

Achieving Justice When Limitation Periods Deny Indigenous Claims

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Outline

- Sources and rationales
- Key Aboriginal law decisions
- *Jim Shot Both Sides v. Canada*
- *Restoule*
- Paths to justice

Source of limitation periods

- Each province & territory has its own statute of limitations.
- A provision of the *Federal Court Act* referentially incorporates into federal law limitation periods in the province or territory where a cause of action arises.

Rationales for imposing limitation periods

- The guarantee of repose.
- The desire to foreclose claims based on stale evidence.
- The expectation that a plaintiff will start a claim in a timely manner.
- Need to be balanced with avoiding injustice of precluding claims too early.

Discoverability

- *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147
 - “a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence”
- *Grant Thornton LLP v. New Brunswick*, 2021 SCC 31
 - “plausible inference of liability”
 - “perfect knowledge” or certainty not required

Problems with applying limitation periods to deny Indigenous claims

- Unique rationales may prevail
- Constitutional concerns
- *Sui generis* nature of Indigenous rights
- Honour of the Crown
- Reconciliation
- Policy concerns (e.g. access to justice)

Key decisions

- *Guerin v. The Queen*, [\[1984\] 2 SCR 335](#)
 - SCC found limitation period hadn't started to run, but operated on the basis that statutes of limitation apply to Indigenous claims.
- *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [\[1995\] 4 SCR 344](#)
 - SCC relied on discoverability principles to find limitation period hadn't started to run.
 - Dismissed concerns about limitations statutes applying to Indigenous claims.

Key decisions

- *Wewaykum Indian Band v. Canada*, [2002 SCC 79](#)
 - SCC found claims would have been barred by BC statute of limitations.
 - Rejected various arguments that limitations statutes should not apply.
- *Canada (Attorney General) v. Lameman*, [2008 SCC 14](#)
 - SCC: “the rules on limitation periods apply to Aboriginal claims”.
 - No notice of constitutional question given and Court didn’t consider effect of s. 35 coming into force.

Key decisions

- *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, [2013 SCC 14](#)
 - “[L]imitations 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.”
 - Would have found claims for breach of fiduciary duty time-barred.

Questions arising from *Manitoba Métis*

- “[H]ow 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.”

-Prof. Kent McNeil & Thomas Enns in 2022

Jim Shot Both Sides v. Canada

- Claim “discovered” in early 1970s and action not commenced until after government refused to negotiate.
- Do limitation periods apply to breach of treaty claims based on s. 35(1)?
- Could the limitation period for a s. 35(1) breach of treaty claim run before s. 35(1) existed?

Jim Shot Both Sides v. Canada

- Enormous range of arguments from the parties, interveners, and AGs.
- Jamal J.: What about the Specific Claims Tribunal?
- Kasirer J.: Issue a declaration?
- Rowe J.: Does a declaration + breach of honour of the Crown effectively circumvent limitation periods?

Restoule

- Ontario arguing limitations defence.
- Trial judge: “no specific limitation for claims of breach of treaty” in Ontario.
- ONCA: “provincial limitations legislation does not preclude the breach of Treaty claims.”
- SCC: TBD

Achieving justice when faced with limitation periods

- Directives against relying on limitation periods
- Specific Claims Tribunal
- Honour of the Crown
- Discoverability
- Constitutionality of limitation periods
- UNDRIP
- Declarations

Truth and Reconciliation Commission of Canada: Call to Action (2015)

- 26. We call upon the federal, provincial, and territorial governments to review and amend their respective statutes of limitations to ensure that they conform to the principle that governments and other entities cannot rely on limitation defences to defend legal actions of historical abuse brought by Aboriginal people.
 - [PDF](#)

Attorney General of Canada's Directive on Civil Litigation Involving Indigenous Peoples (2018)

- Litigation Guideline #14: Limitations and equitable defences should be pleaded only where there is a principled basis and evidence to support the defence.
 - [PDF](#)

Specific Claims Tribunal

- Section 19: “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.”
- Section 20(1) limits to monetary awards, caps compensation at \$150 million, no punitive, exemplary or non-pecuniary damages.

Honour of the Crown

- Should limitation periods be allowed to operate as “instruments of injustice”?
- *Manitoba Métis*: “[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”.

Discoverability

- Is there a “continuing breach” giving rise to new causes of action?
- Should there be a more flexible approach for Indigenous claims generally?
- Need for repose not justified after century of breaches.

Constitutional & International Obligations

- Division of powers: Can a provincial statute extinguish an Indigenous interest which is within the exclusive jurisdiction of Parliament (s. 91(24))
- UNDRIP: *United Nations Declaration on the Rights of Indigenous Peoples* endorsed by Canada in 2016 and enacted domestic legislation in 2021.

Effect of the operation of a limitation period

- Section 35(1) prevents Parliament from extinguishing Aboriginal rights unilaterally.
- Procedural vs substantive: Do limitation periods extinguish rights or do they only prevent recourse to the courts?

Declarations

- Not a “personal” remedy, so not subject to limitation legislation.
- Can advance reconciliation as it requires the Crown to restore its honour and repair the relationship.
- Continuing obligation that informs what a Crown, acting honourably, must do.