Time Is on Our Side

COLONIALISM THROUGH LACHES AND LIMITATIONS OF ACTIONS IN THE AGE OF RECONCILIATION

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"Get over it." Those readers who have braved the comment section on almost any online news article dealing with injustices against Indigenous peoples will be familiar with this phrase, and the unprintable, invective-laden tirade that usually follows. Such views are rightly dismissed as cruel and ignorant of the very real history of colonialism and genocide that Indigenous people have faced throughout Canada's history, and continue to face to this day. Such a sentiment is usually not explicitly voiced in the genteel chambers of Canada's courtrooms. As an illustrative example, the Supreme Court of Canada, in a recent decision, set out that "[t]he reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship is the grand purpose of s. 35 of the *Constitution Act, 1982*."[1] We argue that there is a special role for the courts, even more than the legislative and executive actors in government, in making manifest the kind of reconciliation that such grand statements envisage.

Starting with the paradigm of reconciliation as set out by the Canadian courts, we look at how those same courts have been dealing with the issue of limitation periods and laches. Such doctrines bar the pursuit

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1 *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 10 [*Beckman*].

of claims in court if the defendant is able to show that the plaintiff delayed bringing the claim. Such doctrines are often applied when the Crown, as defendant, makes summary judgment motions where a full record of the evidence is not yet available to the court. We argue here that where laches and limitations are applied without the full consideration of the historical circumstances of Indigenous communities and the very real limits, both in regard to their legal incapacities and the resource constraints that they have faced in order to bring lawsuits to assert their rights, the courts risk doing real injustice to the communities that have come to them for help. While limitations and laches can often be instruments of justice, when they are used in a mechanistic fashion without due consideration for the particular circumstances of the case, they can revisit and reinforce the wrong about which a party has come to the court for vindication. What is at stake here is nothing less than the capacity of the courts to be part of the process of reconciliation that the Supreme Court of Canada has so grandly endorsed.

A. RECONCILIATION AND THE COURTS

The idea that there is work to be done in promoting reconciliation between Indigenous people and non-Indigenous people in Canada has been a running theme in Canadian jurisprudence.[2] While at the beginning of the Supreme Court's jurisprudence on reconciliation the Court seemed to suggest that the work of reconciliation was for Indigenous people to do in reconciling themselves "with the sovereignty of the Crown,"[3] the Court, citing the work of the Truth and Reconciliation Commission (TRC), has recently recast the goal as one of "rebuilding the Crown's relationship with Aboriginal peoples in Canada."[4] It may perhaps be most appropriate then to let the TRC speak on the historical injustices that have led to the need for reconciliation between Indigenous and non-Indigenous people:

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2 See, for example, *R v Van der Peet*, [1996] 2 SCR 507 at para 31 (Lamer CJ), para 310 (McLachlin J, dissenting) [*Van der Peet*]; *R v Sappier; R v Gray*, 2006 SCC 54 at para 22; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 33; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 1; *Beckman*, above note 1 at para 10; *Manitoba Métis Federation v Canada (Attorney General)*, 2013 SCC 14 at para 66 [*MMF*].

3 *Van der Peet*, above note 2 at para 98.

4 *Daniels v Canada (Minister of Indian Affairs and Reconciliation)*, 2016 SCC 12 at para 36.

> For over a century, the central goals of Canada's Aboriginal policy were to eliminate Aboriginal governments; ignore Aboriginal rights; terminate the Treaties; and, through a process of assimilation, cause Aboriginal peoples to cease to exist as distinct legal, social, cultural, religious and racial entities in Canada. The establishment and operation of residential schools were a central element of this policy, which can be best described as "cultural genocide."
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> The Canadian government pursued this policy of cultural genocide because it wished to divest itself of its legal and financial obligations to Aboriginal people and to gain control over their land and resources. If every Aboriginal person had been "absorbed into the body politic", there would be no reserves, no Treaties, and no Aboriginal rights.[5]

The TRC was equally clear and ringing in its assessment of what reconciliation requires:

> Reconciliation requires that a new vision, based on a commitment to mutual respect, be developed. It also requires an understanding that the most harmful impacts of residential schools have been the loss of pride and self-respect of Aboriginal people, and the lack of respect that non-Aboriginal people have been raised to have for their Aboriginal neighbours. Reconciliation is not an Aboriginal problem; it is a Canadian one. Virtually all aspects of Canadian society may need to be reconsidered.[6]

If all Canadians have a role to play in the project of reconciliation, then the courts, as especially powerful organs of the state with special constitutional duties, can be expected to have a special role.

In *R v Sparrow*, decided at the dawn of Supreme Court jurisprudence on the protection of Aboriginal and Treaty Rights through section 35(1) of the *Constitution Act, 1982*, Dickson CJ explained this special role in reference to the long history of the denial of Indigenous rights by the Canadian state. He wrote:

> [T]here can be no doubt that over the years the rights of the Indians were often honoured in the breach. As MacDonald J. stated in *Pasco*

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5 Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015) at 1–3 [TRC].

6 TRC, *ibid* at vi.

> *v. Canadian National Railway Co.*, [1986] 1 C.N.L.R. 35 (B.C.S.C.) at p. 37: "We cannot recount with much pride the treatment accorded to the native people of this country."
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> For many years, the rights of the Indians to their aboriginal lands — certainly as *legal* rights — were virtually ignored. The leading cases defining Indian rights in the early part of the century were directed at claims supported by the Royal Proclamation or other legal instruments, and even these cases were essentially concerned with settling legislative jurisdiction or the rights of commercial enterprises. For fifty years after the publication of Clement's The Law of the Canadian Constitution (3rd ed. 1916), there was a virtual absence of discussion of any kind of Indian rights to land even in academic literature. By the late 1960s, aboriginal claims were not even recognized by the federal government as having any legal status.[7]

In Dickson CJ's explanation, the ignorance of Indigenous rights in the Canadian legal imagination led to the denial of those rights. With great respect to the Chief Justice, the use of the passive voice in the sentence in which the rights of Indigenous peoples under the Canadian legal system "were virtually ignored" glosses over the role of the Canadian state in the proactive denial of these rights. The most notorious of such devices was enacted as section 141 of the *Indian Act*, which stipulated that:

> Every person who, without the consent of the Superintendent General expressed in writing, receives, obtains, solicits or requests from any Indian any payment or contribution or promise of any payment or contribution for the purpose of raising a fund or providing money for the prosecution of any claim which the tribe or band of Indians to which such Indian belongs, or of which he is a member, has or is represented to have for the recovery of any claim or money for the benefit of the said tribe or band, shall be guilty of an offence . . . .[8]

Such a reprehensible denial of a human right as fundamental as the right to counsel, and of the rule of law, is a dark stain on Canadian history. Even when the formal prohibition on hiring counsel of their own choice was not on the books, the federal Crown exercised broad discretionary control over First Nations, especially when spending money was at stake. As historian Jarvis Brownlie has written:

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7 *R v Sparrow*, [1990] 1 SCR 1075 at 1103 [emphasis in original] [*Sparrow*].

8 *Indian Act*, RSC 1927, c 98, s 141. The same section was enacted in SC 1926–27, c 32, s 6, as s 149A of the *Indian Act*.

> The *Indian Act* gave government officials significant control over the economic activities of First Nations communities. Perhaps the most important factor was the department's control of band funds, which consisted of money the bands had received for the sale or lease of land, timber, or other resources. These funds were owned in common by the band, but were held in Ottawa and could be disbursed only upon the passage of a band council resolution. Band council resolutions, in turn, were valid only if approved by the department. Thus a council resolution to use band funds for any purpose was subject to an absolute DIA veto.[9]

The federal Crown's discretionary control over spending and other decision-making could not be expected to produce a situation in which First Nations could have recourse to the courts whenever the Crown had violated their rights. Indeed, the prohibition on retaining lawyers in the *Indian Act* was a very deliberate attempt to stymie the assertion of land rights by First Nations.[10] The provision was enacted when the Crown authorities in British Columbia tired of persistent attempts by some First Nations to retain lawyers to assert their Aboriginal title rights in court; in response, the Crown successfully lobbied for the enactment of section 141, formally prohibiting the retaining of legal counsel without the minister's permission.

The formal prohibition on retaining counsel in section 141 was not repealed until 1951, after the horrors of European totalitarianism forced Canada to begin to face up to unsavoury comparisons with the settler state's treatment of Indigenous people here. It must also be borne in mind that the period after the Second World War also coincided with the height of the residential school era, when Indigenous communities were dealing with a variety of traumas that might reasonably be expected to take precedence over rights and title litigation. In the meantime, the capacities of communities to retain and instruct counsel had to be built up again. It speaks to the extraordinary efforts of the Nisga'a Nation that a mere twenty-two years after they were no longer prohibited from retaining legal counsel their action in support of their Aboriginal title claim was decided at the Supreme Court of Canada in *Calder v British Columbia*

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9 Robin Jarvis Brownlie, *A Fatherly Eye: Indian Agents, Government Power, and Aboriginal Resistance in Ontario, 1918–1939* (Don Mills: Oxford University Press, 2003) at 34.

10 Hamar Foster, "We Are Not O'Meara's Children: Law, Lawyers and the First Campaign for Aboriginal Title in British Columbia, 1908–1928" in Hamar Foster, Heather Raven, & Jeremy Webber, eds, *Let Right Be Done: Aboriginal Title, the Calder Case and the Future of Indigenous Rights* (Vancouver: University of British Columbia Press, 2007) 61.

(Attorney General).[11] Chief Justice Dickson, in his narration of the position of section 35(1) in the context of the Crown-Indigenous relationship, acknowledged just how important this case was:

> It took a number of judicial decisions and notably the Calder case in this Court (1973) to prompt a reassessment of the position being taken by government.[12]

Prior to *Calder*, Crown governments simply denied that Aboriginal and Treaty rights were justiciable legal rights. The *Calder* decision was the major factor that compelled the settler governments to begin negotiations with Indigenous peoples about their rights. In the Chief Justice's understanding, the protection of Aboriginal and Treaty rights through section 35(1) was the next logical step in this story, "the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of [A]boriginal rights."[13]

From the beginning, the Court was conscious of the central role that the courts must play in securing the promise of section 35(1). As the Chief Justice observed of *Calder*, the watershed moment in the recognition of Aboriginal and Treaty rights came about as a result of judicial action. Over a century of waiting for the legislative and executive parts of the Crown to take action on reconciliation with Indigenous peoples had come to naught. It was the courts that compelled Canadians to take these historical injustices seriously. It is in this context that Dickson CJ set out the importance of a robust interpretation of section 35(1) by the courts, precisely because of the sorry record that Crown governments have had in their relationships with Indigenous communities:

> Our history has shown, unfortunately all too well, that Canada's [A]boriginal peoples are justified in worrying about government objectives that may be superficially neutral but which constitute de facto threats to the existence of [A]boriginal rights and interests. By giving aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that [A]boriginal rights are affected. Implicit in this constitutional scheme is the obligation of the legislature to satisfy the test of justification . . . .

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11 *Calder v British Columbia (Attorney General)*, [1973] SCR 313.

12 *Sparrow*, above note 7 at 1104.

13 *Sparrow*, *ibid* at 1105.

> The constitutional recognition afforded by the provision therefore gives a measure of control over government conduct and a strong check on legislative power.[14]

And, of course, the further implicit premise is that the "challenges" of which the Chief Justice spoke in *Sparrow* were to be judicial challenges; and the strong check on legislative power comes from the judicial branch.

The plight of Indigenous peoples in Canada is in many respects similar to other communities who find themselves in situations where they are a minority of the population. The Supreme Court of Canada has also loftily described the duties of the courts to protect the constitutional rights of those communities:

> [A] constitution may provide an added safeguard for fundamental human rights and individual freedoms which might otherwise be susceptible to government interference. Although democratic government is generally solicitous of those rights, there are occasions when the majority will be tempted to ignore fundamental rights in order to accomplish collective goals more easily or effectively. Constitutional entrenchment ensures that those rights will be given due regard and protection. Second, a constitution may seek to ensure that vulnerable minority groups are endowed with the institutions and rights necessary to maintain and promote their identities against the assimilative pressures of the majority. And third, a constitution may provide for a division of political power that allocates political power amongst different levels of government.[15]

Such protection depends on the willingness of the courts to vindicate those rights through judicial review:

> Undoubtedly, one of the key considerations motivating the enactment of the *Charter*, and the process of constitutional judicial review that it entails, is the protection of minorities.[16]

These excerpts evince a consciousness of the failure of the Canadian legal system to protect the legal rights of Indigenous communities over the past century and a half. As Dickson CJ said in *Sparrow*, "the rights of the Indians to their aboriginal lands — certainly as *legal* rights — were virtually ignored."[17] They were ignored until the courts decided they

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14 *Sparrow*, *ibid* at 1110.

15 *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 74.

16 *Ibid* at para 81.

17 *Sparrow*, above note 7 at 1103.

were going to do something to vindicate those rights. As the *Sparrow* Court recognized, Crown governments have ridden roughshod over those rights, and taken legislative and bureaucratic measures to prevent Indigenous communities from asserting those rights in Canadian courts. For the purposes of this chapter, two major conclusions flow from the above. First, this history provides strong reasons to expect that Indigenous communities might be delayed in their assertions of rights. Second, the courts have played a central role in the vindication of these rights, and if the courts were to be prevented from addressing these injustices, it would become much more difficult for the Canadian legal system to move toward reconciliation. The weight of the brutal history of colonialism rests heavily upon the Crown-Indigenous relationship. One would expect that the courts, in considering how the doctrines of laches and limitations apply to Indigenous claims, would be always deeply conscious of this weight. Yet, as we shall see below, this has not always been the case.

B. LIMITATIONS, LACHES, AND INDIGENOUS CLAIMS

The dawn of modern laches and limitations jurisprudence and their application to Indigenous claims in Canada can be traced to the Supreme Court decision in *Guerin v The Queen*.[18] While *Calder* had reached the Supreme Court eleven years prior to *Guerin*, the *Calder* case did not come to a decisive substantial result. Rather, it was in *Guerin* that the Court finally awarded a First Nation material compensation. It did so in the context of the extraordinary discretion that the Crown had (and still has) over the treatment of reserve land. Because the legal title to reserve land is in the Crown, it is for the Crown to negotiate any sale or lease of reserve land once a First Nation has acquiesced to surrender the lands. In *Guerin*, while the Crown had discussed a certain price for the lease of reserve land with the First Nation, and the community had been clear that it would not be willing to lease the land to a golf club at a lower price, the Crown went back on these promises. When the Crown spoke to the golf club and found out that the club wanted a much lower price, it acceded to the golf club's demands and went ahead with the lease, despite what was promised to the First Nation.

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18 *Guerin v Canada*, [1984] 2 SCR 335.

In its defence to the action that was brought by the Musqueam Nation claiming a breach of trust obligations, the Crown advanced a "political trust" defence arguing that there was no "true trust" and thus no cause of action could be enforced in the courts. The Supreme Court found that there are other enforceable fiduciary duties owed by Canada that are not defined as "trusts." Thus, for the first time the Supreme Court recognized that a First Nation could access the courts to enforce equitable obligations owed by the Crown with respect to lands that are held for the benefit of the First Nation.

The Supreme Court in *Guerin* did consider the applicability of the statutory limitation periods and upheld the trial judge's finding that there had been a fraudulent concealment that prevented the First Nation from discovering the breach, and thus the claim had been filed within the six-year limitation period provided.[19] The Court noted that the Crown had actively prevented the First Nation from seeing a copy of the lease in question. The First Nation did not become aware of the actual terms of the lease until March 1970, which is when the limitation period began to run. Similarly, the Court held that equitable fraud on the part of the Crown delayed the laches clock until March 1970.

It bears observing that despite *Guerin*'s revolutionary move in awarding a First Nation material compensation for the Crown's breaches of their land rights, its application of limitations is strictly doctrinal. No acknowledgement of the disadvantageous economic situation of Indigenous communities is referenced in the judgment, nor the history of Crown paternalism that might have caused delays in the prosecution of the action. Nor is there any acknowledgement of the novelty of the idea of judicial vindication of the First Nation's equitable rights, and what effect this might have on laches and limitations. No such references were necessary because neither laches nor limitations would bar the action in *Guerin*.

1) *Wewaykum Indian Band v Canada*

In the subsequent decade, the Supreme Court continued on this path of applying laches and limitations strictly mechanistically. Two major cases of note, where laches and limitations were applied to First Nations claims based on fiduciary duty, were the Supreme Court's decisions known as *Wewaykum*[20] and *Papaschase*.[21]

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19 *Ibid* at 389.

20 *Wewaykum Indian Band v Canada*, 2002 SCC 79 [*Wewaykum*].

21 *Canada (Attorney General) v Lameman*, 2008 SCC 14 [*Papaschase* SCC].

Wewaykum dealt with a claim by two First Nations to each other's respective reserve lands on the allegation that the Crown breached its fiduciary duty in creating the reserves. In *Wewaykum*, there was also no assertion of any entitlement in the reserve lands under section 35(1) of the *Constitution Act, 1982*.[22]

The First Nation initiated its action in 1985, very soon after the Supreme Court's decision in *Guerin* "where a precedent was set of financial compensation to an Indian band for breach of fiduciary duty in the disposition of part of its reserve."[23] Justice Binnie held that the Crown's duties were of a "public" as opposed to a private nature, and, as a result, were limited to the fiduciary's basic duties of loyalty, good faith, and ordinary prudence, as recognized in such cases as *Fales v Canada Permanent Trust Co*.[24] This difference in treatment, compared to *Guerin*, resulted from the fact that, prior to reserve creation, and where the First Nation had asked for reserve land outside of its traditional territory, the Crown has not assumed discretionary authority over existing Aboriginal interests in lands, and instead "wears many hats and represents many interests, some of which cannot help but be conflicting."[25] The Court explained the difference as follows:

> The situation here, unlike *Guerin*, does not involve the Crown interposing itself between an Indian band and non-Indians with respect to an existing Indian interest in lands. Nor does it involve the Crown as "faithless fiduciary" failing to carry out a mandate conferred by a band with respect to disposition of a band asset. The federal Crown in this case was carrying out various functions imposed by statute or undertaken pursuant to federal-provincial agreements. Its mandate was not the disposition of an existing Indian interest in the subject lands, but the creation of an altogether new interest in lands to which the Indians made no prior claim by way of treaty or aboriginal right.[26]

The Court, therefore, was explicitly not deciding on a constitutional cause of action in *Wewaykum*. The Supreme Court upheld the decision of the trial judge to reject the First Nation's claims on their merits and

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22 *Wewaykum*, above note 20 at para 3.

23 *Wewaykum*, *ibid* at para 64.

24 [1977] 2 SCR 302 at 315.

25 *Wewaykum*, above note 20 at para 96. For a longer discussion of the nature of the *Wewaykum* claim, please see Senwung Luk, "Not So Many Hats: The Crown's Fiduciary Obligations to Aboriginal Communities since *Guerin*" (2013) 76 *Saskatchewan Law Review* 1 at 16–24.

26 *Wewaykum*, above note 20 at para 91.

applied the equitable defence of laches and acquiescence to the Nation's claims. In *obiter*, the Supreme Court went on to consider whether section 39 of the *Federal Courts Act*, which incorporates provincial statutory limitation periods as federal law, would have barred the claims advanced in *Wewaykum*, finding that the claims would be statute barred. The Court also considered the First Nation's arguments that statutory limitations periods in this case should not be allowed to operate as "instruments of injustice."[27] The Supreme Court rejected this argument, citing the policy reasons for limitations:

> Witnesses are no longer available, historical documents are lost and difficult to contextualize, and expectations of fair practices change. Evolving standards of conduct ad new standards of liability eventually make it unfair to judge actions of the past by the standards of today.[28]

2) *Canada (Attorney General) v Lameman (Papaschase)*

The *Canada (Attorney General) v Lameman (Papaschase)*[29] decision originated in the Alberta Court of Queen's Bench through summary dismissal proceedings on the basis that there was no issue requiring trial as a result of the application of limitation periods. The claim was brought by purported descendants of the Papaschase band who adhered to Treaty No 6. Pursuant to the terms of the Treaty a reserve was set apart, but in 1886 the majority of the members subsequently withdrew from the Treaty in exchange for scrip. The remaining members were transferred to other bands and the original reserve was surrendered and sold in 1888. The claim requested various forms of relief relating to the size of the reserve originally surveyed, and breaches of fiduciary duty in allowing the members to take scrip and surrender the reserve, and causing the dissolution of the band.

The motions judge noted that there were no constitutional or *Charter* issues before the Court stating the issue as follows:

> [t]he Plaintiffs from time to time noted that Aboriginal rights and treaty rights are now protected by the Constitution, but those protections cannot be used to invalidate actions of government officials that occurred in the 19th century. *The Charter of Rights and Freedoms* does not have retroactive operation, or revive rights that were extinguished before 1982: *R v Sparrow*, [1990] 1 SCR 1075 (SCC), at para 23. At the time

27 *Ibid* at para 121.

28 *Ibid*.

29 *Papaschase* SCC, above note 21.

> of these events, the concept of Parliamentary supremacy was firmly in place, and Parliament was able to vary Aboriginal or Treaty rights if it chose.[30]

The Supreme Court affirmed the motions judge's findings that the claims would be barred by Alberta's *Limitations of Actions Act*. The motions judge found that the limitations clock started running in 1979, when the First Nation provided funding to a researcher to write a Master's thesis in which the facts behind the claim were outlined.[31] The Supreme Court judgment also confirmed that dealing with the dismissal of Aboriginal claims through summary procedures is an appropriate approach.[32] It appears that no extensive evidence of practical obstacles that might have prevented the First Nation from pursuing this claim in the 1980s was put before the motions judge,[33] and none was made available to the Supreme Court. On the basis of this record, the Court mechanistically applied the limitations period set out in provincial legislation of six years.

3) *Manitoba Métis Federation v Canada (Attorney General)*

The Supreme Court released its judgment in *Manitoba Métis Federation v Canada (Attorney General)*[34] *(MMF)* in September 2013. The case dealt with a claim by Métis individuals against Canada alleging that Canada breached obligations in implementing the *Manitoba Act, 1870*.[35] *The Manitoba Act*, which created the province of Manitoba, contained certain "promises" to the Métis peoples that included what is referred to as the "children's grant," which was a promise set out in section 31 of the *Act* to set aside 1.4 million acres of land to be given to the children of the Métis. It was alleged that Canada did not do so diligently.

The Supreme Court was unwilling to recognize that the Métis peoples had an Aboriginal interest and as such the Métis peoples were unable to sustain a claim for a breach of fiduciary duty against Canada. Instead, the Supreme Court focused on a declaration regarding the constitutionality of the Crown's conduct, or, in other words, a declaration that there was a breach of the honour of the Crown. Ultimately the Court

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30 *Papaschase Indian Band No 136 v Canada (Attorney General)*, 2004 ABQB 655.

31 *Papaschase* SCC, above note 21 at para 17.

32 *Ibid* at paras 10–20.

33 *Ibid* at para 18.

34 *MMF*, above note 2.

35 SC 1870, 33 Victoria, c 3.

found that the Crown did not implement section 31 of the *Manitoba Act* in a manner that was consistent with the honour of the Crown.

The Court then went on to consider the application of limitation periods to the Métis' claim. First, the Court noted that the Métis were simply seeking a declaration, without any claim for personal relief or damages, and made no claims that would affect third party interests. In the words of the Court: "[t]hey seek this declaratory relief in order to assist them in extra-judicial negotiations with the Crown in pursuit of the overarching constitutional goal of reconciliation that is reflected in s. 35 of the Constitution."[36] Secondly, the Court noted that under Manitoba's limitations periods, claims for equitable relief are barred; this would have barred a claim to a breach of fiduciary duty, as was already decided from *Wewaykum* and *Papaschase.* However, since the Métis claim was a claim for a "constitutional grievance," this could not be barred by statutory limitation periods.

The Supreme Court commented on the policy rationales underlying limitation periods that had been elaborated on previously by the Supreme Court in *Wewaykum* stating

> Furthermore, 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. As noted by Harley Schachter:
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> > 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.
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> Schachter was writing in the context of Aboriginal rights, but the argument applies with equal force here. Leonard I. Rotman goes even farther, pointing out 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

36 *MMF*, above note 2 at para 137.

> rationales in favour of statutory limitations periods, in the Aboriginal context, there are unique rationales that must sometimes prevail.[37]

Ultimately the Supreme Court found that a claim for a declaration of the constitutionality of the Crown's conduct was not caught by the statutory limitation periods stating that "[t]he principle of reconciliation demands that such declarations not be barred."[38] Thus, the majority was clearly moving away from the strict and mechanistic application of statutory limitation periods when the constitutionality of the Crown's conduct was at issue. As stated by McLachlin CJ: "[i]n the Aboriginal context, reconciliation must weigh heavily in the balance."[39] The Court was also unconvinced that the doctrine of laches, which is equitable in nature, could ever apply to a claim for a declaration regarding whether the constitutional obligation engaging the honour of the Crown has been fulfilled.[40]

Justices Rothstein and Moldaver, in their dissenting reasons, in basic terms stated that the effect of the majority decision was to "judicially eliminate statutory limitation periods."[41] Specifically with respect to the role of reconciliation, the justices stated:

> My colleagues suggest that the above rationales have little role to play in an Aboriginal context, where the goal of reconciliation must be given priority. In so doing, the majority's reasons call into question this Court's decisions in *Wewaykum*, at para. 121, and more recently in *Papaschase Indian Band No. 136 v. Canada (Attorney General)*, 2008 SCC 14, [2008] 1 S.C.R. 372 (S.C.C.), at para. 13 [hereinafter *Lameman*]. In *Lameman*, this Court specifically stated that policy rationales that support limitations periods "appl[y] as much to Aboriginal claims as to other claims" (para. 13 (emphasis added)). Without doing so explicitly, it appears that the majority has departed from the legal certainty created by *Wewaykum* and *Lameman*, in favour of an approach where "reconciliation" must be given priority.[42]

It is notable that the majority refused to apply statutory and equitable limitation periods to the Métis' claims that were characterized as "constitutional grievances" based on the honour of the Crown on the basis that reconciliation outweighs the rationale of strictly applying limitation periods, equitable or statutory.

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37 *Ibid* at para 141 [citations omitted].
38 *Ibid* at para 143.
39 *Ibid* at para 141.
40 *Ibid* at para 153.
41 *Ibid* at para 229.
42 *Ibid* at para 254.

MMF seemed to herald a new era, in which the Supreme Court had turned a page on how courts ought to apply statutory limitation periods to First Nations' claims for breaches of duties and obligations regarding Treaty and Aboriginal rights protected under the Constitution. It was understood that when a First Nation is advancing claims regarding a breach of Aboriginal Rights or Treaty Rights, rights that are protected under section 35 of the *Constitution Act, 1982*, that the Courts should consider whether the application of limitation periods would meet the goal of reconciliation.

4) Decisions Post-*MMF*

In at least one Federal Court decision post-*MMF*, wherein Canada sought to have the claim summarily dismissed based on limitations, the justice was unwilling to do so on the basis that it was at least fairly arguable that the *Wewaykum* and *Papaschase* decisions had been overtaken by the *MMF* decision. The justice stated "whether the application of limitation periods to other claims will be limited or expanded is not clear. This law in this area continues, as with much aboriginal law principles, to develop."[43] However, appellate authority seems to have eschewed this approach.

5) *Peepeekisis Band v Canada (Minister of Indian Affairs and Northern Development)*

Peepeekisis also involved a summary dismissal motion brought by the Crown against the plaintiff First Nation based on limitations. The claim dealt with an allegation that the Crown had mismanaged the plaintiff First Nation's reserve lands, created as a result of the Treaty promises. The Federal Court's decision, which was released before the *MMF* decision, dismissed the claims on the basis that both the statutory limitation periods under the then-in-effect *Public Officers' Protection Act*,[44] and Saskatchewan's *Limitations of Actions Act*,[45] would operate to bar the claims.[46]

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43 *Buffalo River Dene Nation v Canada*, 2015 FC 11 at para 42.

44 RSS 1978, c P-40.

45 RSS 1978, c L-15.

46 *Peepeekisis Band v Canada (Minister of Indian Affairs and Northern Development)*, 2012 FC 915.

The Federal Court of Appeal decision was released after *MMF*.[47] The Federal Court of Appeal reversed the trial judge's finding that the *Public Officers' Protections Act* applied so as to bar the claim, relying on *Guerin*, stating that the duty that the Crown owed in relation to the management of the reserve lands was not a public duty.[48] The Federal Court of Appeal upheld the motion judge's finding that the *Limitations of Actions Act* would apply so as to bar the Nation's claims. Before the Federal Court of Appeal, relying on the newly released *MMF* decision, the plaintiff First Nation argued that the action ought to be pursued as a declaratory proceeding engaging the "honour of the Crown." The First Nation argued that since the claim was based on the allotment of reserve lands, lands created pursuant to the terms of Treaty No 4, the honour of the Crown was engaged through the implementation of the Treaty promises, and thus the principles stated in *MMF* were engaged to favour an approach of reconciliation.

Justice Mainville, writing for the Federal Court of Appeal, was unwilling to decide the issue of whether the reconciliation principles stated by the Supreme Court in *MMF* could allow the action to continue as an action seeking declaratory relief, stating "the principles set out in *Manitoba Métis* cannot extend to cases where an effective alternative dispute resolution mechanism is available to the plaintiffs."[49] The "alternative dispute resolution mechanism" that the Court was referring to is Canada's specific claim process — which is limited to awarding monetary compensation and can only adjudicate on claims against provincial Crowns when the province consents.[50]

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47 *Peepeekisis Band v Canada (Minister of Indian Affairs and Northern Development)*, 2013 FCA 191.

48 *Ibid* at para 42.

49 *Ibid* at para 59.

50 *Ibid* at paras 60–62; see Indigenous and Northern Affairs Canada, "The Specific Claims Policy and Process Guide," online: www.aadnc-aandc.gc.ca/eng/1100100030501/1100100030506#chp19; *The Specific Claims Tribunal Act*, SC 2008, c 22; Specific Claims Tribunal Annual Report (30 September 2013); Specific Claims Tribunal Annual Report (30 September 2014); Dene Moore, "B.C. Judge Warns First Nations Claims Tribunal at Risk of Failure" *The Globe and Mail* (24 November 2014) online: www.theglobeandmail.com/news/british-columbia/tribunal-to-resolve-first-nations-claims-on-the-verge-of-failure/article21743167/; Specific Claims Tribunal Annual Report (30 September 2015); Specific Claims Tribunal Annual Report (30 September 2016). Note: There is a serious argument to be made as to whether Canada's Specific Claims process is truly an effective alternative dispute resolution mechanism. The process is not a full alternative to litigation in that the claims can only be brought against Canada, not the provinces; there is an effective cap on the amount of damages that may be awarded; and Canada controls the decision-

6) *Peter Ballantyne Cree Nation v Canada* and *Ermineskin Indian Band and Nation v Canada*

Two of the most recent decisions where laches and limitations issues went before the Supreme Court were leave to appeal decisions in *Peter Ballantyne Cree Nation v Canada* and *Ermineskin Indian Band and Nation v Canada*. In both cases, the Court denied leave to appeal, leaving the Court of Appeal decisions undisturbed.

In each of these decisions certain claims were dismissed summarily on the basis that the statutory limitation periods would apply so as to bar the claims against the Crown framed as breaches of fiduciary duty. The courts in both decisions emphasized that claims grounded in fiduciary duty must be narrowed or crystallized to a clear point in time when the action occurred. Once the claim or cause of action has "crystallized" there can be no claim for ongoing damages, even if the damages repeat on a daily basis and over many years. In the case of *Peter Ballantyne*, the ongoing flooding of reserve lands, and in the case of *Ermineskin*, the ongoing deductions of a tax as a result of a federal legislative tax program from the Nation's royalties.

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making process as to when a claim will or will not be accepted for negotiation. The process is not a full alternative to litigation in that the claims can only be brought against Canada, not the provinces; there is an effective cap on the amount of damages that may be awarded; and Canada controls the decision-making process as to when a claim will or will not be accepted for negotiation. Further, the litigation tactics used before the Specific Claims Tribunal are thought to be adversarial and extremely costly. These tactics have included motions to strike, challenges to evidence, and challenges to the Tribunal's jurisdiction. See *Aundeck Omni Kaning v Her Majesty the Queen in Right of Canada*, 2014 SCTC 1, which dealt with an application to dismiss a claim based on a challenge to the Tribunal's jurisdiction. The application was dismissed. The Tribunal member stated in response to Canada's argument that it controls the process of when to accept, negotiate, or not negotiate a claim the Tribunal member stated at para 22: "This position, along with the process employed by the Specific Claims Branch for small value claims in relation to this Claim, and perhaps many others, is, frankly, paternalistic, self-serving, arbitrary and disrespectful of First Nations. It falls short of upholding the honour of the Crown, and its implied principle of 'good faith' required in all negotiations Canada undertakes with First Nations. Such a position affords no room for the principles of reconciliation, accommodation and consultation that the Supreme Court, in many decisions, has described as being the foundation in Canada's relationship with First Nations." See also, generally, *Beardy's & Okemasis Band #96 and #97 v Her Majesty the Queen in Right of Canada*, 2015 SCTC 3 at paras 388–90.

Peter Ballantyne Cree Nation v Canada (Attorney General)[51] involves a claim against the Crown and third parties regarding the flooding of the plaintiff First Nation's reserve lands by a dam located off the reserve operated by the third parties. The federal Crown granted the original license for the dams, which authority was then transferred to the province after the 1930 *Natural Resources Transfer Agreement (NRTA)*. At the time that the construction of the dams was being approved, the Indian agent apparently approved the flooding of the First Nation's reserve lands without apparent authorization from the band.[52]

The defendants brought a summary judgment motion. The motions judge found that the Indian agent had given consent to the flooding, and that the consent of the Indian agent was binding on the First Nation. Because the Indian agent was acting on the "ostensible authority" of the First Nation in 1939, the First Nation was now estopped from complaining about the dam.[53] The motions judge also decided that if a cause of action arose against the Crown for breach of fiduciary obligations in consenting to the dam, that the cause of action arose in 1939, when the authorization was given by the Crown on behalf of the First Nation.[54]

Although the decision of the motions judge regarding the ostensible authority of the Indian agent was rejected on appeal, the Court of Appeal affirmed the decision with respect to the commencement of the limitations period in 1939.[55]

It is remarkable that a judge in 2014 could find that a First Nation could be bound by the acts of the Indian agent assigned by the Crown to oversee the community. The Court of Appeal wisely rejected such reasoning. Yet the Court of Appeal nonetheless found that the limitation

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51 *Peter Ballantyne Cree Nation v Canada (Attorney General)*, 2014 SKQB 327 [*Peter Ballantyne* SKQB], rev'd in part 2016 SKCA 124 [*Peter Ballantyne* SKCA], leave to appeal to SCC refused, [2017] SCCA No 95.

52 The motions judge made a finding that the Indian agent who gave authorization for the licence did so with apparent and ostensible authority on behalf of the First Nation and thus it was the First Nation that consented to the grant of the licence. Thus, they would be prevented from asking for *in rem* remedies against the licensor. This was reversed by the Court of Appeal. The Court of Appeal stated that arguments as to whether the First Nation consented would have needed to be determined at trial. Nonetheless, the comments of the trial judge regarding the role of the Indian agent are worrisome. See, for example, E Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986) for the paternalistic treatment of First Nations through the Indian agent system.

53 *Peter Ballantyne* SKQB, above note 51 at paras 65–69.

54 *Ibid* at para 78.

55 *Peter Ballantyne* SKCA, above note 51 at para 93.

clock to a claim of breach of fiduciary duty against the Crown, for consenting on the First Nation's behalf to the flooding, began to run in 1939. While such reasoning is less patently alarming than one in which the Indian agent was acting with ostensible authority from the First Nation, the result is nonetheless that the limitation clock started running in 1939, when section 141 of the *Indian Act* only permitted the retaining of counsel by the First Nation with the Crown's permission.

In *Ermineskin*, the defendant Canada brought a summary judgment motion within ongoing litigation seeking dismissal of a portion of the claim dealing with certain taxes levied on oil production on reserve lands, set aside pursuant to Treaty No 6 and held collectively by four First Nations. The four Nations claimed the federal tax was illegal and contrary to Canada's Treaty obligations to protect the reserve lands from depletion and its fiduciary obligations to ensure the best return for the First Nation whose resources had been surrendered to Canada to be leased for the Nation's sole benefit.

The tax at issue was levied pursuant to the *Oil Export Tax Act*,[56] and its successor legislation from 1 October 1973 to 1 June 1985. One of the four Nations, the Samson Cree Nation, filed its claim in 1989, four-and-a-half years after the tax ceased to be collected.[57]

In summarily dismissing the claim, the Federal Court applied *Wewaykum*, stating "limitations legislation, as well as the principles of laches and acquiescence, are applicable to claims against Canada even when the rights at stake are constitutionally-protected treaty and Aboriginal rights."[58]

Importantly, the Federal Court found that the claim arose when the legislation went into effect, and that the monthly damages suffered by the imposition of the tax were just a "continuing monetary consequence" and not a continuing cause of action. The Court was unwilling to consider the Nation's arguments that the breach occurred on a monthly basis every time the tax was imposed on the oil produced from the Nation's reserve lands.

Before the Federal Court of Appeal, Webb J, in his dissenting reasons,[59] agreed with the Nation, relying on *Kingstreet Investments Ltd*

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56 SC 1973–74, c 53.

57 The Alberta *Limitation of Actions Act*, RSA 1980, c L-15 provided for a six-year limitation period grounded on equitable relief from the discovery of the cause of action.

58 *Samson Indian Nation and Band v Canada*, 2015 FC 836 at para 112.

59 *Samson Indian Nation and Band v Canada*, 2016 FCA 223 [*Samson* FCA], leave to appeal to SCC refused, [2016] SCCA No 473, Côté J dissenting.

v New Brunswick (Finance),[60] which allowed for the recovery of moneys paid under an illegal tax for the limitation period that preceded the filing of the claim.[61] Justice Webb stated that the limitation period would begin when the particular amounts were collected by Canada, and thus the limitation period would only bar those amounts collected more than six years prior to the commencement of the claim.[62]

In reviewing the evidence to determine when the cause of action had been discovered, the Court noted that the plaintiff First Nations had attempted to resolve the issue through "political negotiations," but that by 1978 it was clear that Canada had rejected the political claims and that the Nation's only recourse was legal action.

This statement ignores that it was not until the *Guerin* decision was released in November 1984 that the Nation or its legal advisors would have been aware that a claim against Canada could in any way succeed.

Furthermore, reconciliation ought not mean litigating at the first and earliest opportunity, especially if due regard is given to the unique *sui generis* relationship that exists between Canada and First Nations and the goal of reconciliation. Reconciliation ought to weigh in the favour of suspending the limitation periods for the period of time when active negotiations with Canada were ongoing, and that the Nation was attempting to achieve a political resolution to its claims.

In summary, in both of the most recent cases involving limitations put before the Supreme Court, the respective courts of appeal had applied laches and limitations in a mechanistic fashion to dismiss the claim. Both times, the Supreme Court denied leave to appeal and left the lower court's decision undisturbed.

C. A PRINCIPLED APPROACH TO LIMITATIONS?

On our analysis of the caselaw, there have been some struggles in the courts regarding the application of laches and limitations to claims by Indigenous communities against the Crown. The struggle is well encapsulated in the split between the majority and dissent in *MMF*: between a dynamic interpretation of the doctrine, espoused by the majority, which takes into account how realistic it would have been to expect the Indigenous community to launch a claim at a particular moment in time;

60 2007 SCC 1.

61 *Samson* FCA, above note 59 at para 62.

62 *Ibid* at para 63.

and a mechanistic interpretation, as adopted by the dissent, that simply applies a limitations clock to exclude claims brought longer than a certain number of years beyond when the wrong first occurred. It is our view that the dynamic application of laches and limitations is to be preferred, and we set out our argument for this proposition in this section.

It is conventionally understood that there are three major justifications for limitations systems:[63]

1. Peace and Repose: "the theory is that, at some point after the occurrence of conduct that might be actionable, a defendant is entitled to peace of mind."
2. Evidentiary Concerns: that over time, the quality and availability of the evidence giving rise to a claim will deteriorate, and that "[i]f a point in time is reached when evidence becomes too unreliable to form a sound basis for adjudication, a limitation period should prevent the claim from being adjudicated at all."
3. Economic and Public Interest Concerns: the potential for litigation causes uncertainty, which visits negative economic consequences on society.

It is important to observe with respect to these policy interests that they are only tangentially applicable to claims of Indigenous communities against the Crown. An ordinary defendant may be entitled to peace and repose over time, but it is difficult to see why the Crown as defendant ought to be entitled to the same versus Indigenous communities. The historical injury is to the health of the relationship between the Indigenous community and the Crown, and one whose rectification is the process of reconciliation that is the stated purpose of modern Aboriginal rights jurisprudence. With respect to the quality of evidence, the preponderance of cases against the Crown are brought on the basis of evidence stored in the Crown's archives anyway, which does not suffer from the same concerns about deterioration.

Just as important, all of these policy interests that justify limitations lie in tension with the rule of law. A breach of a person's legal rights does not become any less of a breach due to the passage of time. It may be that time heals wounds, but some wounds are persistent because the injury is continuous.

In *Peter Ballantyne*, the Crown, as fiduciary for the land interests of the First Nation, did not stand up for the rights of the First Nation to their

63 Graeme Mew, *The Law of Limitations*, 2d ed (Toronto: LexisNexis Butterworths, 2004) 12–13. See also *M(K) v M(H)*, [1992] 3 SCR 6 at 28–33.

reserve lands when a dam was constructed that would flood their lands. The Saskatchewan Court of Appeal thought that the limitations period began running in 1939, when the federal Crown consented to the dam. Without acknowledging the historical unreality of such an expectation, the result is that the Crown's breach of the First Nation's rights in 1939 — which continues to the present day through the continued existence of the dam and the effects on the First Nation — are put beyond the ability of the courts to address. The First Nation may have had rights that the Crown breached, yet these are legal rights that will never be vindicated. The prudential concerns behind limitations periods can, in some cases, defeat the rule of law.

There is no principled reason for the application of limitations. There is no principle in saying that breaches of law further in the past are somehow less worthy of vindication. Rather, the reasoning that informs the application of limitations periods is prudential and policy oriented: because some claims are too hard to adjudicate fairly; because people should be encouraged to bring their claims sooner.

It is telling that the policy objectives that inform the application of limitations are so fact dependent. Canadian law has, in other contexts, developed approaches to limitations that have taken the factual context of the claim into account and measured those facts against the interests of justice. Since *M(K) v M(H,)*, for instance, the courts have developed an approach to limitations periods for the bringing of claims relating to incest that try to take into account the nature of the trauma suffered and how that might make it more difficult to bring a claim in as timely a manner as it would take to bring an action in a garden-variety corporate commercial matter.[64] The Court in *M(K) v M(H)* focused on the question of when the victim could "know . . . that a legal claim is possible."[65] A mechanistic application of limitation periods was "particularly inapposite for incest actions."[66] The Court found that it would be inappropriate to "ignore the larger social context that has prevented the problem of incest from coming to the fore."[67] In the interests of justice, it was important for Canadian law to take an approach to limitations in incest cases that took into account the capacity of incest victims to bring suit, and this meant that the limitations clock did not run against the victim until the victim had undergone sufficient therapy to have had the capacity to bring suit.

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64 *M(K) v M(H)*, *ibid*.

65 *Ibid* at 79.

66 *Ibid* at 30.

67 *Ibid* at 32.

In our view, it is only appropriate for a legal system that aims to engender reconciliation between Indigenous and non-Indigenous people to take full account of the historical context of injustices against Indigenous people and the continuing toll it takes on their capacity to bring suit. It is, therefore, especially worrisome for us that so much of the jurisprudence on limitations to Indigenous-Crown disputes has arisen in the context of motions for summary judgment.

D. PREVALENCE OF SUMMARY JUDGMENTS

It is notable that so many of the recent major cases where laches and limitations have been applied to the claims of an Indigenous community have been done in the context of summary judgments. Summary judgment motions permit a judge to determine if she has enough evidence before her before a full trial is held to adduce a full record, and to make a final decision on the claim. The Supreme Court of Canada, in *Hryniak v Mauldin*, recently decided that summary judgments should be used more frequently as part of a set of tools to speed up the wheels of justice.[68]

The key to the operation of the summary judgment rule is the discretionary power vested in trial judges to decide whether to short-circuit the calling of evidence because they have enough in front of them to make a final decision. When it comes to laches and limitations, the key inquiry in the summary judgment analysis is likely to be the question of whether the community should have brought the claim at an earlier time, and whether there has been inordinate delay. As the TRC has pointed out, it is precisely on these questions where there may be more to the history of Indigenous communities than meets the eye of most settler Canadians. As the Commission pointed out:

> Non-Aboriginal Canadians hear about the problems faced by Aboriginal communities, but they have almost no idea how those problems developed. There is little understanding of how the federal government contributed to that reality through residential schools and the policies and laws in place during their existence. Our education system, through omission or commission, has failed to teach this. It bears a large share of the responsibility for the current state of affairs . . . . This has left most Canadians with the view that Aboriginal people were

68 2014 SCC 7 at para 68.

> and are to blame for the situations in which they find themselves, as though there were no external causes.[69]

A case in point is *Peter Ballantyne*, one of the cases we canvassed above. As we described, the Saskatchewan Court of Queen's Bench decided, in a summary judgment motion, that the consent of the Indian agent in the 1930s to the flooding of lands also bound the First Nation to the decision, and thus the First Nation was now barred from complaining about the flooding.[70] The Court of Appeal, while disagreeing with the decision of the Court of Queen's Bench with respect to whether the ostensible consent given to the dam by the Indian agent could now estop the First Nation from complaining about the dam,[71] nevertheless found that the limitation period for the First Nation to complain about the Crown's consent to the dam began to run in 1939, as soon as the Crown originally approved the dam.[72]

It is notable that the Saskatchewan courts made these decisions on summary judgment motions. Nowhere in the reasons for judgment is there consideration of the fact that until 1951, the *Indian Act* prohibited First Nations from hiring lawyers without approval from the federal Crown. It would be easy to imagine the story of how this provision would have affected the First Nation's ability to bring a claim in 1939 being more fully told in a full trial.

A full record of the evidence may also have included more analysis of the role that the Indian agent and the Department of Indian Affairs (DIA) played in the community. They might have heard from someone like Jarvis Brownlie, an eminent authority on the history of Indian agents:

> Aboriginal people who lived on reserves in the interwar period inhabited a physical and administrative world defined by the Indian department. Their lives and plans were controlled by DIA officials in ways most Canadians would have found intolerable. Harold Cardinal has expressed the situation in stark language: "If you are a treaty Indian, you've never made a move without these guys, these bureaucrats saying yes or no." The reserve itself was an invention of colonialism, the Indian department decided who was entitled to live there, and the elective band council system had been imposed by the Indian Act to replace traditional systems of government. Sales of land and resources had created "band funds" owned collectively by the band, which in

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69 TRC, above note 5 at 235.

70 *Peter Ballantyne* SKQB, above note 51 at paras 61 and 152.

71 *Peter Ballantyne* SKCA, above note 51 at para 170.

72 *Ibid* at para 93.

> some cases contained considerable sums, but access to this money was strictly controlled by federal officials. The agents ran the schools, the band councils, and the reserve economies. Aboriginal poverty and marginalization strongly reinforced the importance of the agent, who could offer part-time jobs on the reserve, mediation with the dominant society, and access to food rations and relief in time of need. Given his potential to help those in difficulty, he was not someone to cross lightly.[73]

The control of the Indian agent was pernicious:

> Native activist Harold Cardinal has outlined some of the ways in which an agent could do this: "The Indian agent . . . actively worked against the leaders of the day . . . . He had many weapons . . . . Sometimes he openly threatened to punish people who persisted in organizational efforts. More often he used more subtle weapons such as delaying relief payments or rations to show the Indians which way the wind was blowing . . . . By spreading gossip or falsifying facts, the government officials often were able to undermine the leaders through their own people. It was made quite obvious to people on the reserve that it was not wise to talk to certain Indians.[74]

The power of the Indian agent was directed precisely toward interfering with community decision making:

> Indian agents could exercise authority over meetings of band councils in important ways. It was their role to call council meetings, act as the chair, and express their own views in deliberations. They were excluded only from the voting process. Burton Jacobs has written that, under this system, all administrative matters related to reserves were directly controlled by the agent.[75]

The tremendous power of the Indian agent was deployed to police communications with officials in the Indian Department and generally to isolate First Nations from people who might act as a check against the discretionary power of department officials:

> . . . the department had always preferred to communicate with First Nations people at one remove, that is, through the Indian agent. In 1933, it made this preference into official policy, prohibiting Aboriginal people from approaching the department directly — all inquiries, requests, and complaints had to be made through the Indian agent. The policy

73 Brownlie, above note 9 at 29.

74 *Ibid* at 33.

75 *Ibid* at 35.

> was enforced by a humiliating procedure in which the agent confronted anyone who wrote to the department, advising the person that the department would respond only to requests sent through him.[76]

It is difficult to imagine a First Nation successfully commencing a lawsuit against the Crown in such circumstances. The absolute power that Indian agents wielded over Indigenous communities may have ended decades ago, but substantial inequalities remain between the Crown side and the Indigenous side in litigation. One aspect of this is financial, and one that can be missed in the partial record that goes before a trial judge in a summary judgment setting. The absolute financial control that the Crown had over First Nations has been transmuted into the financial out-muscling of Indigenous communities by the Crown, by dint of the extraordinarily deep pockets of the state. In recent years, it appears that the typical annual spending by the federal Crown in litigation against Indigenous communities is about $110 million.[77] Some back of the envelope calculations will illustrate what this entails. Since there are 634 First Nations in Canada (obviously this excludes Métis and Inuit communities), the $110 million figure works out to mean that the federal government spends about $174,000 litigating against each community per year. Or looked at another way, that is roughly equivalent to a mid-level or senior department of justice litigator being dedicated on a full-time basis, litigating against each and every First Nation in Canada. This is a tally of federal spending on litigation, and of course does not include the amount that provinces, municipalities, and project proponents also spend in litigation against Indigenous communities.

The overwhelming firepower that opponents bring to the table against Indigenous communities is pitted against the ongoing financial control that the Crown exerts over those communities. Canadian law has established that the resources that exist on Indigenous territories belong to the Crown and that Indigenous communities do not have the authority to derive revenues from those resources.[78] As such, they remain beholden to the Crown for funding for basic services. Services such as child welfare have been systematically underfunded[79] and it would be

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76 *Ibid* at 37.

77 Yamre Taddese, "Feds Pouring Big Money into Aboriginal Litigation" *Law Times* (11 November 2013), Online: www.lawtimesnews.com/201311113587/headline-news/feds-pouring-big-money-into-aboriginal-litigation.

78 *St Catharines Milling and Lumber Co v R*, [1888] 14 AC 46 (PC).

79 See, for example, *First Nations Family and Caring Society v Canada (Minister of Indian Affairs and Northern Development)*, 2016 CHRT 2.

reasonable to expect a First Nation to devote their financial resources to such basic programs ahead of financing litigation.

As important as the financial limits on Indigenous communities' capacity to pursue litigation are, it is also important to remember the doctrinal limits to what claims the courts were prepared to hear. As Isaac CJ observed in the Federal Court of Appeal decision in *Semiahmoo Indian Band v Canada*:

> In accordance with paragraph 6(3)(i) of the B.C. *Limitation Act*, the 6-year limitation period in subsection 3(4) does not start to run until the "reasonable plaintiff", having obtained the appropriate advice, would regard the facts known to it as showing that a cause of action has "a reasonable prospect of success". In my view, until the *Guerin* decision, it could not be said that the reasonable plaintiff would have viewed the band's cause of action as having "a reasonable prospect of success". Until *Guerin*, most Aboriginal peoples believed that their only avenue for redress for unfair treatment in land surrenders was in the political arena.[80]

All this must also be seen in the context of a Canadian legal system that sees the default position as one in which the Crown has sovereignty and rights to the land, against whom Indigenous communities must make the case that they have Aboriginal and Treaty rights. Despite the prior existence of Indigenous communities, they are the ones who bear the burden of proof. For communities that choose to try to negotiate their claims with the Crown, the Crown can choose to suspend the negotiations if the Indigenous community proceeds with litigation. Once a limitation period has passed, the Crown may no longer be willing to negotiate. The presumption that the Crown has rights to the land and the sovereignty with which to make decisions about it can operate along with limitations periods to practically immunize them from claims by Indigenous people.

A full record might be able to give the court a sense of the substantial difficulties that Indigenous communities face in bringing suit against the Crown. These are facts that the courts risk missing when they decide cases through summary judgment.

Yet even in the context of a full trial, a court risks doing injustice by applying laches and limitations mechanistically. In our view, a focus on whether it would have been reasonable for the plaintiff to know that a claim was possible — and in unpacking the notion of possibility, including

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80 [1998] 1 FC 3 at para 86ff (CA).

financial and legal limits to the capacities of Indigenous communities — is the fair way to proceed. Such was the approach of the majority in *MMF* and in *M(K) v M(H).*

In all cases, we suggest that it is crucial for the courts to remember the essential role they play in reconciliation between Indigenous communities and settler Canadians. The non-judicial organs of the state do not have a great track record in this regard over the past century and a half. When a court declines to vindicate an Aboriginal or Treaty right, it is incumbent on it to remember the importance of judicial institutions to the process of reconciliation. Denying a claim based on laches and limitations might well stymie that process, perhaps forever.

E. PRACTICAL PROPOSALS FOR MOVING FORWARD

We began this chapter by noting that there is widespread consensus that the historical injustices committed by the Crown against Indigenous peoples are legion. We also noted that the most successful way thus far of rectifying those injustices has been led by the courts, in substantially enforcing the rights of Indigenous peoples against the Crown. Yet the reliance on and strict application of laches and limitations threaten to put an end to the capacity of the courts to do so. In our view, such a mechanistic application of laches and limitations is based on an unrealistic view of the Crown-Indigenous relationship. This possibility should concern anyone who is interested in a reconciliation between Indigenous people and settler Canadians.

Laches and limitations have their place in a well-functioning judicial system. Yet a realistic assessment of the Crown-Indigenous relationship must recognize that it has taken place within the context of a legal system that was anything but well functioning for Indigenous communities. While recognizing that it is possible for Indigenous communities to inordinately delay their claims, we suggest that a mechanistic application of laches and limitations can work real injustice. We are therefore putting forward a few suggestions that would go some way to alleviating the injustice that can result.

1. **No laches or limitations periods for Aboriginal and Treaty rights protected under section 35(1) of the *Constitution Act, 1982*.** These are constitutional rights that are the foundation of a right relationship between the Crown and Indigenous communities. To permit ordinary legislation like limitations statutes to prevent the assertion

of these rights is inappropriately restrictive, and prevents the relationship between the Crown and Indigenous communities envisaged in the Constitution from being protected by the courts.

2. **No laches or limitations periods for the loss of reserve lands**. The courts have repeatedly recognized the importance of reserve lands to Indigenous communities.[81] To permit ordinary provincial legislation to simply prevent the assertion of rights to reserve lands, without proving the infringement is justified, fails to recognize the role of reserve lands in the relationship between Indigenous communities and the Crown.
3. **Indigenous communities should benefit from a rebuttable presumption that they have not delayed.**[82] We have discussed extensively the kinds of difficulties that Indigenous communities have faced in bringing claims forward to the courts. Even today there are a number of major limits to the capacities of communities to make legal claims. These limits exist because of the history of colonialism in Canada, and the demands on the resources of First Nations to deal with the legacy of colonialism and chronic underfunding of basic services. We suggest that if the Crown wishes to rely on laches and limitations, it should be incumbent on the Crown to make a case for it, laying out positive evidence of an active decision to delay.
4. **Any evidence of negotiations with the Crown about a claim should stop any laches and limitations clock.** Such a rule would recognize that negotiations are the preferred means of resolving conflicts and that participating in negotiations should not lead to an adverse finding of delay.

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81 See, for example, *St Mary's Indian Band v Cranbrook (City)*, [1997] 2 SCR 657, especially para 16.

82 For a structurally similar application of limitations to incest cases, see *M(K) v M(H)*, above note 63 at 35.