the Court accepted that the pre-Confederation statutes did not display the requisite clear and plain intent to extinguish Indigenous land rights, that the province did not have the constitutional capacity to extinguish those rights by means of limitations statutes,\textsuperscript{285} and that incorporation of provincial statutes into federal law did not make them applicable to legal actions in provincial courts against private occupiers.\textsuperscript{286}

As a result of the \textit{Chippewas of Sarnia} case, the private occupiers were unable to rely on any statutory limitation periods because the action had been commenced in a provincial superior court and provincial limitations statutes did not apply either of their own force or by referential incorporation into federal law. Thus, even if the statutes displayed the necessary clear and plain intent to extinguish the Chippewas’ land rights (which they did not), they could not do so. Justice Campbell and the Court of Appeal were therefore faced with a situation where they had to decide between the Chippewas’ unextinguished land rights and the interests of the innocent private occupiers. The judges relied on equity to come down on the side of the occupiers.

Justice Campbell rejected the application of the equitable doctrines of laches and acquiescence, as the factual foundation for these defences was entirely lacking. He observed: “There is no evidence of the essential elements of neglect and knowledge. There is no evidence that the Chippewas were aware of their legal rights and in any event they had no means to enforce them because they lacked the legal capacity to do so until 1951.”\textsuperscript{287}

The Court of Appeal disagreed with Justice Campbell on the application of laches and acquiescence by emphasizing different facts: “The Chippewas accepted the transfer of their lands and acquiesced in the Cameron transaction. The landowners altered their position by investing in and improving the lands in reasonable reliance on the Chippewas’ acquiescence in the status quo. This is a situation that would be unjust to disturb.”\textsuperscript{288} The Court concluded:

\begin{quote}
[T]he Chippewas had knowledge of the facts necessary to assert a claim, and in view of that knowledge, \textit{Guerin} is distinguishable…. [W]e are of the view that the Chippewas not only knew that the lands had been given up but actively acquiesced in the transfer by seeking and receiving payment of the proceeds. On these facts, we can
\end{quote}

\begin{footnotes}
\textsuperscript{283} \textit{Chippewas of Sarnia} SCJ, supra note 9 at paras 501-03. At paras 504-18, Campbell J distinguished \textit{Blueberry River}, supra note 44, in part because it was a Federal Court case where referential incorporation of the provincial limitations statute into federal law had occurred and because it involved a claim for damages for breach of fiduciary obligations, not a claim for possession of land.

\textsuperscript{284} \textit{Chippewas of Sarnia} CA, supra note 128 at paras 220, 242.

\textsuperscript{285} The parties accepted this as well, as this aspect of Campbell J’s decision was not appealed: \textit{ibid} at para 222.

\textsuperscript{286} \textit{ibid} at paras 220-42.

\textsuperscript{287} \textit{Chippewas of Sarnia} SCJ, supra note 9 at para 665. The \textit{Indian Act} made it an offence to raise money or pay legal counsel to pursue Indian claims from 1927 to 1951: see note 41 and accompanying text above.

\textsuperscript{288} \textit{Chippewas of Sarnia} CA, supra note 128 at para 299.
\end{footnotes}
see no reason why the equitable defences of laches and acquiescence should not apply.\textsuperscript{289}

As the application of the doctrines of laches and acquiescence is discretionary, the outcome depends very much on individual judges’ views of the facts and the interests of justice, as Chippewas of Sarnia demonstrates. However, one must also ask whether it is even appropriate to apply equitable defences to common law actions, which the Chippewas’ claims for possession of lands and for damages for trespass clearly were.\textsuperscript{290} The Supreme Court considered the application of the defence of laches in Guerin and Wewaykum – applying it on the facts in the latter case but not in the former – but those cases both involved equitable claims based on breaches of fiduciary obligations.\textsuperscript{291} In Manitoba Metis Federation, Chief Justice McLachlin and Justice Karakatsanis rejected the application of laches on the facts, and then added:

It is difficult to see how a court, in its role as guardian of the Constitution, could apply an equitable doctrine to defeat a claim for a declaration that a provision of the Constitution has not been fulfilled as required by the honour of the Crown. We note that, in Ontario Hydro v. Ontario (Labour Relations Board), [1993] 3 S.C.R. 327, at

\textsuperscript{289} Ibid at para 302. Recall that in Guerin, supra note 32, the Department of Indian Affairs had kept the terms of the lease to the golf club secret from the Musqueam.

\textsuperscript{290} The general rule is that equitable defences cannot bar common law actions and remedies: see McGhee, supra note 272 at 645-46; Michael Evans, Bradley L Jones & Theresa M Power, Equity and Trusts, 4th ed (Chatswood NSW: LexisNexis Butterworths Australia, 2016), 694; Reynolds, “Aboriginal Title”, supra note 270 at 114-15. In Manitoba Metis Federation SCC, supra note 80 at para 145, McLachlin CJ and Karakatsanis J stated: “The equitable doctrine of laches requires a claimant \textit{in equity} to prosecute his claim without undue delay” (our emphasis). However, in Chippewas of Sarnia CA, supra note 128 at paras 286-90, the court held that Aboriginal title is not a strictly legal (as opposed to an equitable) interest, and that the common law and equity have fused. On the limited extent of the fusion of law and equity, see Jamie Gilster & James Lee, Hanbury and Martin Modern Equity, 22nd ed (London: Thomson Reuters, 2021), 18-23. For criticism of both Justice Campbell’s and the Court of Appeal’s views on the fusion of common law and equity and the availability of equitable defences, including the \textit{bona fide} purchaser for value without notice rule, to oppose common law actions and remedies, see McNeil, “Extinguishment”, supra note 133 at 329-44; Reynolds, “Aboriginal Title”, supra note 270 at 103-120; Hamilton, “Role of Equity”, supra note 246 at 373-76. To give just one example of the distinctions between these defences, see Megarry & Wade, supra note 265 at 99, stating what they refer to as “the cardinal maxim in which is expressed the true difference between legal and equitable rights”, namely: “\textit{Legal rights are good against all the world; equitable rights are good against all persons except a \textit{bona fide} purchaser of a legal estate for value without notice, and those claiming under such a purchaser}” (emphasis in original). The authors go on to say at 103 that this fundamental distinction between law and equity did not change in 1873 when common law and equitable remedies became available regardless of the court in which the action was brought: “A legal right is still enforceable against a purchaser of a legal estate without notice, while an equitable right is not.” See also EH Burn, Cheshire and Burn’s Modern Law of Real Property, 15th ed (London: Butterworths, 1994), 58, and the case discussed in the next note.

\textsuperscript{291} See also Southwind v Canada, [2017] FCJ No 966 at paras 530-38, where Zinn J considered and rejected the application of laches to a claim against the Crown for equitable compensation for the flooding of reserve lands. The Federal CA affirmed this decision: [2019] FCJ No 672. In the Supreme Court, neither limitations statutes (in Ontario, actions for breach of fiduciary obligations are not subject to the statute of limitations) nor laches were raised, as the requirement that compensation be paid was not questioned; instead, the appeal involved the principles governing how compensation should be calculated: Southwind v Canada, 2021 SCC 28 [Southwind SCC]. At paras 65-83, the Supreme Court distinguished between common law and equitable compensation, revealing in this context as well the distinctions between the common law and equity.
p. 357, Lamer C.J. noted that the doctrine of laches does not apply to a constitutional
division of powers question.292

Given that the Chippewas’ land rights at issue in Chippewas of Sarnia were also constitutional,
the laches doctrine should not have been available to the defendants.293

If, as both Justice Campbell and the Court of Appeal concluded, limitations statutes do not apply
to claims of Indigenous land rights against private occupiers, and, as we have argued, the
equitable doctrines of laches and the bona fide purchaser rule should not apply either,294 courts
are faced with the uncomfortable possibility that Indigenous claimants will prevail against
innocent parties that have been in peaceful possession of land for long periods of time.295 As
Chippewas of Sarnia reveals, judges are very reluctant to come to this conclusion. Their solution
in that case was to leave the private occupiers undisturbed, while leaving open claims by the
Chippewas to compensation against the Crown for breach of its fiduciary obligations, claims that
are not barred by limitation periods in Ontario.296

The Chippewas had suggested alternative solutions. They did “not seek the wholesale eviction of
the present occupiers of the property”; instead, they sought “declaratory relief recognizing their
right to the disputed lands and damages for trespass and breach of fiduciary duty” and were
“ready and willing to negotiate with the federal and provincial governments.”297 The Court of
Appeal was concerned nonetheless that, if they obtained “the declaratory relief claimed, they
would be entitled to possession of the land.”298 To avoid this result, the Court exercised its
discretion and refused the declaratory relief. The danger inherent in this approach was pointed
out by the House of Lords in Scott v Scott, where Lord Shaw observed: “To remit the

292 Manitoba Metis Federation SCC, supra note 80 at para 153. On the extent to which Manitoba Metis Federation
may have overruled Chippewas of Sarnia, see Hamilton, “Role of Equity”, supra note 246 at 378-86.
293 See Hamilton, “Role of Equity”, supra note 246, especially at 362-70.
294 See especially note 290 above.
295 As Brian Slattery put it in “Metamorphosis”, supra note 246 at 256-57, “[t]he courts are torn between a desire to
right a great historical wrong – the wrongful dispossession of Indigenous peoples – and deep misgivings about doing
so at the expense of third parties and the larger society.”
296 See Chippewas of Sarnia SCJ, supra note 9 at paras 8, 436; Chippewas of Sarnia CA, supra note 128 at paras 24,
220, 246, 275. The damage claim does not appear to have been litigated. We do not know if it was settled.
297 Chippewas of Sarnia CA, supra note 128 at para 3. In their Statement of Claim, claims for damages for trespass
and for writs of possession were made against selected, mainly corporate defendants, whereas damages for breach of
fiduciary duty were sought against the Crown: see Amended Fresh Statement of Claim, 23 May 1996, The
Chippewas of Sarnia Band (Plaintiff) and Attorney General of Canada et al. (Defendants), Ontario Court (General
Division), Court File No. 95-CU-92484, paras 3-7, 66-72. See also Refiled Factum of the Appellant, The Chippewas
of Sarnia Band, 17 May 2000, Court of Appeal for Ontario, Court File Nos. C32170, C32188, C32202, para 72(e):
“The Chippewas have always maintained a willingness to negotiate with the Crown, and in its pleadings has
publicly expressed a willingness to consider an ‘absolute surrender’ of properties used for residential and
institutional purposes and a ‘conditional surrender’ of properties used for other purposes” (footnotes omitted).
298 Chippewas of Sarnia CA, supra note 128 at para 3. Actually, a declaration and an order for recovery of
possession of land are separate remedies, so conferral of one does not entail conferral of the other. Even a possession
order and a vesting order, though often combined in one judgment, are distinct remedies: see FH Lawson, Remedies
of English Law (Harmondsworth: Penguin Books Ltd., 1972), 235-36, 282-84. Note too that the declaration in
Manitoba Metis Federation SCC, supra note 80, did not result in any other remedy.
maintenance of constitutional right to the region of judicial discretion is to shift the foundations of freedom from the rock to the sand.”

Other authors have suggested ways in which the rights of Indigenous peoples and private occupiers of unceded Indigenous lands can be balanced to achieve a measure of reconciliation. Brian Slattery, for example, distinguishes between historical and generative Aboriginal title. Historical title is the original title Indigenous peoples have under their own laws and by virtue of their occupation of lands and territories prior to European colonization, as acknowledged in court decisions and by the Crown in the Royal Proclamation of 1763 and treaties. A generative right is a modern “right that exists in a dynamic but latent form, which is capable of partial articulation by the courts but whose full implementation requires agreement between the Indigenous party and the Crown.”

Slattery explains as follows:

Considered as an historical right, aboriginal title is governed by Principles of Recognition, which are traditional common law rules based on ancient dealings between the British Crown and Indigenous American peoples. Considered as a generative right, aboriginal title is governed by Principles of Reconciliation, which are emergent common law rules that envisage treaty settlements negotiated with the assistance of the courts.

Courts can acknowledge core elements of a generative right sufficient to promote negotiations and protect the right in the meantime, but full articulation of the right must come from negotiations rather than judicial decisions. Slattery lists several options available to the courts:

1. recognize the historical title of the claimant group as it existed at the time of Crown sovereignty, as a baseline for modern negotiations;
2. issue such orders as are necessary and appropriate to protect the historical title from further erosion and invasion, while taking account of existing private and public interests;
3. recognize the right of the claimant group to use and possess certain portions of its historical territory, either immediately or after the lapse of a specified period of time;

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299 [1913] AC 417 (HL) at 477, where his Lordship went on to state: “The right of the citizen and the working of the Constitution in the sense which I have described have upon the whole since the fall of the Stuart dynasty received from the judiciary – and they appear to me still to demand of it – a constant and most watchful respect. There is no greater danger of usurpation than that which proceeds little by little, under cover of rules of procedure, and at the instance of judges themselves.” The Aboriginal and treaty rights of the Chippewas at issue in Chippewas of Sarnia are constitutional rights, protected by the Royal Proclamation of 1763, section 91(24) of the Constitution Act, 1867, and section 35 of the Constitution Act, 1982.

300 In summarizing selected works by these authors, we are unable do justice to the sophistication of their arguments. Readers are encouraged to read the works themselves. See also McNeil, “Reconciliation”, supra note 246 (arguing that, where lands subject to Aboriginal title cannot be returned without dispossessing innocent third parties, compensation should be paid by governments who are the real wrongdoers); Hamilton, “Role of Equity”, supra note 246 (arguing that conflicts between Indigenous land rights and private property interests should be resolved through negotiations with the goal of achieving coexistence and reconciliation, rather than through questionable application of equitable doctrines and judicial discretion, as happened in Chippewas of Sarnia).

301 Slattery, “Metamorphosis”, supra note 246.

302 Ibid at 262.

303 Ibid at 257. Slattery elaborates further on these principles at 281-86.
(4) enjoin the parties to enter into negotiations aimed at defining the modern scope of aboriginal title, as a generative right.304

He goes on to suggest that a “court should be flexible and creative in fashioning orders designed to achieve these ends, in keeping with its mandate to recognize and affirm aboriginal rights, both at common law and under section 35(1) of the Constitution Act, 1982.”305 Regrettably, it was just this kind of flexibility that was lacking in the decisions in the Chippewas of Sarnia case.

Gordon Christie has less confidence in the ability of Canadian courts to avoid the colonial paradigm permeating much of the case law.306 He thinks that, if the matter is left to the courts, they will give preference to private property rights, as happened in Chippewas of Sarnia. While he perceives a glimmer of hope in the Supreme Court’s recognition of pre-existing Indigenous sovereignty in Haida Nation307 and of the need to reconcile this pre-existing sovereignty with de facto Crown sovereignty,308 he does not see this reconciliation as a job for the courts. Instead, it should involve a dialogue, “primarily between the Crown and each Indigenous nation in relation to its traditional territories, though perhaps with some room for the voices of private property owners.”309 How might an Indigenous nation understand what it views as illegitimate acts by the federal and provincial governments, including the grant of fee simple interests to settlers? Engaging in what he calls “a thought-experiment”,310 Christie speculates that, at the time when settlers began to encroach on their lands, Indigenous nations may have

… imagined that while each society or nation would manage its own internal affairs, together they would work out a way of sharing the physical space they would come to co-inhabit, an arrangement that would preserve key elements of group autonomy while allowing for a process whereby important decisions about shared land use were arrived at between the two societies.311

This policy of sharing, based on respect and trust, might help provide a way to overcome the past colonial actions of non-Indigenous governments. Dialogue might lead a conception of “shared radical title”,312 based on “truly inter-societal understandings”, leading to sub-arrangements such

304 Ibid at 263.
305 Ibid. For favourable judicial comment on Slattery’s article, see Tsilhqot’in Nation BCSC, supra note 9 at paras 1363-72.
306 Christie, supra note 246.
307 Supra note107. See also Manitoba Metis Federation SCC, supra note 80 at para 67; Mikisew Cree First Nation v Canada (Governor General in Council), [2018] 2 SCR 765 at para 21; Felix Hoehn, Reconciling Sovereignties: Aboriginal Nations and Canada (Saskatoon: University of Saskatchewan Native Law Centre, 2012).
308 Christie, supra note 246 at 200-01.
309 Ibid at 203.
310 Ibid at 204.
311 Ibid at 203. Indigenous nations, in a spirit of remarkable generosity, have often expressed a willingness to share with the newcomers, which was usually the basis on which they entered into treaties: see sources cited in note 259 above.
312 On the meaning of radical or underlying title, which courts have viewed as having vested in the Crown along with sovereignty, see Kent McNeil, “The Source, Nature, and Content of the Crown’s Underlying Title to Aboriginal Title Lands” (2018) 96:2 Can Bar Rev 275.
as “agreements on limits to expropriation, powers of taxation, resource co-management, and so forth.” 313 Christie acknowledges that

Private property would be affected … but there is no need to imagine that it would be seriously threatened. Recognizing that Aboriginal title runs parallel to Crown title does not push aside such things as fee simple title, for all such legal entities exist on top of deeper forms of radical title. 314

He concludes that “creative dialogue could conceivably lead to just and sensible arrangements wherein Aboriginal title might peacefully coexist with third party private property interests.” 315

John Borrows points out that interests in land, whether Indigenous or private, are not absolute; even Crown title is often constrained by other interests, including Indigenous rights. 316 Focusing on Crown grants of unceded Indigenous lands, he argues that the “bluntness” of the application of the nemo dat rule 317 might be attenuated by “Indigenous law, future treaties and Canada’s broader constitutional framework.” 318 He elaborates as follows:

Indigenous peoples’ own laws can accommodate a wide variety of interests. If private owners have accrued entitlements under Indigenous law through their long presence on Indigenous lands it could be possible to continue to protect these interests. Even though the Crown wrongfully created these interests they may nevertheless be sustained under the jurisdiction of an Indigenous legal system. As discussed, the Constitution can give force to these interests as it regards Indigenous peoples’ own laws as part of Canada’s constitutional structure. Furthermore the Crown could recognize this result through treaties, which would likewise secure constitutional protection for private ownership within Indigenous legal systems. 319

Borrows’ approach is in keeping with the generosity Indigenous peoples have always shown to non-Indigenous Canadians and their willingness to share and respect private property rights in most instances. This does not mean non-Indigenous interests should always take precedence. In Borrows’ words,

Reconciliation should not always force the Aboriginal interest to “give-way”. Sometimes it is the Crown or private interests which must be modified or eliminated in advancing this goal…. The Courts should strive to protect each interest, as vigorously as possible, with priority being afforded to Aboriginal title because of its constitutional undergirding, particularly when compared to the non-constitutional aspects of private ownership. 320

313 Christie, supra note 246 at 203.
314 Ibid at 204.
315 Ibid.
316 Borrows, “Private Property”, supra note 246.
317 On this rule, see note 265 and accompany text above.
318 Borrows, “Private Property”, supra note 246 at 112.
319 Ibid (footnote omitted).
320 Ibid at 112-13.
Borrows concludes that “private property should not be automatically immune from a declaration of Aboriginal title.” He hopes that this may be an incentive for the negotiation of modern treaties on a leveller playing field than has previously existed. The principles to be applied in resolving potential conflicts between Indigenous and private parties are “fairness, proportionality, reasonableness, fundamental justice and reconciliation.”

It is not our intention to choose between these various approaches or to articulate an alternative approach. What we want to emphasize is that creative solutions, usually proposing dialogue and negotiation rather than court action, are available to address the potential conflict between Indigenous land rights and private property. Reconciliation cannot involve favouring private property completely over Indigenous rights, as happened in Chippewas of Sarnia, nor can it involve, in Brian Slattery’s words, deciding that “historical aboriginal title gives rise to modern rights that automatically trump third party and public interests”, as that would constitute “an attempt to remedy one grave injustice by committing another.” Use of limitations statutes and the doctrine of laches to give priority to private interests would not lead to a fair balancing of rights and reconciliation either – instead, in Slattery’s words, it would “rub salt into open wounds.”

5. Conclusions

In Wewaykum, Justice Binnie summarized some of the policy rationales for limitation periods: “Witnesses are no longer available, historical documents are lost and difficult to contextualize, and expectations of fair practices change. Evolving standards of conduct and new standards of liability eventually make it unfair to judge actions of the past by the standards of today.” The circumstances of Indigenous peoples are different. The wrongs they suffered were often committed long in the past, before they had any awareness of their rights in the Canadian legal system. While witnesses may no longer be alive, Indigenous people retain memory of past events in their oral histories, which the Supreme Court has said are admissible as evidence and have to

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321 Ibid at 125.
322 Ibid at 133.
323 Slattery, “Metamorphosis”, supra note 246 at 282.
324 Ibid, as quoted by Vickers J in Tsilhqot’in Nation BCSC, supra note 9 at paras 1367-68. For Slattery, this would be the effect of a judicial ruling that a Crown grant extinguished Aboriginal title, which in effect is what the Court of Appeal decided in Chippewas of Sarnia when it exercised its supposed discretion not to invalidate the Crown patent of 1853: see note 272 and accompanying text above.
325 Wewaykum, supra note 23 at para 121.
326 See Hereditary Chiefs Tony Hunt et al v Attorney General of Canada et al, 2006 BCSC 1368 (CanLII) at para 26, where Satanove J observed: “I think it must be recognized that just as aboriginal rights are sui generis, aboriginal rights litigation is also unique. It involves hundreds of years of history and sometimes unconventional techniques of fact finding. It involves lofty, often elusive concepts of law such as the fiduciary duty and honour of the Crown. We cannot simply view aboriginal claims in the same light as other civil litigation. I believe effective case management of aboriginal litigation requires an effort on behalf of all parties and the court to find a creative way to try the issues without invoking oppressive conduct that deters the plaintiffs or prejudices the defendants.” This passage was quoted with approval by the minority (dissenting on other issues) in Uashaunnuat, supra note 136 at para 226. See also Rotman, supra note 55 at 241-42, cited by the Supreme Court in Manitoba Metis Federation SCC, supra note 80 at para 141, for the point that “to allow the Crown to shield its unconstitutional actions with the effects of its own legislation appears fundamentally unjust…. The point is that despite the legitimate policy rationales in favour of statutory limitations periods, in the Aboriginal context, there are unique rationales that must sometimes prevail.”
be accorded the same kind of respect and weight as written documents. Unlike private papers, the historical documents relating to most Indigenous claims are preserved in Canadian archives. As for the standards of the day, the racism inherent in past government treatment of Indigenous peoples is good reason not to rely on those standards to bar legal actions today.

The recent Supreme Court of Canada decision in *Southwind v Canada* provides a striking example of past racist standards. In 1929, a hydroelectric dam authorized by the Canadian, Ontario and Manitoba governments was built at the outlet of Lac Seul in northwestern Ontario. The dam caused the level of the lake to rise by 10 feet, flooding 17 percent (11,304 acres) of the Reserve of the Lac Seul First Nation (LSFN) that had been set aside for their exclusive use and occupation pursuant to Treaty 3, entered into by Canada and the Anishinaabe in 1873. The disastrous implications for the LSFN were ignored. The dam was built without their consent, without lawful authorization, and without compensation (totally inadequate compensation was paid 14 years later). In the words of Justice Karakatsanis, delivering the majority judgment, “Homes were destroyed, as were wild rice fields, gardens, haylands, and gravesites. Fishing, hunting, and trapping were all impacted. The LSFN was separated because one part of the Reserve became an island. And, despite the sacrifices suffered by the LSFN to make the hydroelectricity project possible, the Reserve was not provided with electricity until the 1980s.”

One concerned government official, HJ Bury, the Supervisor of Indian Timber Lands, writing years after construction of the dam about the failure to make adequate provision for the impact of the flooding on the LSFN and to pay compensation, complained:

> I desire to again draw your attention to the serious breach of faith that our Department has made with the Indians of the Lac Seul Reserve, respecting promises made to them regarding flooding compensation…. I consider that these Indians have been very shabbily treated. Their Reserve lands, timber, houses, gardens, rice beds, musk-rat swamps have been flooded now for some years, and we still procrastinate[.] If it had been a white settlement, no person would have dared to flood the property, without paying compensation before flooding took place.

The treatment of the LSFN was not an isolated incident. Should the Crown be able to escape liability for this kind of “standards of the day” abuse by hiding behind statutes of limitations?

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327 Van der Peet, supra note 1 at para 68; Delgamuukw, supra note 1 at paras 80-87; Mitchell, supra note 90 at para 27-37.
328 See Luk & Barrett, supra note 4 at 414.
329 Southwind SCC, supra note 291.
330 Ibid at para 8.
331 *Ibid* at para 28 (emphasis removed by the Supreme Court).
332 See Peter Ballantyne QB, supra note 93.
333 The Crown did not rely on limitations periods in *Southwind*, no doubt because the claim against the Crown was for breach of its fiduciary obligations, for which there is no statutory time limit in Ontario (see note 296 and accompanying text above). However, the Crown has not hesitated to plead limitations statutes in other provinces in factually similar cases: e.g. see Peter Ballantyne QB, *ibid*. However, in 2018 the Attorney General of Canada, Jody Wilson-Raybould, took a step in the right direction by issuing this directive to federal Crown lawyers: “In cases where litigation is long delayed, equitable defences such as laches and acquiescence are preferable to limitation defences. However, these defences should also be pleaded only where there is a principled basis and evidence to support the defence and where the Assistant Deputy Attorney General’s approval has been obtained.” The Attorney
To allow this to happen would be inconsistent with the *Southwind* decision, where the Court, relying on *Guerin* and subsequent decisions, emphasized that “the Crown is subject to a fiduciary duty when it exercises control over Indigenous interests. This fiduciary duty imposes strict obligations on the Crown to advance the best interests of Indigenous Peoples…. The duty does not melt away when Canada has competing priorities.”

In *Wewaykum*, Justice Binnie emphasized the “need for repose.” This focus has to be understood in the factual context of that case, where two Indian bands were challenging each other’s entitlement to their respective reserves. Binnie J commented: “Each band had settled and legitimate expectations with respect to the reserve it now inhabits. Each band still recognizes the need for repose of its sister band (thus seeking compensation from the Crown rather than dispossession of its sister band). Each band claims repose for itself, thus pleading the limitation period in its own defence against the other band.” The need for repose does not necessarily apply in other cases. In the incest case of *M.(K.) v M.(H.)*, Justice La Forest stated that “there is absolutely no corresponding public benefit in protecting individuals who perpetrate incest from the consequences of their wrongful actions. The patent inequity of allowing these individuals to go on with their life without liability, while the victim continues to suffer the consequences, clearly militates against any guarantee of repose.” In *Wewaykum*, the Supreme Court was concerned about the repose of the two bands. But why should the Crown be entitled to repose for the wrongful acts it committed against Indigenous peoples when, like the father who sexually abused his young daughter in *M.(K.) v M.(H.)*, the Crown is in a fiduciary relationship with Indigenous peoples?

Indigenous peoples have always faced barriers to the access to justice other Canadians take for granted. They have had to try to understand what for them are foreign common law and civil law systems and seek redress for the wrongs in courts staffed almost exclusively by non-Indigenous judges. Until relatively recently, sovereign immunity barred them from seeking justice against the Crown in Canadian courts without the Crown’s permission. From 1927 to 1951, a provision of the *Indian Act* made it illegal for First Nations to raise money or pay lawyers to pursue their claims without the federal government’s consent. Given the poverty of many Indigenous communities, lack of financial resources has also presented a barrier to costly legal proceedings. Limitations statutes and laches are another impediment relied upon by the Crown.

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334 *Supra* note 32.

335 *Southwind* SCC, *supra* note 291 at paras 5 and 12.

336 *Wewaykum*, *supra* note 23 at para 122.


338 *M.(K.) v M.(H.)*, *supra* note 23 at 29.

339 See Luk & Barrett, *supra* note 4 at 414.

340 See *Calder*, *supra* note 3.

341 In some instances, Indigenous claimants have been able to overcome this barrier by persuading judges to issue advance costs orders: e.g. see *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71; *Tsilhqot’in Nation v British Columbia*, 2006 BCCA 2; *Grassy Narrows*, *supra* note 138 at para 55. However, these
to prevent Indigenous peoples’ legitimate claims from even being adjudicated. In light of all this, allegations that they have waited too long and “slept on their rights” ring hollow. In *M.(K.) v M.(H.)*, the Supreme Court decided that “this rationale for a rigorous application of the statute of limitations is particularly inapposite for incest actions”, as the victims are often not aware of the connection between the abuse and the damage they have suffered until much later, sometimes after entering therapy. Although the rationales are not the same, there are equally good reasons why Indigenous peoples should not be denied access to the courts by the passage of time.

In the Supreme Court’s recent decision in *Uashaunnuat*, a main reason the majority gave for deciding that the Superior Court of Quebec has jurisdiction to decide a case involving an Aboriginal title claim that extends into Labrador is to provide the plaintiffs with access to justice. Chief Justice Wagner and Justices Abella and Karakatsanis stated: “In the specific context of s. 35 claims that straddle multiple provinces, access to justice requires that jurisdictional rules be interpreted flexibly so as not to prevent Aboriginal peoples from asserting their constitutional rights, including their traditional rights to land.” Likewise, procedural barriers such as limitations statutes and laches should not bar Indigenous peoples’ access to the courts to enforce their collective rights.

Another compelling argument against the application of limitation statutes to Indigenous claims is that these statutes vary considerably from province to province. For example, there is no limitation period on fiduciary claims in Ontario, whereas there is in other provinces. The length of time during which claims can be brought also varies from province to province. These and other statutory differences mean that Indigenous claims that could be brought in one province would be barred in another. This makes no sense, given that the Supreme Court has held that Aboriginal rights law is federal law. Moreover, the Court has also rejected an argument that, due to French colonial law, the Indigenous peoples of Quebec do not have Aboriginal rights equivalent to the rights of Indigenous peoples elsewhere in Canada. This view, Chief Justice Lamer asserted,

… would create an awkward patchwork of constitutional protection for aboriginal rights across the nation, depending upon the historical idiosyncrasies of colonization over particular regions of the country. In my respectful view, such a static and retrospective interpretation of s. 35 cannot be reconciled with the noble and prospective purpose of the constitutional entrenchment of aboriginal and treaty rights in the *Constitution Act, 1982*. Indeed, the respondent’s proposed interpretation risks undermining the very purpose of s. 35(1) by perpetuating the historical injustice.

orders are rarely issued: see *Anderson v Alberta (Attorney General)*, 2020 ABCA 238, leave to appeal granted, 2021 CanLII 2827 (SCC), and discussion in McNeil & Wilkins, “Welcome Home”, supra note 144 at 21-24.

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342 *M.(K.) v M.(H.)*, supra note 23 at 31.

343 *Uashaunnuat*, supra note 136, especially paras 44-52. The dissenting minority was also concerned about access to justice, but they proposed a different solution, namely having judges from both provinces sit together in cases that overlap provincial boundaries: *ibid* at paras 214-38, 281-90.

344 *Ibid* at para 50.

345 See note 296 and accompanying text above.

suffered by aboriginal peoples at the hands of colonizers who failed to respect the distinctive cultures of pre-existing aboriginal societies.347

The same reasoning must apply in the context of diverse provincial limitations statutes.

In this paper, we have presented what we regard as compelling constitutional and policy arguments against the application of limitations statutes and laches to Indigenous claims.348 Wewaykum, based as it was on unique facts, should not have been relied upon to conclude generally, as the Supreme Court did in Lameman, that “the rules on limitation periods apply to Aboriginal claims.”349 As Lameman was decided without any consideration of the underlying constitutional issues, the Court’s understanding of the law in that case needs to be reassessed to take those issues into account. In Manitoba Metis Federation, the Supreme Court did consider constitutional issues, deciding that limitation periods do not apply to declarations of constitutional invalidity.350 The Court also acknowledged that “many of the policy rationales underlying limitations statutes simply do not apply in an Aboriginal context such as this. Contemporary limitations statutes seek to balance protection of the defendant with fairness to the plaintiffs…. In the Aboriginal context, reconciliation must weigh heavily in the balance.”351 Elaborating, Chief Justice McLachlin and Justice Karakatsanis stated:

What is at issue is a constitutional grievance going back almost a century and a half. So long as the issue remains outstanding, the goal of reconciliation and constitutional harmony, recognized in s. 35 of the Constitution Act, 1982 and underlying s. 31 of the Manitoba Act, remains unachieved. The ongoing rift in the national fabric that s. 31 was adopted to cure remains unremedied. The unfinished business of reconciliation of the Mètis people with Canadian sovereignty is a matter of national and constitutional import.352

As the Supreme Court has repeatedly stated, reconciliation is the underlying purpose of section 35. Most recently, in Southwind, Justice Karakatsanis, for eight members of the Court, stated:

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348 While beyond the scope of this paper, additional arguments can be made based on the UN Declaration on the Rights of Indigenous Peoples that has been given statutory endorsement by the United Nations Declaration on the Rights of Indigenous Peoples Act, SC 2021, c 14, and the Declaration on the Rights of Indigenous Peoples Act, SBC 2019, c 44. For a case where the Declaration was raised and found not to be relevant, see Watson, supra note 111 at paras 350-51; compare Thomas and Saik’uz, supra note 103, where the Declaration was referred to several times.
349 *Lameman*, supra note 78 at para 13, where the Court went on to state: “The policy behind limitation periods is to strike a balance between protecting the defendant’s entitlement, after a time, to organize his affairs without fearing a suit, and treating the plaintiff fairly with regard to his circumstances. This policy applies as much to Aboriginal claims as to other claims.” With respect, why should the Crown be given a free pass to organize its affairs without fear of a suit, as if it is no different from a private individual, when it committed wrongs against Indigenous peoples in violation of its fiduciary obligations towards them that they continue to suffer from in many cases? How could that possibly amount to treating Indigenous peoples fairly as plaintiffs?
350 However, we have seen that the Court, in *obiter* because other remedies were not requested, suggested that “personal remedies”, such as damages, could still be barred by limitation. We have criticized this aspect of the decision, in part because it does not take the collective nature of Indigenous rights into account: see notes 234-41 and accompanying text above.
351 *Manitoba Metis Federation SCC*, supra note 80 at para 141.
352 *Ibid* at para 140.
In the context of our national history, the relationship between the Crown and Indigenous Peoples goes to the very foundation of this country and to the heart of its identity. Indeed, the need to reconcile the assertion of Crown sovereignty with the pre-existence of Indigenous Peoples, and to reconcile Indigenous and non-Indigenous Canadians is of “fundamental importance”.353

Along with access to justice, reconciliation should be the predominant policy to be considered when limitations statutes and laches are pleaded by the Crown in an attempt to bar Indigenous claims from even being considered by the courts.

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353 Southwind SCC, supra note 291 at para 60, quoting McLachlin J (dissenting, on other grounds) in Van der Peet, supra note 1 at para 310. See also Mikisew Cree 2005, supra note 260 at para 1: “The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions.”