



The Supreme Court rules that an Indigenous tribe’s treaty land entitlement claim is statute-barred, but that declaratory relief is warranted given the longevity and magnitude of the Crown’s dishonorable conduct.

This appeal is about whether the breach of an Indigenous tribe’s treaty land entitlement was actionable in Canadian courts before the coming into force of section 35(1) of the *Constitution Act, 1982*, which recognized and affirmed the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada.

The Blood Tribe are a member tribe of the Blackfoot Confederacy of First Nations. In 1877, Treaty No. 7 was made between the Crown and the Confederacy. Treaty No. 7 established Blood Tribe Reserve No. 148, the largest reserve in Canada and the home of the Blood Tribe. The reserve’s size was to be set by the treaty land entitlement (“TLE”) provisions, based on a formula promising one square mile for each family of five persons, or in that proportion for larger and smaller families.

The Blood Tribe has long claimed that the size of the reserve did not respect the TLE formula. In 1971, a Blackfoot researcher gathered information on the total number of people in the Blood Tribe for the years 1879 to 1884 and, based on this information, confirmed that the existing reserve boundaries did not match the boundaries owed under the TLE formula. The Blood Tribe formally sought to negotiate with the Minister of Indian Affairs, who rejected its claims.

In 1980, the Chief at the time, Jim Shot Both Sides, commenced an action together with others on behalf of the Blood Tribe in the Federal Court. They alleged breaches of the Crown’s fiduciary duty, fraudulent concealment, and negligence, and sought declaratory relief and damages for breach of contract arising from the Crown’s failure to fulfil the TLE according to the prescribed formula (the “TLE Claim”). Declaratory relief is a determination of a party’s rights without other consequences.

The trial judge dismissed all claims except the TLE Claim, concluding that the Crown had miscalculated the size of the reserve by underestimating the Blood Tribe’s membership, and stated that the Crown’s conduct during the reserve’s creation was unconscionable. The trial judge found that although the facts underlying the TLE Claim were discoverable in 1971 or shortly thereafter, the applicable six-year limitation period did not begin to run until 1982, when the enactment of section 35(1) of the *Constitution Act, 1982* created a new cause of action for treaty breaches. The remedies sought for the TLE Claim were therefore not statute-barred because the action was commenced in 1980.

The Federal Court of Appeal allowed the Crown’s appeal and held that the TLE Claim was statute-barred. In its view, section 35(1) did not create new treaty rights, and a remedy was available for the TLE Claim prior to 1982 regardless of the framed cause of action. The Blood Tribe appealed to the Supreme Court of Canada.

The Supreme Court has allowed the appeal in part and issued declaratory relief.

Section 35(1) of the *Constitution Act, 1982* did not create a cause of action for breach of treaty rights.

Writing for a unanimous Court, Justice O’Bonsawin explained that section 35(1) of the *Constitution Act, 1982* did not create a cause of action for breach of treaty rights. Treaty rights flow from the treaty, not the Constitution, and treaties are enforceable upon execution and give rise to actionable duties under the common law. Accordingly, the Blood Tribe’s TLE Claim was enforceable at common law and actionable prior to the coming into force of section 35(1). The Blood Tribe did not contest the trial judge’s finding that the TLE Claim was discoverable as early as 1971 or that the action was not commenced until 1980. As such, the TLE Claim is statute-barred by operation of the applicable six-year limitation period.

However, Justice O'Bonsawin concluded that declaratory relief is warranted in this case given the longevity and magnitude of the Crown's dishonorable conduct towards the Blood Tribe. She wrote, "[it] will serve an important role in clarifying the Blood Tribe's TLE, identifying the Crown's dishonourable conduct, assisting future reconciliation efforts, and helping to restore the honour of the Crown."

Breakdown of the decision: *Unanimous*: Justice [O'Bonsawin](#) allowed the appeal in part and issued declaratory relief (Chief Justice [Wagner](#) and Justices [Côté](#), [Rowe](#), [Martin](#), [Kasirer](#) and [Jamal](#) agreed)

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