Litigation developments: Aboriginal title and fee simple title

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On Nov. 12, 2024, the Court of King's Bench of New Brunswick issued a decision in *Wolastoqey Nations v New Brunswick and Canada, et al*, 2024 NBKB 203 that adds to a growing body of law in Canada beginning to define the relationship between Aboriginal title and fee simple title.

In this article, we describe the Wolastoqey title claim and judgment on the motions, explain how the decision aligns with recent trends in Aboriginal title jurisprudence, and reflect on how Aboriginal title claims over lands held in fee simple may unfold in future litigation.

The Wolastoqey title claim

In 2021, six Wolastoqey First Nations - the Wolastoqey Nation at Welamukotuk (Oromocto First Nation), Sitansisk (Saint Mary's First Nation), Pilick (Kingsclear First Nation), Wotstak (Woodstock First Nation), Neqotkuk (Tobique First Nation), and Matawaskiye (Madawaska Maliseet First Nation) (collectively, the Wolastoqey Nation or the Plaintiffs) - filed a Notice of Action with an attached Statement of Claim. The named Defendants to the action included the Attorneys General of New Brunswick and Canada (AGNB and AGC), NB Power, and seven private corporate entities referred to as the "Industrial Defendants" (the IDs).

The Plaintiff's *Amended Amended Statement of Claim* (the Claim) seeks a declaration of Aboriginal title over more than 50 per cent of New Brunswick, including approximately 252,758 parcels of land held in fee simple by private individuals and corporate entities. The Claim seeks consequential relief from the Crown and the IDs but does not pursue relief against fee simple holders not named as Defendants who hold fee simple in the claimed title area (the Strangers to the Claim).

The Plaintiffs do not contest the IDs' ownership of fee simple lands, nor do they allege any wrongdoing by any of the IDs, but they challenge the original Crown grants that transferred those lands and argue that their claimed Aboriginal title supersedes fee simple interests. As a remedy, the Plaintiffs seek to cancel the original Crown grants or, alternatively, obtain possession of the lands.

Following amendments to the Claim to specifically include the IDs, the AGNB and ID H.J. Crabbe & Sons, J.D. Irving, et. al. and Acadian Timber, et. al. (collectively the Moving Defendants) filed motions to strike sections of the Plaintiffs pleadings pertaining to the IDs and Strangers to the Claim.

Nature of the motions

The IDs argued that Aboriginal title was legally incompatible with lands held in fee simple, and therefore the pleadings against them had no reasonable chance of success and should be struck. They also argued that the pleadings were scandalous, frivolous, or vexatious. The IDs asserted that they should not be required to defend against this litigation as there is no direct link between the Plaintiffs and themselves sufficient to ground a declaration and relief against them.

The AGNB sought to strike portions of the Claim, asserting that the court lacked jurisdiction to declare Aboriginal title over fee simple lands held by Strangers to the Claim. It argued that such declarations would require material facts not pleaded and raised procedural defects.

Findings of the court

The court issued a decision responding to the motions filed by both the IDs and the AGNB. The court granted the motions in part.

The court dismissed the argument raised by the Moving Defendants that the pleadings were frivolous, vexatious, or abusive.[1]

The court held that the Plaintiffs' attempt to seek private property-based remedies directly against the IDs lacked a legal basis given there was no private law cause of action alleged nor a direct legal relationship between the Plaintiffs and the IDs.[2]

The court determined that the Claim against the IDs improperly seeks property law-based remedies directly from private third parties for constitutional breaches attributed to the Crown.[3] It concluded that involving private parties - against whom no private law cause of action has been asserted and no direct legal relationship established - in a constitutional challenge against the Crown is legally unsustainable.[4]

The court emphasized that Aboriginal title claims are constitutionally grounded and pertain to the *sui generis* relationship between Aboriginal groups and the Crown.[5] Consequently, private parties, including the IDs, cannot be directly implicated in such claims. The Crown alone bears constitutional obligations in this context. If Aboriginal title is recognized, it is declared against the Crown, not private parties.[6]

The court thus granted the motion in part and released the IDs from the proceedings, leaving the AGNB and the AGC as sole defendants.

Notably, the court concluded that Aboriginal title could be declared over privately owned lands held in fee simple.[7] Having come to this conclusion, the court stressed that any resolution of conflicting land interests would fall on the Crown, not private parties, who have "no *legal* reconciliatory role to play between the Crown and the Plaintiffs."[8] Such

conflicts would require reconciliation efforts between the Crown and the Plaintiffs, potentially involving expropriation and compensation for private landholders. Indeed, the "land interests of the IDs will form part of the polycentric reconciliation considerations of the Crown".[10]

The court clarified that "strik[ing] the pleadings that draw private parties into a constitutional claim arising between the Crown and the Aboriginal group does not mean that the Aboriginal group will be denied the possible remedy of repossessing land owned by the IDs." It noted that "[t]he Crown holds the allodial or radical title to fee simple land," emphasizing that while fee simple is "the bedrock of settler society," it confers "only the beneficial interest in the land."[11]

If Aboriginal title were to be declared, the court commented:

> … the Crown may be directed or ordered to use its expropriation powers and may be subject to a claim by the fee simple holders for compensation arising therefrom. This is of course yet to be determined in the course of this litigation.[12]

The court also clarified that an order dispossessing fee simple holders from their land, in favour of a First Nation who has proven Aboriginal title, could only come through an action by the Crown, and that the First Nation could not directly obtain a declaration of repossession directly against the IDs.[13]

Key takeaways

This decision affirms the possibility of recognizing Aboriginal title over fee simple lands. However, because it is a procedural ruling on a motion to strike pleadings, the court did not conclude that Aboriginal title exists over the lands in this case. The decision instead establishes the legal framework under which such a claim could proceed, without confirming the Wolastoqey Nations' title to the lands in question. Notably, the ruling enables the Wolastoqey Nations to proceed with their title claim without narrowing the scope of the territory under dispute, to exclude privately owned lands.

Several of the Industrial Defendants are seeking leave to appeal the decision. Motions seeking leave to appeal to the New Brunswick Court of Appeal are scheduled to be heard in late January 2025.

The decision and recent jurisprudence

While *Wolastoqey Nations* is notable for advancing our understanding of the apparent conflict between Aboriginal title and fee simple, the decision also aligns with recent trends in Aboriginal title jurisprudence.

Phase-based approach

The decision anticipates that the underlying litigation will proceed in phases: the first two phases being to establish the relevant facts and then apply the law of Aboriginal title to those facts. If these phases conclude that at least some portion of the claimed lands is subject to Aboriginal title, a third phase would address the court's discretion to issue a

declaration of Aboriginal title, followed by a fourth phase determining the consequential relief stemming from that declaration.

The court's decision in *Wolastoqey Nations* to adopt a phase-based approach draws significantly on two recent Supreme Court of Canada decisions, *Shot Both Sides v Canada*, and *Ontario (Attorney General) v Restoule*. Notably, the court in *Wolastoqey Nations* reads these decisions as requiring that courts must establish a "negotiation and reconciliation phase" in which the Crown and First Nation are required to attempt in good faith to arrive at a resolution that promotes reconciliation.

Several other Aboriginal title claims across Canada are advancing on a similar phase-based approach. In *Council of the Haida Nation v British Columbia*, the British Columbia Supreme Court divided an Aboriginal rights trial into phases that separately consider whether there was an infringement and the potential remedies for such infringement. Proceeding in this manner provides opportunities to negotiate a settlement and is also more efficient, making better use of judicial resources. Such an approach also aligns with the Supreme Court's admonition in *Haida Nation v British Columbia (Minister of Forests)*, that negotiations, rather than litigation, are preferable for reconciling state and Aboriginal interests.

The judicial preference for negotiated settlements following a phase-based approach to trial in Aboriginal title disputes is reflected in another recent Aboriginal title decision, *The Nuchatlaht v British Columbia*. This case is notable for being only the second instance in Canadian jurisprudence where a court found that an Indigenous group had met the test for establishing Aboriginal title. Despite making that finding, the court temporarily refrained from issuing a formal declaration of Aboriginal title and instead encouraged the parties to negotiate the details of a settlement, including the precise boundaries of the lands at issue and the specific terms under which a declaration may eventually be made.[14]

Parties

The decision in Wolastoqey Nations to strike the pleadings against the IDs, thereby excluding them as defendants, also aligns with a trend in Aboriginal title jurisprudence regarding the role of private (i.e. non-Crown) parties. In similar cases, courts have denied motions to add non-Crown third-party defendants or to serve notice on them at early stages of litigation.

In *The Council of the Haida Nation v British Columbia*, the court dismissed applications by Canada and British Columbia seeking to involve third parties in the litigation, either by naming them as additional defendants or by requiring that notice be given to them, despite the fact that the Haida Nation's pleadings sought relief only against the Crown defendants. In rejecting these applications, the court observed that adding third parties would unduly burden them at a stage when no relief was being claimed against them, and that requiring notice would undermine the Haida Nation's efforts to pursue reconciliation with the non-Indigenous community.[15] The court further concluded that any potential implications for private third parties arising from a declaration of Aboriginal title could be addressed either at a later phase of the proceedings or in separate litigation.[16]

A similar outcome was reached in *Cowichan Tribes v Canada (Attorney General)*, where the court denied Canada's request for an order requiring that notice be given to private registered owners of fee simple lands within the claimed area. Notably, the court referred to the potential interaction between fee simple interests and Aboriginal title as a possible "invalidation" of those fee simple interests, but also noted that the plaintiffs were not seeking, at that stage of the litigation, to invalidate the fee simple interests.[17] The court thereby framed the central issue as a direct, but still only potential, conflict between existing private property interests and the asserted Aboriginal title. As noted above, the court in *Wolastoqey Nations* framed that same central issue very differently.

In *Nisga'a Nation v Mali*, the British Columbia Court of Appeal upheld a trial decision denying the Nisga'a Nation's application to be added as a defendant in the Gitanyow's Aboriginal title claim. The land over which the Gitanyow sought a declaration of Aboriginal title partially overlapped with the area subject to the Nisga'a Final Agreement, which, among other rights, confers fee simple title on the Nisga'a.[18] The Court's refusal to add the Nisga'a Nation as defendants was partly based on the fact that the Gitanyow had amended their claim to focus on the relief sought against British Columbia and Canada, namely a declaration of Aboriginal title and s. 35 rights,[19] and to remove any request for a declaration permitting them to ratify any rights or interests in the claimed area that had been created by Canada or British Columbia.[20] Although the context is different, the court in *Nisga'a* came to a similar conclusion as the court in *Wolastoqey Nations*: a party should not be a defendant to an Aboriginal title claim if no relief is sought or available directly against them.

Future developments

While we now have several decisions affirming the possibility of a declaration of Aboriginal title over lands held in fee simple, there is no decision yet which has actually held Aboriginal title to exist over any specific lands held in fee simple. Many critical questions remain unanswered.

The courts have yet to rule conclusively on various defences that may be argued in Aboriginal title claims that involve fee simple lands. In *Giesbrecht v British Columbia*, the Indigenous plaintiff brought a motion to strike the defences of extinguishment and "displacement." Although the court expressed skepticism, particularly regarding the novel displacement defence,[21] it ultimately concluded that, as a matter of law, neither defence was bound to fail. Notably, the court considered that the argument that an innocent party purchaser for value may be entitled to plead extinguishment may have some substance.[22] We have yet to see how a court might apply such defences, or similar defences based on justified infringement, particularly where grants of fee simple pre-dated the *Constitution Act, 1982*.

The British Columbia Court of Appeal cautioned in *Kwikwetlem First Nation v British Columbia (Attorney General)*, that "considerable uncertainty remains regarding the available remedies upon a declaration of Aboriginal title."[23] In that case, the British Columbia Court of Appeal declined to address whether proprietary remedies (e.g. deeming a grant of fee simple to be void or voidable, or ordering repossession of lands) may apply solely on a prospective basis (i.e. to grants made after a declaration of Aboriginal Title) and specifically declined to address whether a declaration of Aboriginal title could invalidate historical Crown grants in fee simple.[24]

The court in *Wolastoqey Nations* offered an interesting hypothetical – a court could order the Crown to expropriate fee simple titles and then, in turn, transfer those lands to a First Nation – but there are other possibilities. Might a court rule Aboriginal title to exist over fee simple land, but not order repossession unless the land escheated or reverted to the Crown through voluntary measures? Could fee simple owners be entitled to retain possession following a declaration of Aboriginal title, but find themselves subject to the jurisdiction of the First Nation instead of, or in addition to, municipal and provincial jurisdiction?

Alternatively, courts may arrive at a conclusion similar to what Kent McNeil – whose work has been favourably cited in several decisions on this topic - speculated on in a recent Globe and Mail article:

> Dispossessing the current beneficiaries of government land grants would not be just, especially when the land has passed through numerous innocent hands. Instead, compensation should be paid to the Indigenous nations concerned.

In a relevant but non-Aboriginal title case, *Chippewas of Saugeen First Nation v South Bruce Peninsula (Town)*, the Ontario Court of Appeal recently affirmed the ability of fee simple owners to avail themselves of the defence of "*bona fide* purchaser for value without notice" in the context of an unceded reserve lands claim, while noting that such a defence is not absolute.[25] *Chippewas* of Saugeen involved a claim by the plaintiff First Nation against Canada, Ontario, the Town of South Bruce Peninsula, and private landowners over a beach on the northern end of one of the First Nation's reserves. Central to the dispute was whether the beach was intended to form part of a reserve under the treaty the First Nation had entered into with the Crown in 1854. The Court of Appeal held that while the defence of *bona fide* purchaser for value was available to private purchasers (and those who have inherited lands from private purchasers), the defence is not absolute and must yield when fairness demands it.[26] The Court of Appeal noted that when an Indigenous land interest is competing with later acquired rights, courts are called upon to "weigh the equities" and to specifically consider the conscionability of upholding the legal rights of the *bona fide* purchaser in the circumstances.[27] The equities at stake in *Chippewas of Saugeen* favoured the First Nation's interest in its treaty-protected reserve over the interests of the private landowners, whose attachment to the beach was primarily commercial, having used it as a parking lot for tourists. The Court of Appeal concluded that there is no principled reason why an Indigenous land interest should, in every case, give way to the property interest of a private purchaser, even where that purchaser is a *bona fide* purchaser for value.[28]

How these defences and remedies in respect of Aboriginal title claims over lands held in fee simple unfold in future litigation and negotiations will have far-reaching implications for Aboriginal title claims and fee simple ownership across Canada.

BLG regularly advises clients on matters relating to Indigenous land rights, Aboriginal title, and Aboriginal rights, including the interplay between these rights and private interests in lands. If you have any questions about this topic, please reach out to the authors or any of the key contacts below.

Footnotes

[1] Ibid at paras 81-82.

[2] Ibid at paras 109, 112.

[3] Ibid at para 126.

[4] Ibid at para 127.

[5] Ibid at paras 119-121.

[6] Ibid at para 138.

[7] Ibid at paras 182-187.

[8] Ibid at para 171.

[9] Ibid at para 134.

[10] Ibid at para 179.

[11] Ibid at para 133.

[12] Ibid at paras 134-135.

[13] Ibid at para 151.

[14] Ibid at paras 33, 37.

[15] Ibid at para 34.

[16] Ibid at para 50.

[17] Ibid at paras 9, 14, 24.

[18] Ibid at para 4.

[19] Ibid at para 45.

[20] Ibid at para 60.

[21] Ibid at para 78.

[22] Ibid at para 79.

[23] Ibid at para 91.

[24] Ibid.

[25] Ibid at paras. 234-243, drawing largely upon Chippewas of Sarnia Band v. Canada (Attorney General) (2000), 2000 CanLII 16991 (ON CA), 51 O.R. (3d) 641 (C.A.).

[26] Ibid at para 237.

[27] Ibid at para 239.

[28] Ibid at para 241.

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