Unforgiven Trespasses:

Provincial Statutes of Limitations and Historical Interference with

Indian Lands

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Introduction

Since Europeans first arrived in North America, both governments and private individuals have interfered with aboriginal Canadians' right to use and enjoy their traditional territories. Canadian history is rife with examples of the alienation and damage of Indian lands in circumstances that were not only morally reprehensible, but also often contrary to the laws of the day.[1]

Aboriginal peoples have historically faced significant obstacles to seeking remedies in Canadian courts for these injustices. A legacy of paternalism effectively discouraged many aboriginal groups from pursuing claims for interference with their lands until the latter decades of the twentieth century.[2] However, Indian bands are gaining familiarity with and confidence in, the judicial system and are turning to the courts to remedy the historical injustices perpetrated against them.

Canadian courts must now decide whether aboriginal claimants have waited too long before commencing their actions, and whether defendants in these historical claims can use statutes of limitations to insulate themselves from liability. Although a preliminary matter, statutory limitations have the potential to extinguish even the substantively strongest of claims. Presumptions about their application inform bargaining positions in negotiations for settlement.[3]

This paper will explore the application of provincial statutes of limitations to claims made by Indian bands. This article will examine the principles of limitations and consider how these principles have been inconsistently applied to actions commenced by Indian bands in the past. Lastly, this article will examine recent legal developments that suggest Canadian courts are moving towards a constitutional approach to the issue, which if followed, would effectively insulate claims respecting Indian lands from the application of provincial statutes of limitations in provincial courts.

[1] See e.g. the facts of *Chippewas of Sarnia Band v. Canada* (1999) O. J. No. 1406 (Ont. Sup. Ct.), online: QL (OJ), in which unsurrendered Indian lands were sold to settlers in 1839, contrary to the *Royal Proclamation, 1763*.

[2] William B. Henderson, "Litigating Native Claims" (1985), 19 L. Soc. Gaz. 174.

[3] Catherine E. Bell, "Limitations, Legislation and Domestic Repatriation," (1995) 29 U.B.C. L. Rev. 149.

Statutes of Limitations Generally

Pursuant to their jurisdiction over the administration of justice and property and civil rights,[4] each Canadian province has enacted legislation that limits the time in which plaintiffs can commence actions. Under many of these statutes of limitations,[5] a cause of action is expressly extinguished at the conclusion of the limitation period, although provisions are made for extending the limitation period in specific circumstances.[6] The discoverability principle, articulated by the Supreme Court of Canada in *Central Trust Co.* v. *Rafuse*,[7] enables the court to postpone the commencement of limitation periods until the plaintiff discovers, or should discover with the exercise of reasonable diligence, that the cause of action exists.

In *M.(K.)* v. *M.(H.)*,[8] the Supreme Court of Canada held that fairness should be the central consideration in applying the discoverability principle for determining limitation periods. Writing for the majority of the Court, LaForest J. recognized that statutes of limitations are created to protect the interests of potential defendants by allowing them repose, foreclosing claims based on stale evidence, and encouraging plaintiffs to diligently pursue their claims. These considerations must be balanced with the interests of plaintiffs and the public, particularly when the social context in which the claim arose contributed to the plaintiffs' failure to commence proceedings in a timely manner. In *M.(K.)* v. *M.(H.),* the Supreme Court also held that public policy requires that the start of the limitation period for victims of childhood incest, as particularly vulnerable plaintiffs, be postponed until the plaintiffs participate in the therapy necessary to understand the true scope and consequences of the wrong perpetrated against them. *M.(K.)* v. *M.(H.)* seems to have heralded a policy-based approach to interpreting and applying statutes of limitations.

[4] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 91(24) reprinted in R.S.C. 1985, App. II, No. 5., s. 92(13) and 92(14).

[5] See e.g. s. 9(1) *Limitations Act*, R.S.B.C. 1996, c. 266.

[6] See e.g. *ibid.*, ss. 5, 6 and 7.

[7] [1986] 2 S.C.R.147 at 224.

[8] (1992), 96 D.L.R. 289.

Policy Considerations

Indian land claims arise in very different legal and political contexts than most civil actions. As a result, a broader range of policy considerations must be addressed by the courts in applying statutes of limitations. The origins of aboriginal title, the nature of the relationship between the Crown and Indians, and the historical obstacles to seeking redress for interference with Indian land should all inform notions of fairness in the context of such claims.

Most claims for interference with Indian lands are based on the claimants' aboriginal title in the affected territory. In *Delgamuukw* v. *British Columbia*, the Supreme Court of Canada recognized that aboriginal title is derived from Indians' "…historic occupation and possession of their tribal lands…" arising before the assertion of British sovereignty and from "the relationship between common law and pre-existing systems of aboriginal law."[9] Protected by s. 35(1) of the *Constitution Act, 1982,*[10] aboriginal title "encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes… and second, that those protected uses must not be irreconcilable with the nature of the [claimants'] attachment to that land."[11] This interest is *sui generis*, held communally by all members of an aboriginal nation, and is inalienable except to the Crown.[12]

This limit on the capacity of aboriginal groups to freely alienate their lands was articulated in the *Royal Proclamation, 1763,*[13] and is an important aspect of the unique relationship between the Crown and Aboriginal Canadians. The *Royal Proclamation, 1763,* constituted a unilateral undertaking by the Crown to act on behalf of Indians in their dealings with third parties[14] in an effort to consolidate its authority in North America, and protect its aboriginal allies. This undertaking, like the more specific obligations undertaken in treaties between the Crown and First Nations, is grounded in the honour of the Crown and its recognition of the rights of aboriginal groups to their traditional territories.

Pursuant to its jurisdiction under s. 91(24) of the *Constitution Act, 1867,*[15] the federal government is primarily responsible for meeting the Crown's obligations with respect to Indians and their lands. Section 18(1) of the *Indian Act* describes the Crown's role with respect to reserve land as follows:

> Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.[16]

[9] *Delgamuukw v. British Columbia* (1997), 153 D.L.R. (4th) 193 (S.C.C.) at para. 114.

[10] *Constitution Act, 1982*, being Schedule B to the *Canada Act* (U.K.), 1982, c. 11.

[11] *Supra* note 9 at para. 117.

[12] *Ibid.* at para. 113 and 115.

[13] R.S.C. 1985, App. II, No. 1.

[14] *Guerin v. The Queen* (1985), 13 D.L.R. (4th) 321 at 340 (SCC).

[15] *Supra* note 4.

[16] *Indian Act*, R.S.C. 1985, c. I-5.

This provision recognizes the Crown's obligation to act in the best interests of Indian bands and confers the discretion to determine what their best interests are. As a result of the Crown's discretionary control over aboriginal lands, the relationship between the Crown and Indians has fiduciary characteristics.[17]

In order to meet its obligations to protect Indians' interests, the federal Crown was granted the capacity to pursue actions on behalf of Indian bands for unlawful occupation of, or trespass on, reserve lands.[18] However, where the Crown failed to pursue such claims, or was itself a potential defendant, aboriginal groups were often incapable of enforcing their rights in a timely manner. In many cases the Crown failed to disclose potential causes of action.[19] Unfamiliar with Anglo-Canadian legal concepts and institutions, and with limited economic resources, most Indian bands had no realistic opportunity to commence actions with respect to their land, and indeed, between 1927 and 1952, Indians were expressly prohibited from raising money to do so.[20] In applying statutory limitations, systemic barriers to pursuing legal claims are important factors to be considered, as are the unique content and source of aboriginal title and the honour of the Crown in fulfilling its fiduciary responsibilities.

In the United States, similar contextual factors have led to an express policy that state limitation periods are inapplicable to Indian land claims.[21] In *Oneida* v. *Oneida Indian Nation*, the Supreme Court of the United States cited "Congress' concern that the United States had failed to live up to its responsibilities as trustee for the Indians" by refusing to statute-bar a claim based on the unlawful alienation of lands subject to aboriginal title in 1795.[22] Such a policy has not yet been adopted in Canada, and statutory limitation periods have instead been interpreted and applied on a case-by-case basis.

Applications of Statutes of Limitations to Indian Claims

Canadian courts have applied provincial statutes of limitations inconsistently to claims respecting Indian lands.[23] In some cases, courts have strictly interpreted provincial statutes of limitations and found historical claims by Indian bands to be statute-barred.[24] However, many judges have sought to decide such claims on their substantive merits by extending or postponing limitation periods based on concepts of continuing trespass, equitable fraud, and policy-driven interpretations of the discoverability principle.

In *Johnson* v. *BC Hydro,*[25] the British Columbia Supreme Court held that the misappropriation and on-going use of Indian lands constituted a continuing trespass, for which a new cause of action accrued each day. However, courts have been hesitant to apply this reasoning, particularly

[17] *Supra* note 14 at 341. For a thorough discussion of the scope of the Crown's fiduciary responsibilities, see Leonard Ian Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown Native Relationship in Canada*, (Toronto: University of Toronto Press, 1996).

[18] *Supra* note 15; *The Queen v. Smith* (1980), 113 D.L.R. (3d) 522 (F.C.A.) [hereinafter *Smith*].

[19] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344 [hereinafter *Blueberry v. Canada*).

[20] *Indian Act*, 1927 R.S.B.C., c.98, s.141.

[21] *Oneida County v. Oneida Indian Nation* (1985), 470 U.S.226 at 240-245.

[22] *Ibid*.

[23] *Supra* note 3 at 191-192.

[24] *Attorney General (Ontario) v. Bear Island Foundation* (1984), [1985] 1 C.L.N.R. (OS.C.); *Lower Kootenay Indian Band v. Canada*, [1992] 2 C.N.L.R. 54.

[25] [1981] 3 C.N.L.R. 63.

where an initial breach of duty or alienation of land can be pinpointed at a specific point in time.[26]

The Supreme Court of Canada adopted a preferable approach in *Guerin v. the Queen,*[27] a case in which the federal government leased surrendered reserve lands for less than its market value. In writing for the majority of the Court, Dickson J. held that the government's delay in disclosing material facts to the band may constitute equitable fraud sufficient to postpone the running of the limitation period.[28] This approach, in which the limitation period does not begin to run so long as the Crown conceals information relevant to a potential action against it, has been applied in subsequent claims against the federal Crown,[29] but would have no application in the absence of a fiduciary relationship between the Indian band and defendant. Such a fiduciary relationship would arise only "where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power."[30] It would generally be limited to claims against the federal government with respect to claims arising from the surrender of Indian lands.[31]

More recently, the Supreme Court of Canada has applied the policy-driven approach articulated in *M.(K.)* v. *M.(H.)* to allow for the extension of a limitation period for an Indian band's claim against the federal Crown. In postponing the commencement of the limitation period in *Blueberry v. Canada*,[32] the Supreme Court of Canada recognized the obstacles that aboriginal groups historically faced in pursuing claims against the Crown for interference with their lands.

While these approaches to extending or postponing limitation periods have allowed some Indian bands to be compensated for historical interference's with their territories, they have been inconsistently applied and have not prevented the claims of some bands from being barred by the conclusion of limitation periods.[33] Questions as to whether a given claim is statute-barred continue to be litigated, thereby diverting resources from the resolution of substantive issues.

By grounding decisions on principles developed in the general context, the courts have failed to consider the unique position of aboriginal peoples and their lands in the Canadian legal system. As Gonthier J. articulated in *Blueberry* v. *Canada:*

> When determining the legal effect of dealings between aboriginal peoples and the Crown relating to reserve lands, the *sui generis* nature of aboriginal title requires courts to go beyond the usual restrictions imposed by common law, in order to give the true purpose of the dealings.[34]

[26] *Supra* note 3; *Semiahmoo v. Canada* (1997), 148 D.L.R. (4th) 523 (F.C.A.) [hereinafter *Samiahoo*]; *Fairford First Nation v. Canada (Attorney General)* (1999), 2 C.N.L.R. 60 (F.C.(T.D.)).

[27] *Supra* note 14.

[28] *Ibid.*

[29] *Semiahmoo, supra* note 26.

[30] *Supra* note 26 at 341.

[31] *Supra* note 19.

[32] *Ibid.*

[33] See e.g. *supra* note 9.

[34] *Supra* note 19 at para. 7.

Until recently, courts have avoided considerations of the constitutionality of statutes of limitations. However, recent case law indicates that Canadian judges are becoming increasingly willing to examine the constitutional context in which these laws are applied. Superior court justices in British Columbia and Ontario have found provincial statutes of limitations to be *ultra vires* with respect to Indian lands, and questions continue to be raised about the validity of such statutory schemes in light of s. 35(1) of the *Constitution Act, 1982*.

A New Approach?

Two recent provincial superior court cases have found provincial statutes of limitations to be unconstitutional with respect to claims over Indian lands. The approach adopted by the Courts in *Stoney Creek Indian Band* v. *British Columbia*[35] and *Chippewas of Sarnia Band* v. *Canada (Attorney General)*[36] represents a principled consideration of constitutional issues involved, and establishes a fair and predictable standard upon which potential parties to such actions can negotiate.

In the *Stoney Creek* case, Lysyk J. of the British Columbia Supreme Court considered an application by Alcan Aluminum Ltd. for summary judgment pursuant to Rule 18A of the Supreme Court rules.[37] Although his decision has subsequently been set aside by the British Columbia Court of Appeal for lacking an established factual basis and being beyond the ambit of summary proceedings,[38] the appellate court did not refute its reasoning. Thus the judgment of Lysyk J. remains a persuasive examination of the applicability of statutes of limitations to claims of Indian bands in provincial superior courts.

Lysyk J. held that the Stoney Creek Indian band's claim against Alcan for the unauthorized construction of a road across the band's reserve between 1948 and 1951 cannot be statute-barred by the *British Columbia Limitation Act*.[39] Jurisdiction to legislate with respect to "Indians, and lands reserved for the Indians"[40] is conferred on the federal government by s. 91(24) of the *Constitution Act, 1867*. The scope of this head of power was explained by Lamer C.J.C. in *Delgamuukw* v. *British Columbia (Attorney General):*

> The core of Indianness encompasses the whole range of aboriginal rights that are protected by section 35(1) [of the Constitution Act, 1982]... Provincial governments are prevented from legislating in relation to ... aboriginal rights.

Section 91(24) protects a core of federal jurisdiction even from provincial laws of

> general application through the doctrine of inter-jurisdictional immunity.

[35] [1999] 1 C.N.L.R. 192 (B.C.S.C.) [hereinafter *Stoney Creek*].

[36] [1999] O. J. No. 1406, online: QL (OJ).

[37] *Supra* note 2.

[38] *Stoney Creek Indian Band v. Alcan Aluminum Ltd.* (unreported), [1999] B.C.J. No. 2196, online: QL (BCJ).

[39] *Supra* note 26.

[40] *Supra* note 4.

> That core has been described as matters touching on "Indianness" or the "core of Indianness.[41]

To the extent that statutory limitations affect the right to possess Indian land, which is at the core of this federal jurisdiction,[42] they are *ultra vires*, and of no force and effect. Lysyk J. recognized that in order to be meaningful, aboriginal rights must include the ability to legally enforce those rights:

> The right to claim damages for interference with Indian reserve land not only rests upon the right to possession of those lands, but is sufficiently integral to such possession as to share the same characterization for constitutional purposes.[43]

By purporting to extinguish the right to sue for damages for interference with Indian lands,[44] the *Limitation Act* effects the core of federal jurisdiction. Such statutory provisions are not invigorated by s. 88 of the *Indian Act*,[45] which referentially incorporates provincial laws of general application to apply to Indians, but not to Indian lands.[46] As a result, the *ultra vires* provincial statute of limitation "must be read down and given the limited meaning which will confine it within the limits of provincial jurisdiction."[47]

Stoney Creek was followed and expanded upon by Campbell J. of the Ontario Superior Court in *Chippewas of Sarnia Band*.[48] In this proceeding, the Court considered a motion to statute-bar a band's claim for possession of lands that were illegally alienated in 1839. Campbell J. relied on to the reasons of the Federal Court of Appeal in *The Queen* v. *Smith*, a case in which a provincial statute of limitation was found to be inapplicable to actions by the federal government on behalf of Indian bands:

> If provincial law respecting the limitation of actions could apply so as to have the effect of extinguishing the Indian title or the right of the federal Crown to recover possession of land for the protection of the Indian interest,... it would have the effect of destroying or eliminating a part of the very subject-matter of federal jurisdiction.[49]

In *Chippewas of Sarnia*, the court held that the Canadian provinces have never had the jurisdiction to statute-bar claims respecting Indian lands. However, colonial statutes adopted prior to Confederation may be applicable in cases of the historical alienation of aboriginal lands. In this case, the right to possession of lands now owned by private persons was barred by the 60-year equitable limitation period, established by colonial statutes. The band's property rights crystallized into an adequate alternative remedy in damages against the Crown for any wrongful dispossession.[50] Campbell J. balanced the rights of the band against the interests of the current owners (who were *bona fides* purchasers for value without notice), while acknowledging that a remedy must be available for the injustices perpetrated against the

[41] *Supra* note 9 at 270-271.

[42] *Smith, supra* note 18.

[43] *Supra* note 26 at 218.

[44] *Supra* note 35.

[45] R.S.C., 1985 c. I-5.

[46] *Supra* note 26 at 205.

[47] *Derrickson v. Derrickson* (1986), 26 D.L.R. (4th) 175 (S.C.C.) at 184.

[48] *Supra* note 35.

[49] *Supra* note 9 at 572.

[50] *Ibid.* at 545.

Chippewas of Sarnia.

In both *Stoney Creek* and *Chippewas of Sarnia*, provincial statutes of limitations were found to be *ultra vires* as the result of the operation of inter-jurisdictional immunity. However, in *Chippewas of Sarnia*, Campbell J. made reference to the potential for statutes of limitations to violate the aboriginal and treaty rights of aboriginal peoples that are recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*. Campbell J. observed that "the application of the provincial limitation statutes to these lands would extinguish aboriginal title, a result that cannot be achieved without clear and plain Parliamentary intention, conspicuously lacking" in such statutes.[51] The Supreme Court of Canada held in *R.* v. *Sparrow*[52] that "the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right,"[53] which following its reasoning in *Delgamuukw*, would include "the right to occupy lands and engage in activities which are integral to the distinctive aboriginal culture of the group claiming the right."[54] As Lysyk J. recognized, such aboriginal rights would effectively be extinguished if a statute of limitation prevented an aboriginal group from enforcing their rights and remedying breaches of those rights.

The s. 35(1) approach would provide more expansive protection to rights of Aboriginal Canadians.[55] The division of powers argument expressly adopted in *Chippewas of Sarnia* and *Stoney Creek* is less compelling in federal courts, where s. 39(1) of the *Federal Court Act* referentially incorporates provincial statutes of limitations.[56] Both of the provincial superior courts, which have found the limitations provisions to be unconstitutional, acknowledge that a different result would have been likely in the federal court system.[57] However, in *Roberts* v. *Canada*, the Federal Court recently left the door open for a consideration of the constitutional validity of s. 39(1) of the *Federal Court Act*[58] in light of s. 35(1) of the *Constitution Act, 1982*, where an Indian band is able to establish aboriginal title to the subject of the litigation.[59] No court has expressly held that provincial statutes of limitations violate s. 35(1) aboriginal or treaty rights. Given the recent expansion of the scope of rights protected, and the trend towards a closer examination of the constitutionality of such provisions, it could be expected that both provincial and federal courts would deem statutes of limitations *prima facie* inapplicable to claims respecting aboriginal lands.

Conclusion

These recent developments in the application of statutory limitation periods bring Canada closer to the American model, under which claims by Indians are not subject to statutes of limitations in the absence of clear legislative intent.[60] In the United States, public policy requires aboriginal peoples to have an adequate opportunity to apply to court for remedies for

[51] *Supra* note 35 at para. 502.

[52] (1990), 70 D.L.R. (4th) 385.

[53] *Ibid.* at 401.

[54] *Supra* note 9 at 271.

[55] *Supra* note 4.

[56] R.S.C. 1970, c. 10.

[57] *Supra* notes 26 and 35.

[58] R.S.C. 1985, c. F-7.

[59] *Roberts v. Canada*, [2000] 3 C.N.L.R. 303.

[60] *Supra* note 21.

historic wrongs. Canadian courts seem to be moving towards a greater acceptance of a similar policy. Canadian people are increasingly recognizing that, in order to address the historical, constitutional, and political realities of aboriginal claims, these cases must be adjudicated on their merits, rather than avoiding the substantive issues by refusing the claims on the basis of statutes of limitations.