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LIMITATIONS PRIMER

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BC SPECIFIC CLAIMS COMMITTEE

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Overview

The BC Specific Claims Committee is concerned with the effect of legislative and policy changes on the fair and timely resolution of historical grievances which First Nations have against Canada. There are two avenues a First Nation may pursue in resolving their claims – one is negotiating a settlement of the claim under Canada's specific claims policy; the second is litigation to have a court decide upon whether the claim is valid, and if so, the appropriate remedy. Negotiation is governed by Canada's specific claims policy statement set out in *Outstanding Business*. Litigation is governed by the Rules of Court, including rules of evidence, legislation, and limitation periods. In B.C., under legislation, the ultimate limitation period is 30 years – a First Nation cannot sue Canada for wrongful conduct or a breach of fiduciary duty that happened more than 30 years ago. This was confirmed by the Supreme Court of Canada in the *Wewaykum* case decided in December, 2002.

The provincial government is considering changes to its limitations legislation and has announced a consultation process. A separate process in respect of aboriginal litigation is apparently contemplated, but there are no details as to what this separate process will be. In light of *Wewaykum*, changes to the limitation statutes can be expected to affect First Nation claims against Canada.

Because of the historical nature of most wrongful conduct and breaches of duty (i.e., they occurred more than 30 years ago), the practical effect of the limitations legislation is that there is only one avenue for specific claims resolution, and that is a negotiated settlement with Canada. This rests all of the power with Canada – Canada decides whether to accept the claim, on the amount of compensation, and on the terms and conditions of the settlement agreement. If the First Nation does not agree with Canada on any of these components, the First Nation has no viable option to seek a resolution of the claim. Attempts to address this fundamental unfairness are being made through the federal government's legislative initiative to reform the specific claims process. Another way to bring some balance to the rights of First Nations and Canada in the resolution of specific claims is by opening up the court option through reform of limitations legislation. This would make the courts a real alternative and give substantive meaning to Canada's stated objectives in specific claims – "justice, equity and prosperity."

The purpose of this paper is to outline what limitation statutes say, to describe the legislative reform that B.C. is considering, and to offer some ideas on what position the BCSCC might take in order to advance the specific claims of First Nations.

There are strong policy reasons grounded in fairness and justice in support of special limitation rules for historical specific claims against Canada. In particular, those policy reasons argue for a longer ultimate limitation period (more than 30 years), or no limitation period at all.

I. Introduction

a) Defence of time limitation against aboriginal claims

Claims brought by First Nations against Canada often involve events that occurred a long time ago. There are many reasons for this, including the *Indian Act*, the role of the Department of Indian Affairs ("DIA" or "INAC"), and First Nations' lack of control over their affairs and of access to their own records.[1] First Nations have not been in a position to know or to act, and have only relatively recently been able to bring actions based on past wrongs against Canada. When actions are brought, in its defence, Canada raises limitation periods provided for in limitation statutes. A limitation period is a stated period of time, the expiry of which takes away a claimant's right to take legal action in the courts. By this defence Canada says that an action, while it may have merit, cannot go forward because of the passage of time.

b) BC's proposed Limitation Act amendment

Recently, the Province of British Columbia announced the proposed reform of the current provincial *Limitation Act.* In February 2007, the Province issued a Green Paper inviting input and discussion concerning amendments to the *Act.* The Green Paper states expressly that it "will not address how changes to the *Limitation Act* will affect aboriginal litigation. The issue will be discussed with First Nations, thus, will be the subject of further policy review." The BC Specific

[1] Indian agents and other DIA officials were entirely responsible for the protection, preservation and administration of reserve lands, including water, timber, minerals and other resources, often without reference to the Bands themselves. Between the years 1927 and 1951, it was an offence under the *Indian Act* for First Nations to pursue their land claims.

Claims Committee (BCSCC) is pursuing this issue with the Province. In support of their efforts, the BCSCC has requested the development of this Limitations Primer.

This Primer outlines what limitation statutes are and considers the issues surrounding statutory limitations law in relation to specific claims brought by First Nations against Canada related to Indian reserve lands and to other Indian assets. The paper also suggests positions First Nations can advance to best respond to the proposed reform of the *Act.*

Not all issues related to limitation periods are covered in this paper. There is judge made (as opposed to legislated) "you are too late" defences known as equitable limitations which are not considered.[2] There is also law related to the application of limitation statutes to claims brought against the Province on the basis of aboriginal title and rights which raise complex constitutional issues that are also beyond the scope of the discussion here; here we focus only on claims against Canada.

c) Canada's role

Specific claims arise from actions on the part of Canada related to obligations assumed under treaty and responsibilities regarding the management of Indian reserve lands and Indian monies. One of the complexities of dealing with the limitations issues relates to the fact that Canada does not have its own limitations statute. Rather, through federal legislation[3] (discussed below) Canada adopts the limitation statutes in force in the Province where the claim arises. The result is, as it relates to limitations, specific claims are treated differently depending on the Province in which the claim originates. Further, while specific claims are not directed at the Province, provincial limitation statutes and any proposed reform to them is a matter of concern to First Nations. For this reason First Nations must discuss with one level of government (Province) claims and limitations issues which actually concern another (Canada).

[2] Examples of equitable limitations include laches and acquiescence.
[3] See the *Federal Courts Act* and the *Crown Liability and Proceedings Act*.

II. Specific Claims

Following the Supreme Court of Canada's decision in the *Calder* case,[4] the federal government developed two separate claims policies[5] to deal with the historic claims of First Nations:

a) *comprehensive claims* were to deal with aboriginal title, i.e. those lands traditionally used and occupied by the First Nations; and
b) *specific claims* were to deal with a specific category of lands, namely reserve lands which the federal government had mismanaged or otherwise failed to protect for the benefit of the First Nations.

Canada's policy and process to address specific claims is set out in a booklet called *Outstanding Business* (1982). Under the policy, the government defines these claims as "outstanding business between Indians and government which for the sake of justice, equity and prosperity, now must be settled without further delay." (p.3) More specifically, specific claims deal with actions and omissions on the part of Canada as they relate to obligations under treaty, requirements spelled out in legislation (i.e., the *Indian Act*) and responsibilities regarding the management of Indian assets. Where a First Nation can demonstrate a "breach of lawful obligation", i.e., Canada failed to meet its statutory or fiduciary responsibilities, then Canada may accept the claim and negotiate a settlement agreement. Specific claims policies and processes were to provide an alternative to litigation; the idea being that these claims would be settled through a less formal way, inexpensively and expeditiously. The underlying premise is that the Crown and First Nations should together be able to resolve these historical grievances.

[4] *Calder v. British Columbia* (AG), [1973] S.C.R. 313; see also: *R. v. Sparrow*, [1990] S.C.R. 1075 at 1103.
[5] The federal government established two separate processes setting out the steps which First Nations would need to follow in order to seek a resolution of their claims. In British Columbia, the comprehensive claims policy and process has been folded into the BC Treaty Commission process.

Canada's policy is to consider specific claims without relying on the statutes of limitation that would be available to it as a defence if the claim was brought in court. In this regard, Canada has written in its policy:

> …the government has decided to negotiate each claim on the basis of the issues involved. Bands with longstanding grievances will not have their claims rejected before they are even heard because of the technicalities provided under the statutes of limitation or under the doctrine of laches. In other words, the government is not going to refrain from negotiating specific claims with Native people on the basis of these statutes or this doctrine. However, the government does reserve the right to use these statutes or this doctrine in a court case. [*Outstanding Business*, p. 21; see also p. 30] [emphasis added]

If a claim is not accepted or settled, the First Nation's only recourse would be to commence an action in court, where Canada has expressly reserved the right to and can be expected to rely on limitation statutes. Further, the time a First Nation has spent pursuing a claim in the specific claims process may not be accepted by the court as a reason to stop the limitation period clock from running. Thus, First Nations, who may not be able to resolve their specific claims in the claims process, have an interest in what limitation statutes say, and should say, about their claims.

III. Basic Principles of the Law of Limitation Periods

a) Purpose of limitation periods

All Canadian provinces have limitation statutes. By setting the time limits for cases entering the civil justice system, a limitation statute forms one of the basic ground rules for those who wish to resolve their disputes in court. From the broader societal perspective, a statutory limitations system is one of the ways the Legislature decides as a matter of policy to allocate risk among different members of society. In general, limitation statutes are enacted in the interests of defendants to limit the time within which claims may be brought against them. The longer the limitation period a potential defendant is subjected to, the greater the risk that party bears. A limitations regime also serves as a way for the government to strike a balance between the claimant's (or plaintiff's) need to be able to access the civil justice system and defendants' need for certainty and predictability, namely a definite end point to potential legal liability. A

limitations regime is also directed at ensuring the efficient use of the public resources required to run the civil justice system.

Several policy reasons for imposing a time limit for bringing a claim in court have been identified. One is peace of mind. The idea is that, at some point after the occurrence of a possibly wrongful act, a defendant is entitled to peace of mind. A second reason relates to concerns about evidence. With the passage of time, the quality and availability of the evidence diminishes. Memories fade, witnesses die and documents are destroyed. The thinking is that a point of time will be reached when evidence becomes too unreliable to form a sound basis for the court to decide upon, and thus, a limitation period should prevent the claim from being adjudicated at all. A third reason for limitation periods relates to economic considerations. It is thought that business people may be adversely affected by the uncertainty of potential litigation. A potential defendant may be unable or unwilling to enter into other business transactions. Fourth are said to be judgmental reasons. If a claim is not adjudicated until many years after the events that give rise to it, different values and standards from those prevailing at the time the events occurred may be used in determining fault. Because of changes in cultural values, scientific knowledge and societal interests, it is thought that if too much time passes from the time of the wrongful conduct, injustice may result.

However, it is also recognized that there are types of claims that should be exempt from limitations regimes for policy reasons as, for example, claims related to sexual assault (discussed below). For these types of claims it is recognized that fairness and justice tips the balance in favour of no limitation periods or long periods so that plaintiffs can bring their claims to court.

b) Applicability of provincial limitation legislation to First Nations claims against Canada

Although under the *Constitution Act, 1867*, reserve lands fall under Canada's jurisdiction[6] and claims based on Canada's breach of duties in relation to them (e.g., in relation to reserve land surrenders, expropriations for rights of way, or misuse of band funds) are also federal matters, it is provincial limitation statutes that apply to these claims. The reason for this is as follows.

[6] Section 91(24) provides that Canada has exclusive legislative authority in relation to Indians and lands reserved for Indians.

Claims brought by First Nations against Canada based on breaches of duties in relation to reserve lands and band assets may be brought in one of two courts: 1) the Federal Court of Canada; or 2) the superior court in a particular province (in B.C. this would be the B.C. Supreme Court). In either case, federal statutes provide that provincial limitation statutes apply to claims against Canada. Specifically, if an action is brought in (1) Federal Court, section 39 of the *Federal Courts Act*[7] says that the general limitation law of the Province in which the action arose applies. In B.C. the general limitation law of the Province is the *Limitation Act*, R.S.B.C. 1996, c. 266. If the action is brought in (2) the B.C. Supreme Court, s. 32 of the *Crown Liability and Proceedings Act* applies, and says essentially the same thing.[8]

When First Nations sue Canada, provincial limitation statutes are applied as federal law through the provision of one of these two Acts.[9] Therefore, it is the effect of the *provincial limitation regime* that First Nations must consider when bringing forward claims in the courts in relation to reserve lands.

c) Limitation periods – how to know if a claim is too late?

In order to determine whether a claim is stopped (or "barred") from proceeding due to the passage of time, a number of considerations need to be taken into account: What type of limitation period applies? When does the limitation period begin? Can the running of time be suspended or postponed? What happens when the limitation period expires?

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[7] *Federal Courts Act*, R.S.C., 1985, c. F-7

> s. 39(1) Prescription and limitation on proceedings – Except as expressly provided by any other Act, *the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings in the Federal Court of Appeal or the Federal Court* in respect of any cause of action arising in that province.

[8] *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50

> s. 32. Except as otherwise provided in this Act or in any other Act of Parliament, *the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings by or against the Crown* in respect of any cause of action arising in that province, and proceedings by or against the Crown in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose.

[9] Affirmed by the Supreme Court of Canada in *Wewaykum Indian Band v. Canada,* 2002 SCC 79, paras. 114, 116.

i. Types of limitation period

Within a limitation regime, there are typically two kinds of limitation periods: basic and ultimate. A basic limitation period describes the timeframe that would normally apply, absent special circumstances that would justify postponing or suspending the time from running out. An ultimate limitation period is meant to mark the absolute outside time limit, beyond which a basic limitation period cannot be extended.

a) Basic limitation period

Traditionally, limitation regimes have contained a range of basic limitation periods associated with different types of claims.[10] However, there is a developing trend amongst the Provinces to adopt a simplified system that has a single basic limitation period.[11] In B.C.'s Green Paper the proposed amendment would create a single basic limitation of two years for all types of claims.

b) Ultimate limitation period

As noted earlier, the running of the clock in a basic limitation period can be delayed in certain situations. However, the ultimate limitation period ("ULP") marks the absolute maximum time limit for a claim to be brought before the court. No matter how good a reason there is for a delay between the wrongful act and the commencement of the action in court, after the ULP expires, a claim cannot proceed in court. It is absolutely stopped.

All the Provinces have limitation statutes that contain an ULP, ranging from 30 years,[12] 20 years,[13] 15 years[14] to 10 years.[15] One of the key proposed amendments to B.C.'s *Limitation Act* is to shorten the ULP from its current 30-year to a 10-year period.

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[10] For instance, the current B.C. *Limitation Act* sets out three basic limitation periods: (1) 2 years (e.g.: for claims relating to trespass to land), (2) 6 years (e.g.: for claims relating to a breach of fiduciary duty) and (3) 10 years (e.g.: for claims against a trustee to recover trust property).

[11] In the three most recently updated limitation regimes, namely – Alberta, Saskatchewan and Ontario, all of them have adopted a single basic limitation period of two years for all types of claims.

[12] Regimes that currently adopt a 30-year ULP include: British Columbia, Yukon, NWT, Manitoba, Newfoundland and Labrador.

[13] New Brunswick is the only province which has a 20-year ULP.

[14] Both Saskatchewan and Ontario have a 15-year ULP, which is also the suggested approach by the Uniform Law Conference of Canada.

[15] A 10-year ULP is adopted by Alberta and Nova Scotia.

ii. Commencement of time

Generally speaking, and although the issue is technical, a limitation period commences when the right to bring an action arises – namely, when all the elements of a cause of action exist. The wording of the current B.C. *Limitation Act* reflects this general principle.[16] However, various approaches have been used in other provincial regimes. For instance, with respect to the basic limitation period, Ontario, Alberta and Saskatchewan – the three most recently updated regimes - all provide that time starts to run when the losses at issue have occurred and can reasonably be discovered or known.[17] With respect to the ULP, Ontario and Saskatchewan provide that the time starts to run when the wrongful act which caused the loss occurred,[18] whereas Alberta provides that the clock for the ULP starts when the right to pursue a claim arises.[19] The proposed B.C. amendment would start the running of both the basic limitation period and the ULP at the time when the wrongful act is committed.

iii. Suspension of the running of the limitations clock

The starting time for the running of the clock for the basic limitation period may be suspended (sometimes called "postponed") until a party who has a claim "discovers" that there has been an injury caused by another's wrongful act and that there is a basis for a claim against the wrong doer. This results in a longer period of time for a plaintiff to start an action. The basic rationale for this principle is that it would be unjust to allow the limitation period to run before the party who has the claim is even aware of all the facts giving her the right to sue.[20] An example might be where a wrongful act is hidden for some reason, like an undetectable crack in the foundation of a house. The faulty workmanship might not be detectable for many years. To provide relief against the injustice created by hidden facts, the discoverability principle would say that it is only when the crack becomes visible that the clock starts, not when the faulty work that caused the crack was done. This discoverability principle is reflected in s.6 of the current B.C. *Act* and is also found in other provincial legislation.

[16] R.S.B.C. 1996, c.266, s.3(2), s.3(3), s.3(5), s.8(1).
[17] S.O. 2002, c.24, s.4; S.S. 2004, c.L-16.1, s.5; R.S.A., 2000, c.L-12, s.3(1)(a).
[18] S.O. 2002, c. 24, s.15(2); S.S. 2004, c.L-16.1, s.7(1).
[19] R.S.A. 2000, c. L-12; s.3(1)(b).
[20] *Peixeiro v. Haberman* (1995), 25 O.R. (3d) 1 (C.A.), affd [1997] 3 S.C.R. 549.

Limitation statutes in all Canadian jurisdictions also postpone the running of time against parties deemed incapable of managing their own affairs (e.g.: a minor or incompetent adult until the age of majority or competency). Again, as a matter of policy that is reflected in limitation statutes, Provinces have decided that fairness and justice demand that the running of time be postponed in these situations.

iv. Expiry of limitation periods

A party is barred from enforcing his claim in court if the basic limitation period has expired and time cannot be suspended or extended on the basis of allowable circumstances (such as on the basis of the discoverability principle), or if the ULP has expired. The claim cannot be brought back to life unless its revival is explicitly provided for in new legislation.[21]

d) Exceptions from limitation periods on policy grounds: What claims have been singled out for special treatment?

A number of exceptions to the general rules of limitation period can be found in limitation statutes across Canada. These exceptions are created in order to promote specific policy objectives that provincial legislatures have recognized outweigh those policy objectives that underlie the general limitation regime (discussed above). For example, exceptions can be found relating to the following types of proceedings: i) judicial review proceedings; ii) proceedings that involve wilful concealment; and iii) sexual assault related claims.

i. Judicial review proceedings

Limitation statutes generally do not apply to judicial review proceedings.[22] This reflects the view that invalid government action, which is the subject of judicial review, should not be validated by the passage of time.[23] Judicial review of government actions should not be subject to limitation provisions and should always be reviewable by a court.[24]

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[21] See discussion relating to sexual assault claims below.
[22] Eg: S.S., 2004, c.L-16.1, s.3(2)(b); R.S.A, 2000, c.L-12, s.1(i)(iii); S.O. 2002, c.24, s.2
[23] It should be noted that some Rules of Court set out time lines for bringing actions, for example, in the Federal Court, judicial review of decisions made by federal tribunals should be brought within 30 days of the decision. However, these limitation periods are not absolute bars and the Court has discretion to extend the time. The B.C. Rules of Court do not impose a specific time limit for bringing judicial review applications.
[24] See: Report of the Limitations Act Consultation Group (Ontario), *Recommendations for a New Limitations Act* (1991) at 18 (hereafter as "RLACG"); Alberta Law Reform Institute, *Report No. 55: Limitations* (1989) at 39 (hereafter as "ALRI 1989 Report").

ii. Proceedings involving wilful concealment

Generally speaking, the running of time is suspended during a time in which the party against whom the claim is made has wilfully or fraudulently concealed or misled the claimant with respect to matters pertinent to the proceeding. Provincial limitation statutes typically contain provisions dealing with fraudulent concealment.[25] This exception reflects the policy decision that limitation statutes should not be allowed to be used to protect fraud.

iii. Proceedings relating to sexual assault and other exceptions

The running of time is treated very differently in cases involving sexual assault.[26] The running of the clock is suspended and does not begin until damages become apparent to the victim. Some jurisdictions not only have provisions that exempt this kind of claim from the application of both basic and ultimate limitation periods, but also have provisions that revive previously time-barred claims of this nature. This reflects lawmakers' recognition that limitation periods should not be used to reward assailants who have most effectively traumatized and silenced their sexual assault victims.[27]

Other types of exceptions to the operation of general limitation rules can also be found in the Ontario *Limitations Act, 2002*. For instance, s.17 of the *Act* provides that "there is no limitation period in respect of an environmental claim that has not been discovered." In sum, embodied in all of these exceptions is the recognition by lawmakers that there are some important policy objectives that outweigh those promoted by limited periods, and that special zones may need to be carved out within the law of limitations in order to further these other objectives.

e) Agreements to vary limitation periods

The limitation statutes of Alberta, Ontario and Saskatchewan all allow agreements amongst the parties to extend limitation periods. Alberta permits parties to extend but not to shorten limitation periods.[28] Saskatchewan permits parties to agree to extend the basic limitation period

[25] Eg: Alta, s.4; Man., s.5; Ont., s.15(4)(c); Sask., s.17; B.C., s.6(3).
[26] Eg: Ont., s.10, s.16(h), s.24(7); Sask., s.16; B.C., s.3(4)(k) and (l), s.14(6).
[27] For the judicial origin of this exception, see: *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6. Also see discussion in RLACG at 19-21.
[28] Alta, s.7.

up to the maximum set by the ULP.[29] In 2006, Ontario also introduced an amendment to its limitation statute allowing parties to extend the basic limitation period as well as the ULP, so long as the claim has already been discovered.[30] BC is currently silent with respect to this issue, but is considering a change.[31]

f) Transition from old Limitation Act to a new one

When legislation that governs limitation periods is amended, the limitation period that was in place when a wrongful act happened may be different from the limitation period in force when the action is commenced in court. The issue of which of the two regimes applies is technical. To minimize the uncertainties generated by changes to a limitations regime, an amending statute usually contains transition provisions that specify which of the old or new limitation periods applies to a given situation.[32]

The implication of this transition provision proposed by the B.C. Green Paper can be summarized as this: If time has run out prior to the effective date of the new regime, then the transition provision has no impact on the claimant and her claim would be time-barred under the former regime. If time has not run out, then the new transition provision would deny the claimant any advantage that may be attached to the old regime. In other words, whichever of the two regimes would give the claimant the shortest amount of time to pursue her claim, that regime would be required by the new transition provision as the governing framework for a given situation.[33]

[29] Sask., s.21.
[30] Ont., s.22(3) & (4).
[31] See Green Paper, *supra*.
[32] Different hypothetical examples are set out in Appendix "A".
[33] E.g.: B.C., s.14; Ont., s.24; Sask., s.31.

IV. Application of Limitations Law to First Nation Claims

a) Specific references to aboriginal claims in limitation statutes

Of all the limitation statutes that are currently in force in Canada, three contain references that specifically relate to aboriginal claims. They are limitation statutes from: Saskatchewan, Alberta and Ontario.

i. Saskatchewan's *Limitations Act*, S.S. 2004, c.L-16.1, s.3

> (2) This Act does not apply to court proceedings that are: . . .
>
> > (c) proceedings based on existing Aboriginal and treaty rights of the Aboriginal peoples of Canada that are recognized and affirmed in the *Constitution Act, 1982*; . . .
>
> (3) Proceedings described in clause (2)(c) are governed by the laws respecting the limitation of actions that would have been in force if this Act had not been passed.

ii. Ontario's *Limitations Act*, S.O. 2002, c.24, s.2

> (1) This Act applies to claims pursued in court proceedings other than,
>
> > (e) proceedings based on the existing aboriginal and treaty rights of the aboriginal peoples of Canada which are recognized and affirmed in section 35 of the *Constitution Act, 1982*; and
> >
> > (f) proceedings based on equitable claims by aboriginal peoples against the Crown . . .
>
> (2) Proceedings referred to in clause (1)(e) and (f) are governed by the law that would have been in force with respect to limitation of actions if this Act had not been passed . . .

iii. Alberta's *Limitations Act*, R.S.A. 2000, c.L-12, s.13

> An action brought on 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.

All of these provisions exclude certain aboriginal claims against the Crown and provide that these claims are governed by the statutes in force before the current legislation was passed. A clue for the rationale behind these provisions may be found in Ontario's 1991 Report of the

Limitations Act Consultation Group, which notes that issues related to aboriginal land claims had not been considered, needed a separate review and so that this type of claim had been left out of the new *Act* to be still governed by the old:

> It should be particularly noted that the Consultation Group made no attempt to address issues relating to aboriginal land claims. Accordingly, the recommendations are not intended to prejudice any review of those issues.

This statement of the Consultation Group recognizes the unique character of aboriginal claims and the fact that any reform aimed at the interaction of limitations law and aboriginal claims needs to be informed by considerations beyond those that should guide the general reform.

It should be observed that the types of aboriginal claims that are excluded from these various provincial statutes are not the same, and there is no obvious explanation for the differences between Provinces. The exclusion provided by the Ontario provision is the most comprehensive in scope, covering both claims pursuant to s.35 of the *Constitution Act, 1982* as well as general equitable claims.[34] Alberta, however, excludes only claims that are based on a breach of fiduciary duty against the Crown, and therefore any claims pursuant to s.35 would be governed by the current regime, including its 10-year ULP provision.[35] Saskatchewan, on the other hand, excludes claims that are brought pursuant to section 35 of the *Constitution Act,1982* but subject any aboriginal claims that are equitable in nature (i.e., claims based on breach of fiduciary duty

[34] No judicial consideration of the Ontario provision has been found.

[35] The most comprehensive judicial consideration of this provision can be found in *Papaschase Indian Band No. 136* v. *Canada (Attorney General)*, [2004] A.J. No. 999 (Q.B.) (overturned on other grounds: 2006 ABCA 392). The issues in *Papaschase* arose out of an allegedly wrongful surrender of the Papaschase Reserve in 1888. The Court considered s.13 of the new Alberta *Limitations Act* and stated the following at para. 130:

> This section also refers back to the former Act, giving the same result in this litigation. Section 13 does not say that there is no limitation period on aboriginal claims, it just preserves the old law for those claims indefinitely. There is an interesting question whether s. 13 is a limitation provision "between subject and subject" (see infra, para. 134) so that it would apply to the federal Crown at all. The philosophy of the *Crown Liability and Proceedings Act* seems to be that the federal Crown does not expect to be treated any better than ordinary subjects when it comes to limitations, but it does not expect to be treated any worse either. It is one thing for Parliament to adopt provincial limitations legislation of general application, but quite another to allow the provinces to enact limitation provisions that bind the Crown only. However, since the provisions of the former Act apply to this litigation in any event, I need not explore this issue further.

Here, the Court stated that the implication of s.13 is to preserve the old law of limitations with respect to aboriginal claims against the Crown that are based on breach of fiduciary duty. The Court, however, did raise an interesting point about whether provisions such as s.13 of the Alberta *Limitations Act* could bind the federal Crown.
It should be noted that the provision was mentioned (but not analyzed) in *Daniels v. Mitchell*, [2005] A.J. No. 992, para. 48.

like specific claims) to its new regime.[36] Thus, in all of these Provinces, some specific claims will, in certain circumstances, be exempt from statutory limitation periods in relation to claims arising in the future.

b) Review of limitation cases relating to aboriginal claims against Canada

Judges have applied provincial limitation statutes, including the ULP, to bar claims from being brought by First Nations against Canada.

Attached at Appendix "B" is a review of the major cases which have dealt with the issue of limitation periods as applied to cases involving Indian reserve lands. These cases involve claims against Canada for several kinds of remedies or relief, specifically: for a declaration on the status of land [*Wewaykum*]; for monetary damages for trespass to and possession of land [*Wewaykum*]; for monetary damages for breach of fiduciary duty [*Kruger, Apsassin, Wewaykum, Semiahmoo, Fairford, Lower Kootenay*] and for monetary damages for negligence [*Lower Kootenay*].

In these cases First Nations argued that limitation statutes should not be applied at all for a number of reasons. These arguments were that the application of limitation periods is unconstitutional, or that they are inconsistent with the scheme of the *Indian Act* or simply unfair to apply these limitations to deny Indian people their rights in connection with lands reserved for them under the terms of the *Indian Act*. To date, these arguments have not been successful, and the courts, including the Supreme Court of Canada, have found that limitation periods do apply to aboriginal claims against Canada. However, while limitation periods do apply, courts have in certain circumstances accepted that some claims could not be *discovered* for a period of time, and that the clock should not begin to run until they could have been. But, even where postponement of the running of the clock has been allowed, in those Provinces that have a ULP,

[36] No judicial consideration of the Saskatchewan provision has been found.

it has been found to be the absolute time limit regardless of explanation for delay, and has had the effect of stopping otherwise meritorious claims.[37]

V. British Columbia's Proposal to Amend the BC *Limitations Act*

a) Introduction

The *Limitation Act* was last amended in 1996 and the Province has for many years been considering new amendments to it, particularly to the ultimate limitation period. All of the agencies that have been asked to provide recommendations on the proposed reforms have recommended shortening the ULP from the present 30 years to 10 years. This is particularly problematic for First Nations with historic claims which have not been brought to the courts for many good reasons. In many cases, even 30 years has not been long enough, and meritorious claims have been barred by the 30 year ULP now contained in the *Act*. (see for example, *Apsassin* (in part); *Wewaykum*)

b) History of Reform Proposals

The history of BC's reform proposals reveals that the unique position of First Nations' claims has not received separate consideration from a policy perspective.

In its 1974 report, the Law Reform Commission recommended an Ultimate Limitation Period of 30 years beyond which no action (except those actions which should be subject to no limitation period at all) may be brought, notwithstanding any disability, confirmation or postponement of the running of time. The *Limitation Act*, SBC 1975 c. 37 enacted the Commission's recommendation for a 30 year ULP.

The background of the present proposal for amendments to the *Limitation Act* is that in 1990, the Law Reform Commission of B.C. prepared a report for the B.C. Ministry of the Attorney General ("MAG") entitled "Report on the Ultimate Limitation Period: *Limitation Act*, s. 8". The Commission described its task as examining whether the ULP required amendment to attain a more just balance between plaintiffs and defendants. The Commission suggested that the 30

[37] Discussion of possible challenges to limitation statutes in the context of aboriginal claims is found in the academic literature, but these arguments have not yet prevailed in the courts; see: Catherine E. Bell, "Repatriation and Protection of First Nations Culture in Canada" (1995), 25 U.B.C. L. Rev. 149; Alisia Adams, "Unforgiven Trespasses: Provincial Statutes of Limitations and Historical Interference with Indian Lands" (2001) 7 Appeal 32; Tamara Kagan, "Recovering Aboriginal Cultural Property at Common Law: A Contextual Approach" (2005) 63 U.T. Fac. L. Rev 1. To date, these challenges have not won favour in the courts.

year ULP should be reduced to 10 years. In support of this recommendation the Commission seemed to focus exclusively on the small number of cases in which the ULP arose as an issue. They noted that "reported cases under s. 8 are not plentiful. The 30 year ultimate limitation has been found to bar claims arising from land dealings in a few instances". [p. 26] The cases noted are *Kruger*, *Apsassin* and *Sterritt*;[38] all cases brought by First Nations against the Crown. The Commission went on to say "the number of cases which have emerged since the enactment of the *Limitation Act* in which the lapse of time between the material events and the commencement of action is anywhere near 30 years seems to be very small, however. The few cases of this kind mainly involve allegations of fraud or breach of trust". [p. 28] *Kruger* and *Sterritt* are again referenced. The Commission concludes: "while reduction … to 10 years may prevent a few more meritorious claims from succeeding than the present 30 year provision, the number would not likely be large. Our view is that a 10 year ultimate limitation period should apply." [p. 31] From this it recommended that claims based on fraud or wilful concealment should continue to be 30 years. No reference was made to the fact that the small number of cases that do raise the issue involve claims made by First Nations.

In 2002 the B.C. Law Institute released a report entitled "The Ultimate Limitation Period: Updating the *Limitation Act*" which also recommends that the ultimate limitation period be reduced from 30 to 10 years. Both the 1990 Report prepared by the Law Reform Commission of B.C. and the 2002 Report by the B.C. Law Institute justified their recommended reduction of the ULP in part on the basis that such reduction would affect only a very small number of claims. However, the fact that such a reduction would have a disproportionate impact on First Nation claims was not noted in either Report. Like the MAG Report it focussed on the small number of instances where the ultimate limitation period arises: "..the eventuality for which [the ULP] provides is unlikely to materialize in all but a minority of cases". In a footnote the authors note that "few reported cases have arisen where the gap between the occurrence of the material elements of the claim and the start of the action was significantly longer than 10 years. Where these types of claims are reported aboriginal land claims are often at issue". *Kruger, Apsassin* and *Roberts* are referenced. They go on to say: "..few claimants would be affected by the reduction in time…" and that "the reduction of the 30 year ULP ….to 10 years would create

[38] *Sterritt v. Canada*, FCTD 17 Feb 1989

greater certainty in limitations law and provide a reasonable balance between the interests of plaintiffs, defendants and society." [p. 8] Like the MAG report of 12 years before, the B.C. Law Institute recommended that, for cases involving fraud and wilful concealment, the 30 year ULP should continue to apply.

c) Green Paper: February 2007

Most recently, the MAG Justice Services Branch, released a Green Paper (February 2007) entitled "Reforming British Columbia's Limitation Act", which was produced to solicit input and discussion into reforming the existing *Limitation Act*.

i. Areas of reform

The Green Paper outlined eight areas of reform, of which those that are most relevant to First Nations' claims include:

i) whether there should be a single 2-year basic limitation period, and a single 10-year ULP;

ii) whether there should be a single commencement rule which would start the clock (for both the basic limitation period and the ULP) from the date of the wrongful act giving rise to the legal claim, rather than from when all the elements of a cause of action exist;

iii) how the ULP should be postponed where the defendant's concealment has created the delay in starting the proceedings;

iv) whether there should be a provision to permit private agreements to vary limitation periods;

v) how to structure the transition from the old limitations regime to the new.

ii. Policy rationale for reform

The policy reasons for reform that are outlined in the Green Paper include:

- B.C. ought to keep pace with developments in those Provinces, which have recently updated their limitation statutes, i.e., Alberta, Saskatchewan and Ontario, and to harmonize its law with other provincial limitations laws;

- Modernize limitations law by way of simplifying it and making it more easy to understand;
- Different professional groups are not subject to the same limitation periods under the existing law;
- Concern that the current regime risks too many stale-dated claims, which pose a burden to both parties and the court, particularly from an evidentiary point of view;
- Lengthy limitation periods increase record keeping obligations and insurance costs.

VI. BCSCC Response to the Proposed Reform of *Limitation Act*

We set out below some ideas on how the BCSCC might respond to the Green Paper. We discuss both process and substantive matters.

While our purpose here is to present you with options, we do have two recommendations. First, it is recommended that the position advanced by First Nations should be narrowly focused at creating exceptions for specific claims against Canada in order to avoid engaging the Province's concerns about other types of claims which would affect its potential liability. Second, whatever option is chosen, at a minimum, it is recommended that First Nations oppose the proposed reform to reduce the ULP from 30 to 10 years. This is an important issue particularly because of the many historical obstacles in bringing claims to the courts. In many cases, a ULP of 30 years has not been long enough and meritorious claims have not been allowed to go forward.

a) Process Options

The Province has recognized that a separate process is required for consideration of the unique position of First Nations and their claims. In this regard, the Green Paper specifically indicated that aboriginal related issues are outside of its consideration, but has not said how or when First Nations' perspective, experience and ideas will reach the provincial government. On April 23, 2007, the BCSCC wrote to MAG seeking clarity on this.

Another process related issue is the role that Canada has to play. As mentioned above, provincial legislation is only relevant because Canada has chosen not to enact its own limitations statute directly, but rather to adopt the legislation in force in each Province where the claim arises. The Province is not concerned with specific claims against Canada. Rather, the Province is concerned with other types of claims and how limitations legislation effects them. There are two possible options in terms of process. One is to include Canada in a tripartite negotiation process. The other is to engage with the Province alone, and later, having successfully advanced the positions set out below seeking exemptions for specific claims against Canada, then engage in a negotiation with Canada. The advantage of first getting the Province on side and then together approaching Canada is that First Nations will have more leverage to engage Canada in a serious conversation. Otherwise, it is unlikely that Canada wants to deal with the issue directly, as it is to Canada's advantage to continue to hide behind the Province's legislation.[39]

b) Options re: substance of the proposed amendments

i. How will the changes impact First Nations' claims

The net effect of many of the proposed changes is to reduce the window of opportunity a First Nation has to access the civil justice system. The proposed reduction of time for the basic and ultimate limitation periods, the proposed change in the commencement rule (i.e., when the limitation period clock starts to run) as well as the proposed transition provision, all work to significantly shorten the time during which a legitimate civil claim may be kept alive. The proposed amendments, therefore, re-allocate the risk in favour of defendants (i.e., in the case of specific claims, Canada). First Nations could oppose all aspects of the proposed reform that contribute to this significant time reduction, and should, at minimum, oppose the ULP reduction as it most drastically reduces the time for aboriginal claimants to pursue their historic claims against Canada.

[39] See footnotes 7 and 8; if Canada were to enact its own limitations legislation in relation to specific claims, this would at the least ensure uniformity of treatment of specific claims across the country.

ii. Rationale in support of position

The rationale behind the First Nations' opposition would be premised on the characteristics of specific claims. First of all, many of the usual policy rationales in support of limitation periods are inapplicable in the context of specific claims. Given the special relationship between First Nations and Canada, it is not reasonable for Canada to argue that it is entitled to "peace of mind" or "repose" in respect of their fiduciary responsibilities. There can be no good policy reason for any legislated limitation on the honour of the Crown. It is not reasonable that Canada should be given the benefit of changing cultural values to lessen its exposure to claims by aboriginal peoples for its wrongful acts. The general exclusion of judicial review proceedings from limitation statutes (discussed above) reflects a similar logic. The Province has recognized that, in the judicial review context, an invalid government action should not be validated by the passage of time. As to concerns relating to old claims and their related evidentiary problems, the relevance of these concerns to First Nation claims is questionable because much of the evidence at issue in specific claims is documentary in nature, and it is the government who maintains all the historical First Nations records in government archives.[40] Finally, the objective associated with promoting certainty and decreasing business risks is inapplicable in the context of First Nation claims since it is Canada who is the defendant in these cases.

These different policy considerations applicable to First Nation claims have been recognized by courts in the context of equitable limitation periods, (judge made, "you are too late" defences) for example in *Chippewas of Sarnia Band v. Canada (Attorney General)* [2001] 1 C.N.L.R. 56 the Ontario Court of Appeal noted that the court must treat with extreme caution defences based on delay when they are raised in answer to historical grievances of aboriginal people:

> In the case of a claim to aboriginal title, a court must approach the issue of delay with extreme caution and with due regard to the nature of the right at issue. Aboriginal claims often arise from historical grievances. These claims reflect the disadvantages long suffered by aboriginal communities and the failure of our society and our legal system to provide adequate responses. There is a significant risk that denial of claims on grounds of delay will only add insult to injury. It is plainly not the law that aboriginal claims will be defeated on grounds of delay alone. The

[40] Oral history evidence can and does play some role. As for oral history evidence, the courts have understood and explained that the strict rules of evidence must be modified to respond to the oral laws and traditions of aboriginal peoples: *Rv. Van der Peet,* [1996] S.C.R. 254; *Mitchell v. M.N.R.*, [2001] S.C.R. 911.

> reason and any explanation for the delay must be carefully considered with due regard to the historically vulnerable position of aboriginal peoples. (para. 267)[41]

Similarly, in *Stoney Creek Indian Band v. British Columbia* [1998] BCJ No. 2468, Mr. Justice Lysyk recognized that, in considering the effect of delay and the effect of provincial limitations legislation on the part of First Nations in bringing forward their claims, the history of First Nations and the barriers they have historically faced, are relevant considerations:

> Further, there are two aspects of the above quoted passage from Agawa, supra, that invite comment in the circumstances of the present case. One is the element of fairness. The other and related aspect is that for purposes of assessing "fairness to the Indians", attention is appropriately paid to history—including, for present purposes, the social and legal context.
>
> With respect to the latter element, reference may be made to the extracts from the affidavit evidence set out earlier in these reasons that touch upon the situation of Indians resident on the Reserve when the road was pushed through it in 1951. It will be convenient to set out again the concluding paragraph of the extract from the affidavit of Mary John:
>
> > 8. That [we] knew that we could not hire a lawyer to help us out because the Indian Agent told us we couldn't because that is what the Indian Act said.
>
> What did the Indian Act have to say about this? From 1927 until the "new" Indian Act came into force in 1951, the enactment contained the following formidable obstacle to Indians wishing to obtain legal advice:
>
> > 141. Every person who, without the consent of the Superintendent General expressed in writing, receives, obtains, solicits or requests from any Indian any payment or contribution or promise of any payment or contribution for the purpose of raising a fund or providing money for the prosecution of any claim which the tribe or band of Indians to which such Indian belongs, or of which he is a member, has or is represented to have for the recovery of any claim or money for the benefit of the said tribe or band, shall be guilty of an offence and liable upon summary conviction for each such offence to a penalty not exceeding two hundred dollars and not less than fifty dollars or to imprisonment for any term not exceeding two months. 1927, c. 32, s. 6.
>
> Given the realities of the time and place, one might rhetorically question the fairness of result if the Band's right to seek compensation for destruction of property on the Reserve in the course of construction of the road could be extinguished two years after the departure of the bulldozers.
>
> Further, and quite apart from the special situation of Indians and lands reserved for them, fairness is central to both the purpose and application of enactments dealing with limitation of actions. In M.(K.) v. M.(H.), [1992] 3 S.C.R. 6, La Forest J., delivering the principal judgement, identified and elaborated upon the three underlying rationales for such legislation: the certainty, evidentiary

[41] It should be noted that the Court held that while these policy considerations must be taken into account, actions involving aboriginal and treaty rights are not immune from equitable defences.

and diligence rationales (at S.C.R. 29 et seq.). Addressing the element of fairness in the context of the issue of reasonable discoverability, he stated (at S.C.R. 33):

> The foregoing discussion has examined the policy reasons for limitations from the perspective of fairness to the potential defendant. However, this Court has also said that fairness to the plaintiff must also animate a principled approach to determining the accrual of a cause of action. In Kamloops (City of) v. Nielsen, [1984] 2 S.C.R. 2, one of the issues that arose was whether the plaintiff's action was statute-barred by the British Columbia Municipal Act, R.S.B.C. 1960, c. 255, where the plaintiff first became aware of the damage after the one year prescription. Wilson J., writing for the majority, observed that the injustice which statute-bars a claim before the plaintiff is aware of its existence takes precedence over any difficulty encountered in the investigation of facts many years after the occurrence of the allegedly tortious conduct.
>
> . . .
>
> I do not understand the plaintiffs in the present case to go so far as to rely upon some sort of analogous presumption. At a more general level, however, their submission invites a parallel to be drawn with the observation of La Forest J., made in the course of discussing the rationales of limitations statutes, that "one cannot ignore the larger social context that has prevented the problem of incest from coming to the fore" (at S.C.R. 32). In the present case, the plaintiffs also say that the social (as well as the legal) context bears upon the issues before the court.[42]

The Court noted that fairness and regard for historical context are both central to the application of limitations legislation. This case fully supports the position that fairness in legislation requires the recognition of the historical context within which specific claims arise. The provisions of the *Indian Act*, the role of Indian agents, the vulnerability of First Nations to Canada's power, all demand special rules for these unique claims. Without special rules, for example, a provision that says limitations do not apply to specific claims, these claims cannot be resolved through the courts. On these claims, First Nations have no access to justice. There is no fairness in this.

c) Possible positions for First Nations to take

Given the compelling policy reasons for different treatment of First Nation claims, following are options for responding to the proposed amendments.

[42] Paras. 60-63: The case was ultimately overturned on a different point.

i. Option 1 – Exemption for Specific Claims from new *Act*

As noted above, our recommendation is to advance with the Province the position that the *Act* should exempt specific claims. Specific claims would not be subject to any limitation period, including any ultimate limitation period.

Saskatchewan, Alberta and Ontario have done something similar, but have restricted the exemption to claims for breach of fiduciary duty. We would seek a broader exemption that captures all specific claims. This approach highlights the distinctive nature of aboriginal claims and helps to pave the way for creating a special zone within the law of limitations in order to address concerns that are unique to aboriginal claims against Canada. This solution also has the added benefit of harmonizing the new B.C. law with the law in Ontario, Alberta and Saskatchewan, which is one of the Province's own policy rationales for the Green Paper.

As a minimum position, First Nations should insist that their claims be excluded from the proposed reduction of the ULP from 30 to 10 years.

ii. Option 2 – Exemption from existing *Act* and revival of statute barred claims

Option 1 does not really solve the problem because it leaves in effect the limitations regime up until the date of the new *Act*. In general, and as discussed above under the heading 'transition from old *Limitation Act* to a new one', if the time for bringing the claim under the existing *Act* has already expired before the new *Act* comes into force, then the exemption under the new *Act* (Option 1) is not going to revive the claim.[43] Option 2 goes further – First Nations would seek the inclusion of a provision that would allow the revival of previously time-barred claims. This provision, while having no precedent in any jurisdiction in Canada in respect of claims by aboriginal people, would be similar to the reviving provisions already specifically given to sexual assault claims.[44]

[43] Transition rules are very technical, and the discussion here is a general one.
[44] See discussion above under heading "Proceedings relating to sexual assault and other exceptions". E.g.: B.C., s.14(6) and Ont., s.24(7).

iii. Option 3 – Private agreement to vary limitation periods

The Green Paper does not propose any particular treatment with respect to private agreements to vary limitation periods, except to note that this is an area under consideration. First Nations should support the inclusion of a new provision specifically recognizing the parties' right to contract out of the new limitations regime. Furthermore, this new provision should adopt the models of Ontario and Alberta, allowing parties to extend time beyond both the basic limitation period as well as the ULP. In theory, such a provision would allow First Nations to negotiate with Canada for an agreement not to enforce limitation periods that are set out in the new legislation.

Justification for this position can be based upon the fact that all of the updated limitation legislation from Alberta, Saskatchewan and Ontario allow private agreements to vary limitation periods and that harmonization with other provincial limitations law is one of the main objectives for the proposed Green Paper reforms.

Appendix "A"

The BC Green Paper proposes the following transition model:

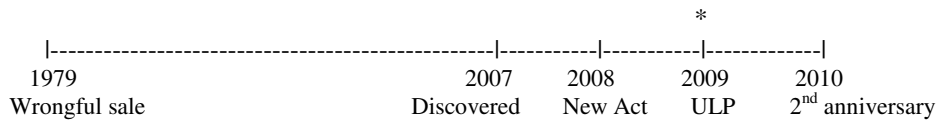
a) If the former limitation period has expired, the claim cannot be brought under the new regime.

The following hypothetical example may help to illustrate this point. On January 1, 2007, the Black Creek Indian Band was surprised to learn that in 1940, Canada had sold a parcel of its reserve land to WWII veterans without having obtained a valid surrender from the Band. Archival records indicate no vote was ever carried out by the Band regarding the sale, although there was evidence that the Chief at the time was supportive of the sale. The Band acquired the right to bring an action against Canada in 1940, immediately after the wrongful sale took place. But by 1970, the claim was time-barred according to the ULP of the existing *Limitation Act*. Assume that the proposed new B.C. *Limitation Act* will come into force on January 1, 2008. According to subsection a) of the new transition provision, the new regime would have no impact on the Band because its claim is already time-barred under the former regime.

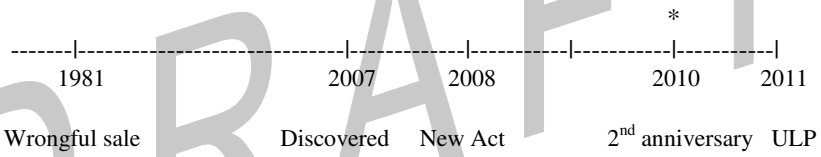
b) If the former limitation period has not expired and discovery of the claim occurred before the effective date of the new regime, then the claim must be brought before the expiry of the proposed two-year basic limitation period (starting to run as of the effective date of the new regime) or the expiry date under the former regime, whichever comes earlier.

The Black Creek Band scenario could again be used to illustrate the meaning of this point. Assume that Canada sold the reserve land without having obtained a valid surrender from the Band in 1979, and the Band discovered this on January 1, 2007. According to this time frame, the ULP under the former regime would expire on January 1, 2009, 30 years after Canada wrongfully sold the land. Assume that the proposed new *Limitation Act* will come into force on January 1, 2008. Since the Band discovered its claim against Canada before the new *Act* has come into force, and since it still has time under the former regime to bring its claim, the Band's situation would be governed by

subsection b) of the new transition provision. Under this subsection, the Band must bring its claim by the earlier of: i) the second anniversary of the effective date of the new *Act* – i.e., January 1, 2010, or ii) the date the former limitation period expired – i.e., January 1, 2009, the ULP under the former regime. According to subsection b) of the new transition provision, the latest date that the Band has to pursue its claim would be January 1, 2009, when the ULP under the old *Act* expires.



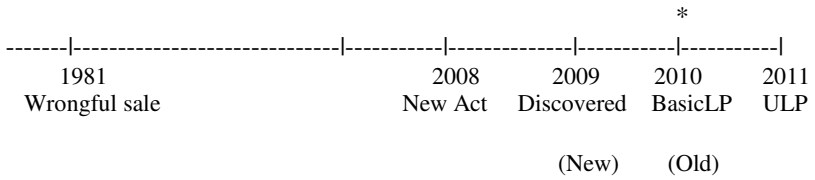
For the sake of further clarification, what if Canada carried out the wrongful sale on January 1, 1981, but the date of discovery and the coming into force date for the new *Act* stay the same? The ULP would then expire on January 1, 2011. According to subsection b) of the new transition provision, the Band must pursue its claim by 2010, the second anniversary of the new *Act*, since it now comes prior to the expiry of the ULP under the old regime.



c) If the former limitation period has not expired and discovery of the claim occurred after the effective date, then the former 30-year ULP does not apply, and the claim is governed by the new regime as if the wrongful act occurred on the effective date of the new *Act*.

The Black Creek Band's scenario could again be repeated here. Assume that the new *Act* comes into force on January 1, 2008 and that somehow the Black Creek Band would not have discovered the mistake until January 1, 2009. Also, assume that Canada wrongfully sold the land on January 1, 1981. The 30-year ULP under the former regime would have expired on January 1, 2011. In this case, since the Band would have discovered the mistake after the effective date of the new *Act* and since the former limitation period would not have expired at the time of discovery, subsection c) of the new transition provision would govern. Subsection c) states that the new regime will be the governing

framework in this situation and the new *Act* applies as if the wrongful act occurred on the effective date of the new statute. In the case of the Black Creek Band, the wrongful sale would therefore be deemed by the new transition provision to have occurred on January 1, 2008 and the Band would need to bring its claim no later than January 1, 2010, within the 2-year basic limitation period of the new *Act.*



Appendix "B"

Review of Cases Involving Indian Reserve Lands and Limitations

In ***Guerin v. Canada***, [1984] 2 S.C.R. 335 the Supreme Court of Canada considered a lease of reserve lands which had been entered into in 1958. Prior to the transaction, the federal Crown had discussions with members of the Musqueam Band and made certain representations to them about the terms of the proposed lease. On the basis of these representations the Band surrendered the lands for lease. The surrender documents themselves did not incorporate the specific terms discussed by the Band. Instead the surrender documents gave the Crown very broad discretion to lease the lands on the terms it saw fit. In the end, the lease entered into was much less favourable to the Band. The terms of the lease actually entered into were not disclosed to the Band. The Crown did not provide the Band with a copy of the lease and repeatedly refused to provide the Band with requested information. The Band did not learn of the actual terms of the lease until March of 1970. They filed their claim against the Crown in December of 1975, which was 12 years after the lease was signed.

The Crown claimed that the Band's action was barred by the provisions of the *Statute of Limitations,* R.S.B.C. 1960, *c.* 370, because it was not filed by January 22, 1964, *six* years from the date the lease was signed. The Supreme Court of Canada rejected this argument. The Court found that there was a special relationship of trust – a fiduciary relationship between the Crown and the Band. As a result:

> Although the Branch officials did not act dishonestly or for improper motives in concealing the terms of the lease from the Band, in my view their conduct was nevertheless unconscionable, having regard to the fiduciary relationship between the Branch and the Band. (p. 390)

Accordingly the Court held that this conduct amounted to fraudulent concealment which postponed the running of the limitation period until the Band actually discovered the terms of the lease. Because the Band did not discover the actual terms of the lease until 1970, and filed the claim in 1975, they were within the six year time limit and could go forward with the claim.

Kruger v. The Queen (1985), 17 D.L.R. (4th) 591 was decided by the Federal Court of Appeal shortly after the *Guerin* decision was released. It involved the taking of two parcels of land from the Penticton Indian Reserve by the federal Department of Transportation for the purposes of an airport. The first parcel of land was expropriated by the Department of Transportation in 1941 on terms unfavourable to the Band after the Band had demanded certain terms in a lease which the Department of Transportation refused to accept. With respect to the second parcel of land, the Department of Transportation was allowed to occupy the lands before there had been any formal disposition of the lands. Advice had been received from the Department of Justice that there was no authority to expropriate reserve lands for airport purposes. Accordingly a surrender was sought from the Band. The Band was eventually persuaded to surrender the lands on unfavourable terms simply because the Band wished to get some compensation for the lands which they were no longer able to use. This transaction took place in 1948.

The Band filed their action in 1979, 38 years following the first, and 33 years following the second, transaction. With respect to the issue of limitation periods, the Court found that, pursuant to section 38 of the *Federal Courts Act*, the provincial *Statute of Limitations* applied. Pursuant to that *Act*, the action was barred six years after the transaction occurred in respect of the claim for breach of fiduciary duty and 20 years after in respect of the claim to recover real property.

The Court held that the time clock should not be postponed from running because the Band was aware of the wrongful act at the time that it occurred.

In ***Lower Kootenay Indian Band v. Canada***, [1991] 42 F.T.R. 241 the Federal Court considered the Band's claim for breach of fiduciary duty and negligence in relation to the 1934 surrender for lease of reserve land. The Band claimed that the lease terms were inadequate, a claim that was admitted by the Crown. The action was commenced in 1982, almost 50 years after the original surrender. The Court held that the provisions of the B.C. *Limitation Act* applied to the Band's claim. The Court found that the 30 year ultimate limitation period excluded any claims based on facts which had taken place more than 30 years prior to the filing of the action in 1982. The

Court then looked at the various actions which had taken place within that 30 year period to determine whether there were any facts giving rise to a new cause of action after the original wrongful act, and if so, what limitation period would apply. The Court found, however, that there was a breach of fiduciary duty and negligence which took place within the 30 year period. Accordingly some claims were allowed to go forward.

The Supreme Court of Canada again revisited the issue of limitation periods as they applied to the Crown's dealing with reserve lands in the case of *Blueberry River Indian Band v. Canada* [1995] 4 S.C.R. 344 (also known as *Apsassin).* In 1945, the Bands executed a surrender which gave the Crown authority to sell or lease their reserve lands for their use and benefit. Several years prior to this they had surrendered the mineral rights in the reserve for leasing purposes. Following 1945 surrender, the Crown disposed of the reserve lands to the Director of the *Veterans Land Act*. In this transfer, the Crown failed to reserve out the mineral rights as was the normal practice. The Director of the *Veterans Land Act* then sold the lands to individual veterans. These sales included the mineral rights. Oil was subsequently discovered under the lands and, because the mineral rights had not been reserved, the benefits of the oil revenue went to the veterans rather than the Crown or the Bands. In 1977 an employee of the Department of Indian Affairs discovered that the Bands had lost their mineral rights and informed the Bands of this. The Bands filed a claim against the Crown in 1978, 33 years after the original surrender, but only one year after they discovered the facts of the case.

The case involved a variety of issues concerning the nature of the Crown's obligation in the disposition of reserve lands. With respect to the issue of limitations, the Court accepted that the B.C. *Limitation Act* applied. The Court noted the various specific limitation periods which might be applicable to the Bands' claims. The Court also noted that there was no specific limitation period for actions based on breach of fiduciary duty. As a result the "catch all" period (the limitation period that aplied for all types of claims that are not specifically mentioned in the *Limitation Act*) of six years would apply. The Court further confirmed that these periods could be postponed in certain circumstances, including where the facts giving rise to the cause of action could not reasonably be discovered before they were. However, the Court concluded that the 30 year ultimate limitation period applied which could not be postponed for any reason.

Accordingly the Bands could only obtain damages for causes of action based on facts which took place less than 30 years prior to the filing of the action.

In ***Semiahmoo Indian Band v. Canada*** (1998), 1 F.C.R. 3 (C.A.) the Federal Court of Appeal applied the 30 year ultimate limitation period in the B.C. *Limitation Act* to a claim based upon a 1951 surrender of reserve lands. The claim was not filed until 1990, more than 30 years after the surrender. Relying upon the decision of the Supreme Court of Canada in *Apsassin,* the Court held that the 30 year ultimate limitation period applied to bar any claims arising from facts which occurred more than 30 years prior to the filing of the claim. Accordingly the claim based on the original 1951 surrender was barred. However, also referring to *Apsassin* the Court held that:

> Even in the context of an absolute surrender for sale, the Crown has a post-surrender fiduciary duty to advance the best interests of the Indian Band, to the extent possible, having regard to the terms of the surrender agreement. Therefore, so long as the Crown has the power, whether under the terms of the surrender instrument or under the *Indian Act*, to exert control over the surrendered land in a manner that serves the best interests of the Band, the Crown is under a fiduciary duty to exercise that power. (p. 544)

The Court rejected the Band's argument that the wrongful act did not occur at one point in time which started the clock, but rather was "continuing" each day, and so the clock had not yet begun to run. However, the Court did accept the Band's argument that the Crown had a continuing obligation to protect the interests of the Band so long as it maintained power and control over the lands. The Court held that there was a "second breach" of fiduciary obligation in 1969 when the Crown failed to reconvey the lands to the Band when specifically requested and when the Crown knew that the lands were not reasonably required for customs purposes. Accordingly, because not more than 30 years had passed between 1969 and 1990 when the action was commenced, there was a cause of action which was not barred by the statute of limitations which could go forward.

The case of ***Fairford v. Canada***, [1999] 2 F.C. 49 (F.C.T.D.) is the only major case that does not originate in B.C., and concerns the Manitoba *Limitations of Actions Act*, RSM 1987 ch. L-150. This case involved claims of breach of fiduciary duty brought by the Fairford First Nation in 1993 against Canada concerning flooding of reserve lands due to dam construction which had

taken place over 30 years before, in the late 1960s. Canada relied upon the six year limitation period covering "actions grounded on accident, mistake or other equitable ground of relief not herein before specifically dealt with…" contained in section 2(1)(k) of the Manitoba *Act*. Like the Band in the *Semiahmoo* case, Fairford argued that the time period had not started to run on the basis of a theory of "continuing breach", or in other words, that the wrongful act ocurred over and over rather than at one time and therefore the clock never started running. Relying upon earlier cases including *Semiahmoo* and *Lower Kootenay*, the Court found that a cause of action for breach of fiduciary duty had to be located at a specific point in time. The limitation period could not be circumvented by arguing that the breach of fiduciary duty was of a continuing nature. The Court concluded that the six year limitation period, therefore applied. The Court then considered when the six year limitation period began to run with respect to the Band's various causes of action, and in particular whether the running was delayed due to the "discoverability rule" which postpones the clock until the facts upon which the cause of action are based are known by the plaintiff or should have been known. The Court found that some of the causes of action were not reasonably discoverable until 1990 and accordingly were not barred by the statute of limitations. Unlike the British Columbia statute, the Manitoba *Limitations of Actions Act* does not contain an ultimate limitation period. Therefore, the claims could go forward.

In ***Wewaykum Indian Band v. Canada***, [2002] 4 S.C.R. 245, the Supreme Court of Canada once again considered the issue of limitation periods. In this case the Bands raised a number of new arguments concerning the applicability of the provincial limitation periods. In particular the Bands argued that the limitations law, as provincial legislation, could not constitutionally be applied to extinguish an Indian interest in land. This argument was rejected by the Court which held that as a result of the *Federal Courts Act*, the provincial legislation applied as federal legislation. The Court also rejected the argument that application of the limitation period was inconsistent with the scheme of the *Indian Act* or unduly harsh as applied to reserve lands or that there was a continuing breach.

The Supreme Court also dealt with the issue of which limitation period applied to the Bands' cause of action – was it the 1897 statute or the 1975 legislation?[45] The causes of action at issue in *Wewaykum* arose prior to July 1, 1975, the date on which the new B.C. *Limitation Act* came into force. If the Bands' causes of action were already extinguished by July 1, 1975,[46] it was *prima facie* the 1897 version of the B.C. *Statute of Limitations* which was in force in British Columbia between 1897 and 1975, that applied. If not so extinguished, the provisions of the new version of the *Limitation Act* [i.e., *Limitation Act (1979)*] would apply.

Two types of cause of action were at issue in *Wewaykum*. The first related to a claim to possession, which under the 1897 statute would be extinguished unless commenced within 20 years. Even if postponement was allowed to account for the Bands' lack of access to pertinent information at the relevant time, the Supreme Court found that the Bands' actions for possession were extinguished by 1957, 20 years after relevant facts were disclosed by the Crown to both Bands. Since the litigation did not begin until 1985, it was time barred pursuant to the 1897 statute. The second type of cause of action at issue in *Wewaykum* relates to the breach of fiduciary duty by the Crown. With respect to this cause of action, the 1897 statute imposed no limitation, and hence this claim was decided pursuant to the transitional provisions of the 1975 statute. Although the 1975 statute was also silent with respect to an action for breach of fiduciary duty, this claim was found to be time barred pursuant to either the six-year general limitation period (i.e., s.3(4)) or the 30-year ULP (i.e., s.8).[47]

[45] See paras. 125-133
[46] *Limitation Act (1979), s.14(1)*
[47] With this analysis, the Supreme Court affirmed McLachlin J's (as she then was) reasoning in *Apsassin* on the applicability of the various limitation periods set out in the 1975 B.C. *Limitations Act* (see: *Apsassin,* para. 107).