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HISTORICAL INFRINGEMENTS OF ABORIGINAL TITLE: *SUI GENERIS* AS A TOOL TO IGNORE THE PAST

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ABSTRACT

The *sui generis* conception of Aboriginal rights provides tremendous opportunity for those rights to be defined by Aboriginal perspectives. Unfortunately, recent decisions from the Supreme Court of Canada exemplify a prejudicial use of this concept. In *Tsilhqot'in,* the Court seemed to suggest that the unique nature of Aboriginal title meant a declaration of title does not operate retroactively. This suggestion disregards the notion that Aboriginal title has always existed and that rights are not created by court declaration. In other decisions, however, the Court ignores the *sui generis* concept and suggests that statutory limitation periods apply to past infringements of Aboriginal rights. The result is a severe restriction on the ability of Aboriginal peoples to seek remedies for past infringements of their lands, even after they have obtained a declaration of title. Moreover, the Court has failed to incorporate Aboriginal perspectives, including historical and ongoing discrimination, the devastating impacts associated with the loss of land, and the potential for Indigenous law to inform the concept of justice in these circumstances. Reliance on the *sui generis* concept in this manner devalues Aboriginal rights and undermines reconciliation as well as Aboriginal peoples' faith in the Canadian legal system.

INTRODUCTION

The *sui generis* conception of Aboriginal rights has been received with cautious optimism by legal scholars. While they praise the notion of empowering Aboriginal understandings, many are concerned about Aboriginal rights being defined and shaped by colonial law.[1] In *Tsilhqot'in*, the Supreme Court of Canada took an important step forward by recognizing and affirming an Aboriginal group's title to its traditional territory. The Court also granted titleholders the meaningful ability to enforce their land rights within Canadian law.[2]

Unfortunately, the Court seemed to rely on the *sui generis* nature of Aboriginal title to limit the impact of its decision. It implied that a declaration of Aboriginal title is not retroactive and therefore the interest associated with that title is distinguishable pre- and post-declaration. It resembles an equitable interest in the pre-declaration period but a legal

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1 John Borrows and Leonard I Rotman, "The *Sui Generis* Nature of Aboriginal Rights: Does it Make a Difference?" (1997) 36:1 Alta L Rev 9 [Borrows and Rotman].

2 *Tsilhqot'in Nation v British Columbia,* 2014 SCC 44, 2 SCR 257 [*Tsilhqot'in*].

interest in the post-declaration period. This implication significantly restricts the rights and remedies associated with a declaration of title, with respect to historical infringements of that title.

At the same time, when Aboriginal groups have sought to address past infringements of their rights, the Court has ignored the *sui generis* nature of those rights and suggested that limitation periods apply to bar non-declaratory remedies. As with a declaration of title, the concept is used against Aboriginal peoples. It seems the Court is concerned about upsetting settled interests, but its views are unclear because it has provided little explanation or justification. In particular, the Court has failed to incorporate Aboriginal perspectives. All of this undermines the fundamental constitutional goal of reconciliation.

This paper examines how the Court seems to rely on the *sui generis* nature of Aboriginal title to restrict, and potentially extinguish, access to remedies for past infringements. Part I explains that Aboriginal title pre-dates colonization and is not created by a court declaration or section 35(1) of the *Constitution Act, 1982*.[3] Part II describes how a declaration of title does not appear to operate retroactively. The rights and remedies associated with a declaration of title are only available "going forward", which restricts the title-holding group's ability to remedy past infringements. Finally, Part III outlines how limitation periods have been applied to bar claims related to past infringements of Aboriginal rights. Taken together, these concepts show how the Court uses the *sui generis* nature of Aboriginal title to prioritize interests of the Crown and settlers, rather than promote reconciliation and sort out past injustices.

I. THE NATURE OF ABORIGINAL TITLE

A. The Source of Aboriginal Title

The connection between Aboriginal peoples and their traditional territory has long been recognized. In the *Royal Proclamation, 1763,* King George III wrote that Aboriginal lands had not been "ceded to or purchased by us" and reserved those lands for the use of Aboriginal peoples under the Crown's protection.[4] In subsequent years, the Crown undertook a policy of negotiating treaties in which Aboriginal groups surrendered title to their lands.

There has not always been agreement with respect to the source and nature of the rights that flow from that connection. The Privy Council in *St. Catharines Milling and Lumber* identified the *Royal Proclamation, 1763* as the source of Aboriginal title, which it considered a "personal and usufructuary right, dependent on the good will of the sovereign."[5] A similar view was espoused by US Chief Justice Marshall, who held that pre-existing Aboriginal rights had been defeated by the doctrine of discovery.[6]

The modern concept of Aboriginal title, however, recognizes that it is an inherent right derived from the occupation of lands prior to the arrival of Europeans. In *Calder*, Justice Judson wrote:

> Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land

3 *Constitution Act, 1982*, s 35(1), being Schedule B to the *Canada Act 1982* (UK), c 11, [*Constitution Act, 1982*].

4 *Royal Proclamation, 1763*, RSC 1985, App II, No 1 [*Royal Proclamation, 1763*].

5 *St Catharines Milling and Lumber Co v R*, [1888] UKPC 70 at 5, (1889) LR 14 App Cas 46 [*St Catharines Milling and Lumber*].

6 *Johnson v Mc'Intosh*, 21 US (8 Wheat) 543 (1823).

> as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a "personal or usufructuary right."[7]

The Court affirmed this view in *Guerin*, in which Justice Dickson (as he then was) explained that the source of Aboriginal title is the historical occupation and possession of traditional lands.[8] It is a *pre-existing* legal right not created by the *Royal Proclamation, 1763*, by the *Indian Act*[9] or by any other executive order or legislative provision.[10]

Aboriginal title therefore pre-dates the arrival of Europeans. Indeed, what makes it *sui generis* is that it arises from possession *before* the assertion of sovereignty, whereas normal estates arise afterwards.[11] As Chief Justice Lamer wrote in *Delgamuukw*:

> Aboriginal title is a burden on the Crown's underlying title. However, the Crown did not gain this title until it asserted sovereignty over the land in question. Because it does not make sense to speak of a burden on the underlying title before that title existed, *aboriginal title crystallized at the time sovereignty was asserted*.[12]

Accordingly, the Court in *Tsilhqot'in* stated that the doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada.[13] It affirmed that the test for Aboriginal title is based on the occupation of title lands prior to the Crown's assertion of sovereignty.[14]

B. Recognition of Aboriginal Title

Aboriginal rights are not "created" by section 35(1) of the *Constitution Act, 1982*. Chief Justice Lamar stated in *Delgamuukw* that section 35(1) did not create Aboriginal rights; rather, it accorded constitutional status to those rights that were existing in 1982.[15] He also explained in *Côté* that section 35(1) is not limited to those rights that existed at common law:

> Section 35(1) would fail to achieve its noble purpose of preserving the integral and defining features of distinctive aboriginal societies if it only protected those defining features which were fortunate enough to have received the legal recognition and approval of European colonizers.[16]

Similarly, a court declaration does not create rights. A court declaration confirms or denies the existence of a right, as if bearing witness to what has always been the legal relationship between the parties.[17] It states the law as it is and has always been. Therefore, a declaration implicitly has a retroactive effect.[18]

The Court has affirmed the implicit retroactive effect of a declaration. In *Hislop*, it held that a declaratory remedy under section 52(1) of the *Constitution Act, 1982* is deemed to be fully

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7 *Calder et al v Attorney General of British Columbia*, [1973] SCR 313 at 328, 34 DLR (3d) 145 [*Calder*].
8 *Guerin v The Queen*, [1984] 2 SCR 335 at 377, 13 DLR (4th) 321 [*Guerin*].
9 *Indian Act*, RSC 1985, c I-5.
10 *Guerin, supra* note 8 at 379.
11 *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 114, 153 DLR (4th) 193 [*Delgamuukw*].
12 *Ibid* at para 145 [emphasis added].
13 *Tsilhqot'in, supra* note 2 at 69.
14 *Ibid* at 24-50.
15 *Delgamuukw, supra* note 11 at 133.
16 *R v Côté*, [1996] 3 SCR 139 at para 52, 138 DLR (4th) 385 [*Côté*].
17 Lazar Sarna, *The Law of Declaratory Judgements*, 4th ed (Toronto: Thomson Reuters, 2016) at 54.
18 *Ibid* at 151.

retroactive because the legislature never had the authority to enact the unconstitutional law.[19] Any government action taken pursuant to that law is also invalid, and those affected by it have a right to redress that reaches back into the past.[20] This "declaratory approach" is derived from Blackstone's aphorism that judges do not create law but merely discover it; they apply existing law or rediscover rules which are deemed to have always existed.[21]

The BC Court of Appeal in *Saik'uz and Stellat'en* applied this principle in the context of Aboriginal rights.[22] Justice Tysoe rejected the argument that the Aboriginal groups' tort claims should be struck because they had not obtained a court declaration as proof of their Aboriginal rights and title. He stated:

> Under this approach, these rights could only be enforced by an action if, prior to the commencement of the action, they have been declared by a court of competent jurisdiction or are accepted by the Crown. In my view, that would be justifiable only if Aboriginal title and other Aboriginal rights do not exist until they are so declared or recognized. However, *the law is clear that they do exist prior to declaration or recognition*. All that a court declaration or Crown acceptance does is to identify the exact nature and extent of the title or other rights.[23]

That statement accords with the common law theory of Aboriginal title described above. Aboriginal title pre-dates colonization and "crystallized" upon the assertion of sovereignty to become a burden on the Crown's underlying title. When the Court issued a declaration of Aboriginal title for the Tsilhqot'in Nation, it was not *creating* a title, but rather *acknowledging* the existence of a title that pre-dated colonization.[24]

In contrast, however, the Court in *Tsilhqot'in* implied that a declaration of Aboriginal title operates only prospectively, such that the rights associated with the declaration did not apply at times when the title lands were previously infringed upon.

II. THE EFFECT OF THE DECLARATION OF TITLE IN *TSILHQOT'IN*

A. The Declaration is Prospective

The Court in *Tsilhqot'in* did not explicitly state that the rights associated with a declaration of title do not operate retroactively. The implication, however, was clear. Under the heading "Remedies and Transition," the Court distinguished between the periods of time before and after a declaration of title is made:

> Prior to establishment of title by court declaration or agreement, the Crown is required to consult in good faith with any Aboriginal groups asserting title to the land about proposed uses of the land and, if appropriate, accommodate the interests of such claimant groups. […] If the Crown fails to discharge its duty to consult, various remedies are available including injunctive relief, damages, or an order that consultation or accommodation be carried out.

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19 *Canada (Attorney General) v Hislop*, 2007 SCC 10 at para 83, 1 SCR 429 [*Hislop*].

20 *Ibid* at 83.

21 *Ibid* at 84.

22 *Saik'uz First Nation and Stellat'en First Nation v Rio Tinto Alcan Inc*, 2015 BCCA 154 [*Saik'uz and Stellat'en*].

23 *Ibid* at 61 [emphasis added].

24 Kent McNeil, "Aboriginal Title and the Provinces after *Tsilhqot'in Nation*" (2015) 71:1 Sup Ct L Rev 67 at 72.

> After Aboriginal title to land has been established by court declaration or agreement, the Crown must seek the consent of the title-holding Aboriginal group to developments on the land. Absent consent, development of title land cannot proceed unless the Crown has discharged its duty to consult and can justify the intrusion on title under s. 35 of the *Constitution Act, 1982*. The usual remedies that lie for breach of interests in land are available, adapted as may be necessary to reflect the special nature of Aboriginal title and the fiduciary obligation owed by the Crown to the holders of Aboriginal title.[25]

The Court then explained that once title is established, the Crown may have to reassess prior conduct in light of the new reality "going forward."[26] This meant BC's *Forest Act*[27] would no longer apply to the Tsilhqot'in Nation's title lands.[28] However, the Court applied the *Forest Act* to those lands with respect to the period of time preceding the declaration and held that the Crown breached its duty to consult when it permitted logging to occur on those lands.[29]

The Court was clearly emphasizing the prospective nature of a declaration of title and suggesting that the rights associated with the declaration are not retroactive. Whereas a declaration provides real and substantial rights going forward, including the usual remedies that lie for breach of interests in land, it seems that the only retroactive claim available is that there has been a breach of the duty to consult. Nevertheless, the Crown already owes a duty to consult where an Aboriginal group asserts an Aboriginal right, regardless of whether that right has been affirmed by a court declaration.[30]

There is precedent for restricting the retroactive effect of a court declaration. As noted above, the Court in *Hislop* affirmed the implicit retroactive effect of a declaration within the context of section 52(1) of the *Constitution Act, 1982*. It then explained that it may be appropriate to restrict that retroactive effect when a court is "developing new law within the broad confines of the Constitution […]."[31] The key question is the nature and effect of the legal change at issue.[32]

There are two prerequisites to justifying a restriction on the retroactive effect of a declaration. First, there is a threshold requirement that there has been a substantial change in the law.[33] This could include situations where a court overrules a prior decision or gives content to broad but previously undefined rights, principles, or norms.[34] Second, if that threshold requirement is met, there are several factors to consider in determining whether the effect of a declaration should be purely prospective: reasonable reliance on the previous law or jurisprudence; whether the government acted in good faith; fairness to the parties; and the need to respect the constitutional role of legislatures.[35]

The Court in *Tsilhqot'in* did not refer to any of these considerations. It merely implied that the effect of a declaration of title is purely prospective. In the period of time prior to the declaration, the Crown owes a duty to consult; in the period of time post-declaration of

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25 *Tsilhqot'in, supra* note 2 at 89-90 (citations omitted).
26 *Ibid* at 92.
27 *Forest Act*, RSBC 1996, c 157.
28 *Tsilhqot'in, supra* note 2 at 116.
29 *Ibid* at 96.
30 *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, 3 SCR 511 [*Haida*].
31 *Hislop, supra* note 19 at 93.
32 *Ibid* at 96.
33 *Ibid* at 99.
34 *Ibid* at 100.
35 *Ibid* at 111.

title, the Crown is a fiduciary and the interest in land is similar to fee simple. The Court provided no explanation or justification for this.

Some justification was provided in the *Haida* decision, where the Court held that prior to a court declaration, the Aboriginal right or title in question is "insufficiently specific" to impose a fiduciary duty on the Crown with respect to the subject of that right or title.[36] Instead, the Crown must act honourably in all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties.[37]

The Court likely has concerns about other impacts on the Crown and third parties. Jack Woodward and David Rosenberg describe the *Tsilhqot'in* decision as a practical and pragmatic compromise: it avoids upsetting long-settled rights and expectations of the Crown and private parties, whose expectations were built up over the many decades or centuries during which Aboriginal title was being infringed upon.[38]

While those concerns are relevant, many more considerations need to be addressed. Aboriginal peoples have historically been at a disadvantage due to systemic discrimination and mistreatment, imbalances in financial and political resources, and a prohibition on bringing legal matters before the courts.[39] They have long claimed and defended their traditional territories[40] but have been unjustly deprived of those lands and resources with tragic consequences.[41] Despite holding a title that is on "equal footing with other proprietary interests,"[42] Aboriginal peoples continue to be deprived of the rights normally associated with an interest in land.

It is not enough for the Crown to say it has relied on the law in good faith. Aboriginal peoples continue to suffer land-related grievances to this day, despite the fact that Aboriginal rights have been a part of the Constitution since 1982. Moreover, the notion of Aboriginal title has been acknowledged since not only *Calder* but also *St. Catharines Milling and Lumber* and the *Royal Proclamation, 1763*. As the Court wrote in *Hislop*, governments must always adhere to the requirements of the Constitution: "[j]ust as ignorance of the law is no excuse for an individual who breaks the law, ignorance of the Constitution is no excuse for governments."[43]

At a minimum, when confronted with a past infringement of Aboriginal title, the Court should address all of these considerations before deciding whether to hold the Crown or third parties liable. Sorting out past injustices is critical to the process of reconciliation, which is the fundamental purpose of section 35(1).[44] Moreover, a lack of explanation and justification can cause Aboriginal peoples to lose confidence in the Court and the integrity of the justice system as a whole. This was alluded to by the Court in *Clyde River*:

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36 *Haida, supra* note 30 at 18.

37 *Ibid* at 17.

38 David Rosenberg and Jack Woodward, "The Recognition and Affirmation of Aboriginal Title in Canada", Case Comment on *Tsilhqot'in Nation v British Columbia,* (2015) 48 UBC L Rev 943 at 959.

39 For example, see John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v British Columbia*" (1999) 37:3 Osgoode Hall LJ 537 [Borrows, *Sovereignty's Alchemy*] at 540.

40 For example, see: *Calder, supra* note 7 at 319; *Ibid* at 546-547; and John Borrows, "The Durability of Terra Nullius: Tsilhqot'in Nation v British Columbia" (2015) 48:3 UBC L Rev 701 at 707-710.

41 John Borrows, "Aboriginal Title and Private Property", (2015) 71:2 Sup Ct L Rev 91 [Borrows, *Aboriginal Title and Private Property*] at 106.

42 *Delgamuukw, supra* note 11 at 113.

43 *Hislop, supra* note 19 at 103.

44 *R v Van der Peet*, [1996] 2 SCR 507 at para 44, 137 DLR (4th) 289 [*Van der Peet*]; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 1, 3 SCR 388.

> Written reasons foster reconciliation by showing affected Indigenous peoples that their rights were considered and addressed. Reasons are "a sign of respect [which] displays the requisite comity and courtesy becoming the Crown as Sovereign toward a prior occupying nation." Written reasons also promote better decision making. [45]

With *Tsilhqot'in*, however, the Court did not provide any explanation or justification for limiting the ability of an Aboriginal group to remedy past infringements of their title lands.

B. Implications

It is not uncommon for restrictions to be imposed on Aboriginal title based on the theory that it is *sui generis*. For example, the titleholders must ensure the ability of succeeding generations to benefit from the land. As well, the Crown can incur on Aboriginal title land without consent of the titleholders if it establishes that the incursion is justified.[46]

Although it did not do so explicitly, the Court in *Tsilhqot'in* seemed to once again rely on the *sui generis* nature of Aboriginal title to restrict the implications of its declaration. It created a unique and novel property interest, which resembles an equitable interest in the pre-declaration period and a legal interest in the post-declaration period.

Post-declaration Aboriginal title resembles a legal interest. It confers ownership rights similar to those associated with fee simple, including the right to decide how the land will be used, the right of enjoyment and occupancy of the land, the right to possess the land, the right to the economic benefits of the land, and the right to proactively use and manage the land.[47] Like other landholders, Aboriginal titleholders can use the land in modern ways, should that be their choice.[48]

In contrast, pre-declaration Aboriginal title resembles an equitable interest. Rather than the ownership rights described above, it seems that only the duty to consult governs pre-declaration infringements of title. The duty to consult, though unique to Aboriginal law, is a concept that has its roots in equity.[49] The Court has previously described the relationship between the Crown and Aboriginal peoples as trust-like; moreover, the contemporary recognition and affirmation of Aboriginal rights must be defined in light of that historical relationship.[50] More recently, this generalized fiduciary obligation (in form, a principle that calls for honourable conduct) has been replaced by the principle of the honour of the Crown, which is effectively the same mandate.[51] The Court's repeated reliance on equitable concepts to shape Aboriginal law suggests that it understands Aboriginal groups to have something resembling an equitable interest prior to the declaration of title.

The implications of this conception of Aboriginal title would significantly impact the rights and remedies available for infringements that occurred pre-declaration.

For example, Aboriginal titleholders would face difficulty in bringing a claim for a tort committed during the pre-declaration period, such as nuisance or trespass. Generally,

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45 *Clyde River (Hamlet) v Petroleum Geo-Services Inc,* 2017 SCC 40 at para 41, 1 SCR 1069 [*Clyde River*] (citations omitted).

46 *Tsilhqot'in, supra* note 2 at 74 and 76.

47 *Ibid* at 73.

48 *Ibid* at 75.

49 *Haida, supra* note 30 at 13.

50 Jamie D Dickson, *The Honour and Dishonour of the Crown: Making Sense of Aboriginal Law in Canada* (Saskatoon: Purich Publishing Limited, 2015) at 91; *R v Sparrow,* [1990] 1 SCR 1075 at 1108, 111 NR 241 [*Sparrow*].

51 Dickson, *supra* note 50 at 91.

a party holding only an equitable interest in property cannot bring claims for torts committed against that property. It is the trustee that has a direct claim against the tortfeasor: any damages recovered are to be held in trust for the beneficiary. If the trustee refuses to sue the tortfeasor, then the beneficiary must sue the trustee for breach of trust or sue the tortfeasor and name the trustee as a party to the proceedings.[52]

In the Aboriginal law context, the titleholder would likely have to bring a claim against the Crown for failing to consult before committing tortious activity or permitting a third party to commit tortious activity. One exception would be to claim a "continuing tort" once a declaration of title is obtained. These torts are treated as if a new cause of action arises every day until the injury is discontinued.[53] Similarly, continuing breaches of the duty to consult may give rise to a remedy such as damages.[54] The relationship between continuing torts and the duty to consult is unclear and fact-specific.[55] Regardless, the remedies available in a suit for tortious activity are less certain if pre-declaration Aboriginal title is treated as an equitable rather than a legal interest.

As well, if the pre-declaration interest were equitable, the "good faith purchaser" rule may govern transfers of property that occurred prior to the declaration. With trusts, a third party who purchases trust property from a trustee, for value and without actual or constructive knowledge of any improper act on the part of the trustee, obtains good title. The remedy for the beneficiary is an action for breach against the trustee.[56] This rule is in contrast to the rule of *nemo dat quod non habet* (one cannot give that which one does not have), which applies to legal title at common law. That rule means that a good faith purchaser for value may hold a defective title, and the true owner can recover the property.[57] In other words, legal title is enforceable against a party who purchased property for value and without notice of any defect; an equitable interest is not.

The Ontario Court of Appeal applied something analogous to the "good faith purchaser" rule in *Chippewas of Sarnia*.[58] The Crown had patented the sale of Chippewa land without a proper surrender, contrary to the *Royal Proclamation, 1763*. The patent was void, but the Ontario Court of Appeal denied the Chippewas the ability to recover the land. The court held that the discretionary nature of public law and equitable remedies required it to consider the reliance of innocent third parties on the apparent validity of the patent for over 150 years.[59] It also had to consider the Chippewas' delay in asserting their claim. Those factors weighed against returning the land to the Chippewas, but did not preclude their right to proceed with a claim for damages against the Crown.[60]

Chippewas of Sarnia supports the view that the "good faith purchaser" rule may apply to Aboriginal title lands prior to a declaration of title. Unlike pre-declaration Aboriginal title lands, the reserve land had been delineated and set aside. That factor overcomes the "insufficiently specific" concern that the Court noted in *Haida*. The interest in the reserve

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52 Graham Virgo, *The Principles of Equity and Trusts*, (Oxford: Oxford University Press, 2012) at 356-357.

53 *Roberts v City of Portage La Prairie*, [1971] SCR 481 at 491, 1971 CanLII 128.

54 *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council,* 2010 SCC 43 at para 49, 2 SCR 650 [*Carrier Sekani*].

55 See *Peter Ballantyne Cree Nation v Canada (Attorney General)*, 2016 SKCA 124, [2017] 1 WWR 685, leave to appeal refused 2017 CanLII 38581 (SCC) [*Peter Ballantyne*] for an example of a court deciding issues of continuing torts and the duty to consult.

56 Donovan WM Waters et al, eds, *Waters' Law of Trusts in Canada*, 4th ed (Toronto: Carswell, 2012) at part 20.II.A.

57 Bruce Ziff, *Principles of Property Law,* 6th ed, 2014 (Toronto: Carswell 2014) at 466.

58 *Chippewas of Sarnia Band v Canada (Attorney General),* [2000] 51 OR (3d) 641, 2000 CanLII 16991 (ONCA) [*Chippewas of Sarnia*].

59 *Ibid* at 310.

60 *Ibid* at 275.

land was more akin to a legal interest, given that Aboriginal title is on equal footing with other proprietary interests. Nevertheless, the Ontario Court of Appeal relied on the *sui generis* concept to reject the suggestion that Aboriginal title is strictly legal in nature, immune from the principles of equity.[61]

The outcome of *Chippewas of Sarnia* is concerning. Nearly all rights and remedies associated with a past infringement of Aboriginal title were extinguished by judicial discretion.[62] That extinguishment of rights and prejudicial use of the *sui generis* concept is noticeably similar to the Court's decision in *Tsilhqot'in*. As Kent McNeil writes:

> [This] sends a message to Aboriginal people that they cannot depend on the Canadian legal system to uphold their claims to lands that were wrongfully taken from them in the past. The Court of Appeal's decision indicates that, *regardless of the legal validity of their claims*, judges will not necessarily allow those claims to prevail if they conflict with the claims of other Canadians who did not participate in and were not aware of the wrongs that were committed. Decisions like this will undoubtedly undermine the already shaky faith that Aboriginal people have in Canadian courts.[63]

Of course, *Chippewas of Sarnia* was decided well before *Tsilhqot'in* and is distinguishable. It is unclear how these complex issues will be resolved in the future and whether courts will treat pre-declaration Aboriginal title as being akin to an equitable interest.

C. Looking Forward

Critically, the *sui generis* concept of Aboriginal title means that analogies to other forms of property ownership, though helpful, do not define its nature and content.[64] Although an interest in pre-declaration title lands could be viewed as akin to an equitable interest, it does not need to be treated as such. Courts should not approach cases involving Aboriginal title by strict reference to rules of common law or equity, and must ensure that form does not trump substance.[65] As Chief Justice Dickson and Justice La Forest wrote in *Sparrow*:

> [Aboriginal rights are] held by a collective and are in keeping with the culture and existence of that group. Courts must be careful, then, to avoid the application of traditional common law concepts of property as they develop their understanding of […] the "sui generis" nature of aboriginal rights.[66]

The *sui generis* concept requires courts to take into account Aboriginal perspectives.[67] Financial compensation will often be inadequate to reduce the experience of loss and alienation felt by Aboriginal peoples who have had their land unlawfully taken from them.[68] As well, principles of equity cannot run only in one direction and reconciliation should not always force the Aboriginal interest to give-way.[69]

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61 *Ibid* at 284-291.

62 Kent McNeil, "Extinguishment of Aboriginal Title in Canada", (2001-02) 33:2 Ottawa L Rev 301 [McNeil, *Extinguishment of Aboriginal Title in Canada*] at 327-346

63 *Ibid* at 344 [emphasis added].

64 *Tsilhqot'in, supra* note 2 at 72.

65 *St Mary's Indian Band v Cranbrook (City),* [1997] 2 SCR 657 at paras 15 and 16, 147 DLR (4th) 3856.

66 *Sparrow, supra* note 50 at 1112.

67 *Delgamuukw, supra* note 11 at 112.

68 Borrows, *Aboriginal Title and Private Property, supra* note 41 at 120.

69 *Ibid* at 112, 124.

Most importantly, diverse interests in Aboriginal title land can be protected by Indigenous law, future treaties, and a broader constitutional framework.[70] John Borrows provides the following explanation:

> Indigenous peoples' own laws do not often frame relationships in absolute terms. This is particularly the case when relating to land. Constraints on ownership often flow from principles of balance, reciprocity and respect within these legal traditions. […] Sharing is a prominent principle within Indigenous law. Thus, perhaps even more than the common law, there is significant room for variegated property interests within a First Nations legal context.[71]

Such an approach more fully embodies the concept of reconciliation and is more consistent with principles of proportionality, reasonableness, and fairness, as well as taking a liberal and purposive approach to constitutional rights.[72]

The Court in *Tsilhqot'in* did not entirely close the door on remedies to past infringements. It noted that post-declaration, the Crown will have to reassess its prior conduct in light of the new reality, including cancelling projects or reforming its legislation.[73] This is an acknowledgement that ongoing infringements of title lands are not acceptable; however, it says little about past conduct that can no longer be remedied apart from an award of damages.

Unfortunately, it seems the Court has prioritized settled interests and expectations of the Crown and third parties, rather than embraced Aboriginal perspectives and reconciliation. This prioritization is especially concerning when one considers the approach the Court has taken with respect to the application of limitation periods to Aboriginal rights.

III. LIMITATION PERIODS

A. Previous Case Law

While the Court in *Tsilhqot'in* relied on the *sui generis* concept to restrict the rights associated with Aboriginal title, the Court has ignored the *sui generis* nature of Aboriginal rights in other cases. It has suggested that statutory limitation periods will apply to claims of infringement of those rights as if they were not unique in law. Once again, the Court has offered little explanation or justification.

Statutory limitation periods bar claims after a specified period of time has elapsed. They promote certainty and allow those in the position of a defendant, after a time, to organize their affairs without fear of an impending lawsuit.[74] As well, claims become stale: witnesses are no longer available, documents are lost and difficult to contextualize, and standards and expectations evolve.[75]

The Court has applied limitation periods to claims made by Aboriginal groups on several occasions. In *Blueberry River*, a limitation period barred portions of a claim involving a Crown breach of fiduciary duty in administering reserve lands.[76] The plaintiffs raised a

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70 *Ibid* at 112.

71 *Ibid* at 101.

72 *Ibid* at 114.

73 *Tsilhqot'in, supra* note 2 at 92.

74 *Canada (Attorney General) v Lameman*, 2008 SCC 14 at para 13, 1 SCR 372 [*Lameman*].

75 *Ibid* at 13.

76 *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, 1995 CanLII 50 [*Blueberry River*]

number of arguments: (1) the limitation period was unconstitutional as it extinguished Aboriginal rights; (2) the limitation period was inconsistent with the fiduciary relationship between the Crown and Aboriginal peoples; (3) the limitation period should take into account the *sui generis* nature of Aboriginal rights; and (4) the limitation period should take into account evolutions in Aboriginal law.[77] These arguments were not raised until the case was before the Supreme Court, and then were dismissed with little analysis or justification. Justice McLachlin (as she then was) simply stated:

> Other arguments, neither presented nor considered below, were presented by the Bands and interveners in support of relaxing or not applying the limitation periods prescribed by the *Limitation Act* of British Columbia. I find them unpersuasive in the context of this case and consider them no further.[78]

The Court then held in *Wewaykum* that limitation periods apply to bar claims regarding reserve creation.[79] In *Lameman*, a case involving various claims arising from a surrender of treaty rights in the late 19th century, the Court simply stated that "[t]his Court emphasized in [*Wewaykum*] that the rules on limitation periods apply to Aboriginal claims."[80]

More recently, the Court in *Manitoba Métis Federation* affirmed that claims for personal remedies flowing from the striking down of an unconstitutional statute are barred by the running of a limitation period.[81] It also stated that limitation periods apply to Aboriginal claims for breach of fiduciary duty with respect to the administration of Aboriginal property.[82] Courts always have the power to rule on matters of constitutionality, however, meaning that Aboriginal groups will not be barred if they seek only a declaration.[83]

One could argue that there is no definitive statement from the Court that limitation periods apply to bar claims for non-declaratory remedies where an Aboriginal right has been infringed. It is unclear whether the arguments in *Blueberry River* were dismissed on the basis that they had not been raised in the lower courts. In *Wewaykum* the Court acknowledged that the Aboriginal interest in reserve and title lands is the same, but found that point was not relevant because the reserves in question were not part of the "traditional tribal lands".[84] In *Lameman*, no notice of constitutional question had been filed.[85]

Regardless, lower courts have rejected those arguments and interpreted the Court's decisions to mean that limitation periods bar claims for non-declaratory remedies in the context of Aboriginal rights.[86] Indeed, Justice Russell of the Federal Court stated that "[*Lameman*] leaves no doubt that the Supreme Court of Canada felt there was no issue of constitutionality when it comes to applying limitations legislation to claims involving Aboriginal and treaty rights."[87]

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77 *Samson First Nation v Canada*, 2015 FC 836 [*Samson*] at para 132, aff'd 2016 FCA 223, leave to appeal refused 2017 CanLII 12233 (SCC).

78 *Blueberry River, supra* note 76 at 122.

79 *Wewaykum Indian Band v Canada*, 2002 SCC 79, 4 SCR 245 [*Wewaykum*].

80 *Lameman, supra* note 74 at 13.

81 *Manitoba Métis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at para 134, 1 SCR 623 [*Manitoba Métis Federation*].

82 *Ibid* at 138.

83 *Ibid* at 134, 144.

84 *Wewaykum, supra* note 79 at 77.

85 *Lameman, supra* note 74 at 9.

86 For example, see: *Samson, supra* note 77; *Peter Ballantyne, supra* note 55; and *Athabasca Chipewyan First Nation v Alberta (Minister of Energy)*, 2011 ABCA 29, 505 AR 72, leave to appeal refused 2012 CanLII 8359 (SCC).

87 *Samson, supra* note 77 at 120.

The lack of explanation or justification for applying limitation periods to Aboriginal rights is concerning. The courts seem to have failed to account for the *sui generis* nature of Aboriginal rights and the reconciliatory purpose of section 35(1) of the *Constitution Act, 1982*.

B. Taking Aboriginal Perspectives into Account

Limitation periods are Crown-imposed rules that prevent reconciliation of Aboriginal and settler interests. They lack the flexibility necessary to consider the *sui generis* nature of Aboriginal rights and the unique context from which Aboriginal claims arise. Those claims often arise from historical grievances, which reflect disadvantages long suffered and the failure of our society and legal system to adequately respond.[88] Denying claims on the basis of time will only add insult to injury—any delay must be carefully considered with due regard to the historically vulnerable position of Aboriginal peoples.[89]

The Court in *Manitoba Métis Federation* acknowledged that many of the policy rationales underlying limitations do not apply in the Aboriginal context, and that reconciliation must weigh heavily in the balance.[90] It cited Harvey Schacter, who wrote that the rationales for limitations are relevant, but the goal of reconciliation is a far more important consideration that ought to be given more weight.[91] The Court also cited Leonard I. Rotman, who pointed out that "allowing the Crown to shield its unconstitutional actions with the effects of its own legislation appears fundamentally unjust."[92]

The equitable doctrine of laches can be a helpful tool for courts to use when assessing claims of past infringements of Aboriginal title. As an equitable doctrine, its overarching concern is fairness. It requires a claimant to prosecute his or her claim without delay, but rather than fixing a specific time limit, it considers the entire circumstances of the case.[93] Justice La Forest explained in *M(K) v M(H)*:

> The doctrine considers whether the delay of the plaintiff constitutes acquiescence or results in circumstances that make the prosecution of the action unreasonable. Ultimately, laches must be resolved as a matter of justice as between the parties, as is the case with any equitable doctrine.[94]

The majority of the Court in *Manitoba Métis Federation* was unwilling to apply the doctrine of laches, despite the fact the claim was based on events that occurred in the 1870s. The Court considered the historical injustices and imbalance of power suffered by the Métis; the unacceptable conduct of the Crown; the fact that Aboriginal law is evolving rapidly; and that the Métis' acceptance of the status quo had not caused the Crown to alter its position in reliance.[95]

That type of explanation and justification is precisely what is missing in earlier decisions involving limitation periods and Aboriginal claims. Aboriginal rights are the unique product of the historical relationship between the Crown and Aboriginal peoples.[96] That historical relationship, and the facts and circumstances surrounding a past infringement, must be more fully explored.

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88 *Chippewas of Sarnia, supra* note 58 at 267.
89 *Ibid* at 267.
90 *Manitoba Métis Federation, supra* note 81 at 141.
91 *Ibid* at 141.
92 *Ibid* at 141.
93 *Ibid* at 146.
94 *M(K) v M(H),* [1992] 3 SCR 6 at 77-78, 1992 CanLII 31 [*M(K) v M(H)*].
95 *Manitoba Métis Federation, supra* note 81 at 145-153.
96 *Tsilhqot'in, supra* note 2 at 72.

However, the doctrine of laches only incorporates the Aboriginal perspective through the lens of equity. Undue reliance on the doctrine would ignore Aboriginal peoples' own legal traditions as they may relate to remedying harms or injustices that date back many decades or centuries. Courts should not interpret Aboriginal rights without reference to Indigenous law. To do so devalues the similarities and differences between legal systems and makes Indigenous law seem incompatible or inferior.[97] Indeed, courts may discover that Aboriginal and non-Aboriginal people have similar concepts of justice for historical wrongs. Borrows and Rotman explain:

> Aboriginal and non-Aboriginal people have developed numerous ways of relating to one another, which over the centuries have produced some similarities between the various groups. […] While imperfect, and often skewed to the disadvantage of Aboriginal people, these points of connection cannot be ignored. The *sui generis* doctrine expresses the confidence that there are enough similarities between the groups to enable them to live with their differences.[98]

While the doctrine of laches considers the entire circumstances of a claim, including fairness to both parties, courts must also look to Indigenous law for new conceptions of what justice might entail in those circumstances.

Unfortunately, unless the Court revisits this issue, the *sui generis* nature of Aboriginal rights will likely continue to be ignored with respect to the application of limitation periods. At the same time, the *sui generis* concept was apparently relied on to limit the remedies available for past infringements of Aboriginal title. In both instances, the concept is used against Aboriginal peoples. The result is that a title-holding group may be able to claim only a breach of the duty to consult for historical wrongs committed against their title lands, and that claim is potentially barred by limitation periods.

The Court has recognized that a morally and politically defensible conception of Aboriginal rights will incorporate both perspectives.[99] However, while clearly concerned with settled interests and expectations of the Crown and third parties, it seems unwilling to fully consider Aboriginal perspectives and the potential for Indigenous law to inform the concept of justice. Such use of the *sui generis* principle is severely prejudicial to Aboriginal peoples and undermines the fundamental constitutional goal of reconciliation.

CONCLUSION

Aboriginal title is *sui generis*: it is unique in law because it is a product of the historical relationship between the Crown and Aboriginal peoples, and because it incorporates both Aboriginal and non-Aboriginal perspectives and understandings. This concept provides a tremendous opportunity to reconcile the past, present, and future interests of Aboriginal groups with those of our broader society. In *Tsilhqot'in*, the Court took an important step forward by recognizing and affirming an Aboriginal group's interest in its traditional territory. It also put an onus on the Crown to reassess its prior conduct in order to discharge its duty to the title-holding group, including cancelling projects or reforming legislation where necessary. That onus provides a path forward for Aboriginal peoples with respect to historical infringements of their traditional territory.

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97 Borrows and Rotman, *supra* note 1 at 12.

98 *Ibid* at 11.

99 *Van der Peet, supra* note 44 at 42, 49.

At the same time, the Court has potentially eliminated other remedies for historical infringements of Aboriginal title. In *Tsilhqot'in*, it appeared to rely on the *sui generis* nature of Aboriginal title to imply that a declaration of title is not retroactive. Yet the Court has simultaneously ignored the *sui generis* concept and suggested that limitation periods apply to bar claims of infringement of Aboriginal rights. In both instances, the concept is used against Aboriginal peoples. The Court is likely concerned about settled interests and expectations of the Crown and third parties, but its concerns are unclear because it has provided little explanation or justification. Moreover, it has failed to incorporate Aboriginal perspectives, including historical and ongoing discrimination, the devastating impacts associated with the loss of traditional lands, and the potential for Indigenous law to inform the concept of justice in these circumstances. Reliance on the *sui generis* concept in this manner devalues Aboriginal rights and undermines the goal of reconciliation as well as Aboriginal peoples' faith in the Canadian legal system.