February 26, 2026

The Application of Provincial Statutes of Limitation to Indigenous Claims

By: Kent McNeil

Case Commented On: *Wesley v Alberta*, 2024 ABCA 276 (CanLII), leave to appeal denied, *Stoney Indian Band, et al. v His Majesty the King in Right of the Province of Alberta, et al.*, 2025 CanLII 44340 (SCC)

The application of provincial statutes of limitation to Indigenous rights claims has become a major issue in recent years (for detailed discussion, see Kent McNeil & Thomas Enns, "Procedural Injustice: Indigenous Claims, Limitation Periods, and Laches" (2022) All Papers (McNeil & Enns). Because many of these claims are based on alleged wrongs committed long in the past, both the provincial and federal governments often rely on the expiry of statutory limitation periods and the equitable doctrine of laches to prevent them from ever being decided on their merits. The Supreme Court has generally accepted the limitations defence insofar as claims for substantive relief such as damages are concerned, but has ruled that declarations of Crown wrongdoing that are designed to promote negotiations, without entailing any consequential remedial relief, are not barred by limitation periods (e.g. see *Manitoba Metis Federation Inc. v Canada (Attorney General)*, 2013 SCC 14 (CanLII); *Shot Both Sides v Canada*, 2024 SCC 12 (CanLII)). The Alberta Court of Appeal decision in *Wesley v Alberta*, 2024 ABCA 276 (*Wesley* ABCA), is a recent example of the application of limitation periods that, in my view, reveals a persistent lack of willingness by the courts to give serious consideration to the constitutional issues at stake.

The Îyârhe (Stoney) Nakoda brought this action against Alberta and Canada in the Alberta Court of King's Bench. They sought, among other things, a declaration that they "have, and at all relevant times have had, unextinguished Aboriginal Title and existing Aboriginal Rights and Treaty Rights in and to the Traditional Lands and the Natural Resources thereof, and Aboriginal Title to the Traditional Lands, as well as existing Aboriginal Rights and Treaty Rights in and respecting the Traditional Use Lands" (*Wesley v Alberta*, 2022 ABKB 713 (CanLII) at para 25). The lands in question include lands within the geographical area of Treaty 7 (1877), to which the Îyârhe Nakoda are parties, as well as some lands within the areas of Treaty 4 (1874) and Treaty 6 (1876). The plaintiffs alleged that Treaty 7, properly interpreted, did not extinguish, but rather affirmed, their Aboriginal rights and title, which remained unsurrendered and were therefore recognized and affirmed by section 35(1) of the *Constitution Act, 1982*.

The judgments of the Alberta King's Bench and the Court of Appeal do not deal with the merits of the claims. They are limited to addressing the contention by Alberta and Canada that the claims are all barred by limitations statutes and the doctrine of laches. As neither the King's Bench nor the Court of Appeal dealt with the laches defence, I will also leave it aside and focus on the limitations issue.

In the King's Bench, Justice Richard Neufeld decided that all claims for consequential remedial relief were barred by the Alberta *Limitations Act*, RSA 2000, c L-12. However, he allowed the claims for declarations of Aboriginal rights and title, as well as for a declaration that the Crown's honour had been breached, to proceed. A majority of the Court of Appeal, in judgments written by Chief Justice Ritu Khullar and Justice Elizabeth Hughes, dismissed the appeals and so allowed only the claims for declarations that do not entail consequential remedial relief to go ahead. Justice Frans Slatter dissented on the declaratory relief issue, as he thought it would undermine the purposes of limitation periods, not lead to worthwhile negotiations, and therefore be a waste of time and resources in this case.

I have already posted a comment criticizing the way the declaratory relief issue was dealt with in *Wolastoqey Nations*, 2025 NBCA 129 (CanLII) ("Declarations of Aboriginal Title Are Not Discretionary", distinguishing declarations that entail consequential remedial relief from pure declarations that do not). I will therefore leave that issue aside and concentrate on the Court of Appeal's reasons for applying the Alberta *Limitations Act* to bar all the plaintiffs' claims involving consequential remedial relief. The Court's decision on this issue was written by Slatter JA, with the substantial concurrence of Khullar CJ and Hughes JA.

Before discussing Slatter JA's judgment, it is worth noting that a significant amendment to the Alberta *Limitations Act* was made by the *Property Rights Statutes Amendment Act, 2022*, SA 2022, c 23, which added section 3.1:

> 3.2 (1) Notwithstanding any provision of this Act,
>
> (a) there is no limitation period in respect of a claim for recovery of possession of real property, … and
>
> (b) a defendant does not have a defence based on adverse possession.
>
> (2) Any action commenced and not concluded before the *Property Rights Statutes Amendment Act, 2022* comes into force continues under this Act as it read immediately before the coming into force of this section, including the 10-year limitation period for the recovery of possession of real property.

Although this amendment was not relevant to the *Wesley* case that had commenced long before, it could mean that First Nations in Alberta can now bring claims to recover possession of lands wrongfully taken from them in the past without being barred from doing so by limitation periods. In the *Wesley* case, the plaintiffs advanced several arguments against the application of the limitations legislation, all of which were rejected, except insofar as the claims were for pure declarations without consequential remedial relief. The argument that the *United Nations Declaration on the Rights of Indigenous Peoples* prevented this legislation from applying was rejected because the Declaration "does not purport to be a binding document"; it "does not have the status of a Convention or a Treaty, and it is not fully incorporated into Alberta law" (*Wesley* ABCA, at para 61). The Court also summarily rejected an argument that the Alberta Natural Resources Transfer Agreement of 1930 prevented the limitations legislation from applying (at para 72). While acknowledging that these arguments deserve further consideration, due to spatial constraints I will focus my discussion on other constitutional issues.

The plaintiffs' principal argument was that the limitations legislation was inconsistent with section 35(1) of the *Constitution Act, 1982* insofar as its application would infringe or extinguish their Aboriginal and treaty rights, and so would be unconstitutional and of no force or effect to that extent due to section 52(1) of the Act.

Justice Slatter acknowledged at para 37 that, as observed in *Shot Both Sides v Canada*, (at paras 33-35, 60), the constitutionality of applying provincial limitations statutes to Aboriginal and treaty rights has not been determined by the Supreme Court. In addressing the section 35(1) argument, he nonetheless relied on that case and other Supreme Court decisions in deciding that the section does not prevent limitations statutes from so applying, pointing out that "those cases clearly involved some Aboriginal rights of the kind that would be recognized and affirmed by s. 35" (*Wesley* ABCA, at para 34).

After observing that Parliament could exercise its jurisdiction over "Indians, and Lands reserved for the Indians" in section 91(24) of the *Constitution Act, 1867* to provide limitation periods for Aboriginal claims, Slatter JA gave these reasons for applying the Alberta limitations legislation:

> However, in the absence of federal legislation, the applicable provincial limitations statutes apply as a matter of property and civil rights and civil procedure in the province under s. 92(13) and 92(14) of the *Constitution Act, 1867*: e.g. *Crown Liability and Proceedings Act*, RSC, 1985, c. C-50, s. 32; *Clark v Canadian National Railway Co*, 1988 CanLII 18 (SCC), [1988] 2 SCR 680 at pp. 708-709. The application of provincial limitation periods to Aboriginal claims is confirmed by s. 88 of the *Indian Act*, RSC 1985, c. I-5 and assumed by s. 13 of the Alberta *Limitations Act*. It is also assumed by s. 19 of the *Specific Claims Tribunal Act*, SC 2008, c. 22, which provides that limitation defences will not be raised in that process. (*Wesley* ABCA, at para 33)

These condensed reasons, which are not expanded upon in the judgment, require unpacking.

First, sections 92(13) ("Property and Civil Rights in the Province") and 92(14) ("The Administration of Justice in the Province…") do not give provinces any authority to legislate in relation to "Indians, and Lands reserved for the Indians" (*R v Sutherland*, 1980 CanLII 18 (SCC), [1980] 2 SCR 451; *Delgamuukw v British Columbia*, 1997 CanLII 302 (SCC), [1997] 3 SCR 1010, at para 179). The case Slatter JA cited in support, *Clark v Canadian National Railway Co*, is not on point because it involved the application of tort law, which the Court, in the context of that case, held to be outside the jurisdiction of Parliament over railways. Some provincial laws of general application can apply to regulate Aboriginal and treaty rights, but they cannot extinguish those rights and can only infringe them after the enactment of section 35(1) in 1982 if the infringement can be justified under the test laid down in *R v Sparrow*, 1990 CanLII 104 (SCC), [1990] 1 SCR 1075 (*Sparrow*) (see *R v Badger*, 1996 CanLII 236 (SCC), [1996] 1 SCR 771 *Delgamuukw*, at paras 178-80; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 (CanLII), [2014] 2 SCR 257, at para 139).

As for the federal *Crown Liability and Proceedings Act*, section 32 does referentially incorporate provincial limitations laws into federal law in legal proceedings by or against the Crown, but section 2 defines "Crown" as "Her Majesty in Right of Canada." So, while this section could be

relied on by Canada in the *Wesley* case, it would be of no avail to Alberta, the other defendant. In his judgment, Slatter JA failed to distinguish between the availability of the limitations defence to the federal and provincial Crowns.

With certain exceptions, including exemption of treaty rights, section 88 of the *Indian Act* does make provincial laws of general application apply to "Indians" (as defined in the Act), but the Supreme Court has held that only provincial laws that would not apply of their own force are referentially incorporated into federal law by that section (*Dick v R*, 1985 CanLII 80 (SCC), [1985] 2 SCR 309). Moreover, it has been held that section 88 only incorporates provincial laws that would trench upon federal jurisdiction over "Indians," not laws that would interfere with federal jurisdiction over "Lands reserved for the Indians" (e.g. see *Chief Stanley Thomas v R*, 1998 CanLII 6557 (BCSC) at paras 1033-40, reversed on other grounds, 1999 BCCA 527 (CanLII); *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700 (CanLII) at paras 1033-40). This issue was left open by the Supreme Court in *Dick*. Moreover, in *Delgamuukw*, the Supreme Court rejected the Crown's contention that section 88 could have the effect of extinguishing Aboriginal rights, as the clear and plain legislative intent required for Aboriginal rights to be extinguished was lacking.

Section 13 of the Alberta *Limitations Act*, also relied upon by Slatter JA, provides: "An action brought on or after March 1, 1999 by an aboriginal people against the Crown based on a breach of a fiduciary duty alleged to be owed by the Crown to those people is governed by the law on limitation of actions as if the *Limitation of Actions Act*, RSA 1980 cL-15, had not been repealed and this Act were not in force." By its terms, this section is limited to actions for breach of fiduciary obligations and, in any case, may be constitutionally invalid, as it appears to trench on exclusive federal jurisdiction under section 91(24) of the *Constitution Act, 1867* by singling Aboriginal peoples out for special treatment (see *Sutherland*; *Delgamuukw*, at para 179; *Four B Manufacturing v United Garment Workers,* 1979 CanLII 11 (SCC), [1980] 1 SCR 1031). Finally, it should not be implied that, because the federal *Specific Claims Tribunal Act,* SC 2008, c 22, excludes the application of limitation periods in proceedings before the tribunal, provincial limitation periods apply in other contexts.

Remarkably, Slatter JA did not seem to think it mattered whether the limitations legislation in question infringed or extinguished Aboriginal and treaty rights. He stated that "limitation periods are effective to provide 'immunity from claims' of all kinds, including *sui generis* Aboriginal rights claims, regardless of whether those rights are 'collective' or whether limitation periods extinguish a right or merely block a remedy" (*Wesley* ABCA, at para 70, emphasis added). He noted nonetheless that the Alberta *Limitations Act* only blocks legal actions to enforce rights – it does not extinguish the rights themselves. He appears to have agreed with the Alberta Law Reform Institute's *Report No. 55: Limitations* (1989) view that "once the expiration of the limitation period provided immunity from the claim, it was rarely necessary to go further and declare the underlying right to be extinguished. The circumstances where this might make a difference were so unusual that they were best left to resolution on a case-by-case basis" (*Wesley* ABCA, at para 32). He concluded that, "once the limitation period has expired, any impediment to or qualification on Alberta's title to the lands is effectively extinguished" (at para 121, emphasis added).

A similar conclusion was reached more recently in *1832067 Alberta Ltd v Dowcar Metals Inc*, 2025 ABCA 264 (CanLII), in which Slatter JA participated and *Wesley* was cited. In their majority

judgment at para 24, Slatter JA and Justice Anne Kirker noted that "a right without a legal remedy is usually sterile in the sense that a bar to claiming a 'remedial order' … is, for practical purposes, the same as if all underlying rights were extinguished in most cases." In endnote 3, they cited *Michalski v Olson*, 1997 CanLII 2360 (MBCA), [1998] 3 WWR 37 at para 24, leave to appeal to Supreme Court refused, 26432 (14 May 1998), where Huband JA, for the Court, observed that "[t]o say that a limitation provision is procedural because it bars a remedy rather than extinguishing a right is an exercise of semantic gymnastics that would baffle any rational observer outside the legal profession." He referred to *Tolofson v Jensen*, 1994 CanLII 44 (SCC), [1994] 3 SCR 1022 at para 80, where Justice La Forest, in the principal judgment, described the view that unenforceable rights somehow continue to exist after limitation periods have expired as "rather mystical." La Forest J preferred the continental European view that statutes of limitation are not just procedural – they "destroy substantive rights" (at para 81; for more detailed discussion, see McNeil & Enns, at 25-31.)

The limitations statutes of many jurisdictions (e.g. the United Kingdom and Ontario) do extinguish title to land along with legal remedies at the end of the limitation period. The reason is simple: if titles remained intact, titleholders who were able to get back in possession, even after the limitation period expired, would have a right to remain in possession because their unextinguished prior title would be superior to the later possessory title of the adverse possessor (statutes of limitation bar rights of claimants but do not confer or transfer rights to adverse possessors, whose title comes from their possession: Robert Megarry & HWR Wade, *The Law of Real Property*, 5th ed 1984, at 109). Such a result would hardly be conducive to social peace, which is one of the purposes of limitation periods.

That possibility apart, if every consequential remedial legal action was taken from the Îyârhe Nakoda by the *Limitations Act*, as the Court of Appeal held, their rights and title would be "effectively extinguished," which, as mentioned earlier, the Supreme Court has held to be beyond the constitutional competence of the provinces ever since Confederation (for Alberta, since the province was created by an Act of the Canadian Parliament in 1905). If, on the other hand, extinguishment of Aboriginal and treaty rights has not occurred due to the way the statute was drafted, the result, according to the Court of Appeal, is that Alberta has succeeded in barring consequential remedial remedies for many past wrongs committed against First Nations. This could create a patchwork of enforceable and non-enforceable Aboriginal and treaty rights across the country, depending on how provincial limitation statutes are worded. Given that these rights are constitutionally-protected aspects of federal law, it does not seem appropriate for their enforceability to depend on the vagaries of provincial law (see *Roberts v Canada*, 1989 CanLII 122 (SCC), [1989] 1 SCR 322; *R v Côté*, 1996 CanLII 170 (SCC), [1996] 3 SCR 139, at paras 49-54, where the Court refused to create a patchwork of Aboriginal rights that would depend on whether France or Britain was the first to colonize a particular region).

The plaintiffs argued nonetheless that, even if the *Limitations Act* did not extinguish their rights, it infringes them. As held in *Sparrow*, any infringements of Aboriginal and treaty right after the enactment of section 35(1) of the *Constitution Act* have to be justified. Justice Slatter's response to this was that "[j]ustification only becomes an issue if an enforceable right exists. That is far beyond anything decided, or even contemplated in *Sparrow*. Absent an infringement, the *Sparrow* test does not apply, and merely pleading a limitations defence is not an infringement

of any Aboriginal right" (at para 40). Although pleading a limitations defence may not be an infringement, I fail to understand how application of a limitation period is not, given that it prevents Aboriginal peoples from enforcing their constitutional rights. Perhaps what Slatter JA had in mind was that any infringement by the expiry of limitation periods would have taken place before Aboriginal and treaty rights received constitutional protection in 1982, and so would not need to be justified. This would follow from his dismissal of the plaintiffs' argument that their claims were for continuing breaches of their rights (*Wesley* ABCA, at paras 117-26).

This raises another issue. In *Tsilhqot'in Nation*, the Supreme Court decided in 2014 that the doctrine of interjurisdictional immunity no longer applies to prevent provincial laws of general application from applying to infringe Aboriginal and treaty rights because, since 1982, these rights have been sufficiently protected by section 35(1). Nothing in that decision removed the protection afforded to these rights by the division of powers protection provided by interjurisdictional immunity prior to 1982 (in *Tsilhqot'in Nation*, at para 2, McLachlin CJC said that the section 35(1) "framework displaces the doctrine of interjurisdictional immunity" (my emphasis)), or possibly even before the Court's decision in *Tsilhqot'in Nation* (see Kent McNeil, "*Tsilhqot'in Nation* and Interjurisdictional Immunity: When Are Judicial Decisions Involving Indigenous Claims Retroactive?" (2023) 56:1 *UBC Law Review* 161-217).

In my opinion, even when provincial limitations legislation does not explicitly extinguish rights, as in Alberta, application of that legislation to claims of Aboriginal and treaty rights would at least infringe them by making them unenforceable. If the infringement would take place through expiry of a limitation period after section 35(1) came into effect in 1982, it would have to be justified under the *Sparrow* test, which could prove difficult – in actual fact, governments have rarely been successful in justifying infringements of the rights of Aboriginal peoples. If the infringement would have taken place prior to the enactment of section 35(1), it is my contention that provincial governments cannot rely on their limitations statutes because application of those statutes would be rendered inapplicable by the doctrine of interjurisdictional immunity, as Aboriginal and treaty rights were then within the core of federal jurisdiction under section 91(24) (*Dick*; *Delgamuukw*, at para 181).

What I find especially remarkable about the *Wesley* case is that section 91(24) and the division of powers arguments stemming from it were not addressed, either by the motions judge or the Alberta Court of Appeal. For some reason, the plaintiffs relied mainly on section 35(1), rather than on section 91(24), despite the fact that most of the alleged violations of Aboriginal and treaty rights occurred long before section 35(1) was enacted. As division of powers arguments were not considered, the Court of Appeal decision cannot be the last word on the availability of limitation statutes to the province of Alberta. It is unfortunate that the Supreme Court refused leave to appeal, as that has left unresolved the significant section 91(24) issues in relation to the application of these statutes to Aboriginal and treaty rights.

Thanks to Robert Hamilton and Kerry Wilkins for helpful comments on a draft of this blog.

This post may be cited as: Kent McNeil, “The Application of Provincial Statutes of Limitation to Indigenous Claims” (26 February 2026), online: ABlawg, http://ablawg.ca/wp-content/uploads/2026/02/ Blog_KM_Wesley.pdf