"Where There Are Legal Rights There Are Remedies": The Promise of Reconciliatory Remedies and the Limitations of *Shot Both Sides*

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I. INTRODUCTION

The Supreme Court of Canada's decision in *Shot Both Sides v. Canada*[1] highlights two tensions in the Court's recent Aboriginal law jurisprudence and its treatment of limitations legislation. First, the Court's decision in *Shot Both Sides* to procedurally bar coercive relief for a section 35 rights claim through limitations legislation runs contrary to the Court's insistence on a broad remedial approach to section 35 rights claims in both *Ontario (Attorney General) v. Restoule*[2] and *Quebec (Attorney General) v. Pekuakamiulnuatsh Takuhikan*.[3] Second, the Court's finding that domestic limitations legislation could bar coercive relief runs contrary to the Court's

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[1] *Shot Both Sides v. Canada*, [2024] S.C.J. No. 12, 2024 SCC 12 (S.C.C.) [hereinafter "*Shot Both Sides*"].

[2] *Ontario (Attorney General) v. Restoule*, [2024] S.C.J. No. 27, 2024 SCC 27 (S.C.C.) [hereinafter "*Restoule*"].

[3] *Quebec (Attorney General) v. Pekuakamiulnuatsh Takuhikan*, [2024] S.C.J. No. 39, 2024 SCC 39 (S.C.C.) [hereinafter "*Takuhikan*"].

increasing recognition of the status of the *United Nations Declaration on the Rights of Indigenous Peoples* in Canada's domestic law, which enshrines the right to effective remedies.[4]

In *Shot Both Sides*, the Supreme Court held that general limitations legislation barred the Blood Tribes' claims for coercive relief flowing from their breach of treaty claim.[5] However, the Court did not consider the constitutional applicability of the limitations legislation because the issue was not properly raised on appeal.[6] Therefore, until the constitutional issue is decided by the Supreme Court, the authors question whether the *Shot Both Sides* decision should be read as an unequivocal affirmation that section 35 rights may always be lawfully barred by limitations legislation. The blanket application of limitations legislation to breaches of section 35 rights would raise practical and doctrinal challenges. It would risk creating an inconsistent patchwork of Crown liability for historic section 35 rights claims across the country. It is also hard to understand how the protective and remedial purpose of section 35 and the honour of the Crown are served by permitting the Crown to decide when it would like to be free of its own liability for its own wrongdoing. While *Shot Both Sides* leaves declaratory relief on the table for limitations-barred claims, the effectiveness of declaratory relief would be largely dependent on the Crown's willingness to negotiate a remedy for such a claim.

To read *Shot Both Sides* as a blanket endorsement that limitations legislation applies to all section 35 rights claims also runs contrary to the remedial promise found in two other recent Supreme Court Aboriginal law decisions, *Restoule* and *Takuhikan*. In those cases, the Court expanded the scope of remedies available to Indigenous peoples for breaches of Aboriginal and treaty rights, and the honour of the Crown. The Court emphasized that the full range of remedies, both declaratory and coercive, are available. Courts should be creative and flexible, and consider the Indigenous group's perspective, in identifying an appropriate remedy. That remedy must restore the honour of the Crown and further reconciliation. Reading the Court's decision in *Shot Both Sides* as a wholesale blessing of statutory limitation periods would undercut the Court's emphasis in those cases that the remedies for such claims should be aimed at restoring the honour of the Crown, governed by flexibility and creativity, and foreground the Indigenous perspective. The remedial promise in *Restoule* and *Takuhikan* would ring hollow.

Additionally, unequivocally upholding procedural limits on coercive relief for

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[4] UNDRIP, arts. 40, 8(2), 10, 11(2), 20(2), 28(1), 32(3). Arguments related to the status of UNDRIP and the right to effective remedies have been put forward by the authors on behalf of their clients in interventions before the Supreme Court of Canada, on behalf of the Kee Tas Kee Now Tribal Council in *Restoule*, and on behalf of Manitoba Keewatinowi Okimakanak Inc. in *Southwind v. Canada*, [2021] S.C.J. No. 28, 2021 SCC 28 (S.C.C.), and on behalf of Cheona Metals Inc. before the British Columbia Court of Appeal in *Gitxaala*.

[5] *Shot Both Sides v. Canada*, at paras. 3-5 (S.C.C.).

[6] *Shot Both Sides*, at paras. 4 & 33-35 (S.C.C.).

historic claims would be in tension with the Supreme Court and other Canadian courts' growing recognition of the status of UNDRIP rights in Canadian law. The courts have now recognized that UNDRIP has been brought into Canadian law[7] and attracts the presumption of conformity.[8] As a result, the right to effective remedies expressed in UNDRIP is enshrined in Canada's domestic law.[9] It is a customary international law norm and contained in international treaties Canada has ratified. It requires that remedies be more than procedural, and that they be viewed as just from the perspective of Indigenous peoples themselves. Limitations legislation, section 35, and the available remedies for breaches of section 35, should all be interpreted consistently with the right to effective remedies. If general limitation periods can bar coercive relief for the Crown's breach of Indigenous people's treaty rights, it would remove some of the most effective remedies available for historic wrongdoing. This would be inconsistent with the right at international law.

The legacy of the *Shot Both Sides* decision remains to be seen. Because the parties did not make arguments about the constitutional applicability of limitations legislation on appeal, and acknowledged that these were not at issue on appeal, the Supreme Court did not consider these questions.[10] Instead, the Supreme Court only considered the "narrow legal issue" of whether treaty claims were actionable prior to 1982.[11] It remains for future courts to grapple with the tensions between the applicability of limitation periods to Aboriginal and treaty rights claims, and the promise of effective remedies rooted in the honour of the Crown and UNDRIP.

II. TENSIONS WITHIN THE SUPREME COURT JURISPRUDENCE: *SHOT BOTH SIDES, RESTOULE* AND *TAKUHIKAN*

1. The Recognition of Procedural Bars to Relief in *Shot Both Sides v. Canada*

In *Shot Both Sides,* the question before the Court was whether the Blood Tribe's treaty land entitlement claim ("TLE claim") for breach of Treaty 7 was actionable in Canadian courts prior to the coming into force of section 35(1) — such that the claim was now limitations-barred — or whether section 35(1) sufficiently changed

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[7] *C92 Reference,* at paras. 4 & 15 (S.C.C.); *Dickson v. Vuntut Gwitchin First Nation,* [2024] S.C.J. No. 10, 2024 SCC 10 at para. 117, *per* Kasirer and Jamal JJ. (majority), see also para. 317, *per* Martin and O'Bonsawin JJ. (dissenting in part) (S.C.C.); *Gitxaala*, at para. 78, *per* Dickson J. (majority) (B.C.C.A.); *Kebaowek First Nation v. Canadian Nuclear Laboratories*, [2025] F.C.J. No. 300, 2025 FC 319 at para. 80 (under appeal) (F.C.).

[8] *Gitxaala*, at paras. 78 & 129, *per* Dickson J. (majority) (B.C.C.A.); *Kebaowek First Nation v. Canadian Nuclear Laboratories*, [2025] F.C.J. No. 300, 2025 FC 319 at paras. 80 & 85 (F.C.); see also *R. v. Montour*, [2023] Q.J. No. 11554, 2023 QCCS 4154 at paras. 117 &, 1188-1202 (Que. S.C.).

[9] UNDRIP, arts. 40, 8(2), 10, 11(2), 20(2), 28(1), 32(3).

[10] *Shot Both Sides*, at paras. 4 & 33-35 (S.C.C.).

[11] *Shot Both Sides*, at paras. 33-35 (S.C.C.).

the state of the law so as to re-start the limitation clock for the Blood Tribe's claim. The parties did not make arguments about the constitutional applicability, validity, or operability of limitations legislation on appeal, and the Supreme Court did not consider these questions. Instead, the Court only considered this "narrow legal issue".[12]

Under Alberta's legislation, the TLE claim was apparently subject to a six-year limitation period. The Blood Tribe conceded that if the TLE claim *was* enforceable and actionable before 1982, when section 35(1) came into force, then the limitation period began to run when their claim was discoverable in 1971 — and was therefore statute-barred.[13] The Blood Tribe argued that the claim was not recognized at law until 1982, and so was only discoverable post-1982. They filed their action in 1980, so they argued it was brought in time.[14]

In its decision, the Supreme Court reiterated that the normal rules of limitation periods apply to Aboriginal and treaty rights claims.[15] The Court acknowledged that the enactment of the *Constitution Act, 1982* and section 35(1) "profoundly shaped and solidified the protection of Aboriginal and treaty rights in Canada" by recognizing and affirming the Aboriginal and treaty rights of the Aboriginal peoples of Canada.[16] Section 35(1) accorded constitutional status to existing Aboriginal and treaty rights, constitutionally entrenching Canada's obligation to respect existing treaty rights, so that they could no longer be abrogated by legislation.[17] Nonetheless, the Court held that this did not create treaty rights, which flow from the treaty. Their existence and scope are determined by the terms of the treaty.[18] The coming into force of section 35(1) therefore did not alter the commencement of the limitation period for the TLE claim, which was actionable already at common law. Thus, the limitations legislation barred the claim prior to 1982.[19]

As a result, the Court held that only declaratory relief was available as a remedy for the claim. While personal relief or damages may be subject to limitations statutes, limitations legislation cannot bar declaratory relief.[20] This followed older

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[12] *Shot Both Sides*, at paras. 33-35 (S.C.C.). The issue of constitutional applicability was discussed at trial (see *Jim Shot Both Sides v. Canada*, [2019] F.C.J. No. 892, 2019 FC 789 at paras. 20 & 384-400 (F.C.)). But the Supreme Court clarified that "the constitutional applicability of the limitations legislation at issue has not been properly raised in this Court and is not a 'component of the overall analysis of the grounds as raised by the parties'".

[13] *Shot Both Sides*, at para. 58 (S.C.C.).

[14] *Shot Both Sides*, at para. 58 (S.C.C.).

[15] *Shot Both Sides*, at para. 60 (S.C.C.).

[16] *Shot Both Sides*, at para. 52 (S.C.C.).

[17] *Shot Both Sides*, at paras. 52-53 (S.C.C.).

[18] *Shot Both Sides*, at para. 54 (S.C.C.).

[19] *Shot Both Sides*, at paras. 5, 32 & 58 (S.C.C.).

[20] *Shot Both Sides*, at paras. 5 & 63 (S.C.C.).

Supreme Court jurisprudence that found that limitation periods apply to *sui generis* fiduciary duty and honour of the Crown claims — including *Wewaykum Indian Band v. Canada*, *Canada (Attorney General) v. Lameman,* and *Manitoba Métis Federation Inc. v. Canada (Attorney General)*[21] — and it built on *Manitoba Métis* to create a general carve-out for declaratory relief.

Barring claims for coercive relief for historic breaches of Aboriginal and treaty rights has profound implications. Aboriginal and treaty rights claims are rooted in the fact that when Europeans arrived in what is now Canada, Indigenous peoples were here, living as independent political entities, holding title to their territories, and governing themselves in accordance with their own laws.[22] When the Crown asserted sovereignty over the lands that are now Canada, Indigenous peoples retained their rights arising from their legal systems and historical occupation and use of the land as common law Aboriginal rights, except to the extent that these were incompatible with the Crown's asserted sovereignty.[23] In 1982, section 35 gave these existing common law Aboriginal rights constitutional protection.[24] First Nations entered into historic treaties with the Crown in the 19th and early 20th centuries, and in 1982, section 35 likewise gave these treaty rights constitutional protection.[25] This means that many Aboriginal and treaty rights claims are based on historic breaches. Many of these breaches could not have been legally or practically prosecuted at the time they occurred.[26]

The Court's decision in *Shot Both Sides* suggests that the availability of a remedy for such historic claims depends on the limitations legislation that applies in the province or territory in which the claim arises, regardless of whether the claim is brought in a provincial court or the federal court. This is because the federal regime defers to the limitation period that applies in the province or territory in which the

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[21] *Wewaykum Indian Band v. Canada*, [2002] S.C.J. No. 79, 2002 SCC 79 at paras. 121 & 125-133 (S.C.C.); *Canada (Attorney General) v. Lameman*, [2008] S.C.J. No. 14, 2008 SCC 14 at paras. 12-13 (S.C.C.); *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, [2013] S.C.J. No. 14, 2013 SCC 14 at para. 134, *per* McLachlin C.J.C. and Karakatsanis J. (majority) (S.C.C.). See *Shot Both Sides*, at para. 60 (S.C.C.), on this point.

[22] *R. v. Van der Peet*, [1996] S.C.J. No. 77, [1996] 2 S.C.R. 507 at para. 30, *per* Lamer C.J.C. (majority) (S.C.C.); *Calder v. British Columbia (Attorney-General)*, [1973] S.C.R. 313 at para. 328, *per* Judson J. (plurality) (S.C.C.).

[23] *Mitchell v. Canada (Minister of National Revenue - M.N.R.)*, [2001] S.C.J. No. 33, 2001 SCC 33 at paras 10-11, 62, *per* McLachlin C.J.C. (majority) (S.C.C.).

[24] *R. v. Desautel*, [2021] S.C.J. No. 17, 2021 SCC 17 at paras. 34 & 68-69, *per* Rowe J. (majority) (S.C.C.); see also *Delgamuukw v. British Columbia*, [1997] S.C.J. No. 108, [1997] 3 S.C.R. 1010 at 133, *per* Lamer C.J.C. (majority) (S.C.C.).

[25] *R. v. Desautel*, [2021] S.C.J. No. 17, 2021 SCC 17 at para. 34 (S.C.C.).

[26] Until 1951 First Nations were prohibited from hiring lawyers or raising money to pursue land claims or other legal rights by the *Indian Act*: *Indian Act*, R.S.C. 1927, c. 98, s. 141. This provision was repealed in *The Indian Act*, S.C. 1951, c. 29, s. 123(2).

claim arises.[27] While some provincial and territorial jurisdictions have limitations legislation that exempt section 35 rights claims, others apply general two- or six-year limitation periods to them. In practical reality, this creates a patchwork of varying levels of Crown liability across the country.

For example, in British Columbia, the B.C. *Limitation Act* "does not apply to court proceedings based on existing aboriginal and treaty rights of the aboriginal peoples of Canada that are recognized and affirmed in the *Constitution Act, 1982*".[28] The B.C. *Limitation Act* provides that such court proceedings are "governed by the law that would have been in force with respect to limitation of actions if this Act had not been passed".[29] The law that would have been in force is the 1996 B.C. *Limitation Act*, which has no limitation period for claims based on Aboriginal and treaty rights, but an ultimate limitation period of 30 years.[30]

Likewise, in Ontario, the *Limitations Act, 2002* does not apply to "proceedings based on the existing aboriginal and treaty rights of the aboriginal peoples of Canada which are recognized and affirmed in section 35".[31] The *Limitations Act, 2002* states that such claims are "governed by the law that would have been in force with respect to limitation of actions if this Act had not been passed".[32] The law that would have been in force is the 1990 *Limitations Act,* which has no limitation periods for claims based on Aboriginal and treaty rights.[33] Ontario courts have held that there is therefore no limitation period for claims based on breach of treaty rights.[34]

By contrast, Alberta's *Limitation Act* sets out a general two-year limitation period for all actions not otherwise specifically provided for in the *Limitation Act*.[35] There is a carve-out for Aboriginal peoples' fiduciary duty claims, which may result in a six-year limitation period for these types of claims.[36]

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[27] *Federal Courts Act*, R.S.C. 1985, c. F-7, r. 39(1).

[28] *Limitation Act,* S.B.C. 2012, c 13, s. 2(2).

[29] *Limitation Act*, S.B.C. 2012, c. 13, s. 2(3).

[30] *Limitation Act*, R.S.B.C. 1996, c. 266, s. 8(1)(c).

[31] *Limitations Act, 2002*, S.O. 2002, c. 24, Schedule B, s. 2(1)(e), (f).

[32] *Limitations Act, 2002*, S.O. 2002, c. 24, Schedule B, s. 2(2).

[33] *Limitations Act*, R.S.O. 1990, c. L.15, s. 45(1).

[34] *Restoule v. Canada (Attorney General)*, [2020] O.J. No. 2881, 2020 ONSC 3932 at paras. 109-111, 181 & 198-200 (Ont. S.C.J.), affirmed, [2021] O.J. No. 6228, 2021 ONCA 779 at paras. 518-520, 645-646 & 662-663, *per* Hourigan J.A. (majority on this issue) (Ont. C.A.).

[35] *Limitations Act,* R.S.A. 2000, c. L.12, s. 3(1).

[36] Under s. 13 of the *Limitation Act*, any "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,* R.S.A. 1980 c. L-15, had not been repealed and this Act were not in force": *Limitations Act,* R.S.A. 2000, c. L.12, s. 13. The 1980 *Limitation of Actions Act*

While most limitations statutes incorporate the principle of discoverability, which provides that the limitations clock begins to run when the claimant first knew or ought to have known of the cause of action, rather than when the cause of action arose,[37] the principle is often insufficient to bring a historic claim within a limitation period. This is because in many jurisdictions discoverability is still subject to an ultimate limitation period. And even in jurisdictions without ultimate limitation periods, the application of the principle of discoverability may not be enough to bring a claim within time, if the Indigenous community took steps to investigate or rectify a historic breach in the past. *Shot Both Sides* illustrates this well. Blood Tribe members first expressed concern about the size and boundaries of the reserve in the 1880s. Concerns over the reserve size arose again in 1969. A Blackfoot researcher identified the reduction in the reserve size, and in 1971, gathered information on the total number of people in the Blood Tribe for the relevant years, which confirmed that the existing boundaries did not match the boundaries owed.[38] As a result, the trial judge found that the claim was discoverable in 1971 or shortly thereafter — over six years before the claim was brought in 1980.[39] At the Supreme Court, the Blood Tribe conceded this point.[40]

Beyond the risk of a patchwork of liability across the country, the larger issue with allowing limitations legislation to bar relief for Indigenous peoples is that it amounts to the Crown determining its own liability for its own wrongdoing. In an older case, the Court of Appeal for Ontario recognized the dangers of leaving it to the Crown. In *Prete v. Ontario (Attorney-General)*, in finding that a six-month limitation period did not apply to bar *Charter* relief, the Court noted, "[t]he purpose of the Charter, in so far as it controls excesses by governments is not at all served by permitting those same governments to decide when they would like to be free of those controls".[41] Those concerns apply equally to section 35 claims. While *Shot Both Sides* leaves declaratory relief on the table for historic claims, the effectiveness of declaratory relief is entirely dependent on the Crown's willingness to negotiate a remedy. Without the threat of coercive relief, this remedy could prove illusory.

2. The Remedial Promise in *Restoule*

Reading *Shot Both Sides* as a blanket endorsement of limitation periods for coercive relief for section 35 rights claims runs counter to the remedial promise in two other

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does not specifically address breach of fiduciary duty claims, but states that any actions not specifically provided for under the Act must be brought within six years after the cause of action arose: *Limitation of Actions Act*, R.S.A. 1980, c. L-15, s. 4(1)(g).

[37] See, *e.g.*, *Limitations Act,* R.S.A. 2000, c. L.12, s. 3(1).

[38] *Shot Both Sides*, at paras. 13-14 (S.C.C.).

[39] *Shot Both Sides*, at paras. 23 & 58-59 (S.C.C.).

[40] *Shot Both Sides*, at para. 31 (S.C.C.).

[41] *Prete v. Ontario (Attorney-General)*, [1993] O.J. No. 2794, 16 O.R. (3d) 161 at para. 13 (Ont. C.A.), *per* Carthy J.A. (majority), leave to appeal refused, [1994] S.C.C.A. No. 46.

recent Supreme Court decisions, *Restoule* and *Takuhikan*. In those cases, the Court held that the full range of remedies, including coercive relief, is available for breach of section 35 and honour of the Crown claims.

In *Restoule*, the Supreme Court found that the Crown breached the Robinson Treaties of 1850 and failed to act in a manner consistent with the honour of the Crown by failing to diligently implement the promises in them. In determining the appropriate remedy for those breaches, the Supreme Court held that for breach of Aboriginal and treaty rights claims and breach of the honour of the Crown claims, "the full range of remedies — declaratory and coercive — is available".[42] The Court explained that Aboriginal and treaty rights protected under section 35 must be just as enforceable as other constitutional rights, and courts must ensure that Aboriginal and treaty rights are protected by adequate, effective and meaningful remedies.[43] As with other constitutional rights, courts should take a purposive approach to determining the appropriate remedy for breaches of Aboriginal and treaty rights, and breach of the honour of the Crown claims.[44] The controlling question is what is required to maintain the honour of the Crown and effect reconciliation.[45] Restoring the honour of the Crown "requires the courts to be creative" within a principled legal framework and provide remedies that "forward the goal of reconciliation".[46]

The Court granted declaratory relief and ordered the parties to negotiate compensation for the breach. While declaratory relief would be helpful, a declaration alone would be insufficient, given the longstanding and egregious nature of the Crown's breach.[47] With a view to respecting the nature of the treaty promise, repairing the treaty relationship, restoring the honour of the Crown, and advancing reconciliation, the Court directed the Crown to engage in time-bound, honourable negotiation with the plaintiffs for past breaches of the treaty.[48] If the parties could not reach a negotiated settlement, the Court directed that the Crown must exercise its discretion and determine an amount to compensate the plaintiffs, reviewable by the Court.[49] So while the primary relief for this historic claim was declaratory, there was still recourse to coercive remedies.

3. The Remedial Promise in *Takuhikan*

In *Takuhikan,* the Supreme Court majority likewise found that the full range of remedies is available for section 35 rights breaches. This appeal concerned tripartite

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[42] *Restoule*, at para. 273 (S.C.C.).

[43] *Restoule*, at paras. 274-275 (S.C.C.).

[44] *Restoule*, at para. 277 (S.C.C.).

[45] *Restoule*, at para. 277 (S.C.C.).

[46] *Restoule*, at para. 277 (S.C.C.).

[47] *Restoule*, at paras. 11 & 283 (S.C.C.).

[48] *Restoule*, at para. 11 (S.C.C.).

[49] *Restoule*, at paras. 11-12 (S.C.C.).

agreements entered into by Canada, Quebec and the Indigenous band council Pekuakamiulnuatsh Takuhikan. The agreements established an Indigenous police force that provided services to the Indigenous community of Mashteuiatsh, to be managed by Pekuakamiulnuatsh Takuhikan, with financial contributions from Canada and Quebec. The majority held that Quebec's refusal to renegotiate its financial contribution when the agreements were renewed — even though Quebec knew that the police force was underfunded and that a return to provincial police services would involve risks for the community — was in breach of the requirements of good faith, and in breach of Quebec's obligation to act consistently with the honour of the Crown.[50]

In determining the appropriate remedy for the breaches, the Supreme Court majority reiterated that the "full range of remedies, including damages and other coercive relief" are available for breaches of the honour of the Crown.[51] This is because a remedy to address a breach of the honour of the Crown is not based on corrective justice, but rather on reconciliatory justice.[52] Its aim is not to compensate the Indigenous claimant only for harm suffered as a result of past wrongs.[53] Rather, it serves to restore and improve the relationship between the Crown and Indigenous peoples to support reconciliation, which takes the past into account but also continues beyond formal claims resolution.[54] The analysis must be focused on ensuring the remedy will have the effect of restoring the honour of the Crown and advancing reconciliation.[55]

The majority emphasized that courts can and must be creative in determining the appropriate remedy to restore the honour of the Crown and advance reconciliation.[56] The high standard that applies to the honour of the Crown justifies the exercise of the courts' discretion to grant a remedy they consider appropriate.[57] The majority explained, "[w]ithin the sphere of reconciliatory justice, flexibility, not rigidity, is the rule".[58] Further, courts must give full consideration to Indigenous perspectives in determining the appropriate remedy for breaches of the honour of the Crown.[59] Measures should be taken to ensure that decisions on remedy are consistent with the

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[50] *Takuhikan*, at paras. 10 & 15, *per* Kasirer J. (majority) (S.C.C.).

[51] *Takuhikan*, at para. 210, *per* Kasirer J. (majority) (S.C.C.).

[52] *Takuhikan*, at para. 18, *per* Kasirer J. (majority) (S.C.C.).

[53] *Takuhikan*, at para. 18, *per* Kasirer J. (majority) (S.C.C.).

[54] *Takuhikan*, at para. 18, *per* Kasirer J. (majority) (S.C.C.).

[55] *Takuhikan*, at paras. 203 & 223, *per* Kasirer J. (majority) (S.C.C.).

[56] *Takuhikan*, at paras. 203 & 223, *per* Kasirer J. (majority) (S.C.C.).

[57] *Takuhikan*, at para. 203, *per* Kasirer J. (majority) (S.C.C.).

[58] *Takuhikan*, at para. 203, *per* Kasirer J. (majority) (S.C.C.).

[59] *Takuhikan*, at para. 211, *per* Kasirer J. (majority) (S.C.C.).

long-term interests of the Indigenous group and with its survival as a viable, distinct culture and society.[60]

In the circumstances of that case, a damages award was appropriate. Quebec's dishonourable conduct served its own interests and harmed Pekuakamiulatuash Takuhikan's interests. From the standpoint of public safety and dignity, and the community's perspective, damages were the appropriate reconciliatory remedy.[61] The majority upheld the Court of Appeal's award of damages to Pekuakamiulnuatsh Takuhikan equal to the deficits they had incurred.[62] In reaching this conclusion, the majority rejected Canada's argument that the most appropriate remedy was declaratory relief.[63] The majority acknowledged that declaratory relief can promote negotiated resolutions of claims, but relied heavily on the fact that Pekuakamiulnuatsh Takuhikan had always sought damages, and that Quebec did not challenge damages as a remedy, only the quantum of damages.[64] The majority held that in this way, the case differed from *Shot Both Sides*, in which the Indigenous party expressly sought a declaration rather than damages, and from *Restoule*, where a government party argued that only a declaration was available.[65] The majority's reasoning suggests that all an Indigenous party has to do to secure damages as a remedy to a Crown breach of its honourable obligations or section 35 rights is to request damages from the get go. But this reasoning sidesteps the way in which the Supreme Court in *Shot Both Sides* upheld procedural bars to securing coercing relief for historic section 35 rights claims. *Shot Both Sides* also sits uncomfortably with the repeated emphasis in *Restoule* and *Takuhikan* that remedies for section 35 rights claims must be rooted in reconciliatory justice, aimed at restoring the honour of the Crown, governed by flexibility and creativity, and guided by the Indigenous perspective.

III. TENSIONS BETWEEN *SHOT BOTH SIDES*, UNDRIP AND INTERNATIONAL LAW

A wholesale application of general limitation periods to coercive remedies for Indigenous rights claims would also run counter to the Supreme Court and lower court's growing recognition of the status of UNDRIP in Canadian law. UNDRIP enshrines the right to effective remedies for rights violations by states,[66] which is a fundamental principle of international law. As binding convention law and customary international law, the right to effective remedies attracts the presumption of

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[60] *Takuhikan*, at para. 211, *per* Kasirer J. (majority) (S.C.C.).

[61] *Takuhikan*, at para. 217, *per* Kasirer J. (majority) (S.C.C.).

[62] *Takuhikan*, at paras. 18, 212 & 217, *per* Kasirer J. (majority) (S.C.C.).

[63] *Takuhikan*, at paras. 218-220, *per* Kasirer J. (majority) (S.C.C.).

[64] *Takuhikan*, at paras. 218-220, *per* Kasirer J. (majority) (S.C.C.).

[65] *Takuhikan*, at para. 220, *per* Kasirer J. (majority) (S.C.C.).

[66] UNDRIP, arts. 40, 8(2), 10, 11(2), 20(2), 27, 28(1), 32(3).

conformity, such that all legislation — and the Constitution — must be interpreted consistently with it.[67] At a minimum, it guarantees Indigenous peoples remedies that are more than procedural, and which they consider to be just from their own perspective and according to their own customs. In order to be "effective", remedies need to be capable of restoring the Indigenous party to the position they would have been in but for the rights breach, by returning lands lost and providing other restitution and redress. Uncritically accepting that Canadian legislatures can bar relief for section 35 rights claims through their own ordinary legislation runs counter to this right, hollowing out the effectiveness of the remedies available to Canada's Indigenous peoples.

It is a long-established principle of international law that domestic limitations statutes cannot bar claims for human rights violations. The Inter-American Court and Commission of Human Rights express this as the principle of "judicial protection".[68] This principle has been invoked by Indigenous peoples in the Americas to preclude domestic legal obstacles from barring remedies, including return of lands and compensation, for breaches of their rights.[69] It is hard to see how statutory limitation periods that bar consequential or coercive relief — including the return of lands wrongfully taken and compensation — are consistent with this principle.

Although there has been some reluctance from lower courts in Canada to read down limitations statutes in light of UNDRIP,[70] these decisions do not reflect the recent recognition of the status and effect of UNDRIP in domestic law, nor the current status of international legal principles that guarantee effective remedies. If section 35 is to be read in conformity with UNDRIP and these principles, it is difficult to see how limitations legislation that bars remedies for its breach could be constitutional.

1. UNDRIP Has Status in Canadian Law

UNDRIP is a Declaration adopted by Resolution of the UN General Assembly. It is not a treaty and cannot be ratified by states. Nevertheless, Canada's executive and legislative treatment of UNDRIP attracts interpretive weight, as courts have

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[67] *R. v. Hape*, [2007] S.C.J. No. 26, 2007 SCC 26 at paras. 53-56, *per* LeBel J. (majority) (S.C.C.).

[68] *American Convention on Human Rights*, 1969, 1144 U.N.T.S. 123, art. 25; *Bulacio v. Argentina* (2003), Inter-Am Ct HR (Ser C) No. 100 at para. 116; *Moiwana Community v. Suriname* (2005), Inter-Am Ct HR (Ser C) No. 124 at para. 167.

[69] *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (2001), Inter-Am Ct HR (Ser C) No. 79 at paras. 106-139; *Saramaka People v. Suriname* (2007), Inter-Am Ct HR (Ser C) No. 172, at paras. 177-185.

[70] *Watson v. Canada*, [2020] F.C.J. No. 105, 2020 FC 129 at paras. 351-352 (F.C.); *Wesley v. Alberta*, [2024] A.J. No. 1011, 2024 ABCA 276 at paras. 68-72, *per* Slatter J.A. (majority) (Alta. C.A.), leave to appeal refused, [2024] S.C.C.A. No. 437.

recognized.[71] Canada has adopted UNDRIP without qualification, and three jurisdictions in Canada have passed UNDRIP implementation legislation: Canada,[72] B.C.,[73] and the Northwest Territories ("NWT").[74] Courts have held that as a result of Canada's adoption of UNDRIP without qualification, along with this UNDRIP implementation legislation, UNDRIP has been brought into the positive law of the country with immediate legal effect.[75] This means that UNDRIP attracts the presumption of conformity,[76] such that statutes and the Constitution must be interpreted consistently with UNDRIP, absent "unequivocal" legislative intent to the contrary.[77] In *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, the unanimous Supreme Court held that UNDRIP has been "incorporated into the country's domestic positive law" by the federal *United Nations Declaration on the Rights of Indigenous Peoples Act*, section 4(a).[78] Similarly, in *Dickson v. Vuntut Gwitchin First Nation*, the majority of the Supreme Court relied on UNDRIP as an interpretive tool for the *Canadian Charter of Rights and Freedoms*, holding that the *Federal Declaration Act* "brought [UNDRIP] into

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[71] *C92 Reference,* at paras. 4 & 15 (S.C.C.); *Gitxaala*, at para. 78, *per* Dickson J. (majority) (B.C.C.A.); *R. v. Montour*, [2023] Q.J. No. 11554, 2023 QCCS 4154 at paras. 1175 & 1188-1202 (Que. S.C.); *Kebaowek First Nation v. Canadian Nuclear Laboratories*, [2025] F.C.J. No. 300, 2025 FC 319 at paras. 75-76, 80 & 85 (F.C.).

[72] *United Nations Declaration on the Rights of Indigenous Peoples Act,* S.C. 2021, c. 14 [hereinafter "*Federal Declaration Act*"].

[73] *Declaration on the Rights of Indigenous Peoples Act*, S.B.C. 2019, c. 44 [hereinafter "*B.C. Declaration Act*"].

[74] *United Nations Declaration on the Rights of Indigenous Peoples Implementation Act*, S.N.W.T. 2023, c. 36 [hereinafter "*NWT Declaration Act*"].

[75] *C92 Reference*, at paras. 4 & 15 (S.C.C.); *Dickson v. Vuntut Gwitchin First Nation,* [2024] S.C.J. No. 10, 2024 SCC 10 at para. 117, *per* Kasirer and Jamal JJ. (majority) (S.C.C.); *Gitxaala*, at paras. 7 & 78, *per* Dickson J. (majority) (B.C.C.A.); *R. v. Montour*, [2023] Q.J. No. 11554, 2023 QCCS 4154 at paras. 1175 & 1188-1202 (Que. S.C.); *Kebaowek First Nation v. Canadian Nuclear Laboratories*, [2025] F.C.J. No. 300, 2025 FC 319 at para. 80 (F.C.). Although none of these decisions discuss the status of UNDRIP in the Northwest Territories, given the similarities between the *NWT Declaration Act* and the *Federal Declaration Act* and *B.C. Declaration Act*, the status of UNDRIP in the NWT must be the same as in B.C. and Canada, as elaborated later in this section.

[76] *Gitxaala*, at paras. 7, 78 & 129, *per* Dickson J. (majority) (B.C.C.A.); *R. v. Montour*, [2023] Q.J. No. 11554, 2023 QCCS 4154 at paras. 1175 & 1188-1202 (Que. S.C.); *Kebaowek First Nation v. Canadian Nuclear Laboratories*, [2025] F.C.J. No. 300, 2025 FC 319 at paras. 80 & 85 (F.C.).

[77] *R. v. Hape*, [2007] S.C.J. No. 26, 2007 SCC 26 at paras. 53-56, *per* LeBel J. (majority) (S.C.C.).

[78] *C92 Reference,* at para. 4 (S.C.C.), see also para. 15, citing the *Federal Declaration Act*, s. 4(a).

Canadian law".[79]

Lower courts have likewise held that UNDRIP has been incorporated into Canadian law and attracts the presumption of conformity, as a result of the *Federal Declaration Act*.[80] Most recently, in *Gitxaala v. British Columbia (Chief Gold Commissioner)*, the majority of the British Columbia Court of Appeal affirmed that UNDRIP has been incorporated into Canadian law and attracts the presumption of conformity.[81] The majority held that although UNDRIP is not formally binding as a treaty, by enacting the *Federal Declaration Act*, Parliament incorporated UNDRIP into Canada's domestic law.[82] The majority held that this approach is consistent with Canada's dualist system of incorporating international law into domestic law by legislative action.[83] By enacting the *Federal Declaration Act*, Parliament gave domestic legal effect to Canada's commitments in relation to UNDRIP.[84] As a result, the majority held that UNDRIP "should be applied as a weighty source for the interpretation of Canadian law in accordance with the presumption of conformity".[85] The majority likewise held that UNDRIP has been incorporated into B.C.'s positive law with "immediate legal effect", by virtue of B.C.'s *Declaration Act*, and B.C. laws must be interpreted consistently with it.[86] The majority also held that the *B.C. Declaration Act*'s section 2(a) is a "binding Crown promise" that the Crown will act as though the existing rights in UNDRIP apply to B.C. laws, including the common law.[87]

The same conclusions could be drawn about the *NWT Declaration Act*.[88] The *NWT Declaration Act* is almost identical to the federal and B.C. Acts. Given the

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[79] *Dickson v. Vuntut Gwitchin First Nation,* [2024] S.C.J. No. 10, 2024 SCC 10 at para. 117, *per* Kasirer and Jamal JJ. (majority) (S.C.C.); see also para. 317, *per* Martin and O'Bonsawin JJ. (dissenting in part) (S.C.C.).

[80] *Gitxaala,* at paras. 78 & 129, *per* Dickson J. (majority) (B.C.C.A.); *R. v. Montour*, [2023] Q.J. No. 11554, 2023 QCCS 4154 at paras. 1188-1202 (Que. S.C.); *Kebaowek First Nation v. Canadian Nuclear Laboratories*, [2025] F.C.J. No. 300, 2025 FC 319 at paras. 80 & 85 (F.C.).

[81] *Gitxaala,* at paras. 78 & 129, *per* Dickson J. (majority) (B.C.C.A.).

[82] *Gitxaala*, at paras. 66, 78 & 128, *per* Dickson J. (majority) (B.C.C.A.).

[83] *Gitxaala*, at para. 78, *per* Dickson J. (majority) (B.C.C.A.).

[84] *Gitxaala*, at para. 78, *per* Dickson J. (majority) (B.C.C.A.).

[85] *Gitxaala*, at para. 78 (B.C.C.A.), see also para. 129, *per* Dickson J. (majority).

[86] *Gitxaala*, at para. 7 (B.C.C.A.), see also para. 125, *per* Dickson J. (majority).

[87] *Gitxaala*, at para. 161, *per* Dickson J. (majority) (B.C.C.A.). Given the similarities between the *BC Declaration Act*, s. 2(a), and the *Federal Declaration Act*, s. 4(a), presumably the same conclusion could be drawn from the *Federal Declaration Act*, s. 4(a): that it enshrines a binding Crown promise that Canada will act as though the existing rights in UNDRIP apply to Canadian laws, including the common law.

[88] *NWT Declaration Act*.

similarities between them, the *NWT Declaration Act* must likewise incorporate UNDRIP into the domestic positive law of the NWT, attract the presumption of conformity, and constitute a binding Crown promise that the Crown will act as though the existing rights in UNDRIP apply to NWT laws, including the common law, as the authors have argued elsewhere.[89]

This means that throughout Canada, UNDRIP has immediate legal effect and attracts the presumption of conformity, as the authors have argued elsewhere.[90] The presumption of conformity is based on the rule of judicial policy that, as a matter of law, courts will strive to avoid constructions of domestic law pursuant to which the state would be in violation of its international obligations, unless the wording of the statute clearly compels that result.[91] This presumption is rebuttable where the statute "demonstrates an unequivocal legislative intent to default on an international obligation".[92] It applies both to legislation and to the *Canadian Charter of Rights and Freedoms*,[93] which means that legislation and the *Charter* must be interpreted consistently with these international law principles, absent express legislation to the contrary.[94] There is also no principled reason why the presumption should not also apply to section 35.[95]

UNDRIP rights may not all attract the presumption of conformity in the same way. In *Gitxaala,* the majority of the British Columbia Court of Appeal cautioned that not all UNDRIP rights have the same status at international law, so what is required for a law to be consistent with UNDRIP will vary case-by-case.[96] The majority found that UNDRIP contains a mix of binding international rights and obligations, general principles, minimum standards, and aspirations.[97] To determine if a law is consistent with UNDRIP, it will likely be necessary to determine the

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[89] Hille & Abell, at paras. 42-44.

[90] Hille & Abell, at paras. 29-36 & 40-41.

[91] *R. v. Hape*, [2007] S.C.J. No. 26, 2007 SCC 26 at para. 53, *per* LeBel J. (majority) (S.C.C.).

[92] *R. v. Hape*, [2007] S.C.J. No. 26, 2007 SCC 26 at para. 53, *per* LeBel J. (majority) (S.C.C.).

[93] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter the "*Charter*"].

[94] *R. v. Hape*, [2007] S.C.J. No. 26, 2007 SCC 26 at paras. 53-56, *per* LeBel J. (majority) (S.C.C.).

[95] See Hille & Abell, at paras. 14-15. In fact, the Federal Court has found that s. 35 and the duty to consult must be interpreted consistently with UNDRIP: *Kebaowek First Nation v. Canadian Nuclear Laboratories*, [2025] F.C.J. No. 300, 2025 FC 319 at paras. 81-82 & 85 (F.C.).

[96] *Gitxaala*, at paras. 128 & 130, *per* Dickson J. (majority) (B.C.C.A.).

[97] *Gitxaala*, at paras. 97 & 128, *per* Dickson J. (majority) (B.C.C.A.).

source, nature and scope of the relevant UNDRIP Articles.[98] If the UNDRIP Article at issue expresses a binding international right, the law must clearly conform with it.[99] But if the UNDRIP Article expresses an aspiration, it may be enough for the law to be generally harmonious with that aspiration.[100]

As we elaborate in the next section, the right to effective remedies is a binding right at international law, and thus laws across Canada must conform with it.

2. The Right to Effective Remedies is Binding International Law

Many key UNDRIP rights are contained in international conventions Canada has ratified, and are customary international law norms,[101] and are thus incorporated into the domestic common law, binding on Canada, and attract the presumption of conformity,[102] notwithstanding the existence of UNDRIP implementation legislation. For instance, in *Gitxaala*, the majority recognized that the right to self-determination is an UNDRIP right with binding international law status. The right to self-determination, expressed in UNDRIP Article 3, has also been identified as a peremptory norm of international law by the International Law Commission, and is enshrined in binding conventions like the *International Covenant on Civil and Political Rights*, and the *International Covenant on Economic, Social and Cultural Rights*.[103] The majority further held that a state duty to consult Indigenous peoples in connection with state action affecting their territories "is generally accepted as a matter of international law", although the content and contours of the duty to consult, and the international law status of the right to free, prior and informed consent, remain to be determined.[104] The majority left open whether other UNDRIP Articles might also constitute binding international rights.[105]

Although not explicitly recognized by the majority in *Gitxaala*, the right to effective remedies is another such right that — while enshrined in UNDRIP —

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[98] *Gitxaala*, at para. 100, *per* Dickson J. (majority) (B.C.C.A.).

[99] *Gitxaala*, at para. 98, *per* Dickson J. (majority) (B.C.C.A.).

[100] *Gitxaala*, at para. 98, *per* Dickson J. (majority) (B.C.C.A.).

[101] *Gitxaala,* at para. 66, *per* Dickson J. (majority) (B.C.C.A.).

[102] *Nevsun Resources Ltd. v. Araya*, [2020] S.C.J. No. 5, 2020 SCC 5 at paras. 90 & 94-96, *per* Abella J. (majority) (S.C.C.); *R. v. Hape*, [2007] S.C.J. No. 26, 2007 SCC 26 at para. 53, *per* LeBel J. (majority) (S.C.C.); see also *Gitxaala*, at paras. 58, 60 & 62, *per* Dickson J. (majority) (B.C.C.A.).

[103] *Gitxaala*, at para. 66, *per* Dickson J. (majority) (B.C.C.A.); see the *International Covenant on Civil and Political Rights*, 1966, 999 U.N.T.S. 171, Can. T.S. 1976, No. 47, art. 1(1) [hereinafter "ICCPR"]; *International Covenant on Economic, Social and Cultural Rights,* 1966, 993 U.N.T.S. 3, Can. T.S. 1976, No. 46, art. 1(1) [hereinafter "ICESCR"]; *Report of the International Law Commission*, UNGAOR, 77th Sess., Supp. No. 10, UN Doc A/77/10 (2022), at 16 & 85-89.

[104] *Gitxaala*, at para. 69, *per* Dickson J. (majority) (B.C.C.A.).

[105] *Gitxaala*, at paras. 66 & 97, *per* Dickson J. (majority) (B.C.C.A.).

expresses already existing, binding international law. A number of interrelated UNDRIP Articles guarantee Indigenous peoples' right to "effective" remedies in domestic courts to enforce their rights. Article 40 protects Indigenous peoples' right to "effective remedies for all infringements of their individual and collective rights", giving due consideration to the Indigenous peoples' traditions and legal systems.[106] Article 8(2) protects the right to "effective" mechanisms for redress for the dispossession of traditional lands, while Article 32(3) entitles Indigenous peoples to "just and fair redress" for projects affecting their lands and resources without their consent.[107] Article 28(1) protects Indigenous peoples' right to restitution or, when that is not possible, just, fair and equitable compensation for lands and resources that have been taken or damaged without their consent.[108] Articles 27 and 40 uphold the right to fair, independent and transparent processes to adjudicate Indigenous peoples' land rights and resolve conflicts.[109]

The International Lawyers' Association ("ILA") has confirmed numerous times that the right to effective remedies has attained customary international law status.[110] This is because effective remedies are an essential element of the effectiveness of rights.[111] Any human rights obligation carries the inherent requirement that a breach of the right is effectively and adequately repaired.[112]

The right is also fundamental to international conventions that are binding on Canada. Article 2(3) of the ICCPR, which Canada has ratified, affirms the right to effective remedies — including judicial remedies — and enforcement of those remedies.[113] The United Nations Human Rights Council has held that Article 2(3)

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[106] UNDRIP, art. 40.

[107] UNDRIP, arts. 8(2), 32(3). Arts. 11(2), 20(2) also provide for a right of redress for Indigenous peoples' cultural, intellectual, religious and spiritual property taken without their consent, and for any deprivation of Indigenous peoples' means of subsistence and development.

[108] UNDRIP, art. 28.

[109] UNDRIP, arts. 27, 40.

[110] International Law Association, Hague Conference (2010), Rights of Indigenous Peoples Committee, "Interim Report", at 43 & 51-52, online: <https://www.ila-hq.org/en_GB/documents/conference-report-the-hague-2010-13> [hereinafter "ILA Hague Report"]; International Law Association, Sofia Conference (2012), Rights of Indigenous Peoples Committee, "Resolution No. 5/2012", at para. 10, online: <https://www.ila-hq.org/en_GB/documents/conference-resolution-english-sofia-2012-4>; International Law Association, Kyoto Conference (2020), Implementation of the Rights of Indigenous Peoples Committee, "Final Report", at 2 & 11-12, online: <https://www.ila-hq.org/en/documents/ila-comm-impl-rights-ind-peoples-final-report-dec-13-2020>.

[111] ILA Hague Interim Report, at 51-52.

[112] ILA Hague Interim Report, at 51-52.

[113] ICCPR, art. 2(3). The Supreme Court has recognized that the ICCPR is binding on Canada and triggers the presumption of conformity: see *Quebec (Attorney General) v.*

requires states to ensure that individuals have accessible and effective remedies to vindicate their rights, that account for the "special vulnerability" of certain groups.[114] The right to effective remedies is also enshrined in the *International Convention on the Elimination of All Forms of Racial Discrimination,* Article 6, which Canada has ratified.[115] The UN Committee on the Elimination of Racial Discrimination ("UNCERD") has confirmed that the ICERD protects Indigenous peoples against discrimination.[116]

The right to effective remedies is also enshrined in Article XVIII of the *American Declaration of the Rights and Duties of Man* ("*American Declaration*")[117] and Article 25 of the *American Convention on Human Rights* ("*American Convention*").[118] The *American Declaration* is a source of legal obligation for member states of the Organization of American States ("OAS"), ensuing from their human rights obligations contained in the OAS Charter, Article 3, which member states have agreed are defined by the Charter.[119] Canada is an OAS member state,[120] and the *American Declaration* is therefore a source of legal obligation for Canada.

Thus, the right to effective remedies should be treated as both binding convention law and customary international law. As such, it is adopted into the common law, and attracts the presumption of conformity. This should be the case across Canada, regardless of whether a jurisdiction has UNDRIP implementation legislation.

3. The Meaning of Effective Remedies at International Law

At international law, the right to effective remedies entitles Indigenous peoples to remedies that are more than procedural or formal in nature and that are genuinely perceived by Indigenous peoples as being sufficient to rectify (and potentially

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9147-0732 Québec inc., [2020] S.C.J. No. 32, 2020 SCC 32 at para. 39, *per* Brown and Rowe JJ. (majority) (S.C.C.).

[114] Human Rights Committee, "General Comment 31: Nature of the General Legal Obligation on States Parties to the Covenant" (March 29, 2004), UN Doc. CCPR/C/21/Rev.1/Add.13, at para. 15.

[115] *International Convention on the Elimination of All Forms of Racial Discrimination*, 1969, 660 U.N.T.S. 1, Can. T.S. 1970, No. 28, art. 6 [hereinafter "ICERD"].

[116] UNGAOR, 52nd Sess., Supp. No. 18, UN Doc A/52/18 (1997), *Annex V: General Recommendation on the rights of indigenous peoples, adopted by the Committee, at its 1235th meeting, on 18 August 1997*, at 122-123.

[117] *American Declaration of the Rights and Duties of Man*, 2 May 1948, Organization of American States, Art. XVIII [hereinafter "*American Declaration*"].

[118] *American Convention*, art. 25.

[119] *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights* (1989), Advisory Opinion OC-10/89, Inter-Am Ct HR, at paras. 39-45.

[120] *Charter of the Organization of American States*, 1948, 119 U.N.T.S. 3, Can. T.S. 1990, No. 23.

compensate for) breaches of their rights. This means that remedies must be able to provide consequential relief. Purely formal or procedural remedies are not sufficiently effective.

The Inter-American Commission and Court of Human Rights, in interpreting the *American Declaration* and the *American Convention*, have held that it is not enough for remedies to exist formally — they must also be effective.[121] In *Maya Indigenous Communities of the Toledo District v. Belize*, the Inter-American Commission recognized that both the *American Declaration*, Article XVIII, and the *American Convention*, Article 25, protect the right to effective remedies for rights violations,[122] and emphasized that judicial remedies must be more than procedural:

> [A] state's obligation to provide effective judicial remedies is not fulfilled simply by the existence of courts or formal procedures, or even by the ability to resort to the courts. Rather, a state must take affirmative steps to ensure that the remedies provided by the state through its courts are "truly effective in establishing whether there has been a violation of human rights and in providing redress."[123]

The effectiveness of remedies depends on the perception of the Indigenous community that has been harmed. The ILA Committee has held that the right to effective remedies requires remedies that re-establish the prior situation and grant redress to the harmed communities, "taking into primary account their own perception of the matter".[124] They "*must* fulfil the actual result of producing in the victims the *genuine* perception that such measure is adequate to restore their dignity".[125] Remedies must therefore be "*adequate* and *effective, i.e.* capable to remove — to the maximum extent possible — the effects of the wrong *as they are perceived by the communities concerned*".[126] When Indigenous peoples have been deprived of traditional lands, full restitution of the lands is to be preferred because in most cases no compensation is adequate to recompense the deep spiritual significance of the lands for the Indigenous peoples' cultural identity and physical existence. Where restitution is not possible, compensation must be "perceived as

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[121] *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (2001), Inter-Am Ct HR (Ser C) No 79 at para. 114; *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and (8) American Convention on Human Rights)* (1987), Advisory Opinion OC-9/87, Inter-Am Ct HR (Ser A) No. 9, at para. 24.

[122] *Maya Indigenous Communities of the Toledo District v. Belize* (2004), Inter-Am Comm HR, No. 40/04, at para. 174.

[123] *Maya Indigenous Communities of the Toledo District v. Belize* (2004), Inter-Am Comm HR, No. 40/04, at para. 184.

[124] ILA Hague Interim Report, at 40.

[125] ILA Hague Interim Report, at 41 [emphasis in original].

[126] ILA Hague Interim Report, at 51-52 [emphasis in original]; see also 40-41; see also International Law Association, Sofia Conference (2012), Rights of Indigenous Peoples Committee, "Resolution No. 5/2012", at para. 10, online: <https://www.ila-hq.org/en_GB/documents/conference-resolution-english-sofia-2012-4>.

just, fair and equitable by the indigenous communities concerned".[127]

Similarly, the UN Expert Mechanism has affirmed that "[s]tates should prioritize the views of indigenous peoples on the appropriate forms of redress" and "[c]ustoms, values and arbitration procedures of indigenous peoples should be recognized and appropriately respected by the courts and legal procedures".[128] The Inter-American Court has also made it clear that remedies for the violations of Indigenous groups' rights must be guided by the Indigenous groups' laws and customs. In *Yakye Axa Indigenous Community v. Paraguay*, the Court ordered the state to return the Indigenous community's traditional territory.[129] But when states are unable to return Indigenous peoples' territory and resources, "the compensation granted must be guided primarily by the meaning of the land for them".[130] Measures such as the selection of alternative lands, or payment of fair compensation, are not subject to pure state discretion.[131] Rather, "there must be a consensus with the peoples involved, in accordance with their own mechanism of consultation, values, customs and customary law".[132]

When Indigenous peoples have been dispossessed of their traditional lands, the most effective remedy for that dispossession will typically be the return of lands (restitution), or if that is not possible, compensation. The UN High Commissioner on Human Rights has stated in its manual about UNDRIP that "restitution of lands and territories is to be the primary means of redress . . . [o]nly when restitution is not possible should other forms of redress and compensation be explored".[133] Likewise, in interpreting ICERD, UNCERD called upon states to not just protect Indigenous peoples' rights to their traditional territories, but also to return lands taken from Indigenous peoples. Only when return of lands is impossible, "the right to restitution should be substituted by the right to just, fair and prompt compensation . . . which should as far as possible take the form of lands and territories".[134]

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[127] ILA Hague Interim Report, at 41.

[128] UNHRC, *Role of languages and culture in the promotion and protection of the rights and identity of indigenous peoples: Study of the Expert Mechanism on the Rights of Indigenous Peoples*, 21st Sess., UN Doc. A/HRC/21/53 (August 16, 2012), at 22, para. 23.

[129] *Yakye Axa Indigenous Community v. Paraguay* (2005), Inter-Am Ct HR (Ser C) No. 125, at para. 217 [hereinafter "*Yakye Axa Indigenous Community*"].

[130] *Yakye Axa Indigenous Community*, at para. 149.

[131] *Yakye Axa Indigenous Community*, at para. 151.

[132] *Yakye Axa Indigenous Community*, at para. 151; see also para. 217.

[133] UNHCHR, *The United Nations Declaration on the Rights of Indigenous Peoples: A Manual for National Human Rights Institutions*, UN Doc. HR/PUB/13/2 (August 2013) at 35; see also 27 & 33-34.

[134] *CERD General Recommendation*, at 122-123. This principle is also expressed in the International Labour Organization, *Indigenous and Tribal Peoples Convention*, 1989, No. 169 (June 27, 1989), art. 16.

The Inter-American Court has repeatedly ordered states to return Indigenous peoples' lands to them. For instance, in *Yakye Axa*, the Court ordered Paraguay to establish a fund to "purchase the land from private owners or to pay fair compensation to them in the case of expropriation, as appropriate".[135] The Court held that expropriation of non-Indigenous interests may be necessary and proportional in attaining the legitimate objective of restoring the Yakye Axa people with their traditional lands.[136] In *Sawhoyamaxa Indigenous Community v. Paraguay*, the Court ordered Paraguay to amend their legislation and take any necessary administrative action to guarantee the Sawhoyamaxa people ownership rights and full use and enjoyment of their traditional lands.[137] This meant considering purchasing private interests in those lands to allow the return of the lands to their original inhabitants.[138] The Court also ordered, "on equitable grounds", that Paraguay establish a community development fund to address the damage to the community from having been displaced.[139] In *Kalina and Lokono v. Suriname*, the Court ordered Suriname to "review the land titles, transfer rights and short- and long-term leases granted to non-indigenous persons, and determine the modifications that are required" and to "review the terms of the mining activities authorized" inside the Kalina and Lokono peoples' ancestral lands.[140] It also ordered Suriname to rehabilitate and remediate areas that had been affected by mining and to not allow any further mining activities in the area.[141]

The Inter-American Court has also held that if compensation is owed to Indigenous peoples for the loss of their ancestral lands, this compensation must adequately reflect the value of what was lost to those Indigenous peoples who lost it. This means the state must compensate Indigenous peoples not just for economic losses, but also for non-pecuniary, non-economic, cultural losses to present and future generations, and for the offence and indignity of being removed from their ancestral lands without their consent. For example, in *Saramaka,* the Court awarded compensation for non-pecuniary losses, recognizing the cultural disruption and spiritual dislocation caused to the Indigenous peoples by the state's interference with

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[135] *Yakye Axa Indigenous Community*, at para. 218.

[136] *Yakye Axa Indigenous Community*, at paras. 144-154.

[137] *Sawhoyamaxa Indigenous Community v. Paraguay* (2006), Inter-Am Ct HR (Ser C) No. 146, at para. 210 [hereinafter *Sawhoyamaxa Indigenous Community*].

[138] *Sawhoyamaxa Indigenous Community*, at para. 212.

[139] *Sawhoyamaxa Indigenous Community*, at paras. 223-224.

[140] *Kalina and Lokono Peoples v. Suriname* (2015), Inter-Am Ct HR (Ser C) No. 309, at para. 274.

[141] *Kalina and Lokono Peoples v. Suriname* (2015), Inter-Am Ct HR (Ser C) No. 309, at para. 290.

their use and enjoyment of their ancestral lands.[142] The Court took a similar approach in *Yakye Axa*, awarding substantial non-pecuniary damages for "denial of the enjoyment or exercise of their territorial rights" because the Court recognized that the Yakye Axa people "are at risk of losing or suffering irreparable damage to their cultural identity and life and to the cultural heritage to be passed on to future generations".[143]

In the face of all of this, the application of general limitations legislation would purport to bar *both* the return of lands to Indigenous peoples *and* compensation for its loss. Yet at international law, domestic legislation and legal obstacles are no excuse for the failure to provide effective remedies. The duty to remedy, governed by international law, "cannot be modified or not complied with by the State owing such duty, by alleging domestic law provisions".[144] As we develop in the next section, this is part of a separate thread of international law which prevents states from relying on domestic legislation to avoid addressing human rights violations.

4. Domestic Laws and Limitation Periods Are No Bar to the Prosecution of Human Rights Violations at International Law

Unsurprisingly, international law has long been concerned with preventing states from relying on domestic legislation to absolve themselves and their officials from liability and to avoid prosecution for the most egregious rights violations, including war crimes and crimes against humanity. To this end, multiple international conventions make it clear that domestic limitation periods do not apply to such violations. For example, the preamble to the *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity* recognizes that "it is necessary and timely to affirm . . . the principle that there is no period of limitation for war crimes and crimes against humanity, and to secure its universal application".[145] Article 1 of the *Convention on statutory limitations* provides that no statutory limitation shall apply to war crimes, crimes against humanity, and the crime of genocide.[146] The *European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes* upholds the same principle.[147]

Neither of these conventions have been ratified by Canada, but this norm has

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[142] *Saramaka People v. Suriname* (2007), Inter-Am Ct HR (Ser C) No. 172, at paras. 82 & 200.

[143] *Yakye Axa Indigenous Community*, at paras. 203 & 217.

[144] *Sawhoyamaxa*, at para. 197; see also *Yakye Axa Indigenous Community*, at para. 181.

[145] *Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity*, 1968, 754 U.N.T.S. 73, Preamble [hereinafter "*Convention on statutory limitations*"].

[146] *Convention on statutory limitations,* art. 1.

[147] *European Convention on the Non-Applicability of Statutory Limitation to Crime against Humanity and War Crimes*, 1974, E.T.S. No. 82, art. 1.

arguably crystalized into a customary international law norm.[148] In *Agent Orange*, the United States District Court, Eastern District of New York recognized that while the United States are not a signatory of the relevant international conventions, "these instruments suggest the need to recognize a rule under customary international law that no statute of limitations should be applied to war crimes and crimes against humanity".[149]

Although war crimes, crimes against humanity and genocide are the most heinous of rights violations, the norm prohibiting domestic bars to the prosecution of these crimes is consistent with the more general principle at international law that states should not be able to shield themselves from liability for human rights violations, and other international law obligations, with their own domestic statutes. This is, for example, a principle of international treaty law. Under the *Vienna Convention on the Law of Treaties*, which Canada has ratified, a state party "may not invoke the provisions of its internal law as justification for its failure to perform a treaty".[150]

In the Americas, under the *American Convention*, this principle applies to rights violations in general. Article 25 of the *American Convention* has been interpreted to prohibit domestic limitation statutes from barring judicial redress to human rights violations. Article 25(1) provides that everyone has the right to simple, prompt and effective recourse to a competent court for "protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention", even if the violation was committed by someone acting in their official duties.[151] State parties must undertake "(a) to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state; (b) to develop the possibilities of judicial remedy; and (c) to ensure that the competent authorities shall enforce such remedies when granted".[152] Article 25 is often read in conjunction with Arts. 1 and 2, which require state parties to adopt "legislative or other measures as may be necessary to give effect to. . . rights or freedoms [under the Convention]".[153]

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[148] Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law: Volume I: Rules* (Cambridge: Cambridge University Press, 2005), at 614-618.

[149] *Agent Orange Product Liability Litigation, Re, Vietnam Association For Victims of Agent Orange et al. v. Dow Chemical Company et al.,* 373 F.Supp.2d 7 (E.D.N.Y. 2005), 10th March 2005, at 97.

[150] *Vienna Convention on the Law of Treaties*, 1969, 1155 U.N.T.S. 331, Can T.S. 1980, No. 37, art. 27. This rule is without prejudice to Art 46, which provides that a state party "may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance": arts. 27 & 46(1).

[151] *American Convention*, art. 25(1).

[152] *American Convention*, art. 25(2).

[153] *Yakye Axa Indigenous Community*, at paras. 99-105; *American Convention*, arts. 1-2.

Collectively, these Articles have been applied to various types of rights violations and have been found to preclude reliance on domestic limitations statutes or amnesties. For example, in *Bulacio v. Argentina*, the Inter-American Court held that state parties to the *American Convention* have a duty to punish every violation of the rights recognized therein: "extinguishment provisions or any other domestic legal obstacle that attempts to impede the investigation and punishment of those responsible for human rights violations are inadmissible".[154] The Court held that "no domestic legal provision or institution, including extinguishment, can oppose compliance with the judgments of the Court regarding investigation and punishment of those responsible for human rights violations".[155]

The Inter-American Court has also applied this principle to ensure effective remedies for human rights violations and the displacement of Indigenous peoples. In *Moiwana Community v. Suriname*, armed forces of Suriname attacked and killed members of the N'djuka Maroon village. Those who escaped the attack went into exile or internal displacement. At the time of the application, there had allegedly not been an adequate investigation, no one had been prosecuted, and the survivors remained displaced. The Court found that the displacement of the community violated their right to property under Article 21 of the *American Convention*.[156] Further, Suriname's seriously deficient investigation of the attack violated Article 25, and Suriname's *Amnesty Act* did not apply to bar the claims. The Court explained:

> As the Tribunal has asserted on repeated occasions, no domestic law or regulation — including amnesty laws and statutes of limitation — may impede the State's compliance with the Court's orders to investigate and punish perpetrators of human rights violations. If this were not the case, the rights found in the American Convention would be deprived of effective protection. This conclusion is consistent with the letter and spirit of the Convention, as well as general principles of international law.[157]

Article 25 is not limited to prohibiting domestic statutes from procedurally barring extra-judicial killings, or other specific human rights violations. It extends to protect any "fundamental rights recognized by the constitution or laws of the state concerned or by this Convention".[158] It would be difficult — and arguably offensive — to try to separate out state actions that displace Indigenous peoples from their lands and deprive them of those lands from other types of human rights viola-

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[154] *Bulacio v. Argentina* (2003), Inter-Am Ct HR (Ser C) No. 100 at para. 116.

[155] *Bulacio v. Argentina* (2003), Inter-Am Ct HR (Ser C) No. 100 at para. 117.

[156] *Moiwana Community v. Suriname* (2005), Inter-Am Ct HR (Ser C) No. 124 at para. 135.

[157] *Moiwana Community v. Suriname* (2005), Inter-Am Ct HR (Ser C) No. 124 at para. 167.

[158] *American Convention*, art. 25(1).

tions.[159] As a result, the Inter-American Court has given an expansive interpretation to Article 25, and its protection of the principle that domestic laws are no excuse for a state's failure to effectively remedy breaches of Indigenous peoples' rights.

5. Limitations Statutes Must Be Interpreted Consistently with the Right to Effective Remedies

To date, lower courts in Canada have been reluctant to read down limitation statutes in light of UNDRIP, most recently in *Watson v. Canada* and *Wesley v. Alberta*. However, these decisions do not appear to reflect recent recognition of the status and effect of UNDRIP in domestic law. Nor do they give effect to the international legal principles that guarantee effective remedies.

In *Watson*, the Federal Court considered the application of limitation statutes to an action arising from the improper amalgamation of two Bands in 1884.[160] Both Bands were signatories of Treaty 4, under which each of them was promised a reserve. But in 1874 the Bands were improperly amalgamated under the *Indian Act* without their consent.[161] While the Federal Court issued a declaration that the amalgamation was unlawful because the federal Crown failed to implement Treaty 4 in accordance with the honour of the Crown, the Court found that the claim for compensatory damages was barred by statutory limitation periods.[162] This was despite the fact that the plaintiffs sought to rely on the right to effective redress enshrined in UNDRIP, Article 8(2).[163] The Court held that "[c]urrently, *UNDRIP* is a non-binding United Nations resolution supported by Canada as a political commitment" and concluded that although UNDRIP can serve as an interpretative aid, it could not "change or overturn" statutory limitation periods.[164]

The Alberta Court of Appeal similarly rejected the application of UNDRIP to overturn limitation statutes in *Wesley*. The Court upheld a case management judge's

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[159] The Inter-American Court has recognized the importance of traditional territories to Indigenous peoples, and the interconnectedness of lands, culture and survival. In *Mayagna (Sumo) Awas Tingni Community,* the Court recognized that the "close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival": at para. 149.

[160] *Watson v. Canada*, [2020] F.C.J. No. 105, 2020 FC 129 at paras. 3-12 (F.C.). In *Watson*, the claim was brought in the Federal Court, and the *Federal Courts Act*, R.S.C. 1985, c. F-7, and *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, effectively incorporated the applicable Saskatchewan limitations legislation: at para. 353.

[161] *Watson v. Canada*, [2020] F.C.J. No. 105, 2020 FC 129 at para. 522 (F.C.).

[162] *Watson v. Canada*, [2020] F.C.J. No. 105, 2020 FC 129 at paras. 346, 519-520, 522 & 524 (F.C.).

[163] *Watson v. Canada*, [2020] F.C.J. No. 105, 2020 FC 129 at para. 350 (F.C.), citing UNDRIP, art. 8(2).

[164] *Watson v. Canada*, [2020] F.C.J. No. 105, 2020 FC 129 at para. 351 (F.C.).

decision that Alberta's *Limitations Act* applies to Aboriginal right claims.[165] This was on the basis that UNDRIP was not a convention or a treaty, and not a "binding document", nor had it been fully incorporated into Alberta law.[166] According to the Court, the *Federal Declaration Act* was "primarily a platform for focused implementation".[167] The Court held that even if UNDRIP were a treaty, it could not be incorporated into Canadian law as customary international law to the extent that it conflicts with domestic statutes like Alberta's *Limitations Act*.[168] Further, the Court found that there is nothing in UNDRIP suggesting that Indigenous peoples can enforce their rights other than in court under normal court procedures, subject to general defences to enforcement of claims.[169]

These decisions do not appear to reflect current recognition of the status and effect of UNDRIP, nor the current status of the right to effective remedies in domestic law. Although the Federal Court in *Watson* concluded that Saskatchewan's limitations statutes, incorporated by federal statute, were not inconsistent with UNDRIP, the point does not appear to have been fully argued by the plaintiffs, as they did not point to any area of limitations statutes where UNDRIP would be a relevant interpretive aid.[170] Further, the basis for the Court's conclusion appears to have been overtaken by subsequent developments in the law: *Watson* was decided in January 2020, before Parliament enacted the *Federal Declaration Act* in 2021. It was also decided prior to the Supreme Court's recognition of the incorporation of UNDRIP into domestic law in the *C92 Reference*, and the British Columbia Court of Appeal's similar recognition in *Gitxaala*.[171]

While the decision in *Wesley* postdates both Parliament's enactment of the *Federal Declaration Act*, and the Supreme Court's decision in the *C92 Reference*, it reflects a narrower interpretation of the effect of the *Federal Declaration Act*, which is arguably inconsistent with both the Supreme Court's conclusions in the *C92 Reference* and the British Columbia Court of Appeal's conclusions in *Gitxaala*. Both of those decisions found that the *Federal Declaration Act* was far more than "primarily a platform for focused implementation" of UNDRIP, as the Alberta Court

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[165] *Wesley v. Alberta*, [2024] A.J. No. 1011, 2024 ABCA 276 at paras. 68-72, *per* Slatter JA. (majority) (Alta. C.A.).

[166] *Wesley v. Alberta*, [2024] A.J. No. 1011, 2024 ABCA 276 at para. 61, *per* Slatter JA. (majority) (Alta. C.A.).

[167] *Wesley v. Alberta*, [2024] A.J. No. 1011, 2024 ABCA 276 at para. 61, *per* Slatter JA. (majority) (Alta. C.A.).

[168] *Wesley v. Alberta*, [2024] A.J. No. 1011, 2024 ABCA 276 at para. 61, *per* Slatter JA. (majority) (Alta. C.A.).

[169] *Wesley v. Alberta*, [2024] A.J. No. 1011, 2024 ABCA 276 at para. 61, *per* Slatter JA. (majority) (Alta. C.A.).

[170] *Watson v. Canada*, [2020] F.C.J. No. 105, 2020 FC 129 at para. 351 (F.C.).

[171] *C92 Reference* (S.C.C.); *Gitxaala* (B.C.C.A.).

of Appeal characterized it.[172] The Supreme Court found that the *Federal Declaration Act* brought UNDRIP into Canadian law.[173] In *Gitxaala*, the British Columbia Court of Appeal went further, confirming that UNDRIP attracts the presumption of conformity, and finding that some UNDRIP Articles enshrine binding principles of customary international and convention law.[174] The right to effective remedies is one such principle, a customary international law norm that is adopted into the common law "[a]bsent an express derogation".[175] There needs to be "unequivocal legislative intent to default" on this international obligation.[176]

Neither the Alberta nor the Saskatchewan limitations legislation — nor limitations legislation in other Canadian jurisdictions — contain the type of "express derogation"[177] or "unequivocal legislative intent to default" on international obligations[178] required to rebut the automatic incorporation of customary international law norms into the common law, or the presumption of conformity. Instead, provincial limitation statutes have tended to capture Aboriginal and treaty rights claims through generic catch-all provisions, without reference to the unique international law obligation to provide effective remedies to claims rooted in Indigenous rights.

In *Chippewas of Sarnia Band*, the Court of Appeal for Ontario held that generic provisions in limitation statutes do not evidence the "clear and plain intent necessary to extinguish aboriginal or treaty rights".[179] In that case, the Court held that two pre-Confederation limitations statutes could not bar the Band's claims to recover their treaty and title lands. While courts have yet to address how the standard of "unequivocal legislative intent" to derogate from customary international law

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[172] *Wesley v. Alberta*, [2024] A.J. No. 1011, 2024 ABCA 276 at para. 61, *per* Slatter JA. (majority) (Alta. C.A.).

[173] *C92 Reference*, at paras. 4 & 15 (S.C.C.); see also *Dickson v. Vuntut Gwitchin First Nation,* [2024] S.C.J. No. 10, 2024 SCC 10 at para. 117, *per* Kasirer and Jamal JJ. (majority) (S.C.C.).

[174] *Gitxaala*, at paras. 66, 78 & 129, *per* Dickson J. (majority) (B.C.C.A.).

[175] *Nevsun Resources Ltd. v. Araya*, [2020] S.C.J. No. 5, 2020 SCC 5 at para. 90, *per* Abella J. (majority) (S.C.C.), citing *R. v. Hape*, [2007] S.C.J. No. 26, 2007 SCC 26 at para. 39, *per* LeBel J. (majority) (S.C.C.).

[176] *R. v. Hape*, [2007] S.C.J. No. 26, 2007 SCC 26 at para. 53, *per* LeBel J. (majority) (S.C.C.).

[177] *Nevsun Resources Ltd. v. Araya*, [2020] S.C.J. No. 5, 2020 SCC 5 at para. 90, *per* Abella J. (majority) (S.C.C.), citing *R. v. Hape*, [2007] S.C.J. No. 26, 2007 SCC 26 at para. 39, *per* LeBel J. (majority) (S.C.C.).

[178] *R. v. Hape*, [2007] S.C.J. No. 26, 2007 SCC 26 at para. 53, *per* LeBel J. (majority) (S.C.C.).

[179] *Chippewas of Sarnia Band v. Canada (Attorney General)*, [2000] O.J. No. 4804, 51 O.R. (3d) 641 at paras. 229, 240 & 241 (Ont. C.A.), leave to appeal refused, [2001] S.C.C.A. No. 63.

compares to the standard of "clear and plain intent" to extinguish Aboriginal rights,[180] they each require something more than provisions of general application.

In any event, Canadian governments should not be able to control their own liability to Indigenous peoples for historic rights violations through general legislation. Even if conflicting provincial legislation expressly displaced the common law presumption of conformity and the norms in UNDRIP, it cannot displace section 35 of the *Constitution Act, 1982*. Courts have routinely interpreted the content of constitutional rights with reference to binding principles of customary international law — and properly interpreted, section 35 includes a right to effective remedies. Provincial limitation statutes that deny relief to Indigenous peoples would be inapplicable to the extent they limit effective remedies for violations of their rights without sufficient justification — a high bar for governments to meet and limited to a narrow range of public purposes.[181] Ultimately, the decisions in *Watson* and *Wesley* did not grapple with these issues and these issues remain to be decided.

IV. CONCLUSION

This paper has explored the tensions within the Supreme Court's recent decisions in *Shot Both Sides*, *Restoule* and *Takuhikan*. A reading of *Shot Both Sides* that would categorically apply limitation periods to claims for coercive relief for breaches of section 35 rights undercuts the Court's affirmation in *Restoule* and *Takuhikan* that the full range of remedies, including coercive relief, is available for breaches of section 35 rights and honour of the Crown claims. The Court in *Restoule* recognized that "[i]t is a well-established principle of Canadian law that '[w]here there are legal rights there are remedies'".[182] Statutorily barring recourse for the violation of those rights departs from that principle. It also departs from the international law principles of the right to effective remedies, and that domestic limitations statutes cannot bar claims for human rights violations. Given that statutes must be presumed to conform with UNDRIP, and to binding international law principles such as the right to effective remedies, it is hard to see how an interpretation of statutory limitation periods to bar coercive relief for section 35 rights claims is consistent with these principles. Ultimately, the legacy of the *Shot Both Sides* decision remains to be seen. The Court only considered the "narrow legal issue" of whether treaty claims were actionable prior to 1982, and did not assess the applicability, constitutional validity, or operability of limitations legislation. A court considering those questions afresh might well reach a different conclusion.

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[180] *Chippewas of Sarnia Band v. Canada (Attorney General)*, [2000] O.J. No. 4804, 51 O.R. (3d) 641 at para. 242 (Ont. C.A.).

[181] *R. v. Sparrow*, [1990] S.C.J. No. 49, [1990] 1 S.C.R. 1075 at 1111-1113 (S.C.C.); *R. v. Badger*, [1996] S.C.J. No. 39, [1996] 1 S.C.R. 771 at paras. 80-82 (S.C.C.), *per* Cory J. (majority).

[182] *Restoule*, at para. 274 (S.C.C.), citing *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217 at para. 102 (S.C.C.).