Wolastoqey Nations v. New Brunswick and Canada, et.al., 2024 NBKB 203

FC-322-2021

IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK
TRIAL DIVISION
JUDICIAL DISTRICT OF FREDERICTON

BETWEEN:

WOLASTOQEY NATION AT WELAMUKOTUK (OROMOCTO FIRST NATION), WOLASTOQEY NATION AT SITANSISK (SAINT MARY'S FIRST NATION), WOLASTOQEY NATION AT PILICK (KINGSCLEAR FIRST NATION) WOLASTOQEY NATION AT WOTSTAK (WOODSTOCK FIRST NATION), WOLASTOQEY NATION AT NEQOTKUK (TOBIQUE FIRST NATION) AND WOLASTOQEY NATION AT MATAWASKIYE (MADAWASKA MALISEET FIRST NATION) ON BEHALF OF WOLASTOQEY NATION

Plaintiffs

and

THE PROVINCE OF NEW BRUNSWICK, THE ATTORNEY GENERAL OF CANADA, H. J. CRABBE & SONS, LTD., J.D. IRVING, LIMITED, 712414 N.B. LTD., ACADIAN TIMBER LIMITED PARTNERSHIP, BY ITS GENERAL PARTNER, ACADIAN TIMBER GP INC., ACADIAN TIMBER GP INC., ARCADIA SITES LIMITED, ARCTIC FALCON LIMITED, AV GROUP NB INC. / GROUPE AV NB INC., CHARLOTTE PULP AND PAPER CO. LTD., EASTCAN TRADING LIMITED, HIGHLANDS OPERATIONS LIMITED, IRVING OIL LIMITED, IRVING PAPER LIMITED LES PAPIERS IRVING LIMITÉE, JUNIPER ORGANICS LIMITED LES PRODUITS ORGANIQUES JUNIPER LIMITÉE, K.C. IRVING, LIMITED, MIRAMICHI TIMBER HOLDINGS LIMITED GESTION BOIS MIRAMICHI LIMITÉE, NEW BRUNSWICK POWER CORPORATION/SOCIÉTÉ D'ÉNERGIE DU NOUVEAU-BRUNSWICK, THE NEW BRUNSWICK RAILWAY COMPANY, POOLS PROPERTIES LIMITED LES IMMEUBLES POOLS LIMITÉE, ROTHESAY PAPER HOLDINGS LTD., ST. GEORGE PULP & PAPER LIMITED, STRESCON LIMITED, TWIN RIVERS PAPER COMPANY INC., VAN BUREN-MADAWASKA CORPORATION, NEW BRUNSWICK SOUTHERN RAILWAY COMPANY LIMITED/LA COMPAGNIE DE CHEMIN DE FER DU SUD, NOUVEAU-BRUNSWICK LIMITEE, BURNT HILL FISHING CLUB

Defendants

DECISION
On Motion Brought by the **Defendant**, the **Attorney General of New Brunswick (AGNB Motion)**

and

DECISION
On Motions Brought by the **Defendants,**
H.J. **Crabbe** & Sons, J.D. **Irving**, et. al., and **Acadian** Timber, et. al. **(IDs Motion)**

BEFORE:	**Justice Kathryn A. Gregory**
HEARING HELD:	**Fredericton, New Brunswick**
DATES OF HEARING:	**March 25-28 and April 2-5, 2024**
DATE OF POST-HEARING BRIEFS:	**June 12, 2024**
DATE OF DECISION:	**November 12, 2024**
SUBJECT MATTER:	**Defendants' Motions to Strike Pleadings**

COUNSEL:

Renée Pelletier, Jaclyn McNamara, Graeme Cook, and **Victoria Wicks**, Counsel for the Plaintiffs
Joshua McElman, K.C., and **Bailey Campbell,** Counsel for the Defendants, Province of New Brunswick and New Brunswick Power Corporation
Jonathan Tarlton, **Kelly Peck,** and **Alan Farquhar,** Counsel for the Defendant, the Attorney General of Canada
Alexander Cameron, Counsel for the Defendant, H.J. Crabbe & Sons Ltd.
Catherine Lahey, K.C., R. Paul Steep, and **Thomas Isaac**, Counsel for the Defendants, J.D. Irving Ltd., et.al.
Hugh Cameron, K.C., and **Sean Corscadden**, Counsel for the Defendants, Acadian Timber Ltd. Partnership, et. al.
Philippe Frenette, Counsel for the Defendant, Twin Rivers Paper Company Inc.
Catherine Hirbour, Counsel for the Defendants, Irving Oil Ltd., et. al.
Edwin Ehrhardt, K.C. and Michiel Vandenberg, Counsel for the Defendant, AV Group NB Inc. (did not participate in the motions)
Robert Grant, K.C., Counsel for the Defendant, Strescon Ltd. (did not participate in the motions)

GREGORY J:

The Overview

1. "Let us face it, we are all here to stay." *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 186. This is the concluding line in the majority decision of Lamer, CJC following his reluctant order for a new trial in *Delgamuukw*, after years and years of litigation, due to a flaw in the pleadings.

2. By these words, the Chief Justice (as he then was) was conveying the difficult, but aspirational challenge that faces us all, Aboriginal and non-Aboriginal: the pre-existence of Aboriginal societies must be reconciled with the sovereignty of the Crown. This is indeed the basic purpose of s. 35(1) of our *Constitution* that in 1982, recognized and affirmed existing Aboriginal and treaty rights.

3. At that time, Lamer, CJC, was encouraging negotiated settlements of the issues in dispute in *Delgamuukw*, referring to the Crown's "moral, if not legal, duty to enter into and conduct those negotiations in good faith… Ultimately it is through negotiated settlements…reinforced by the judgments of this Court, that we will achieve… reconciliation…" (at para. 186).

4. As will be discussed herein, recent decisions from the Supreme Court now direct that the duty to negotiate land claims is indeed a *legal* one and not just a moral one: see *Haida Nation v. British Columbia*, 2004 SCC 73, at para. 25 and *Tsilhqot'in v. British Columbia,* 2014 SCC 44, at para. 17.

5. In the absence of such settlements, we are faced with long and expensive litigation, "…not only in economic but in human terms as well." (*Delgamuukw*, at para. 186). It is imperative, therefore, that the pleadings correctly frame the issues to be litigated.

6. "Pleadings not only serve to define the issues but give the opposing parties fair notice of the case to meet, provide the boundaries and context for effective pre-trial case management... Clear pleadings minimize wasted time and may enhance prospects for settlement." (*Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56, at para. 43)

7. The motions before me seek to strike certain pleadings in the Plaintiffs' *Amended Amended Statement of Claim* (the Claim). The Moving Defendants assert that the pleadings defy the rules of civil procedure, namely *Rules 23* and *27* of our *Rules of Court*. They seek relief pursuant to these rules and *Rule 37*.

The Background

8. In 2021, six Wolastoqey Nations (the Wolastoqey) filed a *Notice of Action with Statement of Claim Attached* against the Attorneys General, provincial and federal (AGNB and AGCan), NB Power, and the Industrial Defendants (IDs).

9. For ease of reference, the IDs are a group of seven companies, namely H.J. Crabbe and Sons (**Crabbe**); J.D. Irving and their named affiliate companies (**JDI**); Acadian Timber and their named affiliate companies (**Acadian**); Irving Oil Limited and their named affiliate companies (**Irving**); AV Group and their named affiliate companies (**AV**); Twin Rivers (**Twin**) and **Strescon** (Strescon previously entered into an agreement with the Plaintiffs and took no part in the motions).

10. The Claim filed is the second iteration of a claim first filed in 2020, later withdrawn and replaced by the current Claim. The first claim listed only AGNB and AGCan as defendants.

11. While there are some differences in the two claims, the essence of both is the same: the Claim seeks a declaration of Aboriginal title over a large swath of land amounting to more than 50% of the land in the province (283,204 separate parcels of land). It seeks consequential relief, from both the Crown and from the private party IDs, arising from the sought declaration of title. A map depicting the general location of the claimed land is attached as *Schedule A* to the Claim.

12. The claimed land encompasses some 252,758 parcels of fee simple title land owned by private individuals and corporate entities, including the IDs. *Schedule B* purports to set out the parcel identifiers of land owned by the IDs. *Schedule C* purports to set out ungranted land owned by the Crown.

13. The majority of the IDs are privately held companies engaged in the business of growing, managing, harvesting and milling trees from their land.

14. I had originally set out to issue two separate decisions in relation to the motions filed, but as so much of the law, and the relief sought, overlaps, and would require repetition or reference back to one decision, I have opted to issue one decision that responds to all motions filed. For ease of reference, and because the motions filed by three ID Defendants have application to all IDs as a group, I will distinguish the motions before me as the "IDs Motion" and the "AGNB Motion".

The History of the Pleadings

15. The Plaintiffs have attempted to get the pleadings correct in this case. Their first attempt, naming only AGNB and AGCan as defendants, was met with requests and concerns from AGNB related to the Claim's impact on private fee simple landholders, both corporate and residential, and the failure to notify and/or include those private parties in the litigation.

16. In response, the Claim underwent several amendments. It became an *Amended Amended Statement of Claim*, seeking to exclude any impact on unnamed residential and corporate land holders, to specifically include the IDs, and to obtain certificates of pending litigation, or some alternate form of notice, relating to the lands owned by the IDs.

17. The Plaintiffs now face these motions to strike their pleadings as they relate to the now-included-IDs and those the Plaintiffs refer to as "Strangers to the Claim" (the unnamed private fee simple title holders, both residential and corporate, whose lands fall within the scope of the claim for Aboriginal title).

18. The Plaintiffs were previously unsuccessful in defending their pleading for certificates of pending litigation, or some alternate form of notice, against the IDs (the related pleading was struck in my first pre-trial decision in this matter, *Wolastoqey v. NB*, 2024 NBKB 021).

19. At this time, only the Claim has been filed. No statements of defence have been filed. Numerous requests for particulars and corresponding responses have been exchanged with expressions of mutual dissatisfaction from all sides.

The Anticipated Litigation

20. All parties agree and anticipate that the litigation in this case will take years if not decades to resolve. It will be time-consuming and exceedingly expensive. That this is so, was the subject of comment by all parties at the hearing of the motions. I agree; the first iteration of the Claim was filed four years ago and only the Claim and particulars have been filed, no other pleadings.

21. This is Aboriginal rights litigation. This, in and of itself raises issues, and sets the matter in a context not present in what I will call routine/private party civil litigation. The litigation pace, thus far, is indeed glacial.

22. The Plaintiffs claim primarily against the Crown for alleged historical wrongdoing. To establish that alleged wrongdoing, the Plaintiffs will be required to establish on

the evidence and factually that they meet the legal test for Aboriginal title to the claimed land in *Schedule A*.

23. Claims for Aboriginal title to land are ongoing in Canada and one has been resolved now by the Supreme Court in *Tsilhqot'in* in 2014, recognizing Aboriginal title to certain land. That case involved, and most involve, Crown land only. The Supreme Court has not yet ruled directly on what happens when private fee simple land falls within the scope of a claim for Aboriginal title.

24. While academics have been predicting this "conflict" for some time, the case before me appears to squarely raise the so-called contest between private fee simple title versus Aboriginal title. This adds layers of complexity and, I might add, emotion to the matter.

25. I pause here to address the emotional undercurrent in this matter, only to say that this procedural decision is squarely set, as it must be, in the *legal* context; it must certainly not be interpreted by any party or indeed the public as addressing in any way the much broader moral context of reconciliation between Aboriginal and settler societies.

26. John Borrows, in *Aboriginal Title and Private Property.* The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference 71, (2015), wrote on the conflict between private fee simple title and Aboriginal title, as follows:

> An important question which the Tsilhqot'in decision raises is whether "private" and Aboriginal land titles will conflict under the Supreme Court's new framework. Will Aboriginal title oust privately held beneficial interests in land, or will privately owned land prevent declarations of Aboriginal title over such lands? This article's answer to the foregoing question is: it depends. Neither private property nor Aboriginal title is absolute in Canadian law. Both deserve the utmost respect and protection — though either interest can be attenuated in appropriate circumstances. This article explores the Constitution's potential for both protecting and attenuating so-called private interests in land in the face of a declaration of Aboriginal title. I believe the Tsilhqot'in decision contains a nascent framework for carefully calibrating a healthier relationship between Aboriginal title and private ownership. (at page 93)

27. Understanding the nature of the Claim is critical to my deliberations on these motions. The Claim seeks first a declaration of Aboriginal title and consequent to that, relief. This suggests a natural divide in the proceedings, as is the case in most Aboriginal rights litigation.

28. I raised this issue with counsel at the end of the hearings, asking if bifurcation is a remedy I can consider in my deliberations on the IDs Motion. Plaintiffs' counsel agreed, however, opposing counsel asked that I rule on the IDs Motion as worded without consideration of the issue of bifurcation. They wish to make further submissions should bifurcation need to be considered following my decision on the IDs and AGNB motions.

29. Despite ID counsels' request that I not consider bifurcation as a *remedy* on their motion, I will nonetheless reference what I consider to be a natural divide anticipated in this litigation.

30. There will most likely be separate phases to this litigation whether it is specifically ordered by this Court or not: the first natural phase will be the determination of historical facts based on the evidence tendered. The second phase will involve the application of the law of Aboriginal title to those facts. Assuming the facts and the law yield a conclusion of Aboriginal title to the lands claimed, or some part thereof, the third phase will consider the discretionary issuance of a legal declaration and the fourth phase will be what, if any, consequential relief flows from the issuance of such a legal declaration.

31. These first two phases I refer to as the "factual and legal phases"; the latter two phases, assuming on the facts and law Aboriginal title is determined to apply to the claimed lands, I refer to as the "declaration and relief phases".

32. I find the most recent decisions of the Supreme Court in *Shot Both Sides v. Canada*, 2024 SCC 12 and *Ontario v. Restoule*, 2024 SCC 27, effectively direct, as part of or prior to the "declaration and relief phases", a "negotiation and reconciliation phase" between the two constitutional parties. This is discussed and considered further in my decision.

33. Indeed, the conflict/contest raised in this litigation alleging Aboriginal title to more than 50% of the land in the province, in relation to which hundreds of thousands of titles are owned in fee simple, surely constitutes the apex of the reconciliation goal inherent in s. 35 of the *Constitution*.

34. The sovereign Crown holds the "radical" or underlying title to all of the land in issue in this Claim: *Tsilhqot'in*, at para. 69. At issue in this Claim, is whether that radical title *was and is* burdened by Aboriginal title, deemed an "independent legal interest, which gives rise to a fiduciary duty on the part of the Crown." (at para. 69)

35. To that is added the undisputed fact that sitting atop this radical title (possibly burdened by Aboriginal title), is the "beneficial" title granted by the Crown to fee simple title holders.

36. In the absence of Crown reconciliation relating to this epic conundrum, this Court will be called upon by way of the Claim to resolve the conflict inherent in the two forms of title: fee simple versus Aboriginal title, assuming such latter title is found to exist factually and legally speaking.

37. Any court regretfully called upon to manage such a mammoth request must start with the pleadings, as this Court is being requested to do by way of the motions before me. In this regard, I consider myself directed by the Supreme Court to approach this task practically and pragmatically: "...the honour of the Crown requires increased attention to minimizing costs and complexity when litigating s. 35 matters and *courts should approach proceedings involving the Crown practically and pragmatically in order to effectively resolve these disputes*." (*Newfoundland v. Uashaunnuat*, 2020 SCC 4, at para. 51, emphasis added).

38. Further, I am guided by the requirement to take a "functional approach...to pleadings in Aboriginal cases. The function of pleadings is to provide the parties and the court with an outline of the material allegations and relief sought." (*Tsilhqot'in*, at para. 20). This is precisely because "...the legal principles may be unclear at the outset... [and] ...the evidence as to how the land was used may be uncertain at the outset... [and] ...It is in the broader public interest that land claims and rights issues be resolved in a way that reflects the substance of the matter." (*Tsilhqot'in*, at para. 21-23).

39. I find, based on the pleadings set out in the Claim, that the substance of the issue before the Court is whether Aboriginal title factually and legally existed and exists in relation to the land depicted in *Schedule A*. From a procedural perspective only, this points to manageable litigation between the Crown (AGNB and AGCan) and the Plaintiffs.

40. It will only be upon a court determination of the facts and the legal test for Aboriginal title that the litigation will face what appears to be a gargantuan task associated with the relief sought by the Plaintiffs: a declaration and consequent relief that may impact in one way or another some 250,000 fee simple parcels of land.

The Procedural Backdrop

41. Judges routinely deal with procedural motions relating to pleadings and the case law in that regard from the Supreme Court and our Court of Appeal is clear on what is required for proper pleadings (see *Lax Kw'alaams,* and *Tingley v. Attorney General of Canada et. al.*, 2021 NBCA 18).

42. But this is anything but a routine procedural motion.

43. While pleadings are important in all litigation, they are exceedingly important in claims for Aboriginal title because of the complexity and duration of the litigation process.

44. The consequences of flawed pleadings in Aboriginal title cases were commented on by Kent MacNeil in his article, *Reconciliation and Third-Party Interests: Tsilhqot'in Nation v. British Columbia*, Indigenous Law Journal. Volume 8, Issue 1 (2010), p. 7-26. At the trial level, a decision that ultimately proceeded to the Supreme Court in *Tsilhqot'in*, the trial judge concluded after years of litigation that he could not grant declaratory relief due to a defect in the plaintiffs' pleadings. At page 9, MacNeil wrote of this unfortunate happening:

> Justice Vickers nonetheless found that Aboriginal title had been established over a large area, both inside and outside the claim area, and offered his opinion that the plaintiff would have been entitled to a declaration of title had the case been properly pleaded. He wrote a lengthy judgment explaining the basis for this opinion... one has to wonder why this matter was not identified earlier and resolved through amendment. Why spend four and a half years in a courtroom, with all the attendant effort and expense, to arrive at an inconclusive result? (emphasis added)

45. The AGNB argues here that the pleadings, as worded, call upon this Court to exceed its jurisdiction in relation to the sought declaration of Aboriginal title given the undisputed existence of fee simple title owned by the Strangers to the Claim. The AGNB states that the grounds for such a declaration are absent in the pleadings. They seek a determination of this as a legal question at this stage in order to focus the litigation and to provide some reassurance to current fee simple holders while this litigation presses forward.

46. The IDs Motion argues that the sought declaration and relief has no reasonable prospect of success directly against them, and that such declaration and relief can only come through the Crown.

47. AGNB relies primarily on *Rule 23.01(1)(a)* which enables this Court to make a determination of law; the IDs Motion does not seek the determination of a question of law but instead relies primarily on *Rule 23.01(1)(b)*, which allows the Court to strike pleadings that disclose no reasonable cause of action.

48. Given my obligation to be pragmatic and practical, the fact that these motions have consumed eight days of court time including additional time to prepare extensive written materials, and have now taken me some five months to render a decision after an extensive review of the materials and the law, I find that I must make certain legal

determinations in relation to both motions for the purpose of shortening the trial and/or to save substantial costs.

49. First, I will set out the specific relief sought in the AGNB and ID motions, respectively.

The Motion Relief Requested

50. The AGNB Motion seeks the following relief on their motion, as paraphrased by me:

1. Questions of law:

(a) **Does this Court have the jurisdiction to make a declaration of Aboriginal title over fee simple lands owned by the "Strangers to the Claim"?**

If not, those portions of the Claim must be struck, namely paras. 2, 3 and 25 and any reference thereto in the Schedule A attached to the Claim and any related Particulars

(b) **Is the Claim seeking such declaration in relation to the fee simple lands of the Strangers theoretical, academic and/or obscure, such that declaratory relief cannot be issued?**

If so, as per above, portions of the Claim must be struck, namely paras. 2, 3 and 25 and any reference thereto in the Schedule A attached to the Claim and any related Particulars.

(c) **Is the remedy of *scire facias* available in New Brunswick?**

If so, has the Plaintiff satisfied the pre-conditions for such relief?

If not available or the pre-conditions have not been satisfied, portions of the Claim must be struck, namely paras. 1(b) and 32 and any other references to *scire facias*.

2. Additional/Alternative Relief:

(a) Should paras. 1, 2, 3, 15, 16, 18, 26, 35, 36, 40, Schedule A and any Particulars be struck because they do not plead material facts, nor a cause of action, they are scandalous and frivolous and because the Plaintiffs failed to give notice of an intent to seek a declaration of Aboriginal title

(b) Should paras. 1(d) and 32 be struck for not meeting pre-conditions for a claim of *scire facias* and/or because they fail to plead material facts or a cause of action and are scandalous and frivolous.

3. Additional/Alternative:

(a) Should the Plaintiffs be required to file an amended Claim removing all claims against the Strangers and plead that the Plaintiffs had Aboriginal title as at the time of sovereignty and that damages are owed by the federal and provincial Crowns only, removing all references to *scire facias*, and pleading material facts relating to their claim of Aboriginal title.

4. Costs

51. The IDs Motion (recall it is in fact three motions all seeking essentially the same relief, as between themselves, with some exceptions noted below) seeks the following relief, again, as paraphrased by me:

1. to strike the pleadings against them pursuant to *Rule 23.01(1)(b)* of the *Rules of Court* on the basis that they fail to disclose *a reasonable cause of action*

2. to strike the pleadings against them pursuant to *Rule 27.09(b)* and *(c)* on the basis that they are scandalous, frivolous or vexatious and/or are an abuse of the Court

3. on a finding by this Court that the pleadings should be struck as against all three Moving Defendants (and all IDs by implication), convert the motions to motions for judgment pursuant to *Rule 37.10(a)*

4. should the pleadings not be struck, require Wolastoqey to provide further and better particulars pursuant to *Rule 27.08(1)* (**JDI and Crabbe only**); should Wolastoqey fail to do so, strike the pleadings pursuant to *Rule 27.09(e)* (**JDI only**)

5. Should particulars be ordered, suspend the requirement to file a *Statement of Defence* for a period of time after the delivery of the particulars (**JDI only**)

6. A determination of a question of law pursuant to *Rule 23.01(1)(a)* that the decision of the Supreme Court in *Tsilhqot'in Nation*, is *per incuriam* in failing to reference received law including the *Statute of Frauds, 1677* 29 Car 2, c. 3, the *Real Property Limitation Act*,1833 3 & 4 Will 4, the *Wills*

Act, 1837 7 Will 4 & 1 Vic c. 26 and like provincial legislation, and related law (**Crabbe only**)

7. **Acadian** (in its additional capacity as a *Stranger to the Claim*) seeks the same relief as requested in the AGNB Motion, heard on March 25-28, 2024, to determine questions of law; to strike the Claim as against the Strangers; and, to file an amended Claim (this is essentially a supportive response to the AGNB Motion but raised in the IDs Motion)

8. Costs (the parties request a separate hearing on costs to follow the decision of this Court on the merits of this motion).

52. As an aside and having regard to the relief sought in paragraph 51(6) above, I note that at prior pre-trial conferences with all counsel, I expressed the Court's wish that the parties not duplicate each other's arguments on the motions. Counsel for Crabbe heeded that message well by advancing a novel argument that challenges the findings in *Tsilhqot'in* regarding the test for Aboriginal title. The argument is an interesting one.

53. Counsel for Crabbe maintains that *Tsilhqot'in* is wrongly decided in that it applies a territorial test to the component requiring sufficiency of occupation that was rejected in *R. v. Marshall*, 2005 SCC 43.

54. Counsel for Crabbe ably poured through old legislation dating back to the 1600s and reviewed other medieval concepts applicable to property law in support of his argument.

55. Interesting though it may be, I find that nothing in the matters before me now turns on this and I therefore need not address this at this time.

The Specifics of the Impugned Pleadings – AGNB

56. The pleadings primarily impugned by the AGNB are set out at paragraphs 2, 3 and 25 of the Claim. Those paragraphs are as follows:

> *2. The Plaintiffs seek no relief as against fee simple holders not named as Defendants who hold fee simple in the Traditional Lands ("Strangers to the Claim"). The incidents of fee simple title enjoyed by Strangers to the Claim, including the incident of peaceable possession, are not placed in issue by the Plaintiffs. As outlined in paragraph 1(c), however, the Plaintiffs seek damages and compensation from the Province and Canada for the breach of Aboriginal title in the granting of fees simple in the Traditional Lands to Strangers to the Claim.*

> *3. The Plaintiffs do not seek a declaration of Aboriginal title in paragraph 1 (a) that binds Strangers to the Claim with respect to such Strangers to the Claims' property rights.*
>
> *25. Wolastoqey Nation's title to the Traditional Lands has never been extinguished through surrender or legislation, and survives today.*

57. In the alternative, the AGNB seeks to strike paragraphs 1, 2, 3, 15, 16, 18, 26, 35, 36, 40, *Schedule A* and any related particulars because they do not plead material facts, a cause of action, and/or they are scandalous and frivolous; and, because the Plaintiffs failed to give notice of an intent to seek a declaration of Aboriginal title.

58. As I understand the point of the Plaintiffs' inclusion of paragraphs 2 and 3 in the Claim is so that the Plaintiffs can give some type of assurance to unnamed fee simple title holders that any court declaration of Aboriginal title will not impact them directly. In effect, it is a statement of non-claim, as opposed to a statement of claim.

The Specifics of the Impugned Pleadings – IDs

59. There really are very little specifics to the pleadings as they relate to the Moving ID Defendants and all IDs. This is hardly surprising given that the Plaintiffs, in the motion prior as well as in the motion presently before me, have stated clearly that they *do not allege any wrongdoing as against any of the IDs*.

60. The Plaintiffs seek a declaration and consequent relief, that being, an order cancelling the original Crown grants to the lands now owned by the Moving ID Defendants (and all IDs) (*scire facias*), and in the alternative, an order returning possession of those lands to the Plaintiffs' (ejectment or repossession). (see the Claim at paras. 1(b) and 1(e))

61. The Moving ID Defendants, for their part, seek to strike the pleadings against them by relying on the requirement that a reasonable cause of action be pleaded.

62. As set out in the Claim, the Plaintiffs seek a *declaration* of Aboriginal title to the land, airspace, land covered by water, offshore and inshore water bodies, foreshore, rivers, lakes and streams, or to such portions thereof, as set out on the map in *Schedule A* attached to the Claim. This, the Plaintiffs refer to as their "Traditional Lands."

63. *Schedule B* to the Claim lists the properties owned by the IDs named in the Claim. While the Plaintiffs do not dispute that the IDs own the land in fee simple, they dispute the Crown grants that originally transferred that fee simple and, in the alternative, they dispute that those fee simple interests trump their claimed Aboriginal title.

64. Proceeding by way of a statement of claim for such a declaration is wholly sensible given the anticipated factual disagreement, but for the purposes of this motion, it is critical to stay focussed on the fact that the relief sought in the Claim is *declaratory*.

The Rules of Court

Rule 23

65. The Moving Defendants reference and rely on *Rule 23* to make a determination of law and to strike pleadings in the Claim for failing to disclose a reasonable cause of action.

66. *Rule 23* states the following:

> **Determination of Questions Before Trial**
> 23.01Where Available
>
> (1)The plaintiff or a defendant may, at any time before the action is set down for trial, apply to the court
>
> (a) **for the determination prior to trial, of any question of law raised by a pleading in the action where the determination of that question may dispose of the action, shorten the trial, or result in a substantial saving of costs** (AGNB only)
>
> (b) **to strike out a pleading which does not disclose a reasonable cause of action or defence** (AGNB and IDs)

67. This Rule is addressed by the New Brunswick Court of Appeal in *Tingley,* at para 112, as follows: "The answer to the objection, quite simply, is that Rule 23.01(1)(a) permits the court to determine a preliminary question of law, at any time, provided a pleading brings it into play. The determination of a question of law raised by a pleading need not be the pleading of the moving party: *Shanks v. Shay et al.*, 2020 NBCA 62, [2020] N.B.J. No. 224 (QL). There is no requirement that a question of law be specifically raised in a pleading."

68. With respect to *Rule 23(1)(b)*, it is important to set out here its limitations of application. *Rule 23* looks only to the pleadings and not to the wider evidentiary foundation of the matter. This is what distinguishes this rule from *Rule 22*, relating to summary judgment. *Rule 23* requires the motion judge to consider only the pleadings and to assume the factual assertions in the pleading are true.

69. This is explained in *Sewell v. ING Insurance*, 2007 NBCA 42, at para. 26, wherein Drapeau, CJ, as he then was, states the following:

> The principles that inform the determination of a defendant's motion to strike under Rule 23.01(1)(b) are well settled and can be summarized as follows: (1) the only question for judicial resolution is whether it is plain and obvious that the Statement of Claim fails to disclose the essential elements of a cause of action tenable at law. That conclusion should be reached only in the clearest of cases; (2) correlatively, absent exceptional circumstances, **the court must accept as proved all facts asserted in the Statement of Claim and abstain from looking beyond the pleading itself** and any documents referred to therein (see *Hogan v. Doiron* (2001), 243 N.B.R. (2d) 263, 2001 NBCA 97 (N.B. C.A.), para. 38 and *Boisvert v. LeBlanc* (2005), 294 N.B.R. (2d) 325, 2005 NBCA 115 (N.B. C.A.), para. 21). To expand the exercise beyond those limits would operate to morph the motion under Rule 23.01(1)(b) into an application for summary judgment under Rule 22, the appropriate vehicle to determine prior to trial whether there is factual merit to a claim; (3) the Statement of Claim is to be read generously to accommodate drafting deficiencies; and (4) where a generous reading of its provisions fails to breath life into a pleading, all suitable amendments should be allowed (see Rule 27.10(1) and *LeDrew v. Conception Bay South (Town)* (2003), 231 Nfld. & P.E.I.R. 61, 2003 NLCA 56 (N.L. C.A.)). Those principles reflect the Legislature's injunction that the Rules be "liberally construed to secure the just, least expensive and most expeditious determination of every proceeding on its merits": Rule 1.03. [emphasis added]

70. Our Court of Appeal, in *Tingley,* at para. 41, references the decision in *Hunt v Carey Canada*, [1990] 2 SCR 959, wherein the test pursuant to *Rule 23.01(1)(b)* is "... the highly forgiving and accommodating test articulated in Hunt v. Carey Canada, [1990] 2 S.C.R. 959." *Hunt* explains that:

> ...courts were to use the rule only in those exceptional instances where it was "plain and obvious" that, **even if one accepted the version of the facts put forward in the statement of claim**, the plaintiff's case did not disclose a reasonable cause of action. The question was not whether the plaintiff could succeed since this was a matter properly left for determination at trial. The question was simply whether the plaintiff was advancing a "reasonable" argument that could properly form the subject matter of a trial. [emphasis added]

71. *Tingley* further states at para. 113 that "This Court has espoused the law's reluctance to strike pleadings unless, on the pleaded facts, a pleading can obviously not be

sustained, even with a generous reading and with accommodation for drafting deficiencies through amendments. In considering a motion to strike, the judge's function is not to "try the issues" but rather to decide "if there are issues to be tried": Abrams et al., at p. 767"

72. Regardless of whether a claim invokes Aboriginal law or non-Aboriginal law, the adversarial process requires procedural fairness and the application of rules relating to the pleadings.

73. The pleadings in any case frame the triable issues. In *Smith v. Agnew*, 2001 NBCA 83, an appeal related to a summary judgment motion, Drapeau JA (as he then was) states the following, at para. 3: "As a general rule, only the issues that emerge unresolved from the pleadings require adjudication at trial.... At the hearing of the application, the pleadings constitute the sole indicator of the basis upon which the plaintiff will seek to hold the defendant liable at trial..."

74. In the *Tingley* decision, LeBlond, JA writes about *Rule 23.01(1)(b)* specifically. He states that "The question to be answered is always: do the facts as pleaded disclose a reasonable cause of action, i.e. one that has some chance of success? The question cannot be answered in the affirmative if it is plain and obvious the action cannot succeed: Operation Dismantle v. The Queen, [1985] 1 S.C.R. 441, [1985] S.C.J. No. 22 (QL)."

75. Regarding the requirement that I consider the facts to be true regarding Aboriginal title, I must also keep in mind the leeway granted to pleadings in Aboriginal rights litigation. The approach to pleadings in Aboriginal rights/title cases is modified by the Supreme Court in *Tsilhqot'in*, at para. 20: "The function of pleadings is to provide the parties and the court with an outline of the material allegations and relief sought. Where pleadings achieve this aim, minor defects should be overlooked, in the absence of clear prejudice."

76. The special considerations that support this approach to pleadings in an Aboriginal title claim, are as follows, from *Tsilhqot'in*, at paras. 21-23:

> First, in a case such as this, the legal principles may be unclear at the outset, making it difficult to frame the claim with exactitude.
>
> Second, in these cases, the evidence as to how the land was used may be uncertain at the outset. As the claim proceeds, elders will come forward and experts will be engaged. Through the course of the trial, the historic practices of the Aboriginal group in question will be expounded, tested and clarified....;

> The occupation of traditional territories by First Nations prior to the assertion of Crown sovereignty was not an occupation based on a Torrens system, or, indeed, on any precise boundaries. Except where impassable (or virtually impassable) natural boundaries existed, the limits of a traditional territory were typically ill-defined and fluid. ... [Therefore] requir[ing] proof of Aboriginal title precisely mirroring the claim would be too exacting. [para. 118]
>
> Third, cases such as this require an approach that results in decisions based on the best evidence that emerges, not what a lawyer may have envisaged when drafting the initial claim. What is at stake is nothing less than justice for the Aboriginal group and its descendants, and the reconciliation between the group and broader society. A technical approach to pleadings would serve neither goal. It is in the broader public interest that land claims and rights issues be resolved in a way that reflects the substance of the matter. Only thus can the project of reconciliation this Court spoke of in Delgamuukw be achieved. [italics added]

Rule 27

77. All Moving Defendants also rely and refer to *Rule 27* to strike the pleading in the Claim for being scandalous, frivolous or vexatious, and/or an abuse of process.

78. *Rule 27* states the following:

> **Striking Out a Pleading or Other Document**
> The court may strike out any pleading, or other document, or any part thereof, at any time, with or without leave to amend, upon such terms as may be just, on the ground that it
> (a) may prejudice, embarrass or delay the fair trial of the action,
> **(b) is scandalous, frivolous or vexatious,**
> **(c) is an abuse of the process of the court,**
> (d) is a contempt of court, or
> (e) is not in conformity with the Rules of Court.

79. In *M.B. v. L.B.*, 2019 NBCA 75, at para. 11, the Court referenced its decision in *University of New Brunswick Student Union Inc. v. Smith* (1987), 84 N.B.R. (2d) 292, [1987] N.B.J. No. 804 (N.B. C.A.), where "Stratton C.J.N.B. described the test for determining whether an action is frivolous or vexatious as follows:

> As noted, the learned motions Judge concluded that the appellants' actions should be dismissed. The propriety of that decision has been appealed. Our task in respect of the present motions is not to determine the appeals but

> rather to decide if the appeals are frivolous, vexatious or without grounds. Black's Law Dictionary, (5th ed.) defines a frivolous appeal as one in which no justiciable question has been presented and the appeal is readily recognizable as devoid of merit in that there is little prospect that it can ever succeed. The same authority defines vexatious proceedings as those instituted maliciously and without probable cause. And we would underline that it has long been settled that the Court's jurisdiction to dismiss a suit as frivolous or vexatious is to be used sparingly and only in cases which are clear and beyond doubt [para. 3]....

80. The Court then states, at para. 12: "Broadly speaking, the Rule is designed to prevent an abuse of the court's process, time and resources, as well as to insulate the other litigant from the attendant costs associated with defending a frivolous appeal."

81. I will say at the outset that all motions will be determined in accordance with *Rule 23.01(1)(a)* and *(b)* and not *Rule 27*. I find nothing vexatious, frivolous and/or abusive about the pleadings here despite the vehement arguments to this effect by the Moving Defendants.

82. I pause to note here that despite the speculation and aspersions cast by the Moving Defendants against the Plaintiffs for including the IDs in this litigation as defendants, and referencing the *Strangers*, I do not attribute nefarious motives to their actions in this regard. The law relating to Aboriginal title is an evolving area of the law fraught with difficult and complex legal questions. This is so particularly in the area where private fee simple interests, as opposed to Crown land only, are implicated in claims for declarations of Aboriginal title.

Rule 37

83. At least one party has requested judgment following the requested striking of the pleadings pursuant to *Rule 37*. I am mindful that such relief in the form of judgment, is a matter of discretion but only exercisable where an amendment to the pleadings will not correct the pleadings deficiency. Judgment does not always follow as a matter of course in motions for *Rule 23.01(1)(b)* relief:

> Under our Rules of Court, where relief is granted under Rules 23.01(1)(a) or (b), judgment does not automatically follow. Indeed, an amendment to the pleadings might cure the problem and breathe life into the action or defence, hence the option, in a proper case, of a conversion order and judgment pursuant to Rule 37.10(a). For statement of claim purposes, that relief is warranted where no amendment giving rise to a reasonable cause of action is appropriate: see *Tingley*, at para. 39

The IDs Motion Relief Reframed

84. While the focus in submissions on the IDs Motion, written and oral, was on the existence of a "reasonable cause of action", it was, despite this, not lost on any of the parties that the remedy requested here in the Claim is *declaratory* in nature.

85. As noted, declaratory relief does not require the pleading of a reasonable cause of action: "A declaration is a narrow remedy but one that is available *without a cause of action* and whether or not any consequential relief is available: *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623 (S.C.C.), at para. 143; P. W. Hogg, P. J. Monahan and W. K. Wright, *Liability of the Crown* (4th ed. 2011), at p. 37; L. Sarna, *The Law of Declaratory Judgments* (4th ed. 2016), at p. 88." *Ewert v. Canada*, 2018 SCC 30, at para. 81. [emphasis added].

86. This is also noted by reference to *Ewert v. Canada*, 2018 SCC 30, in the extra-judicial writing of the Supreme Court jurist, Justice Rowe (and Diane Shnier), in *The Limits of Declaratory Judgments*, (2022) 67:3 McGill LJ 295, at page 297.

87. Indeed, pursuant to *Rule 27.06 (11)*, no objection can be taken to pleadings that seek declaratory relief only, whether or not consequential relief is sought.

88. I could deny the IDs Motion here on this basis, but I decline to do so. Much time and expense were expended on this motion by all parties (held over four days at an off-site location due to the number of parties and counsel involved).

89. I find that in addition to being directed to be practical and pragmatic, our *Rules of Court*, in particular *Rules 1.02.1* and *1.03(2)*, direct me to construe the rules in issue in the least expensive manner and toward the most expeditious determination of the matter:

> 1.02.1 In applying these rules, the court shall make orders and give directions that are proportionate to what is at stake in the proceeding and the importance and complexity of the issues.
>
> 1.03(2) These rules shall be liberally construed to secure the just, least expensive and most expeditious determination of every proceeding on its merits.

90. Thus, despite the wording used by counsel in the IDs Motion, the intent of the motion and the arguments from all counsel allow me to consider the motion by interpreting the alleged "absence of a reasonable cause of action" as "the absence of the grounds for a declaration." I will explain.

91. I am aware that judicially assessing whether a reasonable cause of action is pleaded is distinct from assessing whether the grounds for a declaration are pleaded. However, I find that the underlying principle of both assessments is the same: should the pleadings (whether predicated on a cause of action or a declaration) be struck as they disclose no reasonable prospect of success? (*Tingley*, at para. 114)

92. "Success", therefore, must be assessed according to the nature of the relief requested in the Claim, assuming the facts alleged are true.

93. The confusion here, I suspect, is with the wording of our *Rules of Court*. In *Rule 16*, an "originating process" is either an "action" (commenced by way of a statement of claim) or an "application" commenced by notice of application (typically where facts are not in dispute).

94. *Rule 27* states that where an "originating process" is commenced by way of a statement of claim, the "pleadings" are defined as the statement of claim, the defence and any reply. *Rule 23.01* allows for the striking of any pleading that does not disclose a reasonable cause of action.

95. Here, the matter was commenced, as I said sensibly, by way of an "action/statement of claim". As stated, the rules allow for the striking of pleadings for the failure to disclose a reasonable cause of action. However, the "pleadings" here, set in a "statement of claim", seek the "declaration" of a right (plus consequent relief).

96. The Supreme Court lays out the four grounds required for the discretionary granting of a declaration in *Ewert*, at para. 81, as follows:

> A court may, in its discretion, grant a declaration where it has jurisdiction to hear the issue, where the dispute before the court is real and not theoretical, where the party raising the issue has a genuine interest in its resolution, and where the respondent has an interest in opposing the declaration sought: see *Daniels v. Canada (Minister of Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 S.C.R. 99(S.C.C.), at para. 11; *Khadr v. Canada (Prime Minister)*, 2010 SCC 3, [2010] 1 S.C.R. 44(S.C.C.), at para. 46; *Solosky v. R.* (1979), [1980] 1 S.C.R. 821 (S.C.C.), at pp. 830-33.

97. From the written material and the submissions from all parties, and despite the parties' focus on the wording "a reasonable cause of action", at issue is the Moving ID Defendants ultimate argument that they should not be required to defend against this litigation as there is no direct link between them and the Plaintiffs sufficient to ground a declaration and relief against them. They repeat the phrase coined by counsel for AGNB: "All roads lead to the Crown."

98. In effect, they challenge the fourth ground required for a declaration: the legal relationship and/or interest between the IDs and the Wolastoqey. In other words, they contend that they are not proper parties to respond to the Claim.

99. The fourth ground for a declaration is referenced by Dickson, CJ, for the Supreme Court in *Solosky v. R.* (1979), 105 D.L.R. (3d) 745 (SCC). In the context of his description of declaratory relief generally, he states that "Declaratory relief is a remedy neither constrained by form nor bounded by substantive content, *which avails persons sharing a legal relationship*, in respect of which a "real issue" concerning the relative interests of each has been raised and falls to be determined." (para. 11- emphasis added)

100. Further, in the recent decision of the Supreme Court in *Shot Both Sides*, at para. 66, the Court states that: "Declarations set out the parameters of *a legal state of affairs or the legal relationship between the parties*. They primarily confirm or deny the legal rights of the parties… (see, e.g., Manitoba Metis, at paras. 6 and 154; Smith, at p. 15)." [emphasis added]

101. In *Ewert*, at para. 82, the Court refers to the availability of a declaratory judgment having considered the four grounds for such equitable relief, using the following language to refer to the fourth ground: "Finally, the federal Crown, and its representative, the Commissioner of the CSC, *are proper parties to oppose* the declaration." [emphasis added]

102. As stated, I find that the real issue in the IDs Motion before me, is the fourth ground required for a declaration against the IDs and the Crown, rephrased by me, as follows: *do the Moving Defendants (and all IDs by implication) have a legal relationship and/or an interest in dispute with the Plaintiffs such that they are proper parties to oppose the declaration sought?*

103. It may well be that the Plaintiffs cannot meet the second ground supporting a declaration against the IDs. That is, any dispute between the Plaintiffs and the IDs is theoretical, and not real, based essentially upon the same issue that arises on the fourth ground, namely that a declaration of Aboriginal title to the claimed lands to which fee simple title is held cannot resolve any apparent conflict between the two interests as such resolution in the form of reconciliation and relief can only come through the Crown (as guided and perhaps directed, if need be, by the Court).

104. As I rest the decision on the IDs Motion on the ground requiring a legal relationship or interest directly between the Plaintiffs and all IDs, I will not delve into this second ground required for a declaration against the IDs.

The AGNB Motion Relief

105. The AGNB advances its motion to strike pleadings on the basis that the sought after declaration and consequent relief, in the face of the existing fee simple interests of the Strangers cannot issue by this Court. The AGNB argues that *none* of the grounds for declaratory relief are met in the Claim for such relief.

106. The AGNB takes the position that I can determine at this early stage of the litigation whether the law can recognize a declaration of existing Aboriginal title in the face of existing fee simple title.

107. The argument raises both procedural and substantive law concerns. Procedurally, the concern is that hundreds of thousands of fee simple title holders are not parties to the litigation that asks for relief relating to their lands. Substantively, the AGNB appears to be arguing that where fee simple exists, Aboriginal title cannot co-exist in law.

108. As the AGNB argument on their motion invokes a similar argument as is raised on the IDs Motion "reframed", I will address the IDs Motion first and follow up with brief comment in relation to the AGNB Motion.

The Analysis

The Legal Relationship/Interest

109. Telegraphing the disposition of the IDs Motion to better understand the analysis that follows, I state that the sought after declaration of Aboriginal title with consequential relief *directly* against the private IDs has no reasonable prospect of success. The IDs have no *legal* relationship and/or interest, in the context of this Aboriginal rights litigation, to oppose the declaration sought by the Plaintiffs.

110. With the greatest respect to all counsel for the Plaintiffs, who, like counsel for the Moving ID Defendants and for the Crown, have demonstrated great legal skill in this matter and who are tasked with the tremendous responsibility of getting the pleadings right, I find the inclusion of the IDs, and the related pleadings in the Claim, to be misconceived.

111. The Plaintiffs do not dispute, and candidly accept, that no private law cause of action applies against any of the IDs. There is no claim against the IDs in contract, negligence, or tort. Indeed, the Plaintiffs, in oral submissions, recognized and referred to the IDs as "innocents" in this matter.

112. There is thus no private law direct legal connection or relationship between the private party IDs and the Plaintiffs, other than that the IDs own the lands sought by the

Plaintiffs based on their assumed (for the purposes of this motion) Aboriginal title to the same land.

113. I pause to note here a decision of our Court in 2017, wherein Grant J was faced with a similar question regarding the pleadings in a declaratory relief context, *though not in an Aboriginal rights context.*

114. In the decision in which declaratory relief was requested by one party with no alleged legal relationship to one of the two defendants, Grant J of this Court dismissed a motion to strike the pleadings for a failure to plead a reasonable cause of action: *J.D. Irving v. Southern New Brunswick Forest Products Marketing Board et al*, 2017 NBQB 103.

115. Grant J noted that the relief sought in the action was declaratory only, with consequential relief. The moving party claimed (as do the Moving ID Defendants before me) that there was no legal link between the plaintiff and one of the two defendants named in the action.

116. Grant J. ruled that because the *outcome* of the claimed declaration would/could affect the defendant seeking the motion relief, and that such declaratory relief could not be granted impacting that defendant if they were not a party to the action, the motion must fail.

117. While I defer to and agree with Grant J's reasoning in that case, it is often said that context is everything. Here, the matter before me is quite distinct from that before Grant J. Suffice it to say at this point, that in the context of Aboriginal rights litigation involving the Crown, additional litigation principles apply and must be considered by the courts: "Ultimately, a declaration is a discretionary remedy that must be considered within the unique context of the legal dispute at issue." (*Shot Both Sides*, at para. 82).

118. This brings me to the nature of the pleadings against the IDs, which brings me to the curt saying, "you cannot get there from here."

119. There is nothing in the pleadings that converts the Claim to one in private law arising from a *direct* legal relationship between the non-Crown Moving ID Defendants and the Plaintiffs.

120. The legal relationship at issue in this Claim for a declaration, based on the pleadings, is that between the Crown and the Plaintiffs, not between the IDs and the Plaintiffs.

121. This arises from the unique – *sui generis* – nature of Aboriginal title and the *sui generis* relationship between the Crown and the Plaintiffs.

122. While I will delve more deeply into my rationale for this conclusion, suffice it to say briefly at this time, this is because "...Part II Aboriginal rights, like Part I Charter rights, are held against government...", (*Tsilhqot'in*, at para. 142) in other words, the Crown.

123. This is not to say that constitutional declarations cannot impact on or apply to private interests, but this is not a basis upon which to plead that private parties should be included in actions between two constitutional entities such as Aboriginal groups and the Crown.

124. The Supreme Court has for decades now carved out an area of law known as Aboriginal rights law. Aboriginal title is a particular aspect of that area of the law that is considered so unique - *sui generis* – that it cannot be categorized under the recognized areas of the law such as civil or property law. While aspects of Aboriginal title point to similarities in fee simple title, noted by the Supreme Court, we are guided by the seemingly incongruous caution against treating Aboriginal title as anything other than utterly unique (see *Uashaunnuat*, at para. 36).

125. Thus, pleading for a declaration of constitutional proportion against private parties who have no constitutional authority or obligation, posits the property law relief sought against the IDs as the legal link/interest between the Plaintiffs and the IDs. This, in my opinion, is wrong in law and does not meet the fourth ground for the availability of the declaration sought. This means the declaration sought against the IDs *directly* does not have a reasonable prospect of success.

126. I agree with the submission from JDI that the Claim as filed against the IDs seeks private, property law-based remedies directly against private third parties for alleged constitutional breaches by the Crown. Their presence in this litigation is a distraction and a detraction from the constitutional nature of the action.

127. It is simply untenable at law to draw private party litigants, against whom no private law cause of action has been alleged, *and no direct legal relationship established,* into a constitutional challenge against the Crown (leave aside the practical implications of such an approach: there are seven main corporate defendants included in this case along with multiple corporate affiliates, all represented by multiple lawyers necessitating special arrangements for extended court hearings).

128. Indeed, this "routine" motion by the IDs to strike pleadings before me took four hearing days to complete with post-hearing briefs. In this motion, only three of the seven corporate defendants sought to file materials and make submissions. All but two corporate defendants were in attendance. It is to be expected that as the Claim advances, more of the corporate defendants may wish to weigh in with materials and

submissions. The pace of this litigation will no doubt be even more glacial than most Aboriginal rights cases.

129. The problem with joining private parties to Aboriginal title litigation was commented on early in *Haida*, at the trial level, *The Council of the Haida Nation v. British Columbia*, 2017 BCSC 1665, at para 34:

> ... Requiring private parties to join such a daunting lawsuit would impose an undue burden on them and I fail to see how they could meaningfully participate in it. This would also negatively affect the ability of the Haida Nation to effect the kind of reconciliation with the non-aboriginal community that is the fundamental objective of aboriginal rights litigation: see *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 (S.C.C.) at para. 1.

130. Aboriginal title claims are judicially recognized as being complex, lengthy and extremely expensive proceedings. Parties who cannot contribute to the claim being made, should not be involved in such litigation.

131. The Moving ID Defendants, as I interpret their complaint with the pleadings, dispute that the pleadings establish that they have an interest or a legal relationship *directly* with the Plaintiffs making them proper parties to oppose the action alongside the Crown. In essence, the argument is that the pleadings against them do not establish this fourth necessary ground for a declaration directly against them.

132. Claims such as the one before me are, I believe, misconceived in their attempt to claim Aboriginal title directly against fee simple owners without any pleadings of a *direct legal* relationship between the Aboriginal group and the fee simple owners. The private parties are only involved in the litigation because they hold fee simple title to land granted by the Crown that may be burdened with Aboriginal title.

133. To strike 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. The Crown holds the allodial or radical title to fee simple land. While fee simple is indeed the bedrock of settler society, it grants only the beneficial interest in the land: see *Annapolis Group Inc. v. Halifax Regional Municipality*, 2022 SCC 36, for a discussion of expropriation powers, the meaning of "beneficial interest" and the common law power inherent in private property rights.

134. Should the Court determine that such a remedy is warranted flowing from a declaratory judgment (and should reconciliation fail), 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.

135. The difference is that it will be the Crown who stands between the Aboriginal and non-Aboriginal which will better foster reconciliation than pitting Aboriginal directly against private party non-Aboriginal over their respective land interests.

136. This is indeed the very essence of the goal and principle of reconciliation inherent in s. 35 rights. In *Southwind v. Canada*, 2021 SCC 28, Karakatsanis, J states the following:

> This is an ongoing project that seeks the "reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship" (at para. 55)
>
> ....
>
> Rooted in the honour of the Crown, the Crown's fiduciary duty exists to further a socially important relationship. It structures the role voluntarily undertaken by the Crown as the intermediary between Indigenous interests in land and the interest of settlers...Indeed, the need to reconcile the assertion of Crown sovereignty with the pre-existence of Indigenous Peoples, and to reconcile Indigenous and non-Indigenous Canadians is of "fundamental importance" (at para. 60)

137. For the purposes of the IDs Motion, I make no determination as to whether the facts pleaded can support a finding of Aboriginal title. Instead, I presume they do on the basis that even if I go so far as to accept that Aboriginal title is proven, factually and legally, (again for the purposes of this motion only), the Moving ID Defendants are entitled to some of the relief they seek here.

138. Aboriginal title, if declared, is declared as against the Crown. It establishes the legal relationship, interests, and state of affairs as between the Crown and the Aboriginal group, not as between an Aboriginal group and private parties. I acknowledge such a declaration impacts everyone, Crown and non-Crown, but the *legal* declaration itself is against the Crown only. It is not declared against private parties as they hold no constitutional status as against the Aboriginal group.

139. Assuming as I must for the purposes of the motion that the Plaintiffs have Aboriginal title to the lands claimed, I find that the pleadings against the IDs *directly* do not establish a legal relationship or interest such that they along with the Crown are proper parties to oppose the request for a constitutional declaration.

140. This is understood by reference to the public law nature of Aboriginal title to which I now turn.

The Public Law Nature of Aboriginal Tittle

141. As I did in my first pre-trial decision in this case, I set out here what has been stated by the Supreme Court of Canada to date on the nature of Aboriginal title. It is indeed the very nature of Aboriginal title that makes apparent the impropriety of pleading against private non-Crown parties.

142. In *Delgamuukw*, Lamer C.J.C, traces the history of the Supreme Court's consideration of Aboriginal title back to the 1888 decision of the Privy Council in *St. Catharine's Milling & Lumber Co. v. R.* (1888), 14 App. Cas. 46 (Canada PC).

143. The key findings in *Delgamuukw* are as follows:
    a. Aboriginal title ("AT" here only) is a right in land (para. 111)
    b. AT is a *sui generis* interest in land (meaning of its own kind or class) distinguishing it "...from 'normal' proprietary interests, such as fee simple." (para. 112)
    c. The characteristics of AT "...cannot be completely explained by reference either to the common law rules of real property or to the rules of property found in aboriginal legal systems." (para. 112)
    d. AT "...must be understood by reference to both common law and aboriginal perspectives." (para. 112)
    e. The *sui generis* nature of AT means it has the following dimensions:
        i. the title is inalienable, meaning it cannot be transferred, sold or surrendered to anyone but to the Crown
        ii. the title is sourced in the "...prior occupation of Canada by aboriginal peoples." (para. 114), meaning:
            1. AT is sourced in the common law principle that "...occupation is proof of possession in law..." That possession pre-dated "...colonization by the British and survived British claims to sovereignty..." (para. 114), and
            2. AT is sourced in "...the relationship between common law and pre-existing systems of aboriginal law." (para. 114)
        iii. the title is held communally; "...it is a collective right to land held by all members of an aboriginal nation." (para. 115)
    f. AT "encompasses the right to exclusive use and occupation of the land..." for a variety of purposes not limited to aboriginal practices, customs and traditions but the uses must not be irreconcilable with the nature of the group's attachment to the land in question (para. 117).

144. In the 2014 decision in *Tsilhqot'in*, McLachlin, C.J.C., for the Court, expanded on the test to establish Aboriginal title in the context of a claim by semi-nomadic indigenous groups. Nothing in this decision detracts from anything stated in *Delgamuukw* regarding the nature of Aboriginal title.

145. The key findings in *Tsilhqot'in* are as follows:
    a. AT is "...an independent legal interest..." (para. 69)
    b. AT is "a beneficial interest in the land..." with the right to "...the benefits associated with the land..." (para. 70)
    c. Comparing Aboriginal title to other forms of land ownership "...may help us to understand aspects of Aboriginal title. But they cannot dictate precisely what it is or is not. As La Forest J. put it in Delgamuukw, at para. 190, Aboriginal title "is not equated with fee simple ownership; nor can it be described with reference to traditional property law concepts". (para. 72)
    d. AT "...confers ownership rights similar to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to proactively use and manage the land." (para. 73)
    e. An important limitation to AT is that title is held "not only for the present generation but for all succeeding generations. As stated in Delgamuuk, it cannot be alienated except to the Crown nor can it be misused or used in a way that is irreconcilable with the ability of future generations to benefit from the land. (para. 74)

146. In the 2020 decision, *Uashaunnuat*, at para. 36, the majority decision addresses the *sui generis* nature of Aboriginal rights and the inability to fit them into any recognized category of property or personal rights as those are understood in civil law:

> However, no matter the facial similarities, s. 35 rights are not simply an amalgam of real rights and personal rights connected to Aboriginal peoples. As the term sui generis makes clear, s. 35 rights are legally distinct and, indeed, "impossible to fit into any recognized category": Reid, at p. 607. They are neither real rights nor personal rights as defined in the civil law, but sui generis rights. Given the foregoing, s. 35 rights should not be pigeonholed into a category of civil law rights...

147. I find what matters here on these motions is that Aboriginal title, and Aboriginal law generally, is a facet of constitutional law. Fee simple is a legal interest grounded in medieval concepts of property law that has no constitutional dimension as its source. The fact that the sought declaration encompasses private land does not in my opinion alter the nature of the Claim for a constitutional declaration against the Crown.

148. Though set in the context of treaty rights, the very recent decision of the Court in *Restoule*, at para. 210, emphasizes the constitutional law, not private law, nature of Aboriginal rights:

> Finally, a claim for breach of an Aboriginal treaty right is fundamentally different than an action on the case. Treaty claims are not actions in the nature of tort or contract, which seek to vindicate private rights, and which derive from the law of trespass. Rather, Aboriginal treaties are sui generis agreements representing the exchange of solemn promises between the Crown and Indigenous peoples (Simon, at pp. 404 and 410; Sioui, atp. 1038; Badger, at para. 41). The rights at stake are constitutional, engaging issues of public law rather than private law.

149. Earlier in *R. v. Côté*, [1996] 3 S.C.R. 139, at para. 49, the majority judgment described Aboriginal title as "a distinct species of federal law rather than a simple subset of the common or civil law…"

150. Malcolm Lavoie writes on this in his article, *Aboriginal Title Claims to Private Land and the Legal Relevance of Disruptive Effects*, (2018) 83 S.C.L.R. (2d), pages 129-166, at pages 142-143, as follows:

> That said, the very classification of Aboriginal title as legal or equitable has the air of an anachronism about it. The legal/equitable distinction developed based on the historic jurisdictions of the English courts of law and equity. Aboriginal title is a unique interest in land, drawing inspiration from legal, equitable, and Indigenous sources. Courts have repeatedly cautioned against the mechanical application of common law rules to Aboriginal title. Precedents developed under legal actions for trespass or ejectment do not automatically apply any more than do those developed in the context of trust property. The need also to consider Indigenous legal principles sheds further doubt on any approach that proceeds on the basis of classifying the rights and remedies associated with Aboriginal title as being either clearly legal or equitable.

151. This should not be taken to suggest that should Aboriginal title be declared, the declaratory relief ordered by a court could not consider repossession of private land, but such relief could only come through the Crown, not *directly* from the IDs.

152. Indeed, it is the nature of the *sui generis* relationship between Aboriginal groups and the Crown, that the latter stands as a buffer, where appropriate, and a conduit, where necessary, between Aboriginal and settler societies.

153. Similarly, and as noted by Brian Slattery in his article, *The Constitutional Dimensions of Aboriginal Title*. (2015) 71 S.C.L.R. (2d), at page 47: "In effect, the reason why Aboriginal title cannot be described in traditional property terms is that it is not a concept of private law at all. It is a concept of public law. It does not deal with the rights of private entities but with the rights and powers of constitutional entities that form part of the Canadian federation."

154. Although set in the context of the duty to consult, the *Haida* decision, from the Supreme Court, makes the point that only the Crown is responsible for breaches of Aboriginal rights, not private parties unless there is some *direct* cause of action in private law between an Aboriginal group and a non-Crown third party: see paras. 53 and 56:

> The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect Aboriginal interests.
>
> The fact that third parties are under no duty to consult or accommodate Aboriginal concerns does not mean that they can never be liable to Aboriginal peoples. If they act negligently in circumstances where they owe Aboriginal peoples a duty of care, or if they breach contracts with Aboriginal peoples or deal with them dishonestly, they may be held legally liable.

155. Brian Slattery, again at page 47, explains how Aboriginal title is a product of the unique relationship between the Crown and Aboriginal peoples:

> Finally, Aboriginal title flows from a special historical relationship between the Crown and Aboriginal peoples. Chief Justice McLachlin comments:
>
> > It is this relationship that makes Aboriginal title sui generis or unique. Aboriginal title is what it is — the unique product of the historic relationship between the Crown and the Aboriginal group in question.
>
> This final characteristic provides the key to the nature of Aboriginal title. The historical relationship between the Crown and Aboriginal peoples evolved organically from a complex series of treaties, alliances and associations from the 1600s onward, many of which continue to the present day. Over time this relationship took on a constitutional character, as Aboriginal peoples became partners in the emerging federation of Canada. Aboriginal title, as the "unique product" of this relationship, shares in its constitutional character.

156. A claim for Aboriginal title is a public law claim of constitutional proportion. It is a claim that falls within the unique parametres of Aboriginal law shaped by the constitutional recognition of Aboriginal rights in s. 35 and by the evolving jurisprudence of the Supreme Court of Canada. This is discussed in *Uashaunnuat,* at paras. 30-31 and 64:

> 30 Owing to its origins in the special relationship between Indigenous peoples and the Crown, Aboriginal title has unique characteristics that distinguish it from civil law and common law conceptions of property. Aboriginal title is inherently collective and exists not only for the benefit of the present generation, but also for that of all future generations: Tsilhqot'in Nation, at para. 74; see also B. Slattery, "The Constitutional Dimensions of Aboriginal Title" (2015), 71 S.C.L.R. (2d) 45, at pp. 45-47. With its aim of benefiting both present and future generations, Aboriginal title restricts both the alienability of land and the uses to which land can be put: Tsilhqot'in Nation, at para. 74. These features are incompatible with property as it is understood in the civil law and common law: see K. Anker, "Translating Sui Generis Aboriginal Rights in the Civilian Imagination", in A. Popovici, L. Smith and R. Tremblay, eds., Les intraduisibles en droit civil (2014), 1, at pp. 23-28.
>
> 31 Moreover, Aboriginal perspectives shape the very concept of Aboriginal title, the content of which may vary from one group to another. As such, disputes involving title should not be resolved "by strict reference to intractable real property rules" but rather must also be understood with reference to Aboriginal perspectives: St. Mary's Indian Band, at para. 15; see also Delgamuukw, at para. 112; Marshall, at paras. 129-30 (concurring reasons of LeBel J.).
>
> ....
>
> 64 Section 35 of the Constitution Act, 1982, operates uniformly across Canada. The determination of whether a claimed Aboriginal or treaty right enjoys constitutional protection under s. 35 is a matter of constitutional law, not of federal law or provincial law...

157. That courts have struggled to describe the nature of Aboriginal title is an understatement. Having poured through the caselaw and academic writings on such title, it is clear that Aboriginal title is *sourced* in the relationship between the Crown and the Aboriginal group. It is a constitutional concept that reflects and merges Crown sovereignty with the recognition of prior Aboriginal possession of land.

The "Apparent" Conflict between Fee Simple Title and Aboriginal Title

158. The parties, in their filings and submissions, have admirably wrestled with the many conflicting, and at times, downright confusing legal principles that seem at complete odds with each other, namely the *apparent* conflict in this case between Aboriginal title to, and fee simple ownership of, land.

159. What is to be determined by this Court is whether the Plaintiffs have Aboriginal title to their claimed Traditional Lands as against their constitutional partner in reconciliation, the Crown. Sidelining this judicial and constitutional exercise by the inclusion of a legal debate with private landowners about who has better title to the land is untenable, unnecessary, and quite possibly a false dichotomy.

160. It is these very interests that must be *reconciled* by or through the Crown (whether by adversarial litigation between the Crown and the Aboriginal groups or by negotiation), not by or through litigation drawing in private parties who hold fee simple title to the claimed land.

161. As an example of the difficulty of drawing in private parties with land interests rooted in private property law concepts, take the pleading here of ejectment. This is wholly grounded in Eurocentric real property law. The pleadings relating to Aboriginal title are not grounded in real property law at all. To attempt to ground it as such completely ignores its constitutional nature and the fact that it is sourced in the relationship with the Crown and the latter's assertion of sovereignty over the land in dispute.

162. It is indeed a tortured and ultimately futile exercise to try to make Aboriginal title fit into ancient, known and existing legal categories, when by its nature, it is unique. The Supreme Court has specifically cautioned against this. This was noted in my earlier pre-trial decision, above referenced, at paras. 102-103:

> In *R. v. Marshall/Bernard*, 2005 SCC 43, at paragraph 61, McLachlin C.J.C. for the majority, references the historical development of the common law concept of "title" as compared to Aboriginal title and cautions against looking for "...indicia of aboriginal title in deeds or Eurocentric assertions of ownership." (Marshall, supra at para. 61)

163. I acknowledge this comment is made in the context of what is required to *prove* Aboriginal title, but she references how "[t]he common law, over the centuries has formalized title through a complicated matrix of legal edicts and conventions..." I take the point to be that Aboriginal title is not to be found or contemplated in those Eurocentric concepts.

164. I pause to discuss a decision from the Ontario Court of Appeal, cited repeatedly by

all parties in this motion: *Chippewas of Sarnia Band v. Canada*, 51 O.R. (3d) 641 (5-member panel of the ONCA) (*CO Sarnia*). This decision has been heavily criticized by some academic writers but leave to appeal to the Supreme Court was denied, not once but, twice when reconsideration of the denial of leave was sought.

165. I find that this case discloses the very problem of including private parties in Aboriginal title litigation. It mistakenly allows for the pitting of private fee simple title holders *directly* against Aboriginal title holders and contorts legal principles in doing so.

166. The *CO Sarnia* summary judgment decision involved a claim for a declaration of Aboriginal title over lands owned by the Crown and by private fee simple land holders. The Court assessed the matter primarily by reference to known common law and equity principles relating to property law.

167. While this decision loomed large for all of the parties before me, I do not find it particularly helpful. This is mainly because it is a 24-year-old decision that predates many Supreme Court of Canada decisions from which different directions, legal principles and analyses arise in the context of Aboriginal law. In particular, the approach now directed by the Supreme Court is that declaratory judgments are to be catalysts for negotiation and reconciliation between the Crown and the Aboriginal groups. Such negotiation and reconciliation efforts do not involve private, non-Crown, parties.

168. I find that the Court in *CO Sarnia*, without the benefit of the cases decided by the Supreme Court since 2000, tried to apply "the complicated matrix of legal edicts and conventions" to Aboriginal title and how it may or may not interface with fee simple title.

169. This was noted in Malcolm Lavoie's article, previously cited, at page 131, with reference to that very decision in the footnote: "Whether seeking to vindicate the proprietary interests of Aboriginal title holders or those of private owners, the legal analysis often resorts to a kind of mechanical formalism. The analysis is based, for instance, on the anachronistic classification of the unique rights and remedies associated with Aboriginal title as being within either the historic jurisdiction of the courts of law or equity."

170. The apparent "conflict" between Aboriginal title and fee simple title relating to the same land is not a sufficient basis, given the *sui generis* and constitutional nature of Aboriginal title, on which to turn the "contest" into a private law battle between non-Crown private parties and Aboriginal groups.

171. Should Aboriginal title be declared on land granted away in fee simple, the "problem" or the "conflict" this presents will initially fall on the Crown, per *Shot Both Sides* and *Restoule*, to negotiate and reconcile. Indeed, the "problem" - so called - may well test the very limits of the court's jurisdiction, but this is yet to be assessed.

172. Both *Shot Both Sides* and *Restoule* appear to be refining the role of the courts in Aboriginal rights litigation. Once the "conflict" or the "wrongdoing", however it may be characterized (always assuming the facts to be true), is factually and legally determined, a reconciliation process is triggered invoking polycentric considerations on the part of the Crown. While a court will, or may, hold a reviewing jurisdiction over this process, and possibly a decision-making jurisdiction should reconciliation break down absolutely, it will be on the Crown to take into consideration the fee simple title interests of land holders as part of that process of reconciliation.

173. This is understood by considering the nature of declaratory relief in the Aboriginal law context, to which I turn now.

The Nature of the Declaratory Relief

174. It is important to recall the *raison d'être* of declaratory judgments. While a bare declaration of rights is not enforceable, as discussed by Rowe, J in, *The Limits of the Declaratory Judgment*, "...it is useful in the sense that courts will recognize and adhere to the declaration in any future proceedings seeking consequential relief." (at page 307).

175. The usefulness of the declaratory judgment is that it...

> ...is a judicial statement confirming or denying a legal right of the applicant. Unlike most rulings, the declaratory judgment merely declares and goes no further in providing relief to the applicant than stating his rights. While consequential relief may be joined or appended, the court has the power to issue a pure declaration without coercive direction for its enforcement.
>
> The essence of a declaratory judgment is a declaration, confirmation, pronouncement, recognition, witness, and judicial support to the legal relationship between parties without an order of enforcement or execution. (at page 305, citing Lazar Sarna, The Law of Declaratory Judgments, 4th ed. (Totonto: Thomson Reuters, 2016) at 13-17)

176. Both *Shot Both Sides* and *Restoule* discuss the significance and limitations of judicial declarations in the Aboriginal law context. In *Shot Both Sides,* the Court states at para. 70:

> Declaratory relief takes on a "unique tenor" in the context of Aboriginal and treaty rights because it is a means by which a court can promote reconciliation to restore the nation-to-nation relationship (the Hon. M. Rowe and D. Shnier, "The Limits of the Declaratory Judgment" (2022), 67 McGill L.J. 295, at pp. 314 and 318). It relies in part on the government acknowledging the declaration promptly and acting honourably in determining the means for advancing reconciliation (J. Teillet, "A Tale of Two Agreements: Implementing Section 52(1) Remedies for the Violation of Métis Harvesting Rights", in M. Morellato, ed., *Aboriginal Law Since Delgamuukw* (2009), 333, at pp. 340-41).

177. Further in *Restoule*, the Court states at para. 282, referring back to *Shot Both Sides*: "As this Court has noted, declaratory relief "is not meant to represent the end of the reconciliation process" for the Crown's breach of a treaty; it "merely helps set the stage for further efforts at restoring the nation-to-nation relationship and the honour of the Crown" (*Shot Both Sides*, at para. 74)."

178. Indeed, and as I noted at the outset, a constitutional declaration of Aboriginal title will trigger reconciliatory action on the part of the Crown and the Plaintiffs, as it is now recognized as a *legal* duty, not just a moral one on the part of the Crown: see *Haida,* at para. 25 and *Tsilhqot'in,* at para. 17. As stated in *Restoule*, at paras. 296-297, (though in an Ontario context), upon the declaration of an Aboriginal right:

> ...the Crown will have to engage in complex polycentric decision making that weighs the solemnity of its obligations to the Anishinaabe and the needs of other Ontarians and Canadians, Indigenous and non-Indigenous alike. This is well within the expertise of the executive branch, but is much less within the expertise of the courts.
>
> These principles concerning the proper role of the courts dovetail with the idea that "[r]econciliation often demands judicial forbearance. Courts should generally leave space for the parties to govern together and work out their differences" (First Nation of Nacho Nyak Dun, at para. 4). As Lamer C.J. wrote in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, "it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve ... a basic purpose of s. 35(1) — 'the reconciliation of the pre-existence of [A]boriginal societies with the sovereignty of the Crown'" (para. 186; see also F. Hoehn, "The Duty to Negotiate and the Ethos of Reconciliation" (2020), 83 *Sask. L. Rev.* 1). As this Court has recognized in the duty to consult context, "[t]rue reconciliation is rarely, if ever, achieved in courtrooms" (Clyde River (Hamlet) v. Petroleum Geo-Services

Inc. 2017 SCC 40, [2017] 1 S.C.R. 1069, at para. 24; see also *Mikisew Cree 2018*, at para. 22).

179. While the land interests of the IDs will form part of the polycentric reconciliation considerations of the Crown (*Restoule*), these private parties again have no *legal* reconciliatory role to play between the Crown and the Plaintiffs.

180. Referring again to *Shot Both Sides* and *Restoule*, such a "contest" if there is one, is to be addressed as part of the "declaration and relief phase", in which I include the reconciliation phase of the litigation to follow any declaration of Aboriginal title. The fee simple interests will become part of the Crown polycentric considerations and decision-making over which the Court retains reviewing jurisdiction, should the need arise.

181. It is through this *sui generis* relationship, in which the Crown stands as both a buffer, where necessary, and a conduit, where possible, between Aboriginal and non-Aboriginal individuals and settler societies.

Comments on the AGNB Motion

182. The AGNB takes the position that the Court does not have jurisdiction to issue a declaration of Aboriginal title in relation to land already owned in fee simple. They argue this from a procedural and substantive basis.

183. I do not agree. I do agree, however, that any mention in the pleadings relating to the Strangers, must be struck, with the exception of the map in *Schedule A* that depicts the scope of the Claim as against the Crown and covers fee simple properties.

184. There is no relevance and no basis for any reference to the Strangers in the pleadings. No declaration is sought, nor could one be against the Strangers based on my reasoning in relation to the declaration and relief sought against the IDs. Their reference in the pleadings appears to amount to statements intended to quell concerns raised by the AGNB.

185. I find that both parties have made use of the references in the pleadings to the Strangers as a basis to make politically charged commentary outside the courtroom that is not conducive to either the litigation process or the reconciliation process, the latter arising at some point in this litigation.

186. Given the absence of any legal rationale to include any reference to the Strangers, any and all references to them are struck from the Claim.

187. This does not apply to the map set out in *Schedule A* which depicts the scope of the claim to Aboriginal title. The fact that this map includes land owned in fee simple by both the IDs and the Strangers does not render the declaratory relief sought *against the Crown* to be without a reasonable prospect of success, depending of course on the evidentiary case yet to be advanced.

188. I do agree with the AGNB and the AGCan that the medieval claim for *scire facias* must also be struck as it is a relic of a legal concept that has been overtaken by provisions allowing for the judicial review of Crown grants of land.

189. The Plaintiffs acknowledge that *scire facias* is an ancient and outdated legal construct but seek nonetheless to rely on the principles underlying such a prerogative remedy. Pragmatically and practically speaking, the pleadings should, where possible, focus on remedies available in their evolved and legislated form.

190. This being said, the Supreme Court has directed that pleadings in Aboriginal rights contexts must be given some leeway provided it does not unreasonably prejudice the responding party. I find that a pleading for an abolished ancient remedy such as *scire facias* does not help to focus the pleadings in this case. I will therefore accede to the Plaintiffs' alternative request that they be permitted to amend their pleadings to request a remedy "in the nature of *scire facias*." (Plaintiffs' Brief, para. 170)

191. I dismiss the AGNB request to strike paragraphs 1, 15, 16, 18, 26, 35, 36, 40 and the *Schedule A* of the Claim. I do so on the basis that case law allows for certain leeway in pleadings involving Aboriginal claims. This was referenced earlier and is specifically set out under the heading "Pleadings in Aboriginal Land Claims Cases" in *Tsilhqot'in*, at paras. 19-23:

> ...cases such as this require an approach that results in decisions based on the best evidence that emerges, not what a lawyer may have envisaged when drafting the initial claim. What is at stake is nothing less than justice for the Aboriginal group and its descendants, and the reconciliation between the group and broader society. A technical approach to pleadings would serve neither goal. It is in the broader public interest that land claims and rights issues be resolved in a way that reflects the substance of the matter. Only thus can the project of reconciliation this Court spoke of in *Delgamuukw* be achieved.

Summary

192. I have determined that the impugned pleadings against the IDs must be struck because it is plain and obvious that they do not, and cannot (for *Rule 37* purposes), allow for

a "... 'reasonable' argument that could properly form the subject matter of a trial." (*Hunt*).

193. The pleadings here against the IDs aim to include them in much litigation in which they play no part and can contribute nothing other than additional legal resources in opposition to the Claim.

194. The Moving ID Defendants own fee simple land in claimed Aboriginal title territory. That they own fee simple title is not in dispute. Further, they have no evidence or alleged facts to contribute to the "factual and legal phases" of this litigation. The IDs are effectively along for the ride; that is, all seventeen companies with their cadre of counsel.

195. While there may be, or not, an argument for intervention status by some or all of the IDs at some point in this litigation, this is quite a distinct status from being forced to participate in the Claim as defendants.

196. For the purposes of these motions, assuming the facts of prior occupation sufficient to establish Aboriginal title are true, there is no direct link between those facts and a constitutional declaration and consequent relief against any private fee simple title holders. The declaration and consequent relief can only be against and come from the Crown.

197. As I read *Shot Both Sides* and *Restoule*, the effect of those decisions is to direct courts that the way forward in Aboriginal rights litigation is to focus on the reconciliation process that respects the limitations of the courts and fosters the relationship between the Crown and Aboriginals.

The Disposition

198. As requested by the Moving Defendants, both the IDs and the AGNB, the following pleadings are struck from the Claim, pursuant to *Rule 23.01(1)(a) and (b)*: paragraphs 2, 3, 12 and 13, this includes any related references thereto in the Particulars.

199. In addition, the following paragraphs in the Claim, and any related Particulars, must be modified, as follows:

    a. 1(c) – remove the reference to "Defendants"
    b. 1(d) – add in "an Order *in the nature of scire facias* as against the Crown defendants in respect of the properties..."
    c. 1(e) – add in "in the alternative to (d) an order for the recovery of land as against the Crown defendants in respect of the property identification numbers..."

d. 32 – refer to an Order *in the nature of scire facias*
e. 33 – the reference to paragraph 29 appears to be in error and should be corrected; further, the paragraph should be modified to remove any reference to "Defendants" (referring to non Crown defendants) and to request as against the Crown defendants, in words to the effect, as follows: "the recovery of land set out in Schedule B, by any such means in its power and authority and to place the Plaintiffs' in possession of such lands in accordance with any declaration of Aboriginal title"
f. 34 – remove the reference to "parties" and insert "persons"
g. 37 and 38 – remove the words "by the Defendants".

200. The effect and intent of my decisions in relation to the IDs and AGNB Motions are that any remaining pleadings must reflect the requirement that any declaration and relief sought is only against the AGNB and/or AGCan.

201. More specifically, where ejectment, recovery of land and *scire facias* are claimed, the Plaintiffs shall amend the Claim such that it indicates such relief is requested against the Crown only and in relation to *scire facias*, that such relief is *in the nature of scire facias* only.

202. As the pleadings cannot be amended to establish a legal relationship or interest such that the IDs are proper parties to oppose the Claim, given the jurisprudence and the admissions or acknowledgements of the Plaintiffs that no wrongdoing or private law basis exists as against the IDs, I exercise my discretion to grant judgment to the Moving ID Defendants (which includes by implication all IDs) as requested pursuant to *Rule 37*.

203. I highlight that while the pleadings, as they relate to and involve the IDs as defendants are struck, I do not find that the Plaintiffs are required to amend the map set out at *Schedule A* or to remove *Schedule B*. It remains to be determined in the action as a whole whether a declaration of Aboriginal title as against the Crown should issue covering lands owned privately in fee simple in order to set in motion a reconciliation process and to determine consequent relief between the Crown and the Plaintiffs regarding that land, having regard to the existing settler fee simple interests in the land.

204. Intervention requests, if any, from fee simple rights holders whose lands may fall within the scope of any factually and legally determined Aboriginal title land may be considered at the legal "declaration and relief phases" of the litigation. I make no further comment at this time on the viability of any such intervention until such requests are squarely before the Court.

205. All three moving ID parties and the AGNB have requested costs on the motions but no party has made specific submissions on what amount is appropriate in the context of this novel litigation in New Brunswick. While *Rule 59*, states that a judge *shall* fix costs on a motion for judgment, judicial discretion exists to refuse such an order:

> Rule 59.08(1)(b) states that, on deciding a motion for judgment, the judge shall fix costs. While Rule 59.01(2)(b) provides that nothing in the Rule shall be construed to interfere with a judge's authority to allow or refuse costs with respect to a particular issue or part of a proceeding, the discretion must be exercised judicially. *Edmondson v. Edmondson*, 2022 NBCA 4, at para. 82

206. I will hear the parties by written submission only on the issue of costs on this and the prior December 2023 motions in which the issue of costs was deferred. It will be most helpful if the parties indicate accurately and specifically the costs incurred on the motions to date and what they seek in costs.

207. I emphasize to the parties that this should be done in consideration of the principles of Aboriginal law, its evolving nature, particularly the thorny question of how private fee simple title and Aboriginal title interact, and the context here where "What is at stake is nothing less than justice for the Aboriginal group and its descendants, and the reconciliation between the group and broader society." (*Tsilhqot'in*, at para. 23)

Kathryn A. Gregory, J.C.K.B.