Treaty Litigation:
Some Common Pitfalls and Obstacles

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A. INTRODUCTION

Over the last three decades, courts have struggled with Treaty-based claims. The resulting jurisprudence has constructed a loose framework for interpreting Treaties. The passage of time, contrasting cultural contexts and ill-fitting common law precepts make Treaty litigation challenging and at times uncertain.

This paper identifies a few of the common hurdles facing First Nations and their legal counsel including Treaty interpretation, oral history, limitations, standing and equitable compensation. While by no means purporting to be a comprehensive or exhaustive review of the law in this area, this paper's modest objective is to survey these few challenges to litigating Treaties with an eye to considering how these "pitfalls and obstacles" may be effectively addressed by First Nations and their legal counsel.

B. TREATY INTERPRETATION

1. Principles of Treaty Interpretation

Courts have struggled to interpret the broad promises set out in historic Treaties. The process has been further complicated by claims that substantive promises were made during Treaty negotiations, but were often left out of the final Treaty document.

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To address these challenges, the courts have set out a broad framework for the interpretation of Treaty texts.[2] Justice McLachlin provided a useful overview of the Supreme Court of Canada's ("SCC") principles of Treaty interpretation in her minority judgment in *R. v. Marshall* ("*Marshall*"):

1. Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation;
2. Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the Aboriginal signatories;
3. The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed;
4. In searching for the common intention of the parties, the integrity and honour of the Crown is presumed;
5. In determining the signatories' respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties;
6. The words of the treaty must be given the sense which they would naturally have held for the parties at the time;
7. A technical or contractual interpretation of treaty wording should be avoided
8. While construing the language generously, courts cannot alter the terms of the treaty by exceeding what "is possible on the language" or realistic;
9. Treaty rights of Aboriginal peoples must not be interpreted in a static or rigid way. They are not frozen at the date of signature. The interpreting court must update treaty rights to provide for their modern exercise. This involves determining what modern practices are reasonably incidental to the core treaty right in its modern context.[3]

[2] Whether the courts have remained faithful to these principles is an interesting question, but lies beyond the scope of this paper.
[3] *R. v. Marshall* [1999] C.N.L.R. 161 ("*Marshall*") at para 78.

More recent SCC cases such as *Haida Nation v. British Columbia (Minister of Forests), ("Haida")*[4] and *Mikisew Cree First Nation v. Canada* (*Minister of Canadian Heritage*) ("*Mikisew*")[5], have stressed the importance of upholding the honour of the Crown when interpreting Treaties.

Not unexpectedly, Treaty interpretation appears to be more of an art than a science. While the language of determining common intentions and reconciling the disparate world views of signatories has a ring of honouring and preserving historic promises, the application of these principles is far from straightforward. The SCC's approach suggests a meeting of the minds where none may have, in reality, existed. This is especially problematic in relation to Treaty rights related to activities such as hunting, fishing and trapping. The intensity of settlement and resource development which exists today in previously remote areas (or even in some of the early settled areas) would have been inconceivable to First Nation signatories at the time many of the historical Treaties were negotiated. In this light, it is difficult to conclude that promises not to interfere with traditional pursuits have been upheld in a balanced or reasonable manner.

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[4] *Haida Nation v. British Columbia (Minister of Forests)* [2004] S.C.J. No. 70 at paras 19 and 20: "The honour of the Crown also infuses the processes of treaty making and treaty interpretation. In making and applying treaties, the Crown must act with honour and integrity, avoiding even the appearance of "sharp dealing" (*Badger*, at para 41). Thus in *Marshall, supra*, at para 4, the majority of this Court supported its interpretation of a treaty by stating that "nothing less would uphold the honour and integrity of the Crown in its dealings with the Mi'kmaq people to secure their peace and friendship…."….Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*. Section 35 represents a promise of rights recognition, and "[i]t is always assumed that the Crown intends to fulfil its promises" (*Badger, supra*, at para 41)….It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate."

[5] *Mikisew Cree First Nation v. Sheila Copps [Minister of Canadian Heritage] and Thebacha Road Society* [2005] 3 S.C.R. 338 at paras 51: "….The honour of the Crown is itself a fundamental concept governing treaty interpretation and application that was referred to by Gwynne J. of this Court *as a treaty obligation* as far back as 1895, four years before Treaty 8 was concluded: *Province of Ontario v. Dominion of Canada* (1895), 25 S.C.R. 434, and at pp. 511-12 *per* Gwynne J. (dissenting). While he was in the minority in his view that the treaty obligation to pay Indian annuities imposed a trust on provincial lands, nothing was said by the majority in that case to doubt that the honour of the Crown was pledged to the fulfilment of its obligations to the Indians. This had been the Crown's policy as far back as the *Royal Proclamation of 1763*, and is manifest in the promises recorded in the report of the Commissioners. The honour of the Crown exists as a source of obligation independently of treaties as well, of course. In *Sparrow*, *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010, *Haida Nation* and *Taku River*, the "honour of the Crown" was invoked as a central principle in resolving Aboriginal claims to consultation despite the absence of any treaty."

While the courts have accepted that contextual information such as oral histories should be examined to understand the intention of the signatories fully, First Nation litigants often find the application of this jurisprudence to be less promising and more challenging than expected.

2. Evidence

(a) Oral Promises

Because the text of a Treaty recorded an agreement made orally, the spoken promises made by the Crown are of great significance to the interpretation of that Treaty. This reflects the reality that many Indian signatories could not (and did not) read the Treaty document. The importance of the context in which a Treaty was negotiated to its interpretation was discussed by the SCC in *R. v. Badger* ("*Badger*"):

> . . when considering a treaty, a court must take into account the context in which the treaties were negotiated, concluded and committed to writing. The treaties, as written documents, recorded an agreement that had already been reached orally and they did not always record the full extent of the oral agreement.[6]

In *Marshall,* Binnie J. for the majority stated that it would be "unconscionable for the Crown to ignore the oral terms" of a Treaty.[7] Where there are ambiguities in the text, the court must choose, from among the possible interpretations, one which favours the understanding of the Indian signatories:

> [A]ny ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Indians. A corollary to this principle is that any limitations which restrict the rights of Indians under treaties must be narrowly construed.
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> …
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> The words in a treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction. Rather, they must be interpreted in the sense that they would naturally have been understood by the Indians at the

[6] *R. v. Badger*, [1996] 2 C.N.L.R. 77 (S.C.C.), at para 52.
[7] *Marshall*, at para 12.

> time of signing. This applies, as well to those words in a treaty which impose a limitation on the right which has been granted.[8]

Thus, extrinsic evidence of the oral promises made at the time the Treaty was negotiated is admissible to indicate the signatories' understanding of the Treaty. Sometimes evidence of the oral promises comes from the written reports of the Treaty Commissioners themselves. Other times, it may come from oral history of the First Nations. In *R. v. Horseman* ("*Horseman*"), for instance, the court considered elder interviews about Treaty promises as well as an affidavit signed in 1937 by James Cornwall which discussed the Treaty No. 8 negotiations from the Indian perspective.[9]

(b) Oral History

In *Delgamuukw v. British Columbia* ("*Delgamuukw*") Lamer C.J., as he then was, stated that indigenous oral history should be placed on an equal footing with other types of historical evidence when considering Aboriginal claims:

> Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents.[10]

There is no unique or formal procedure for considering the admissibility of Aboriginal oral history evidence. As with other forms of admissible hearsay, the court must determine whether the evidence is sufficiently necessary and reliable. Death or infirmity of those who personally witnessed the events will suffice for the necessity of oral history.

Despite Lamer C.J.'s comments, subsequent lower court decisions in the context of Treaty interpretation have placed significant restrictions on the use of oral evidence. In *Benoit v. Canada* ("*Benoit*"), the Federal Court of Appeal ("FCA") adopted the methodology championed

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[8] *Badger*, at paras 41 and 52.
[9] *R. v. Horseman* [1990] 1 S.C.R. 901, at pg. 12.
[10] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para 87.

by Professor von Gernet, which would severely limit the use of oral history.[11] Although the trial judge in *Benoit* described Dr. von Gernet's approach as "exceedingly critical", Nadon J.A. held as follows:

> In my view, the approach suggested by Dr. von Gernet to oral history evidence is undeniably a proper approach and is entirely in line with the remarks made by McLachlin C.J. at paragraph 38 of *Mitchell*, *supra*, where she indicated that evidence adduced to support Aboriginal claims should not be weighed in a manner that "fundamentally contravenes the principles of evidence law ...".
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> I agree with Dr. von Gernet that oral history evidence cannot be accepted, *per se*, as factual, unless it has undergone the critical scrutiny that courts and experts, whether they be historians, archaeologists, social scientists, apply to the various types of evidence which they have to deal with. My specific purpose in referring to Dr. von Gernet's Report is to emphasize the fact that the Trial Judge ought to have approached the oral history evidence with caution. In *Mitchell*, *supra*, for example, the Trial Judge and the Supreme Court of Canada accepted the oral history evidence of Grand Chief Mitchell which, McLachlin C.J. points out at paragraph 35 of her Reasons, was confirmed by archeological and historical evidence. In other words, depending on the nature of the oral history at issue, corroboration may well be necessary to render it reliable.[12]

The challenge for First Nation litigants with respect to this approach is that oral history evidence often lacks the markers of reliability courts generally expect of other forms of evidence. Experts like Von Gernet raise concerns with the reliability of oral histories and identifies some of the "deficiencies" which may be perceived as inherent in the very nature of oral transmission including: (1) the "feedback effect" (*i.e.* the incorporation of written documents into oral traditions); (2) the "present past" (*i.e.* the construction of the past to suit present political and social objectives through selective appropriation, remembering, forgetting or inventing); (3) the fallibility of human memory over time and particularly across generations; (4) "overwhelming evidence" that oral traditions do not remain consistent over time. [13]

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[11] *Benoit* v. *Canada*, 2003 FCA 236

[12] *Benoit*, at paras 111 to 113 (emphasis added).

[13] *Oral Narratives and Aboriginal Pasts: An Interdisciplinary Review of the Literature on Oral Traditions and Oral Histories* (Ottawa: Indian and Northern Affairs, 1996), available online at http://www.ainc-inac.gc.ca/pr/pub/orl/index_e.html

Because of these inherent difficulties, oral history evidence is vulnerable to rejection[14] (or minimal weight as assigned by the trial judge) if too much doubt is cast on its veracity. This appears particularly true where oral accounts conflict with the written historical record. Judges tend to favour written records over oral accounts where these sources conflict.[15] At the very least, courts tend to require corroboration of oral accounts by other evidence in the case before they are persuaded of its reliability.[16]

Similarly, where oral history evidence is internally inconsistent,[17] contains glaring inaccuracies or anachronisms,[18] merges written and oral accounts,[19] or is inconsistent with previous accounts

[14] See *Samson v The Queen*, (2005) FC 1622 for a devastating rejection of any independent weight given to oral history evidence of a First Nation in the context of Treaty No. 6..

[15] See *R. v. Marshall,* [2001] 2CNLR 256 (Nova Scotia Prov. Ct.) at paras. 64-65 ["In the present case we have evidence of oral tradition provided by a single witness … On the other hand, we do have a mass of 18th-century documents, both French and British, containing no evidence of seven districts or a grand council. The massive written record is far more convincing than the minimal oral evidence"] aff'd [2005]2 SCR 220(SCC); *Benoit* at para. 27 ["… the reliability and accuracy of the viva voce evidence on which the Trial Judge relied for his conclusion must be viewed against the background of the historical evidence"].

[16] *Benoit* at para. 113 ["… depending on the nature of the oral history at issue, corroboration may well be necessary to render it reliable"]; *Mitchell* at para. 35 ["Grand Chief Mitchell's testimony, confirmed by archaeological and historical evidence, was especially useful because he was trained from an early age in the history of his community"]; Contra, *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700 ("*Tsilhqot'in*"), paras. 151 to 168 and 196.

[17] *Newfoundland (Minister of Government Services and Lands) v. Drew*, [2003] N.J. No. 177 (S.C.T.D.)at para. 210 ["Chief Joe's description of Newfoundland's place within the 'traditional' seven district scheme is not in accord with the understanding of other Mi'kmaq"].

[18] See *R. v. Marshall*, [2001] N.S.J. No. 97, upheld in [2002] N.S.J. No. 98, where Curran P.C.J. referred to a wampum belt in the Vatican Archives, which the Chief of the Mi'kmaq of Nova Scotia mistakenly believed had been made by their ancestors for the Pope when in fact it had been made by Aboriginals in Quebec. In *Newfoundland (Minister of Government Services and Lands) v. Drew*, [2003] N.J. No. 177 (S.C.T.D.) at para. 216, Barry J. rejected a set of Mi'kmaq culture-hero legends as proof of pre-contact use of lands in Newfoundland, in part because they contained such accounts as a story of the hero travelling to England and France in a stone canoe before the arrival of Europeans in the New World.

[19] *Newfoundland (Minister of Government Services and Lands) v. Drew*, [2003] N.J. No. 177 (S.C.T.D.) at para. 210 ["While Chief Joe could relate events dating to 18th century Nova Scotia, the Province submits his understanding of these events can be attributed to his literacy and the effect of written feedback on oral traditions. For example, the Chief alluded to an event in 1749, in apparent reference to the scalping proclamation of Lord Cornwallis. However, memory of this event, which has gained great notoriety in recent Mi'kmaq consciousness, is actually derived from European documents rather than from aboriginal oral traditions"]. The Federal Court excluded the oral genealogical evidence of a witness in *Kingfisher* v. *Canada*, [2001] F.C.J. No. 1229 (T.D.), aff'd [2002] F.C.J. No. 831 (C.A.), because of the witness's own acknowledgement that he learned much about his family history from an elderly historian who owned a local museum (at para 58). In *Ontario (A-G) v. Bear Island Foundation* (1984), 15 D.L.R. (4th) 321 (H.C.J.) at 336 [aff'd [1989] 68 O.R. (2d) 394 (CA); aff'd [1991] 2 S.C.R. 570]:the principal witness's oral history evidence was admitted, but apparently granted negligible weight, in part because the witness did not have ancestors with direct oral knowledge of the events in question, did not speak the native language (and thus could not communicate fully with elders), and had acquired his knowledge late in life and under his own direction.

provided by the community,[20] it tends to be readily discounted, often with devastating results for the First Nation's case.

That said, the negative approach to oral history evidence typified by experts like Von Gernet has not been universally accepted and has, indeed, come under criticism for invalidating indigenous oral traditions.[21] Vickers J., in the 2007 *Tsilhqot'in* trial decision, made the following comments about Von Gernet's approach:

> Despite what Canada has argued, I was left with the impression that Dr. von Gernet would be inclined to give no weight to oral tradition evidence in the absence of some corroboration. His preferred approach, following Vansina, involves the testing of oral tradition evidence produced in court by reference to external sources such as archaeology and documentary history. In the absence of such testing, he would not be prepared to offer an opinion on the weight to be given any particular oral tradition evidence. If such testing did not reveal some corroborative evidence, it is highly unlikely that he would give any weight to the particular oral tradition evidence. This approach is not legally sound. Trial judges have received specific directions that oral tradition evidence, where appropriate, can be given independent weight. If a court were to follow the path suggested by Dr. von Gernet, it would fall into legal error on the strength of the current jurisprudence.[22] [Emphasis added.]

Nevertheless, the overarching consideration for First Nations and their legal counsel in preparing and presenting oral history evidence should focus on how to convince the court of the reliability of this evidence. It is important that First Nation litigants provide oral history evidence that is, where ever possible, corroborated with the other streams of evidence (genealogical, historical, etc.) , particularly on contested issues. When preparing its case, a First Nations litigant should develop a clear and comprehensive methodology for gathering and preparing its oral history evidence, directed at presenting as coherent a picture as possible, striving not only for internal consistency within oral accounts, but also reasonable consistency with the other forms of evidence in the case.

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[20] See *Benoit* at paras. 30-67; *Hwiltsum First Nation v. Canada (Minister of Fisheries and Oceans)*, [2001] F.C.J. No. 1308 (T.D.).

[21] John Burrows, "Listening for a Change: the Courts and Oral Traditions", (2001) 39 Osgoode Hall L.J. 1 – 38 at para. 12

[22] *Tsilhqot'in*, para. 154; see also paras. 151 to 168 and 196.

Ideally, such oral history will be anchored in incontrovertible facts. Use of oral history evidence should be selective and strategic. More evidence is not necessarily better evidence. Mechanisms should exist for screening the evidence, assessing it in light of the theory of the case, identifying and addressing internal inconsistencies, and ensuring that oral history witnesses can show a proper chain of transmission of the evidence. A First Nations litigant's approach to oral history evidence should be as critical as with its most adverse expert witness: only through such rigorous scrutiny can potential weaknesses be identified and addressed, before such weaknesses are exploited by the Crown in court against the First Nation.

Oral history evidence is not simply gathered and then presented; rather, effective use of oral history evidence demands an ongoing and rigorous filtering process. It is necessary to sift through the numerous oral accounts, in light of each other and all of the accumulated evidence, and identify which testimony First Nation litigants choose to lead. In addition, any oral history "experts" (e.g. anthropologists, etc.) should be selected carefully. Their opinions must be tested with a critical eye, and assessed against how their testimony fits with the theory of the case and how they will stand up under cross-examination.

The following measures may enhance the viability of oral history evidence:

1. Identification of key areas that will benefit from strategic use of oral history evidence, such as the geographic extent of particular First Nation(s) usual vocations of hunting, trapping and fishing at the time of adhering, gaining admission or accepting Treaty annuities. The First Nation's perspective about this evidence is just as critical as the existing historical record and expert evidence on this issue, as First Nations have an inherently ability to ground-truth such evidence better than do experts or non-First Nations witnesses.

2. Assessment of the oral history evidence in light of the other evidence in the case, identifying conflicts and gaps in this evidence, reconciling or explaining differences in accounts.

3. Assembly of all extant records of the community's oral history and identify any inconsistencies with present testimony.[23] This was a key factor in *Benoit* as the Federal Court of Appeal held that TARR transcripts illustrating the intent of the Aboriginal signatories were admissible evidence.[24]

4. Determine which witnesses will present the best evidence of the community's oral history, and the most reliable and coherent accounts, separately and together. The first step is to conduct extensive interviews with elders and land users according to the First Nation's protocols and indigenous legal traditions, to establish trust in the community (and, sometime, in neighbouring communities too) and to gather fully informed understanding of the extent oral history testimony.[25] Then, legal counsel for the First Nation litigant will need to determine which or how much oral history evidence to lead. For the witnesses selected to give oral history evidence in court, legal counsel should work with those witnesses[26] to assess the strength of both the witness and their account before they are subjected to a critical line of questioning by the Crown.

5. Retaining an expert witness on the nature of oral history generally and specifically (if possible) about the oral traditions of the First Nation litigant, to provide the judge with background to receive oral history evidence on an equal footing with more familiar modes of proof. Such an expert might provide the court with culturally appropriate methods of assessing the reliability of oral

[23] The Federal Court of Appeal found that there was a voluminous historical record with respect to Treaty 8, *Benoit* v. *Canada*, 2003 FCA 236 at para 115; There can be transcripts, audio and video tapes of elder evidence held by archives and research departments set up by First Nation and tribal organisations (often called "Treaty and Aboriginal Rights Research" or "TARR"). Such records must be reviewed by legal counsel for First Nation litigant, although gaining access to TARR records can be a challenge in and of itself at times. Records of previous oral history evidence are overlooked at the peril of First Nation litigants.

[24] *Benoit*, at paras 28 to 33; The Federal Court of Appeal found that TARR transcripts, the purpose of which TARR interviews was to record Aboriginal understanding of the Treaty promises were admissible as evidence and should have been considered by the trial judge.

[25] This process in the *Tsilhqot'in* Aboriginal title case took a number of years. The language barrier was an important challenge to address, given that many of the elders and land users did not speak English. In addition, a number of elders interviewed in preparation for the case were ultimately unable to provide testimony in court or were unable to provide interview due to age or death.

[26] E.g. through a filtering process like a mock cross-examination, to help the witnesses understand the adversarial process in court and so forth.

histories or the appropriate indicia of reliability[27], and counter western assumptions about oral histories that might unfairly taint their assessment;

6. Prepare for the Crown expert witness that will attempt to discredit the First Nation litigant's oral history evidence. This is a common strategy employed by Crown defendants across Canada – hiring a non-First Nation's person to opine that the First Nation's own stories are inherently unreliable. However unseemly this strategy may be, Crown litigants have used it effectively to discredit First Nation oral history evidence as the discussion above demonstrates. Consequently, First Nation litigants need to consider retaining their own expert to challenge such Crown experts. Not to do so is to risk having whole groups of elders discredited in the court system, with devastating effects for those people personally as well as for future assertions of Treaty rights by that First Nation.[28] To address such Crown experts, First Nation litigants need to research thoroughly, and brace for, the particular methodology of deconstruction of such witnesses, and then be able to demonstrate a pattern of testimony that undermines the integrity of the Crown witness' position on oral history evidence. Part of the preparation by a First Nation litigant to counter such Crown experts could include undertaking its own deconstruction of its oral history evidence before it is made available to the Crown's expert, to highlight potential deficiencies and to develop strategies on how to overcome them.

3. Modified Treaty Rights

While Treaty and Aboriginal rights obtained constitutional protection under section 35(1) of the *Constitution Act, 1982,* prior to the 1982 such rights could be modified and extinguished by the Crown with clear and plain intent.[29] This means that First Nation litigants must be aware of any legislation prior to 1982 that may have modified or extinguished rights set out in their Treaty.

[27] See *William v. British Columbia*, 2004 BCSC 148; 2CNLR380 at para 24; *Tsilhqot'in,* at paras 138, 139, 158 and 168;
[28] This was one of the after-effects of the *Benoit* decision for the Treaty 8 First Nation litigants in northern Alberta.
[29] *R. v. Sparrow*, [1990] 3 C.N.L.R. 160 (S.C.C.) at para 37.

The courts have been reluctant to find that Treaty rights have been extinguished *per se*. However, in *Horseman*[30] and *R. v. Badger* ("*Badger*")[31], the Natural Resource Transfer Agreements ("NRTA"s) in Alberta, Saskatchewan and Manitoba were found to have 'modified' Treaty rights in those Prairie provinces.

The NRTAs were entered by the Parliament of Canada and the Prairie provinces in 1930 to give those provinces jurisdiction over Crown lands and natural resources, a right they did not have when they entered Confederation. Effectively, the SCC has held that the NTRAs extinguished the commercial rights to fish, hunt and trap of the various Treaty signatories in those provinces. However, the right to fish and hunt for sustenance was maintained and, the SCC held, was enlarged to the entire area of the particular province, not just within the particular Treaty territory. The courts in Alberta have also held that the NRTAs have extinguished any right to hunt for food on unoccupied private land.[32]

Legal counsel for First Nation litigants should make themselves aware of any pre-1982 legislation that has the potential to modify Treaty rights, be it the NRTAs or other enactments, pre or post Confederation that could have the effect of modifying the Treaty rights in question.

C. LIMITATION PERIODS

Limitation periods have enormous potential to undermine Treaty-based litigation. Limitations can bar an individual from pursuing an action where an appropriate period of time has expired. Limitations vary from province to province as each common law province has a statute of limitations, setting out the relevant limitation periods for various causes of action.

The policy rationale behind limitations is simple: a party must bring an action in a timely manner. The alleged wrongdoer should not be indefinitely left wondering whether they will be

[30] *Horseman*.
[31] *Badger*.
[32] *R. v. Littlewolf*, [1992] 3 C.N.L.R. 100 (Alta. Q.B.).

found liable. Furthermore, timely legal action prevents evidence from becoming stale as a result of the passage of time.

Typically, the limitation 'clock' begins to tick when all of the elements of the related cause of action have occurred; i.e. the limitation period begins to run from the time the plaintiff is able to bring an action. However, the courts have recognized that this approach can be inequitable in certain situations. For example, under British Columbia's *Limitations Act* (the "*BC Limitation Act*"), a cause of action does not arise until the plaintiff discovers, or with "reasonable diligence", could have discovered, that the damage has been suffered.[33] Where a cause of action is continuing, the limitation period typically runs from each day: the plaintiff can bring an action in respect of all damages caused within the appropriate period immediately preceding the commencement of an action.[34]

This "discoverability principle" was articulated and applied in *Guerin v. the Queen*, ("*Guerin*"), where the SCC found that the delay by Indian and Northern Affairs Canada in providing a First Nation band with a copy of a lease of surrendered reserve lands was akin to equitable fraud and thus postponed the running of the limitation period:

> It is well established that where there has been a fraudulent concealment of the existence of a cause of action, the limitation period will not start to run until the plaintiff discovers the fraud, or until the time when, with reasonable diligence, he ought to have discovered it.[35]

Provincial limitation statutes often contain provisions addressing plaintiffs who are under some legal disability at the time the cause of action arises.[36] These provisions extend limitation periods when it is recognized that a victim may have difficulty bringing an action in a timely fashion. The SCC has also recognized that policy decisions may play a role in extending limitation periods: in *M.(K.) v. M.(H.),* limitation periods for victims of childhood incest were extended

[33] Ie. the "Discoverability Principle." R.S.B.C. 1996, c. 266, s. 6(3),(4). Cf. S.O. 2002, c. 24, s. 5. See also *Central Trust Co. v. Rafuse* 2 S.C.R., para 24.
[34] G.H.L. Fridman, *Introduction to the Canadian Law of Torts*, 2nd Edition (Lexis Nexis: 2003), 227.
[35] *Guerin v. the Queen* [1984] 2 S.C.R. 335 at para. 115.
[36] Fridman, *Introduction to the Canadian Law of Torts*, 227.

until victims had the opportunity to participate in therapy to come to terms with the nature and scope of the abuse suffered.[37]

1. Aboriginal Litigants and Limitations

Despite a panoply of historical and modern obstacles which have prevented Aboriginal peoples from suing the Crown, provincial limitations statutes typically do not provide exemptions for Aboriginal groups.

Since the arrival of Europeans in North America, Aboriginal peoples have seen the alienation of their land, the placement of extensive limitations on their livelihoods, including those which are constitutionally protected Treaty and Aboriginal rights, and the illegal expropriation of band funds and assets. These violations have been so egregious, that Canada instituted the Specific Claims Process[38] and, more recently, an administrative tribunal to deal with outstanding claims.[39] Currently, 588 specific claims which have been researched and submitted to Canada remain unresolved.[40]

Aboriginal groups were also barred from bringing legal proceedings against Canada from 1927 to 1951 under the *Indian Act*.[41]

In *Blueberry River Indian Band v. Canada* ("*Blueberry River Indian Band*"), the SCC suggested that common law restrictions may be inequitable when applied to First Nations:

> When determining the legal effect of dealings between aboriginal peoples and the Crown relating to reserve lands, the sui generis nature of aboriginal title

[37] *M.(K.) v. M.(H.)* (1992), 96 D.L.R., para 289.
[38] The Specific Claims Process is a dispute resolution process instigated by Canada to resolve Aboriginal grievances relating to the Crown's failure to honour Treaty promises, illegal alienation of Indian lands and the misuse of Band assets. A band whose claim is accepted for negotiation and is not negotiated within 3 years, may bring the claim before the Specific Claims Tribunal.
[39] *Specific Claims Tribunal Act*, S.C. 2008, c. 22
[40] Indian and Northern Affairs Canada *Specific Claims Progress Report*. Retrieved from http://www.ainc-inac.gc.ca/al/ldc/spc/prp/index-eng.asp.
[41] Mary C. Hurley, *Settling Comprehensive Land Claims* (Library of Parliament: September 21, 2009), pg. 1.

> requires courts to go beyond the usual restrictions imposed by common law, in order to give the true purpose of the dealings."[42]

Although Canada agrees to waive limitation periods when negotiating specific claims, Canada continues to rely on limitations when First Nation claims have been brought before the courts.[43] Given that many Aboriginal claims are rooted in historical grievances, limitation periods represent a significant barrier to the resolution of Aboriginal issues.

2. Review of Selected Jurisprudence on Limitation Periods and First Nation Claims

A series of cases have considered the application of limitations to Aboriginal claims. While some courts have strictly applied provincial statutes of limitations in actions involving Aboriginal groups[44], the cases outlined below suggest that in certain circumstances limitation statutes will be not apply to Aboriginal claims.

(a) Stoney Creek

In *Stoney Creek Indian Band v. British Columbia* ("*Stoney Creek*"), the British Columbia Supreme Court ("BCSC") found that the band's claims against a company which constructed an on reserve road without authorization could not be statute barred by British Columbia's *Limitations Act* (the "*BC Limitations Act*") because the matter fell within federal jurisdiction under s. 91(24) of the *Constitution Act*, 1867:[45]

> In sum, the law in this area remains somewhat unsettled and continues to evolve. However, the better view, in my opinion, is that the right to claim damages for interference with Indian reserve lands not only rests upon the right to possession of those lands, but is sufficiently integral to such possession as to share the same characterization for constitutional purposes. Therefore, the provisions of the [BC

[42] *Blueberry River Indian Band v. Canada* (*Department of Indian and Northern Affairs*) [1995] 4 S.C.R. 344, at para 7.
[43] See cases discussed below. One may question how this is consistent from a policy perspective …
[44] See *Lower Kootenay Indian Band v. Canada* [1992] 2 C.N.L.R. 54.
[45] *Stoney Creek Indian Band v. British Columbia* [1999] 1 C.N.L.R. 192 (B.C.S.C.).

Limitation] Act upon which Alcan relies [ss. 3(2) and 8] are constitutionally inapplicable.[46]

The trial judge found that section 88 of the *Indian Act* ("section 88") was not applicable, as section 88 does not apply to Indian lands.[47] While the BCSC decision was set aside by the British Columbia Court of Appeal, ("BCCA"), the appellant court did not overturn the trial judge's reasoning with respect to limitations.[48]

(b) Blueberry River

In *Blueberry River*, the Blueberry River and Doig River First Nations sued Canada for breach of fiduciary duty in federal court. The SCC held in favour of the band; however, the SCC also determined that the *BC Limitation Act* applied. Under the doctrine of discoverability, the action was not statute-barred as the bands commenced litigation soon after they learned about the breach; however, recoverable losses were limited to those within 30 years following the date of transfer of the reserve, as per the ultimate 30 year limitation period set out in the statute.

The *BC Limitation Act* applied in *Blueberry River* as a result of the action being brought in Federal Court. Under the s. 39 of the *Federal Court Act*, provincial limitation acts are expressly incorporated into actions brought in the Federal Court.[49] Thus, in *Blueberry River*, the *BC Limitation Act* was found to apply as a federal statute, through referential incorporation under the *Federal Court Act*.

(c) Chippewas of Sarnia Band

Stoney Creek was considered by the Ontario Court of Appeal ("ONCA") in *Chippewas of Sarnia Band v. Canada* ("*Chippewas of Sarnia*"). In *Chippewas of Sarnia*, the band claimed a large tract of former band-owned land in southern Ontario that the Crown had conveyed to an individual in the nineteenth century without carrying out a proper surrender.

[46] *Stoney Creek*, para 69.
[47] *Stoney Creek*, para 29.
[48] *Indian Act*, R.S.C. 1985, c. I-5, section 88.
[49] *Federal Courts Act*, R.S.C. 1985, c. F-7.

Like the BCSC decision in *Stoney Creek*, the ONCA found that statutory limitations did not bar the claim of the Chippewas.[50] Unlike *Blueberry River*, provincial limitation statutes were not incorporated into the applicable federal. Furthermore, the action did not fall under the *Crown Liability and Proceedings Act*, which incorporates Ontario limitation statutes by reference, or the *Nullum Tempus Act*, which sets out a 60 year limitation period, as the Chippewas' action was not a "proceeding by the Crown", a requirement of both statutes.[51] Nor did the 1834 and 1859 limitation statutes contain the clear and plain intent necessary to extinguish Aboriginal rights.[52]

Chippewas of Sarnia mirrors the decision in *Stoney Creek:* the provincial law did not apply, because the Aboriginal interest fell within s. 91(24) of the *Constitution Act, 1867*. As the action was brought in provincial, rather than federal court (unlike *Blueberry River*) no limitation statutes were applicable through referential incorporation.

(d) Wewaykum[53]

In *Wewaykum*, as in *Blueberry River*, the *BC Limitation Act* was found to apply as federal law, through referential incorporation under the *Federal Court Act*:[54]

> Section 39(1) effectively incorporates by reference the applicable British Columbia limitation legislation, but the relevant provisions apply as federal law, not as provincial law: Blueberry River, supra, at para.107.[55]

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[50] *Chippewas of Sarnia v. Canada* (*Attorney General*) 2000 CanLII 5620 (O.N.C.A.), at para 242.
[51] *Chippewas of Sarnia v. Canada*, at para 229.
[52] *Chippewas of Sarnia v. Canada*,at para 241.
[53] Note: *Wewaykum* is relied on in *Papaschase Indian Band* (*Descendants of*) *v. Canada* (*Attorney General*), 2004 ABQB 655 in which a provincial limitation statute was found to apply to a matter brought in the Alberta Court of Queen's Bench. While the trial judgment suggests that provincial limitation statutes can apply to Aboriginal actions brought in provincial court, the court of appeal in *Papaschase Indian Band No. 136* (*Descendants of*) v. *Canada* (*Attorney General*) [2007] 2 C.N.L.R. 28 (A.C.A.), at para 145 suggests that the issue of constitutionality would have been revisited If the case had not been decided on other bases: "that renders it unnecessary to discuss other limitations issues such as the argument against the competence of provincial legislation to trench upon Aboriginal or treaty rights, or the rebuttal that that provincial legislation is federal legislation by incorporation." If the reasoning set out in *Stoney Creek* was followed, the writer is of the opinion that the ACA would have found that the limitation statute did not apply.
[54] *Wewaykum Indian Band v. Canada* (1999), 27 R.P.R. (3d) 157 (F.C.A.).
[55] *Wewaykum*, at para 114.

(e) Tsilhqot'in Nation

In *Tsilhqot'in Nation v. British Columbia* ("*Tsilhqot'in*"), the BCSC considered the application of the *BC Limitation Act* to a claim of infringement of Aboriginal rights and title.[56] Although not a Treaty case, *Tsilhqot'in* provides a useful analysis, as it considers the applicability of provincial limitation statutes for Aboriginal rights claims through section 88 of the *Indian Act*.

Vickers J. applied the four-step analysis set out in *R. v. Morris* ("*Morris")* to consider whether the *BC Limitation Act* was applicable to the Aboriginal title claim.[57] He found that the *BC Limitation Act* did not apply, as the statute was a provincial law that affected Aboriginal title, which lies at the core of Indianess:

> For the reasons I have already discussed in the section on constitutional issues, I conclude that British Columbia's *Limitation Act* is constitutionally inapplicable to claims for unjustified infringement of Aboriginal title. To conclude that the *Limitation Act* applies to such a claim would mean that with the passage of time and the application of the provisions of the *Act*, the Province could effectively extinguish Aboriginal title. Granting the Province the ability to extinguish Aboriginal title is contrary to law. Provincial laws that affect Aboriginal title lands go to the core of Indianness and do not apply to those lands. This is true even though the law purports to be of general application.[58]

Vickers J. went on to find that the *BC Limitation Act* did not apply to Aboriginal title actions under section 88 of the *Indian Act*, because section 88 does not apply to land.[59] This reasoning is identical to the *Stoney Creek* and *Chippewas of Sarnia* judgments.

More relevant, however, with respect to Treaty rights, Justice Vickers found that through section 88 the *BC Limitation Act* applied to the claims of unjustified infringement of an Aboriginal right:[60]

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[56] *Tsilhqot'in v. British Columbia,* 2007 BCSC 1700, at para 1308.
[57] *R. v. Morris*, 2006 SCC 59.
[58] *Tsilhqot'in*, at para 1314.
[59] *Tsilhqot'in*, at para 1318.
[60] *Tsilhqot'in*, at para 1319.

> Aboriginal rights apart from title area are a core federal matter under s. 91(24) of the Constitution Act, 1867. Section 88 of the Indian Act makes provincial "laws of general application...applicable to and in respect of Indians in the province..." The exception referred to in s. 88 do not apply in this instance and accordingly, I conclude that s. 88 does constitutionally invigorate the Limitation Act. As a result, the Limitation Act applies to claims of unjustified infringement of An Aboriginal right other than Aboriginal title. The principle of discoverability would be applicable and the limitation period would run only from the date when a party became aware of a cause of action. Accordingly, the period would begin to run from the time of the decision in Sparrow, namely May 31, 1990.[61]

Vickers J. subjected Aboriginal rights to the *BC Limitation Act* because the section 88 exemption does not apply to Indians, only lands reserved for Indians:

> The application of s. 88 to "Lands reserved for the Indians" has not been conclusively resolved by the Supreme Court of Canada. On a consideration of the case law outlined above, I conclude that provision is directed only to "Indians" and cannot be used to invigorate provincial legislation in its application to Aboriginal title lands.[62]

As the Aboriginal rights claims were advanced within the applicable limitation period, they were not barred by statute.

Vickers J.'s analysis is in keeping with the cases discussed above, which suggest that provincial limitation acts will not generally apply to actions brought in common law provincial courts unless the limitation statute applies as a law of general application under section 88.

(f) Athabasca Chipewyan

In contrast, actions brought in Federal Court are subject to the relevant provincial limitation statute, if the statute is referentially incorporated under the *Federal Court Act*.

Recently, the Alberta Court of Appeal ("ABCA") released its decision in *Athabasca Chipewyan First Nation v. Alberta* (*Minister of Energy*) ("*Athabasca Chipewyan*"), a consultation case

[61] *Tsilhqot'in*, at para 1319.
[62] *Tsilhqot'in*, at para 1039.

concerning the judicial review of a series of leases granted to Shell Oil.[63] On its face, *Athabasca Chipewyan* appears to contradict the cases discussed above. ABCA dismissed the case based on the application of the six month limitation period set out in then Rule 753.11 of the Alberta Rules of Court. *Wewaykum* is referred to for the general proposition that limitations can apply to Aboriginal groups.[64] Interestingly, *Athabasca Chipewyan* contains no discussion of the applicability of provincial limitation laws to Indian bands.

While *Athabasca Chipewyan* is a provincial court case in which provincial limitations were applied, conceivably Rule 753.11 could have been found to apply as a law of general application under section 88. Through this reasoning, *Athabasca Chipewyan* can be reconciled with the other cases; however, this analysis is not contained in the decision.

3. Other Jurisdictions

In *Oneida County v. Oneida Indian Nation* the U.S. Supreme Court considered the application of limitations to an Indian claim involving the unlawful alienation of Indian land. The U.S. Supreme Court found that no statutory limitation applied to the Oneida claim:

> The legislative history of the successive amendments to 2415 is replete with evidence of Congress' concern that the United States had failed to live up to its responsibilities as trustee for the Indians, and that the Department of the Interior had not acted with appropriate dispatch in meeting the deadlines provided by 2415. E. g., Authorizing Indian Tribes to Bring Certain Actions on Behalf of their Members with Respect to Certain Legal Claims, and for Other Purposes, H. R. Rep. No. 97-954, p. 5 (1982). By providing a 1-year limitations period for claims that the Secretary decides not to pursue, Congress intended to give the Indians one last opportunity to file suits covered by 2415(a) and (b) on their own behalf. Thus, we think the statutory framework adopted in 1982 presumes the existence of an Indian right of action not otherwise subject to any statute of limitations. It would be a violation of Congress' will were we to hold that a state statute of limitations period should be borrowed in these circumstances.

[63] *Athabasca Chipewyan First Nation v. Alberta* (*Minister of Energy*) 2011 ABCA 29.
[64] *Athabasca Chipewyan*, at para 26.

4. Comment

Despite strong policy supporting the waiver of limitations in connection with First Nation claims, courts have consistently upheld provincial limitation periods where limitation periods are referentially incorporated by federal statutes and in cases not involving land, incorporated as laws of general application under section 88.

The case law to date suggests that, where provincial limitation statutes are referentially incorporated by federal legislation such as the *Federal Court Act,* subject to discoverability, the limitation will apply to Aboriginal claims.

Where provincial limitation statutes are not referentially incorporated, they may still apply to First Nation claims under section 88 of the *Indian Act* with respect to claims based on Aboriginal and Treaty rights. As section 88 does not apply to Indian lands, provincial limitations will not be saved by section 88 in claims involving land, such as those relating to Aboriginal title or reserve lands.

Where Treaties are involved, perhaps the most important issue to keep in mind with respect to provincial limitations is the discoverability principle. If an action may be subject to limitations, legal proceedings should be commenced as soon as possible once the alleged wrongdoing has been brought to the plaintiff's attention. This is especially important where First Nations engage in long-drawn out negotiations outside of the court process. For litigation to remain an option, court actions should be initiated and if necessary, placed in abeyance.

D. EQUITABLE COMPENSATION

First Nation litigants who bring Treaty litigation often sue the Crown for historic breaches of their respective Treaty, breaches that sometime stretch well back in time by fifty, one hundred or even one hundred and fifty years. Measuring the damages the Crown should pay is not an easy task. The decision in *Whitefish Lake Band of Indians v. Canada* ("*Whitefish*")[65] helped to

[65] *Whitefish*, 2007 OCA 744.

clarify when equitable compensation is available for historic breaches of lawful obligations by the Crown to First Nations.

The question raised in the appeal of *Whitefish*, was whether the Crown can avoid making full redress to an Indian Band for a historic wrong it indisputably committed, notwithstanding the passage of time. The appeal was about the compensation that equity awards when a fiduciary has breach its duty and the award must account for losses arising from the breach over time.

At trial, Canada admitted that it breached its fiduciary duty to the Whitefish Lake Band which surrendered the timber rights to its reserve in 1886. The Crown sold the timber rights to 76 acres of the reserve for $316. The purchaser was a Member of Parliament, who flipped the timber rights for $43,000 in 1887. The following year, the timber rights were flipped again for $50,000 to $55,000. The trial judge assessed that the value of the timber rights in 1886 was $31,600. The main issue for the appeal was how to bring that value forward to account for inflation and loss of use over time.

Justice John Laskin, writing for all three justices of ONCA, held as follows:

> I would allow the appeal on this issue. In my view, the trial judge erred in principle by failing to award Whitefish equitable compensation for its lost investment opportunity caused by the Crown's breach of fiduciary duty. Whitefish is entitled to compensation measured by the amount the fair value of its timber rights would have earned in the Whitefish trust account maintained by the government for its benefit, but discounted to reflect realistic contingencies. Because the deficiencies in the record prevent this court from assessing Whitefish's compensation, I would order a new hearing on this issue.[66]

ONCA ordered a new hearing because the evidence was meagre at best in terms of what would have happened to the money over time in Whitefish's trust account held by Indian Affairs. There were only 4 years of account records submitted at trial, which could not be stretched out over a period of 120 years. There was conflicting evidence whether Indian Affairs paid compound interest on band accounts between 1886 and 1969. ONCA was also left with some

[66] *Whitefish*, at para 132.

doubt as to how Whitefish might have used some of the money over time and what discount should be applied to the equitable compensation to address "realistic contingencies."

Whitefish suggests that equitable compensation will be based on an approximation of actual spending patterns of the First Nations, derived from historic band trust account transactions. As such, equitable compensation awards will range depending on the historic spending habits of the relevant band. Assessing equitable damages may be as much an art as a science.[67] It is recommended that First Nation litigants hire an expert to examine the trust records of a band prior to considering a request for equitable compensation.

E. STANDING

Although not a typical problem in most Treaty cases, standing can become an issue when the Treaty right in question is one that benefits an individual rather than the collective, or when there is some doubt as to the nature of the collective itself. While Treaty-based litigation are most often brought by way of representative proceedings, this approach can be problematic where an individual wishes to litigate without the support of the associated First Nation. In recent years, class action proceedings have been encouraged as an alternative route for groups of individuals to access justice.

The decision in *Soldier v. Canada* (*Attorney General*) ("*Soldier*")[68] sheds some light on the complexity faced by individual Aboriginal litigants. In *Soldier*, Indians under Treaties No. 1 and 2 brought a class proceeding against the Attorney General of Canada with regard to the payment of annuities pursuant to their respective Treaties. At trial, Simonsen J. refused to certify the action stating that the right should have been enforced by the Indian band by way of representative action, not as an individual right enforced via class proceeding.[69] Simonsen J.

[67] In *Guerin*, the Department of Indian Affairs leased surrendered reserve land on much less valuable terms than what had been promised to the First Nation. The SCC accepted as fair the global assessment of equitable damages of $10 million made by the trial judge based on all sorts of factors other than a straight measure of damages at the time of breach brought forward to the date of trial: see paras. 47, 48, 53, 54, 75 and 117.
[68] *Soldier v. Canada (Attorney General)*, [2009] 2 C.N.L.R. 362 (MCA)
[69] *Soldier* (MCA) at para 16.

found that the plaintiffs did not fulfill the requirements of the *Class Proceedings Act*[70], as a class action was not the preferable procedure due to the nature of the rights involved.[71] Simonsen J. also found that the plaintiffs were not an adequate representative of the interests of the class, as they did not intend to introduce any evidence beyond the Treaty texts.[72]

Steel J.A., for a unanimous Manitoba Court of Appeal ("MCA"), acknowledged the lack of clarity surrounding the law in this area, and found that the trial judge's decision fell within her discretion in matters of fact and mixed fact and law. As a result, the trial decision which held that the class proceeding was not the preferable procedure was upheld.

Steel J.A., did not, however, agree that the lack of standing was related to the nature of the right in question:

> Given that low threshold, I believe the judge erred when she held that the plaintiffs had no standing because entitlement to the annuity under Treaties No. 1 and 2 is a collective right for which an individual may not sue. Quite simply, the law in this area is not sufficiently clear to conclude that it is beyond doubt that the action could not succeed at trial.[73]
>
> ...
>
> it becomes clear that the answer to whether this is a matter of collective rights to be litigated by way of a representative action or a matter of common rights to be litigated by way of class proceedings is not so clear a matter of law that it can be said that it is plain and obvious that the plaintiffs have no standing and therefore no cause of action. I find that the judge erred in so holding.[74]

Interestingly, the MCA judgment suggests that different types of Treaty rights may require different treatment by the courts:

> However, some aboriginal rights are personal or private rights. It may even be argued that different types of treaty rights should be treated differently and that, as the treaty right at issue here involves the payment of money or provision of

[70] *The Class Proceedings Act*, C.C.S.M. c. C130.
[71] *Soldier v. Attorney General of Canada; Bone v. Attorney General of Canada* 2006 MBQB 50 at para 75.
[72] *Soldier* (MBQB), at para 77.
[73] *Soldier* (MCA), at para 46.
[74] *Soldier* (MCA), at para 59.

> goods to Indians by the government, it is different from broader treaty rights involving hunting, fishing or other traditional Aboriginal activities (which are more akin to Aboriginal rights).[75]

While the trial judgment relied on *Papaschase Indian Band* (*Descendants of*) *v. Canada* (*Attorney General*)[76] for the proposition that a representative action is the preferred procedure for the assertion of collective rights, other reasons were put forward by the trial judge for refusing to certify the class, including the opting out provisions in class actions, which are not found in representative actions.[77] Ultimately, the MCA found that given the lack of clarity in the law, the decision fell within the trial judge's discretion:

> Given the continuing controversy across the country as to which vehicle is more appropriate in which circumstance, it cannot be said that the certification judge erred in principle or committed palpable and overriding error when, after weighing the advantages and disadvantages, she decided that in this case, a representative action would be the preferable procedure.[78]

The MCA also considered the trial judge's finding that the plaintiffs were not the appropriate representatives, because they did not intend to adduce any expert or historical evidence. While Steel J.A. notes that by itself, this may not have been fatal to their claim, he echoes the trial judges concerns about the lack of evidence the plaintiffs intended to put forward:

> While strategy and tactics may change as litigation progresses, representative plaintiffs purporting to advance litigation on behalf of approximately 40,000 individuals entitled to treaty annuity payments must, at a minimum, demonstrate an understanding of the jurisprudence on treaty interpretation. The plaintiffs' stated intention not to adduce any expert evidence regarding context or history could be fatal to the claim and highly prejudicial to class members. The certification judge was rightly concerned about the adequacy of representation of the class in this case. Her reservations may not have been determinative if that were the only missing criterion. She may, in that case, have decided to adjourn the matter, allowing for the filing of an amended litigation plan. But, given her finding on preferability, it confirms her decision.

[75] *Soldier* (MCA), at para 49.
[76] *Papaschase Indian Band* (*Descendants of*) *v. Canada* (*Attorney General*), 2004 ABQB 655
[77] *Soldier* (MCQB), at paras 75 and 77.
[78] *Soldier* (MCA), at para 89.

While further clarification is needed in this area of the law, *Soldier* confirms that individuals may have significant hurdles in bringing Treaty-related litigation when they do not have the backing of their respective First Nation through a representative action. If an individual chooses to bring a class proceeding, they should be aware that the law in this area in unclear. Class action representatives should confirm that they fit within the relevant class proceeding legislation and ensure that they will be presenting a sufficient evidentiary basis to substantiate their claim.

Individual Treaty-litigants should seek the backing of their First Nation through a representative action, where possible. A letter of support or a band-council resolution from the respective First Nation may be sufficient to support the standing of the individual to bring the action.

F. SUMMARY

Before any Treaty-based litigation is commenced, First Nation litigants and their legal counsel should thoroughly consider the challenges associated with such proceedings. This paper reviews some of the challenges or issues to be considered. In particular, close attention should be paid to Treaty-interpretation issues and the evidentiary basis which the action is to be relied on. When applicable, the impact of legislation, including limitations, should also be considered as well as any potential standing issues.