

# SCC Declares Treaty Breach But Finds Land And Damages Claim Is Statute Barred



On April 12, 2024, the Supreme Court of Canada ruled that the Blood Tribe's treaty land entitlement claim seeking additional reserve land and damages was statute barred by the Alberta *Limitations of Actions Act*, but that declaratory relief was still warranted to advance reconciliation and other objectives. Writing for a unanimous Court in *Shot Both Sides v. Canada* ([2024 SCC 12](#)), Justice O'Bonsawin issued a declaratory judgment that the Applicant Blood Tribe was deprived of 162.5 square miles of reserve land under Treaty 7, and that this discrepancy was a dishonourable breach of the Treaty by the Crown. While it remains to be seen how the federal government will respond to this judgement, the decision provides important clarification on certain limitations issues and the potential availability of declaratory relief even where claims are statute barred.

## Background and procedural history

This dispute related to the treaty land entitlement provisions in Treaty 7, which covers approximately 130,000 square kilometers (50,000 square miles) in southern Alberta. It was signed on September 22, 1877 and each First Nation signatory was accorded a reserve, the size of which was set by the terms of the treaty in the amount of "one square mile for each family of five persons, or in that proportion for larger and

smaller families” (the treaty land entitlement (“TLE”)).<sup>1</sup> Concerns about the size (and exact location) of the Blood Tribe reserve were voiced in 1888, but did not result in litigation. Research between 1969 and 1971 showed that the boundaries of the reserve did not match the boundaries owed under the terms of the treaty. Negotiations began in 1976, but did not resolve the issue. In 1980, the Blood Tribe brought an action in the Federal Court for breach of fiduciary duty, fraudulent concealment, negligence and breach of treaty (framed as contract in that action); the claim was amended in 1999 to include (among other things) a constitutional claim under section 35(1) of the *Constitution Act, 1982*. That action was held in abeyance pending assessment under the Department of Indian Affairs and Northern Development’s Specific Claims Policy, which ultimately did not resolve the issues. The claim was reactivated and heard in phases in 2016 and 2018, with a judgment of the Federal Court being released in 2019.

The Federal Court (in [2019 FC 789](#)) found that the membership of the Blood Tribe at the time of signing Treaty No. 7 was underestimated, and thus the size of the reserve should have been larger, specifically by 162.5 square miles. The Court concluded that this conduct was discoverable in 1971, but that the applicable limitation period began in 1982, with the coming into force of the section 35(1) of the *Constitution Act, 1982*. This decision (specifically the issue of when the limitation period began to run) was appealed to the Federal Court of Appeal, which held (in [2022 FCA 20](#)) that the claim was statute barred before 1982 as discussed in this [previous blog post](#).

## Limitations issue

On appeal to the Supreme Court, the Blood Tribe argued that their treaty claims were not actionable until 1982 when s. 35(1) of the *Constitution Act, 1982* came into effect. As a consequence, the Blood Tribe contended, their claim is not

statute-barred because the limitations clock did begin to tick until 1982.

The Court disagreed, holding that the treaty claim was actionable and remedies were available prior to the *Constitution Act, 1982* coming into effect and that s. 35(1) did not alter the commencement of the applicable limitation period. The Court held that “treaty rights flow from the treaty, not the Constitution” and that the adoption of s. 35(1) did not create causes of action for the breach of treaty rights but accorded existing rights with constitutional status.<sup>2</sup> At the end of the day, treaties “create and embody enforceable obligations based on the mutual consent of the parties” and are enforceable from the date of execution.<sup>3</sup>

In this case, all parties agreed that the claim was discoverable in 1971. Since the claim was not commenced until 1980, and pursuant to the then-applicable six-year limitation period in Alberta, the Court held that the Blood Tribe’s claim was statute-barred.

The Court noted that they were not addressing the constitutional applicability of limitations legislation on treaty (or Aboriginal) rights claims, which was not advanced by the parties but was raised by several intervenors. This issue will likely be the subject of future litigation.

## **Declaratory judgment**

Despite finding the treaty claim was statute-barred, the Court held that declaratory relief was warranted “given the longevity and magnitude of the Crown’s dishonourable conduct towards the Blood Tribe”.<sup>4</sup> The Court declared that Canada, having provided the Blood Tribe with less reserve land than they were entitled to, “dishonourably breached the treaty land entitlement provisions of Treaty No. 7”.<sup>5</sup>

In making these declarations, the Court affirmed that limitations legislation cannot bar courts from issuing declarations on the constitutionality of the Crown's conduct if the requirements for declaratory relief are met. A bare declaratory judgment does not grant consequential or coercive relief, but sets out the parameters of a legal state of affairs or the legal relationship between the parties. Declaratory relief is discretionary but the jurisprudence makes clear that declarations should not be issued where there is no practical effect.

In this case, the Court found that there would be a practical effect as the Crown's breach of Treaty 7 is ongoing and a declaration of the Crown's dishonourable conduct could help advance reconciliation. It was noted that the Crown opposed the declaration being sought by the Blood Tribe at almost every stage of the litigation and only conceded it breached the TLE in submissions before the Supreme Court of Canada (where it also conceded that declaratory relief could be appropriate). The Court found "this concession, at the eleventh hour of this litigation"<sup>6</sup> should not prevent declaratory relief, which "will serve an important role in clarifying the Blood Tribe's TLE, identifying the Crown's dishonourable conduct, assisting future reconciliation efforts, and helping to restore the honour of the Crown"<sup>7</sup>.

## **Conclusion**

This judgement clarifies that Aboriginal and treaty rights claims were actionable prior to 1982 and that the adoption of s. 35 did not impact the commencement of limitation periods for Aboriginal and treaty rights claims. The judgement ultimately bars the Blood Tribe's recovery of damages and land through the courts, returning the issue to negotiations between the parties. It remains to be seen whether this declaratory judgement will advance the objectives set out by the Supreme Court, but it is clear that the Court saw purpose

in issuing this specific declaratory judgement and that any uncertainty about whether reconciliation efforts would be successful did not in their view diminish its utility.

## Footnotes

1. See *Shot Both Sides v. Canada*, [2024 SCC 12](#) at para 2.
2. *Ibid* at paras 32 (citing *Canada v. Jim Shot Both Sides*, [2022 FCA 20](#) at para 205) and 53.
3. *Shot Both Sides v. Canada*, [2024 SCC 12](#) at para 40.
4. *Ibid* at para 5.
5. *Ibid* at para 83.
6. *Ibid* at para 81.
7. *Ibid* at para 82.

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*The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.*

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