SCC FILE NO. 40024

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

THE ATTORNEY GENERAL OF ONTARIO and
HIS MAJESTY THE KING IN RIGHT OF ONTARIO

APPELLANTS/RESPONDENTS
ON CROSS-APPEAL

- and –

MIKE RESTOULE, PATSY CORBIERE, DUKE PELTIER, PETER RECOLLET, DEAN SAYERS and ROGER DAYBUTCH, on their own behalf and on behalf of all Members of the Ojibewa (Anishinaabe) Nation who are beneficiaries of the Robinson Huron Treaty of 1850

RESPONDENTS/APPELLANTS
ON CROSS-APPEAL

(continued)

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TSAWOUT FIRST NATION

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

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THE RED ROCK FIRST NATION and THE WHITESAND FIRST NATION

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PART I – OVERVIEW OF POSITION

1. *Ubi ius ibi remedium* – where there is a right, there is a remedy. This ancient legal maxim is an animating principle of the common law, but too often is not applied in the court processes dealing with Aboriginal and Treaty rights and the infringement of those rights.

2. In *Mikisew*, Binnie J. stated that:

> 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. The management of these relationships takes place in the shadow of a long history of grievances and misunderstanding.[1]

3. While this case offers a glaring example of Crown mismanagement of a treaty relationship, it is no outlier. Myriad historical disputes relating to Aboriginal and Treaty rights are winding their way through the superior courts of this country. While this Court has stated that true reconciliation is rarely achieved in the courtroom,[2] the courts play an extremely important role in defining section 35 rights, clarifying parties' obligations, and providing remedial relief when needed, to advance the parties towards reconciliation.[3]

4. To perform this important role, courts must have access to the full suite of remedial tools, and otherwise meritorious cases should not be summarily dismissed based on "basket clauses" in provincial limitations legislation. Where there is an established Aboriginal or Treaty right but no remedy, that right is effectively extinguished. Rather than operating as a shield, as intended, limitations statutes have in many circumstances become a sword wielded by the Crown to defeat Indigenous claims.

5. Such a result does not further reconciliation or access to justice, but inhibits it, 'pouring salt in the wound,' causing further distrust of court processes among Indigenous litigants, and diminishing the confidence of society in courts as guardians of the *Constitution*.

PART II – ISSUES

6. Tsawout First Nation ("Tsawout") takes no position on the ultimate disposition of the

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[1] *Mikisew v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 [*Mikisew*] at para. 1.
[2] *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40 at para. 24.
[3] *R. v. Desautel*, 2021 SCC 17 at paras. 84-86.

appeal and cross-appeal. However, Tsawout submits that the overarching goals of reconciliation and access to justice should guide this Court's deliberations. Tsawout submits that the full suite of remedies ought to be available in section 35 litigation, and that provincial limitations statutes are inimical to access to justice and are inconsistent with the UN Declaration on the Rights of Indigenous Peoples ("UNDRIP").

PART III –ARGUMENT

A. The Whole Suite of Remedies Must be Available for Section 35 Claims

7. Ontario argues that a declaration is an appropriate and effective remedy because it will foster reconciliation. If accepted, this position will likely lead to the opposite conclusion, fraught with years of negotiations between the First Nations and Ontario. This cynical position must be rejected. The historic breach of an Aboriginal or Treaty right cannot be ameliorated simply by undertaking subsequent good faith negotiations; the breach must be settled by consent or resolved in court.[4] The courts are the guardians of the *Constitution* and must have the necessary tools to remedy breaches of constitutional rights. When dealing with historic claims that may span 170 years, absent agreement, the court must bring some finality to these disputes.

8. In addition to declaratory relief, compensation must be available to put the Indigenous group in the position it would have been had the Crown performed its treaty obligations. In *Southwind*, this Court had an opportunity to consider remedies when the Crown is found in breach of its fiduciary duty in the context of a wrongful taking of reserve land.[5] This Court found that equitable compensation was payable by the Crown:

> In summary, equitable compensation deters wrongful conduct by fiduciaries in order to enforce the relationship at the heart of the fiduciary duty. It restores the opportunity that the plaintiff lost as a result of the fiduciary's breach. […] Equitable presumptions — including most favourable use — apply to the assessment of loss. The most favourable use must be realistic. The trial judge must be satisfied that the assessment reflects the value the beneficiary could have actually received from the asset between breach and trial and the importance of the relationship between the Crown and Indigenous Peoples.[6]

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[4] *Ross River Dena Council v. Canada*, 2019 YKCA 3, at paras. 127 and 134.
[5] *Southwind v. Canada*, 2021 SCC 28 [*Southwind*].
[6] *Southwind* at para. 83.

9. Thus, this Court set out three remedial goals: 1) deterrence; 2) putting the plaintiff in the position they would have been in but for the breach; and 3) reconciliation. These goals are equally applicable when considering how to remedy breaches of section 35 rights, perhaps even more so given their constitutional status. Given the deep public interest in reconciliation, these goals serve not only Indigenous claimants, but society as a whole.[7]

10. While this Court has not taken the opportunity to address the approach to compensation or damages for breaches of section 35 rights, the approach to *Charter* damages provides a useful analogue. In *Ward*, this Court set out the function of damages under section 24(1) of the *Charter*: 1) compensation; 2) vindication and 3) deterrence.[8] Compensation and deterrence are equally applicable functions for *Charter* damages and fiduciary duty claims. Vindication focuses on the harm the infringement causes society as *Charter* breaches "impair public confidence in the efficacy of the constitutional protection."[9] Thus, vindication performs a similar function to reconciliation in the section 35 context.

11. If declaratory relief is all that is available for breaches of section 35 rights, there is a very real possibility that none of these goals (deterrence, compensation, and reconciliation) can be satisfied. Both the Indigenous group and the public at large will lose confidence in the *Constitution* and our system of justice. Having established a breach of a Treaty right, the courts have a responsibility to fashion novel remedies, including compensation, that address the Crown's Treaty [and Aboriginal] rights breaches.[10]

12. The foundational section 35 cases support this approach. In *Sparrow*, this Court set out the test for Crown justification once a *prima facie* infringement of an Aboriginal [or Treaty] right has been established.[11] This Court held that compensation is a factor to consider in determining whether an infringement of an Aboriginal right is justified.[12]

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[7] *Redmond v British Columbia (Forests, Lands, Natural Resource Operations and Rural Development)*, 2020 BCSC 561 at para. 38, aff'd 2022 BCCA 72.
[8] *Vancouver (City) v. Ward*, [2010] 2 S.C.R. 27 [*Ward*] at paras. 25-30.
[9] *Ward* at para. 28.
[10] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 at paras. 89-90.
[11] *R. v. Sparrow*, [1990] 1 S.C.R. 1075 [*Sparrow*] at pp. 1111-1113; *R. v. Badger*, [1996] 1 S.C.R. 771 [*Badger*] at para. 75, confirmed the test is the same in a treaty context.
[12] *Sparrow* at p. 1119.

13. Similarly, in *Delgamuukw* this Court recognized that the economic aspect of Aboriginal title suggests that fair compensation will be required when Aboriginal title is infringed.[13]

14. Finally, this Court has recognized that in the consultation context, a previous breach of the duty to consult or a continuing breach can lead to a range of remedies including injunctive relief and the awarding of damages.[14]

15. Thus, there is no impediment to courts exercising their remedial muscles to fashion an appropriate remedy that goes beyond declaratory relief to include damages or equitable compensation, or in this case, confirming that such relief is available when a Treaty breach is found. When considering breaches of section 35 rights, there is no principled reason to take a different approach from the fiduciary duty or *Charter* cases.

B. Policy Rationales for Limitations Statutes Don't Account for Aboriginal Context

16. Many of the traditional policy rationales underlying limitations statutes do not apply in the context of Aboriginal and Treaty right claims. Rather, reconciliation and the honour of the Crown weigh heavily in balancing protection for defendants with fairness to the plaintiffs.[15]

17. The three traditional rationales underlying limitation periods — the certainty, evidentiary, and diligence rationales — are orientated towards protecting defendants.[16] Recognizing the need to treat plaintiffs fairly, this Court described a fourth rationale — that limitations statutes should account for a plaintiff's *specific circumstances* assessed through a subjective/objective lens — and clarified that the best interpretation of limitations legislation seeks to give effect to all four rationales.[17]

18. The traditional policy rationales do not fit neatly in the context of Aboriginal and Treaty

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[13] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 ["*Delgamuukw*"] at para. 169 per Lamer C.J.C., and at paras. 203-204 per La Forest J.
[14] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 at paras 37 & 49.
[15] *Manitoba Metis Federation Inc. v. Canada*, 2013 SCC 14 [*Manitoba Metis*] at para. 141.
[16] *M(K) v M(H)*, [1992] 3 S.C.R. 6 (SCC) at paras. 21-24; *Novak v Bond*, [1999] 1 S.C.R. 808 ["*Novak*"] at para. 66.
[17] *Novak* at para. 66-67.

rights claims, where the evidentiary record is supported by extensive Crown records and oral history, supplemented by expert testimony. Reliance on the certainty and diligence rationales would allow the Crown to shield its own unconstitutional actions.[18]

19. Rather, the interpretation of limitations laws in the context of section 35 rights claims must give priority to the specific circumstances of Indigenous claimants and the ultimate goal of reconciliation.

20. As recognized in the *Royal Proclamation, 1763,* the Crown has long been aware of Indigenous peoples' interests in their lands and the Crown's obligation to protect these interests. However, since contact, the Crown has consistently and deliberately put up procedural and substantive barriers that limit Indigenous peoples' ability to advance claims and obtain recognition of their rights. This has been particularly the case in British Columbia where the Crown quickly abandoned the practice of treaty-making and refused to acknowledge the rights of Indigenous peoples.[19] Instead, the Crown used colonial law and policy to suppress these claims and oppress Indigenous communities.

21. Since colonization, the Crown has pursued a series of policies intended to assimilate Indigenous peoples—policies that are now characterized as cultural genocide.[20] One of the earliest policies, enfranchisement, encouraged educated Indigenous men of "good moral character" (as determined by the Crown) to abandon their Indian status in exchange for the rights of citizens, including the right to own property and vote.[21] In 1867, the Crown introduced compulsory enfranchisement for Indians who attained certain levels of education, including those admitted to practice law.[22] An individual could be an Indian or a lawyer, not both.

22. Other Crown policies, including the potlach ban in 1884, undermined Indigenous

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[18] *Manitoba Metis* at para. 141.
[19] *Williams Lake Indian Band v. Canada*, 2014 SCTC 3 at para. 195
[20] Renvoi à la Cour d'appel du Québec relatif à la *Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis*, 2022 QCCA 185 at paras. 69-70.
[21] *Act to encourage the gradual Civilization of the Indian Tribes in this Province, and to amend the Laws respecting Indians*, S. Prov. C. 1857, 20 Vict., c. 26.
[22] *An Act to amend and consolidate the laws respecting Indians*, SC 1876, c 18, s 86(1).

governance structures and the relationships between Indigenous groups.[23] Introduced in 1885, the pass system required Indians to obtain written permission from their Indian Agent before leaving the reserve, allowing the Crown to restrict and control the movement of Indigenous peoples, prevent large gatherings, and stifle potential uprisings.

23. Despite these and other barriers, several Indigenous Nations in British Columbia continued to seek formal recognition of their title throughout the late 1800s and early 1900s, calling on the Crown to negotiate treaties. Rather than acknowledge these claims, the Crown amended the *Indian Act* in 1927 to prevent Indigenous peoples from raising money for legal claims and hiring lawyers.[24] From 1927 to 1951, First Nations were effectively barred from advancing claims in court.[25]

24. The Crown removed the lawyer ban in 1951 but Indigenous litigants continued to run into procedural barriers. For example, in *Calder* a majority of this Court held they had no jurisdiction to make a declaration of Aboriginal title because Nisga'a had not obtained a fiat to sue the Crown as required under the *Crown Procedure Act*.[26]

25. This context — the Crown's history of simultaneously denying and suppressing Aboriginal and Treaty rights claims — must inform courts' interpretation of limitations.

C. Limitations Statutes Make Reconciliation Difficult if not Impossible

26. Tsawout agrees with the Court of Appeal and the respondents on appeal that Ontario's 1990 *Limitations Act* does not capture breach of treaty claims.[27] The Court of Appeal's conclusion is straightforward: 1) the 1990 *Limitations Act* does not reference Aboriginal treaties, and 2) had the legislature intended to include Aboriginal treaty claims, it would have done so explicitly.[28]

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[23] *An Act to Further Amend the Indian Act*, SC 1884, c 27, s 3.
[24] *Indian Act*, RSC 1927, c 98, s 141.
[25] *Saugeen First Nation v. Attorney General of Canada***,** 2021 ONSC 4181 at paras. 1179-1181.
[26] *Calder et al. v. Attorney-General of British Columbia*, [1973] SCR 313 (SCC) at p. 345 and pp. 424-27; *Crown Procedure Act*, RSBC 1960, c 89.
[27] *Restoule v. Canada (AG)*, 2021 ONCA 779 [*Restoule*] at para. 662.
[28] *Restoule* at paras. 644-47.

27. However, the Court of Appeal's comment in *obiter* that a legislature could have intended to target Treaty rights claims with a basket clause is worrying. In British Columbia, Alberta, and Saskatchewan, where the majority of Aboriginal claims are litigated, their applicable limitations statutes do not explicitly reference Aboriginal and Treaty rights, but include general 2-year or 6-year limitation periods for "any other action". [29] If courts interpret these "basket clause" provisions as applying to Aboriginal and Treaty rights claims, the result is that the respondent First Nations' claims are actionable in Ontario but would be statute-barred in British Columbia, Alberta, and Saskatchewan.

28. While cases from this Court suggest that limitation periods may apply to Aboriginal and Treaty right claims, this issue has yet to be fully considered. Although this Court mentions in *Wewaykum* and *Lameman* that those cases were statute-barred, this Court also found that those cases were without merit.[30] *Wewaykum* was not a section 35 case but a fiduciary case in relation to a "ditto mark error." In *Lameman*, this Court found there was no genuine issue for trial.[31]Finally, in *Manitoba Metis*, this Court considered the narrow question of whether Manitoba's limitations legislation could prevent this Court from issuing a declaration that Canada did not act diligently to fulfill its obligations to the Métis under s. 31 of the *Manitoba Act*.[32]

29. Applying limitations statutes to Aboriginal and Treaty rights claims not only defeats reconciliation, it ignores the honour of the Crown, prevents access to justice, and disregards UNDRIP. In addition, it creates a patchwork of protection for section 35 rights across Canada.[33] It also defeats one of the foundational purposes of section 35 – to afford

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[29] *Limitation Act*, RSBC 1996, c 266, s. 3(5), which applies to s. 35 rights claims by virtue of the *Limitation Act*, SBC 2012, c 13, ss. 2(2) and 2(3); *Limitation of Actions Act*, RSA 1980 c L-15, s. 4(1)(g), which applies breach of fiduciary duty claims advanced by Indigenous peoples by virtue of *Limitations Act*, RSA 2000, c L-12, s 13, which applies to all other claims; *The Limitation of Actions Act*, RSS 1978, c L-15, s. 3(1)(j), which applies to s. 35 rights claims by virtue of *The Limitations Act*, SS 2004, c L-16.1, ss. 3(2)(c) and 3(3).
[30] *Wewaykum Indian Band v. Canada*, 2002 SCC 79 *Wewaykum*]; *Canada v. Lameman*, 2008 SCC 14 [*Lameman*].
[31] *Lameman* at para. 12.
[32] *Manitoba Metis* at para. 40.
[33] *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 [*Innu*]at para. 64.

Aboriginal peoples constitutional protection against provincial legislative power.[34] Aboriginal and Treaty rights claims are not "any other action" — they arise from the breach of constitutionally protected, *sui generis* rights and must be adequately remedied.

D. Limitations Acts are Not Simply Procedural

30. Recently, in *Jim Shot Both Sides*, the Federal Court of Appeal classified limitation periods as "procedural", stating that they do not expunge rights but rather bar remedies based on those rights.[35] With respect, this decision, and others like it, fail to account for the on-the-ground reality that in many circumstances, denial of a remedy effectively extinguishes the right.

31. Tsawout's situation serves as a useful illustration regarding how the application of a limitation period can effectively extinguish an existing treaty right. Tsawout is a successor to the North Saanich [Douglas] Treaty entered between Governor James Douglas and the Saanich people in 1852.[36] In addition to promising the rights to carry on their hunting and fisheries as formerly, the treaty committed to surveying and setting aside the Nations' "village sites and enclosed fields." In many circumstances, this did not take place and Crown grants were issued to third parties to occupy these village sites.

32. One of these sites is ŁEL̓TOS (James Island), among the most expensive pieces of property in British Columbia. The First Nation sued the federal and provincial Crowns for, among other things, declaratory relief and equitable compensation.[37] The village site has been alienated by the Crown to a third party and it is unlikely a court would order a transfer of the Island to the First Nation without compensation. The Crown has defended the claim on myriad grounds but relies heavily on limitations arguments. Assuming the limitations cases cited are correct, the First Nation may succeed in obtaining a declaration that the lands are a village site, but it will be a pyrrhic victory – they will not get the land back and there will be no compensation for the unlawful taking. Foreclosing the Nation

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[34] *Sparrow* at p. 1105.
[35] *Canada v. Jim Shot Both Sides*, 2022 FCA 20 [*Jim Shot Both Sides*] at para. 221.
[36] *Saanichton Marina Ltd. v. Claxton*, [1989] 3 CNLR 46, 36 BCLR (2d) 79 (BCCA) at para. 2.
[37] Leave to Intervene Application of Tsawout First Nation, Affidavit #1 of Allan Claxton, Exhibits A & B

from seeking a legal remedy effectively extinguishes the right to this and other village sites that were promised in the treaty rendering it an empty shell of a treaty promise.[38] Such a result is not in accord with the honour of the Crown, is inconsistent with the common law, and makes reconciliation unattainable.

33. The honour of the Crown dictates that the Crown fulfill its treaty promises and no sharp dealing is permitted.[39] The case under appeal represents a stark example of the Crown failing to fulfill its treaty promises. The role of the court is to provide useful remedies for breaches of these sacred obligations. While declarations can fulfill an important purpose when Aboriginal and treaty rights are breached, other potential remedies, including compensation, must be available to make the First Nation whole.

34. When provincial limitations statutes are interpreted in accordance with this Court's guidance in *Novak* (limitations statutes must account for a plaintiff's circumstances), *Manitoba Metis* (reconciliation must inform the application of limitations), and *Innu* (Aboriginal rights are *sui generis* and must not be subject to a patchwork of constitutional protection), it is clear that provincial limitation periods ought not to apply to Aboriginal and Treaty claims. They are not "personal" claims which might attract limitations considerations as was the case in *Ravndahl* in the Charter context.[40]

35. Notwithstanding Tsawout's position that limitations statutes should not apply to section 35 claims, laches and acquiescence may apply to equitable claims in appropriate circumstances, as confirmed by *Wewaykum*, but only after a full hearing on the matter.[41] The Attorney General of Canada discourages the use of limitations defences, but allows equitable defences such as laches and acquiescence only where there is a principled basis and evidence to support the defence.[42] The Aboriginal cases cited above confirm there are other procedures available, for example, summary judgment, motions to strike, summary

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[38] *R. v. Marshall*, [1999] 3 S.C.R. 456 at para. 52.
[39] *Badger* at para. 41.
[40] *Ravndahl v. Saskatchewan*, 2009 SCC 7.
[41] *Wewaykum* at para. 108.
[42] Department of Justice Canada, "The Attorney General of Canada's Directive on Civil Litigation Involving Indigenous Peoples" (2018), Litigation Guideline 14.

trial, to address unmeritorious claims.

36. Since *Manitoba Metis*, Canada has affirmed the application of UNDRIP to the laws of Canada.[43] While several UNDRIP Articles are engaged in this appeal,[44] Article 40 deserves particular attention:

> *Indigenous peoples have the right* to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as *to effective remedies for all infringements of their individual and collective rights*. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.[45] [emphasis added]

37. UNDRIP is no longer a non-binding, "aspirational" international instrument; rather it forms part of Canadian law. Canada's commitment to implement UNDRIP obligates Canada to provide effective remedies for infringements of Aboriginal rights. Limitations legislation that bars access to those effective remedies is antithetical to UNDRIP.

38. The enactment of section 35 gave the promise of rights recognition. Without effective remedies when those rights are infringed there is a very real risk those rights will be rendered an artifact. The playing field is already tilted heavily in favour of the Crown. Limiting the potential suite of remedies and accepting limitations defences when the Crown breaches Aboriginal and Treaty rights makes the game not worth playing and promise of reconciliation an unattainable goal.

PART IV – COSTS

39. Tsawout does not seek costs and requests that no costs be ordered against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of February 2023.

John W. Gailus
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Tsawout First Nation

Courtenay Jacklin

[43] *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14.
[44] UNDRIP Articles 8, 11, 20, 25, 26-28, 37 & 40 have relevance to this appeal.
[45] UNDRIP Article 40.

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