

## ABKB Decision Confirms That Constitutionally Protected Aboriginal Rights are Captured by Limitation Defences

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Relying on limitations and laches, the Governments of Alberta and Canada (Crowns) applied for summary dismissal<sup>1</sup> of a 2003 action commenced by the Stoney Nakoda First Nations (collectively) and the Stoney Indian Band or tribe (collectively, the Stoney) against the Crowns, wherein the Stoney sought a wide range of remedial relief as well as a declaration of Aboriginal title and rights to land in southern Alberta.

In granting partial summary judgment, the Court in *Wesley*<sup>2</sup> referenced the Supreme Court of Canada's decisions in *Manitoba Métis*,<sup>3</sup> *Wewaykum*,<sup>4</sup> and *Lameman*,<sup>5</sup> and confirmed that Aboriginal claims are subject to provincial limitations legislation even where rights at stake are constitutionally protected, unless there is a claim for declaratory relief.

Accordingly, the Court decided that non-declaratory (remedial and coercive) relief was barred by limitations legislation, but that the declaratory relief (and hybrid declaratory relief, i.e., relief that may be coercive by granting exclusive possessory rights, or that may affect rights of third parties) sought could proceed towards trial.

The Court left the door open with respect to the application of a laches defence in connection with the Aboriginal rights and title claims in this particular case and suggested that the availability of any such laches defence would be best decided later in the proceedings with the benefit of additional evidence regarding the reasons for the Stoney's delay and the prejudice to non-parties that might arise from the declarations(s) sought.

### Implications: Limitations and Laches Defences

The Stoney argued that their claims for recognition of Aboriginal rights and title cannot be barred by limitation legislation or the doctrine of laches (even if the statement of claim was filed outside of the time prescribed by the statute), because:

- The Amended Statement of Claim (filed in 2014) is in essence a claim for declaratory relief, which is not subject to limitations. Aboriginal rights and title are *sui generis* rights and have no life until recognized by the Crown or declared to exist by the Courts (*Manitoba Métis*<sup>6</sup>).

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- The availability of recourse to the Courts to establish rights and title claims is essential to reconciliation, and that adherence to the *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295 (September 13, 2007) (UNDRIP) is crucial.
- To find otherwise would effectively extinguish their rights under s. 35 of the *Constitution Act, 1982*.

The Court's determination of the Stoney arguments above included as follows:

- Aboriginal claims are indeed subject to limitations legislation even where the rights at stake are constitutionally protected and are Aboriginal rights, unless there is a claim for declaratory relief (*Manitoba Métis*,<sup>7</sup> *Wewaykum*,<sup>8</sup> and *Lameman*<sup>9</sup>).
- Limitations statutes **do not extinguish nor infringe** on underlying Aboriginal rights. Time periods prescribed by the *Limitations Act* and the application of it do not offend s. 35 of the *Constitution Act, 1982* and is not inconsistent with the honour of the Crown and the pursuit of reconciliation.
- A laches defence is potentially available to all claims by the Stoney in this case, including claims for declaratory relief, but must be determined at a later point in the proceedings.
- Utilization by the Crown of a limitations or a laches defence is not inconsistent with the honour of the Crown and the pursuit of reconciliation.
- UNDRIP is an aspirational document that has no force in Canada or Alberta, and the *UNDRIP Act* does not apply to displace the clear statutory language of Alberta's limitations legislation.

Cassels will continue to monitor the case and the progress at trial.

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1 *Wesley v Alberta*, 2022 ABKB 713 [*Wesley*].

2 *Wesley*.

3 *Manitoba Métis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 [*Manitoba Métis*].

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

5 *Papaschase Indian Band No 136 v Canada (Attorney General)*, 2004 ABQB 655, rev'd on other grounds 2006 ABCA 392 and restored 2008 SCC 14 [*Lameman*].

6 *Manitoba Métis*.

7 *Manitoba Métis*.

8 *Wewaykum*.

9 *Lameman*.

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