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 Motions Brought by the **Defendants**:
J.D. Irving, et. al., H.J. Crabbe & Sons and Acadian Timber, et. al.

and

DECISION
On Motion Brought by the **Plaintiffs**

BEFORE:	**Justice Kathryn A. Gregory**
HEARING HELD:	**Saint John, New Brunswick**
DATES OF HEARING:	**December 4, 5, and 6, 2023**
DATE OF DECISION:	**February 1, 2024**
SUBJECT MATTER:	**Defendants' Motions to Strike a Pleading for Certificates of Pending Litigation** and **Plaintiffs' Motion for an Alternate Form of Notice to Certificates of Pending Litigation**

COUNSEL:

Renée Pelletier, Jaclyn McNamara and Victoria Wicks, Counsel for the Plaintiffs
Josh J. B. McElman, K.C., Counsel for the Defendants, Province of New Brunswick and New Brunswick Power Corporation (*NB Power did not participate in the motions on consent*)
Jonathan D.N. Tarlton, Counsel for the Defendant, the Attorney General of Canada
Alex M. 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 J. Cameron, K.C., Counsel for the Defendants, Acadian Timber Ltd. Partnership, et. al.
Philippe Frenette, Counsel for the Defendant, Twin Rivers Paper Company Inc.
Matthew T. Hayes, K.C. and John Roberts, Counsel for the Defendants, Irving Oil Ltd., et. al.
Edwin Ehrhardt, K.C. and Michiel J. Vandenberg, Counsel for the Defendant, AV Group NB Inc.
Robert G. Grant, K.C., Counsel for the Defendant, Strescon Ltd. (*Strescon did not participate in the motions on consent*)

GREGORY J:

Overview

1. This decision is set in the context of a *Notice of Action with Statement of Claim Attached* filed in 2021 by six Wolastoqey Nations in New Brunswick (the Claim). The Claim seeks a declaration of Aboriginal title to a large portion of land in the Province of New Brunswick.

2. As has been stated many times over during these proceedings, a claim of Aboriginal title to land currently "owned" (as the term is commonly understood) by third party landholders is an extraordinary, and to some, an alarming turn of events.

3. Due to the scope of the Claim, the publicity generated, the duelling narratives advanced by the parties, and the impassioned pleas to this Court (at this early stage of what will no doubt be a long and drawn-out litigation process over many years), I wish to preface this decision with some context as provided by various decisions of the Supreme Court of Canada:

    a. "...the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: *when Europeans arrived in North America, aboriginal peoples were already here*... It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status": *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 30 [emphasis added]

    b. "Ultimately, 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 what I stated in Vanderpeet, .31, to be a basic purpose of s. 35(1) — 'the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.' *Let us face it, we are all here to stay"*: *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 186 [emphasis added]

    c. "This Court confirmed the *sui generis*[1] nature of the rights and obligations to which the Crown's relationship with Aboriginal peoples gives rise and stated that what makes Aboriginal title unique is that it arises from possession *before* the assertion of British sovereignty, as distinguished from other estates such as fee simple that arise *afterward"*: *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, at para. 14 [footnote added]

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[1] *Sui generis*: meaning of its own kind, unique

d. Recent jurisprudence from the Supreme Court of Canada has fine-tuned the concept of Aboriginal title, its characteristics and elements of proof. Those elements refer generally to an Aboriginal group's prehistoric presence on certain defined land, the use and continuity of possession of the land by the Aboriginal group in question and the ability to enforce exclusive possession over time, up to the present: *Delgamuukw, supra; R. v. Marshall/R. v. Bernard*, 2005 SCC 43; and *Tsilhqot'in, supra*

4. Having set out the larger background and context, I come to the matters before me to which my decision specifically relates: 1) motions by three Defendants to strike a pleading in the Claim requesting certificates of pending litigation - "CPLs" (*Motions to Strike-CPLs*); and 2) a motion by the Plaintiffs for alternate notice to the requested CPLs (*Motion for Alternate Notice*).

Clarification and Preliminary Issues

5. With regard to the *Motions to Strike-CPLs*, some clarification is required for the purposes of my decision.

6. First, and for the purposes of this decision, I have divided up the named Defendants into two groups for ease of reference: the **Crown** (I include here the Province of New Brunswick (PNB) and the Attorney General of Canada (AG Can)) and the **Industrial Defendants** ((the IDs) which includes all other named Defendants, except NB Power and Strescon, as they took no part in these motions on consent of the parties).

7. The moving Defendants, of which there are three: JDI, Crabbe and Acadian and their named affiliates, all seek to strike paragraph 1(b) of the Claim that requests the issuance of CPLs relating to land owned by the IDs, specifically as follows:

> (b) certificates of pending litigation for properties bearing the property identification numbers set out in Schedule "B", except any properties identified therein as associated with the defendant New Brunswick Power Corporation/Societe D'energie Du Nouveau-Brunswick against which the Plaintiffs do not seek certificates of pending litigation

8. The moving Defendants rely on *Rules 23* and *27* of the *Rules of Court* to do so. *Rule 23* allows for such relief if the pleading discloses no reasonable cause of action. *Rule 27* allows for such relief where the pleading is scandalous in nature and an abuse of process.

9. Two of the moving Defendants, JDI and Acadian, seek additional relief in the form of "declarations" from this Court. They seek a declaration stating that CPLs, in the context of the Claim are "not registerable", "serve no purpose and have no effect",

"are scandalous, frivolous, vexatious and/or are an abuse of process", "will constitute an unjust restraint on trade", and "will have a disproportionate effect on the Defendants."

10. The Plaintiffs note that the briefs of all moving Defendants focus on their request to *strike* the CPL pleading in the Claim. Despite the framing of the Defendants' arguments in this way, the Plaintiffs maintain that such relief can only be predicated on a question of law to be determined first; that being: does Aboriginal title constitute an "interest in land".

11. I must say that I am somewhat confused by the Defendants' requested *declaratory* relief. There is no authority cited for such relief.

12. Consistent with *Rule 1.03(2)* that requires the *Rules of Court* to be "...liberally construed to secure the just, least expensive and most expeditious determination of every proceeding on its merits", I infer from the *declaratory* relief requested that they are seeking a determination of the question of law suggested by the Plaintiffs *and* a determination of whether a CPL relating to a claim of Aboriginal title is "registerable" in the provincial land registration systems.

13. I understand the Plaintiffs' desire to focus the Court on the questions of law because, as they correctly note, *Rule 23.02* significantly limits any supporting evidentiary record. I note, however, no such restriction is imposed by *Rule 27*.

14. I take the Plaintiffs point to be that should I decide that the claimed Aboriginal title is an "interest in land" such that CPLs *could* issue, the Defendant motions fail outright, and they would be required to file anew on the question of whether such CPLs *should* issue.

15. This latter question, being a discretionary issue for the Court, would only then render relevant the evidentiary record before me now.

16. I accept the Plaintiffs' point in this regard in theory, however the motions, the briefs and the oral arguments from all parties, were not limited to reliance on *Rule 23*. Further, the *Rules of Court* provide for flexibility and encourage efficiency in the resolution of matters before the Court.

17. It is correct that leave was not sought by the Defendants to tender evidence under *Rule 23,* but if such leave had been sought, I would have granted it given the context in which these motions are set.

18. The Claim itself is a behemoth, running in excess of 500 pages (due to the hundreds of pages of listed property identification numbers). More than 15 lawyers are involved

in this matter. Two interlinked courtrooms were required for the three-day hearing on the motions before me; a 2700-page Record was filed; and fulsome argument was heard from all moving parties.

19. Given this context, the parties can expect, subject to prejudice that cannot be corrected, that this Court will adjust and modify the application of the *Rules of Court* accordingly in this and in subsequent motions. This is not routine or ordinary litigation.

20. While the *Rules of Court* and principles of evidence are important and can be binding or determinative in what I will call *routine* civil litigation, they are less so in a case such as this where the Court must pay heed to the directives and recommendations of the Supreme Court of Canada regarding claims to Aboriginal rights.

21. Further, I wish to add that given the extraordinary nature of the Claim in issue, and the likely fact that the litigation of this case will take years, the parties are encouraged to take a nuanced approach to this litigation, focussing less on the "litigation trees" and more on the "litigation forest".

22. As an example of the litigation "trees", the Plaintiffs raised a preliminary objection as did the Defendant, Acadian. The objections are interlinked: the Plaintiffs objected to Acadian filing a brief objecting to the filing of an affidavit by the Plaintiffs.

23. Suffice it to say that I have dismissed both objections. Both the brief and the affidavit will form part of the Record as filed before this Court.

24. The Court is looking to address the "real" question on these motions to strike. Here, the question is not whether Aboriginal title is an "interest in land" as referenced generally and without definition in *Rule 42* (which permits the issuance of a CPL). The question on these motions to strike, is whether Aboriginal title is an "interest in land" such that CPLs can be "registered" *as contemplated* by the land registration legislation.

25. In effect, the relief sought by the Plaintiffs in their Claim is the "registration" of CPLs, not their simple issuance by the Court. In fact, *Rule 42* is predicated on registration in the land registration systems. There is no other purpose to a CPL but registration so as to give formal notice and to secure a priority of interest in the land.

26. For ease of reference, *Rule 42.01* states the following:

> Preservation of Rights Pending Litigation
> Certificate Of Pending Litigation
> **42.01** When Issued

> A Certificate of Pending Litigation (Form 42A) may be issued in any proceeding in which *any title to, or interest in, land* is brought in question. [emphasis added]

27. While *Rule 42* references *title to land* as well as an *interest in land*, all parties argued the motions using the latter description, an *interest in land*. I do not believe anything turns on the distinction in the *Rule* between "title to" and "interest in" land for the purposes of the motions given the focus on an "interest in land" by all parties.

28. *Rules 42.02* and *42.03* require only a description, sufficient for registration, of the land in question.

29. The point of this formal notice is set out at s. 59 of the *Registry Act*, the only section of the *Act* that references a CPL:

> The instituting of an action or the taking of a proceeding, in which action or proceeding any title to, or interest in, land is brought in question, shall not be deemed notice of the action or proceeding to any person not being a party thereto until a certificate of pending litigation prescribed by the Rules of Court under the Judicature Act has been signed by the clerk of The Court of King's Bench of New Brunswick in the judicial district wherein the action was instituted or the proceeding taken, and has been registered in the registry office for the county in which the land is situate.

30. Section 38 of the *Land Titles Act* provides for the registration and removal of a CPL as follows:

> A certificate of pending litigation in prescribed form may be registered against land described therein and may be removed from registration by the registration of a court order or a certificate of the clerk of the court for the judicial district in which the action was commenced to the effect that the action in respect of which the certificate of pending litigation was issued
>
> (a) has been discontinued; or
>
> (b) has been disposed of by a judgment in favour of the defendant and no appeal has been taken within the time limited for so doing.

31. Neither of these sections advance the issue before me in any significant way. I cite them for reference only.

32. I, therefore, now turn to the legal question on which the *Motions to Strike-CPLs* are predicated: is Aboriginal title an "interest in land" intended and contemplated by the

Legislature in the *Registry Act* and the *Land Titles Act* such that CPLs can be issued and "registered" thereunder pending resolution of the Claim?

33. From this flows the request for relief: if not an "interest in land" so intended by the Legislature, the pleading for CPLs discloses no reasonable cause of action per *Rule 23* and must be struck (and *may* be scandalous or frivolous per *Rule 27*). If it is so intended, the motions fail and the pleading stands.

The Defendants' Motions to Strike the Pleading Requesting Certificates of Pending Litigation

The Background

34. As previously noted, in 2021, six Wolastoqey Nations (the Wolastoqey) filed the Claim against PNB, AG Can, NB Power and the IDs, the latter all commercial forestry companies.

35. For ease of reference, the multitude of private companies are grouped into seven, namely J.D. Irving (**JDI**); H.J. Crabbe and Sons (**Crabbe**); Acadian Timber (**Acadian**); Irving Oil Limited (**Irving**); AV Group (**AV**); Twin Rivers (**Twin**) and **Strescon** (by the time of the hearing of the motions, Strescon had entered into an agreement with the Plaintiffs and took no part in the motions). Collectively, as stated, they are referred to as the **IDs**.

36. 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 PNB and AG Can as defendants.

37. 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. A map depicting the general location of the claimed land is attached as *Schedule A* to the Claim.

38. The claimed land encompasses some 16500 parcels of land set out in *Schedules B and C* of the Claim. Of the 16500 parcels of land in the claimed area, 5028 of those are freehold parcels of land currently owned collectively by the IDs.

39. As part of the Claim, the Wolastoqey seek CPLs in relation to the 5028 parcels of land owned by the IDs.

40. The IDs, except for Acadian, which is a publicly traded company, are privately held companies engaged in the business of growing, managing, harvesting and milling trees from their land.

41. As noted above, the moving Defendants, JDI and Acadian seek an order from this Court *declaring* that CPLs in the context of this Claim are not registerable in the New Brunswick land registration systems. All three moving Defendants ask that this pleading in the Claim be struck.

The Relief Requested

42. The three above-noted Defendants seek the following relief, as paraphrased by me:

    a. A *declaration* that:

        i. the CPLs requested by the Plaintiffs are "not registerable" in the *Registry Act* system or the *Land Titles Act* system
        ii. unregistrable CPLs serve no purpose and have no effect
        iii. a claim for unregistrable CPLs is scandalous, frivolous, vexatious and/or abusive of the Court process
        iv. the registration of CPLs would affect a disproportionate result pending the determination of the Claim
        v. the registration of CPLs would affect an unreasonable and unjustifiable restraint on trade pending the outcome of the Claim

    b. An *order*:

        i. striking paragraph 1(b) of the Claim that requests the registration of CPLs against the IDs on the basis that it discloses no reasonable cause of action, pursuant to *Rule 23*
        ii. striking paragraph 1(b) of the Claim on the basis that it is scandalous, frivolous, vexatious and/or abusive of the Court process, pursuant to *Rule 27*
        iii. ordering costs against the Plaintiffs.

The Arguments in Brief

43. For ease of understanding this decision, I have grouped the arguments advanced by the opposing parties into the following categories.

44. The moving Defendants advance the following arguments (paraphrased by me):

a. **Case Law** - The case law directly on point establishes that Aboriginal title cannot be registered in either a provincial registry or land titles system

b. **Interest in Land** - Aboriginal title is not an "interest in land" as contemplated by the New Brunswick *Registry Act* or the *Land Titles Act*

c. **Registration** - CPLs in relation to a claim of Aboriginal title are "not registerable" under the relevant legislation

d. **Rule 23** - It is plain and obvious, assuming the facts pleaded are true, that the Plaintiffs' claim for CPLs fails to disclose a reasonable cause of action

e. **Rule 27** - The Plaintiffs request for CPLs is purposeless and ineffective, other than as litigation leverage, rendering the pleading scandalous, vexatious and an abuse of process; further, the Plaintiffs rely on legislation they seek to invalidate in the Claim, which is abusive

f. **CPLs as Injunctions** – The motions, as framed, allow for the Court to consider the injunctive effect and impact of the registration of CFLs on the moving Defendants.

45. The Plaintiffs reply with the following arguments (also paraphrased by me):

a. **Case Law** - The case law referenced by the Defendants is not authoritative on a New Brunswick Court and pre-dates the decision of the Supreme Court of Canada granting Aboriginal title in *Tsilhqot'in*

b. **Interest in Land** - Aboriginal title is an "interest in land" as contemplated by the New Brunswick *Registry Act* and the *Land Titles Act*

c. **Registration** - CPLs in relation to claimed Aboriginal title are "registerable" under the relevant legislation

d. **Rule 23** - It is not plain and obvious, assuming the facts pleaded are true, that the Plaintiffs' claim for CPLs fails to disclose a reasonable cause of action; and, the novelty of a claim is not a basis to strike a pleading

e. **Rule 27** - The CPLs requested in the pleading are for a legitimate purpose, namely to protect their interest in and claim to repossess land currently owned by the IDs; and, to protect unknown third parties who will not have formal notice of the litigation; the Plaintiffs seek to invalidate only those aspects of the relevant legislation that are unjustifiably contrary to or in violation of Aboriginal rights

f. **CPLs as Injunctions** - The motions, relying on *Rules 23* and *27*, do not allow for the consideration of the effect and impact of CFLs on the Defendants. Alternatively, if the Court is inclined to consider such impact, any prejudice arising from not finding CFLs registerable weighs heavier against the Plaintiffs.

Case Law:
Aboriginal Title - Generally

46. Before turning to the case law relating *specifically* to CPLs in the context of claims to Aboriginal title, it is helpful to outline the case law from the Supreme Court of Canada on Aboriginal title *generally.*

47. In *Delgamuukw*, *supra*, 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).

48. 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).

49. In the most recent analysis by the Supreme Court in the 2014 decision in *Tsilhqot'in, supra,* 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: see para. 24. It does not detract from anything stated in *Delgamuukw*.

50. *Tsilhqot'in* does, however, expand somewhat on the notion of "exclusive use and occupation" as referenced in *Delgamuukw,* in terms of what legal rights are conferred by way of Aboriginal title.

51. 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." (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)

52. It is against this legal backdrop that I turn now to the case law that addresses CPLs and claimed Aboriginal title.

Case Law:
Aboriginal Title and CPLs Specifically

53. There is no case in New Brunswick at any level of court that has grappled with the issue of whether a CPL is available for registration in the provincial registry system relating to lands claimed to be subject to Aboriginal title.

54. The Defendants who filed briefs in relation to the motions all reference what appears to be the only caselaw in the country directly on point. In two appellate level

decisions, the Supreme Court of Canada refused leave to address the issue. In ascending order, the decisions are cited as follows:

> ***Delgamuukw v British Columbia*** (1987), 16 BCLR (2d) 145 (BCCA), leave to appeal to SCC refused (1987), 12 BCLR (2d) xxxvi (***Delgamuukw/Uukw*** to avoid confusion with *Delgamuukw* previously cited)
>
> ***Cook v Beckman*** (1990), 84 Sask R 89 (SKCA)
>
> ***Chippewas of Kettle & Stony Point v Canada (Attorney General)*** (1994), 17 OR (3d) 831 (Ont GD)
>
> ***James Smith Indian Band v Saskatchewan (Master of Titles)*** (1995), 131 Sask R 60 (SKCA), leave to appeal to SCC refused, [1995] SCCA No. 274
>
> ***Skeetchestn Indian Band v British Columbia (Registrar, Kamloops Land Title District)***, 2000 BCSC 118, affirmed 2000 BCCA 525.

55. In *Delgamuukw/Uukw*, the plaintiffs sought registration of two certificates of *lis pendens* (now more commonly known as a CPL) in relation to their litigation claiming Aboriginal rights to land. Their application to do so was denied by the registrar of the land titles system.

56. The plaintiffs appealed the decision of the registrar. The judge hearing the appeal at the superior court level reversed the decision and allowed the certificates to be registered in the system. The province appealed.

57. The questions for the British Columbia Court of Appeal were: "...is registrability a requirement and is the estate or interest claimed registerable?" (*Delgamuukw/Uukw, supra* at para. 10).

58. The Court of Appeal, at paragraph 11 of the decision, looked to the applicable legislation and considered the sections therein "...with regard to the nature and purpose of a Torrens system." Citing their earlier decision in *Heller v. Reg., Vancouver Land Registration Dist.* (1960), 33 W.W.R. 385, /26 D.L.R. (2d) 154 at 159-60, the Court repeated the purpose of the Torrens system of registration, as follows:

> As to question (1), the Torrens System of land registration has been recognized by Legislatures and Courts throughout the Commonwealth, since the first legislation on the subject was enacted in Australia in 1858, as a system of which the primary object was to establish and certify to the ownership of absolute and indefeasible titles to land under Government

> authority as well as to guarantee the titles, and to simplify transfers thereof: Hogg, *The Australian Torrens System*, 1905, pp. 1 & 2; Megarry, *Law of Real Property*, 1957, p. 930; *Re Shotbolt* (1888), 1 B.C.R. 337, *per* Crease, J., at p. 342; see also *Fels v. Knowles* (1906), 26 N.Z.L.R. 604, where Edwards J., said at p. 620:
>
> > The cardinal principle of the statute is that the register is everything and that, except in cases of actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world. Nothing can be registered the registration of which is not expressly authorized by the statute. Everything which can be registered gives, in the absence of fraud, an indefeasible title to the estate or interest.

59. The Court of Appeal in *Delgamuukw/Uukw* concluded that the *Act* in question required registrability and that a certificate of *lis pendens* relating to a claim to Aboriginal rights to land was not registerable pursuant to the *Act*. Leave to appeal this decision to the Supreme Court of Canada was denied.

60. In *Cook*, the Aboriginal plaintiffs registered caveats against land they claimed was misappropriated reserve land. The caveats were subject to applications pursuant to the relevant land titles legislation to determine if the caveats could be maintained pending the final determination of the overall actions.

61. The chambers judge made the mistake of ruling on the ultimate question in the action, whether a reservation was created as alleged, and on that basis vacated the caveats.

62. At the appeal level, the Court found his approach to be in error and stated the conclusion regarding the interest in the land could not stand. They then turned to the issue of the caveats. Relying on the decision above-noted, *Delgamuukw/Uukw*, the Court concluded that "...Torrens system legislation was never intended to be, and has not in practice been, applied to Crown lands held for Indians." (para. 17). They further added that because the caveats covered land owned by private landowners who were not made parties to the overall action claiming the land, the caveats could not be maintained.

63. In *Chippewas of Kettle*, the plaintiffs filed a statement of claim against the federal government seeking to set aside a surrender and sale of reserve land, an easement over beach lands and damages against the federal Crown for breach of their fiduciary duty. They sought the issuance of a CPL for registration in the provincial system relating to that land.

64. The application judge in *Chippewas of Kettle* did not reference the earlier caselaw in *Delgamuukw/Uukw* and *Cook* addressing the object and purpose of the Torrens system. He opted instead to balance the equities of the matter based on the nature of the claims made and the remedies sought. He denied the application for the certificate.

65. In *James Smith*, the Court of Appeal, concurring in the result but split somewhat on the analysis, had to address the question of whether a Master of Titles was entitled to refuse to register caveats requested by the Aboriginal band asserting title to certain lands in Saskatchewan.

66. Two appellate judges concluded that there was no *general* prohibition to registration and that matters must be determined on a case-by-case basis. The third appellate judge, referring to *Delgamuukw/Uukw* and *Chippewas of Kettle*, applied the same reasoning in those decisions and found that the Aboriginal title claim was "outside the ambit of the Act." (para. 19)

67. The majority, applying a case-by-case analysis, found that as a matter of general principle one could "...not exclude the possibility that there may be interests in land which derive from aboriginal title which are compatible with a land registration system and may therefore be registerable under the Act." (para. 22) They concluded, however, that the Master was entitled to refuse the registration because "on its face" it did not disclose a registerable interest in land. They adopted the extensive reasoning of the chambers judge in the matter: see *James Smith Band v. Saskatchewan (Master of Titles)*, [1994] 115 Sask R 25, Gunn J.

68. In *Skeetchestn*, the plaintiff native band appealed a lower court decision dismissing an appeal of a decision of the Registrar of Land Titles refusing to register a CPL. The British Columbia Court of Appeal issued two sets of reasons, concurring in the result denying the appeal.

69. Both sets of reasons essentially make the point that Aboriginal title was simply not contemplated as an interest subject to inclusion or registration in the provincial Torrens system. They relied on the unique nature of Aboriginal title as an interest not sourced in the Crown's ultimate allodial or its beneficial title which the Torrens system was intended to serve.

70. At the lower court level, the judge stated his understanding of the irreconcilability of Aboriginal title with a fee-simple based land registration systems:

> The Torrens system is designed to register interests in land that have a clear identity recognized by the rules of real property law. It is a real property regime based on fee simple grants by the Crown. A fee simple interest can be fragmented into smaller units. Other registrable interests

> in the land result from the fee simple interest. However, aboriginal title is not derived from fee simple. It is *sui generis* and does not lend itself to categorization. It is not alienable; it can only be surrendered to the Crown. Aboriginal title does not fit within the scheme of current real property law in that it is not an interest in land contemplated by the *Land Title Act* which only accommodates traditional common law or equitable interests in the land. Aboriginal title has no "identity recognized by the ordinary rules of the common law." Furthermore, under the Torrens system priorities are based on the date of registration rather than the date when the right is acquired and therefore cannot accommodate aboriginal title which has its source in the occupancy and use of lands prior to the assertion of sovereignty by the Crown. For those reasons, aboriginal title is not registrable under the *Land Title Act*.
>
> The same considerations apply to a caveat. From a practical point of view the principal difference between a caveat and a certificate of pending litigation is that the caveat has a predetermined life span during which nothing can be registered. Property subject to a certificate of pending litigation can be dealt with, although subsequent dealings may be subordinated to the claim being advanced.
>
> The Supreme Court of Canada decision in Delgamuukw does not address the issue of registration of aboriginal title. Nor does it cast any light on the impact that aboriginal rights have on privately owned lands as opposed to Crown lands. According to Delgamuukw, it is possible for two aboriginal groups to have aboriginal title over the same land provided those interests can be reconciled and coexist. Delgamuukw does not say that this is so with respect to fee simple title. It suggests no mechanism for reconciling fee simple and aboriginal rights. (*Skeetchestn* (BCSC), *supra* at paras. 43-45)

"Interest in Land"

71. While the Plaintiffs in the matter before me frame the question *generally*, the question for the Court is really whether Aboriginal title is an "interest in land" *as contemplated* by the relevant New Brunswick legislation?

72. In the face of the above-noted case law on point from the provinces of British Columbia, Saskatchewan and Ontario, the Plaintiffs urge this Court to answer the question in their favour based on the following four propositions:

    a. Aboriginal title has now clearly been determined by the Supreme Court of Canada to constitute "an interest in land".

b. The 2014 Supreme Court of Canada decision in *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 renders the provincial caselaw above noted out of date and no longer persuasive.

c. The wording of the legislation in both the *Registry Act*, RSNB 1973, c. R-6 and the *Land Titles Act*, SNB 1981, c. L1.1, is more expansive and permissive than the legislation in issue in the above noted decisions such that it can include Aboriginal title as an "interest in land".

d. *Tsilhqot'in* has changed the applicability of the doctrine of interjurisdictional immunity rendering the relevant provincial legislation applicable to Aboriginals.

73. The moving Defendants urge the Court to answer the question in their favour based on the following propositions:

a. The nature of Aboriginal title is such that it cannot constitute an "interest in land" as contemplated by the New Brunswick legislation.

b. There is nothing in *Tsilhquot'in* that changes Aboriginal title into an interest in land that is contemplated by the relevant New Brunswick legislation or to render the above noted case law on point outdated and no longer persuasive.

c. The object and purpose of the relevant New Brunswick legislation does not contemplate or allow for an "interest in land" to include Aboriginal title.

d. It is improper on the part of the Plaintiffs to rely on legislation, arguing it includes Aboriginal title as an "interest in land", when they ultimately seek to invalidate the legislation according to the Claim.

74. I can state unequivocally, at the outset, that "Aboriginal title" is an "interest in land":

See *Delgamuukw, supra*:

a. referring to Dickson J. in *Guerin v. R.*, [1984] 2 S.C.R. 335 describing aboriginal title as an 'interest in land' which encompassed a 'legal right to occupy and possess certain lands' (para. 119)
b. "What aboriginal title confers is the *right to the land itself*" (paras. 138 and see 140 emphasis added).

See *Tsilquot'in Nation v. B.C.*, 2014 SCC 44 :

c. Also citing Dickson J. in *Guerin* that "aboriginal title is a beneficial interest in the land" (para. 70)
d. "Aboriginal title confers ownership rights…" (para. 73).

75. However, I can also state, unequivocally, that Aboriginal title is an "interest in land" like no other:

See *Delgamuukw*:

a. certain inherent limits render Aboriginal title "distinct from a fee simple" (para. 111)
b. Aboriginal title is distinguished from "'normal' proprietary interests, such as fee simple" (para. 112)
c. "…its characteristics 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. it is sourced in the "…common law principle that occupation is proof of possession in law…and in the relationship between the common law and pre-existing systems of aboriginal law." (para. 114)

See *Tsilhqot'in*:

e. "Analogies to other forms of property ownership — for example, fee simple — 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)

See Slattery, Brian. *The Constitutional Dimensions of Aboriginal Title.* (2015) 71 S.C.L.R. (2d):

f. "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." (pp. 47) (emphasis in original).

76. This latter clarification from Brian Slattery, based upon caselaw from the Supreme Court of Canada, helps to contextualize and position the concept of Aboriginal title in the matter before me.

77. Aboriginal title to land is of constitutional proportion. It is not "created", it existed prior to Crown sovereignty (if title is established), nor can it be "transferred". It is inalienable (except to the Crown): see *Tsilhqot'in.*

78. The "creation" and "transfer" of interests in land is the very object and purpose of the *Registry Act* and the *Land Titles Act.* Both *Acts*, as noted above, apply to the "...creation or transfer of an interest in land."

79. The *Registry Act* and the *Land Titles Act* state the following at s. 1.1(2) and s. 2.1(2) respectively:

> 1.1(2)This Act applies to
> (a) the creation or transfer of an interest in land including a lease...
>
> 2.1(2)This Act applies to
> (a) the creation or transfer of an interest in land including a lease...

80. On their face, Aboriginal title and the land registry systems in New Brunswick appear to be quite incompatible. But whether they are in fact so, requires consideration of the principles of statutory interpretation.

81. This was addressed in *Tsilhqot'in* when the question arose whether the *Forestry Act* applied to Aboriginal title land:

> Whether a statute of general application such as the *Forest Act* was *intended* to apply to lands subject to Aboriginal title — the question at this point — is always a matter of statutory interpretation.

82. The basic rule of statutory interpretation is that "the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 1. (paras. 107-108)

83. Sections 2, 15 and 16 of the *Land Titles Act* provide some assistance in this regard:

> 2(1) This Act applies to the registration of the title to
> (a) every parcel of land, including land owned by the Crown,
>
> 15(3) Every instrument shall be registered according to its tenor and intent and the registration thereupon *creates, transfers, surrenders, charges or discharges*, as the case may be, the land, estate or interest therein described. [emphasis added]

> 15(4) Nothing in this Act confers on a registered owner, claiming otherwise than as a purchaser for valuable consideration, *any better title* than was held by his immediate predecessor in title. [emphasis added]
>
> 16 Notwithstanding anything in any other enactment, the owner who is shown by the title register to be the owner of a parcel of land described therein holds the land in fee simple subject, in addition to the overriding incidents implied by this Act, to such encumbrances, liens, estates or interests as are shown by the title register to have been registered against or in respect of that land and free from all other encumbrances, liens, estates or interests whatever, except in case of fraud wherein he has participated or colluded.

84. In *Tsilhqot'in*, the Court had before it a historical record relating to the *Forestry Act* from which it could infer an intention on the part of the legislature to include land over which Aboriginal title was claimed.

85. The parties in the matter before me focussed on the current iteration of the relevant legislation. While there is nothing before me in the nature of a historical record that would assist with the interpretation of the Legislature's intent to include Aboriginal title as part of the term "interest in land" in either *Acts* in issue, I find that I can refer to caselaw and academic interpretations for assistance in this regard.

86. In a 1960 article, Gerard LaForest, Q.C., at that time the Dean of Law at the University of Alberta (well before his appointment to the judiciary and to the Supreme Court of Canada), traced the history of the New Brunswick *Registry Act*.

87. G. LaForest, Q.C. (as he then was), described the registry system as a system for the "conveyancing" and "recording" of title. The "conveyancing" of course refers to the transferring of interests and the "recording" refers to the recording of priorities of interest: "The second point to observe about the Registry Act is that it established a new system of priorities among conveyances. At common law, the rule was simple: first in time, first in right." LaForest, Gerard. *The History and Place of the Registry Act in New Brunswick Land Law: A System of Conveyancing.* UNB Law Journal, 1960, Vol. 20, Art 1.

88. The article links the earliest methods known in England for the transfer of land to the earliest iteration of the *Registry Act*, dating back to 1786. That history is predicated on fee simple interests in land:

> The oldest form of conveyance known to the common law is the feoffment with livery of seisin. It was, as the name implies, the delivery of seisin — the feudal counterpart of possession.
>
> ....

> The feoffment was not just a way of conveying land. It was for many years the ordinary way. It was impossible at common law to convey a *fee simple* or other *freehold estate* in possession by deed. As it was put technically, such estates, or as they were called, "corporeal hereditaments", lay in livery and not in grant. [emphasis added]

89. G. LaForest, Q.C. explained that "...it is obvious that such forms of conveyances would be far too complicated for the needs of a frontier land like early New Brunswick..." and so section s. 10 of the 1786 *Act* (which is identical in wording to s. 39 of the version current to the time of the writing of the article in 1960 and to s. 34 of the current *Act)* was enacted, as follows:

> Every conveyance, duly acknowledged or proved and registered according to the law in force at the time of the registration, shall be effectual for the transferring of the land therein described and the possession thereof, according to the intent of such conveyance without livery of seisin or any other act.

90. I note that the *Interpretation Act*, R.S.N.B. 1973, c. I-13, at s. 38 defines "conveyance" as "...any instrument by which a freehold or leasehold estate, or other interest in real estate, may be transferred or affected;(acte de transfert). (emphasis added).

91. As the law currently stands, Aboriginal title land may not be transferred except to the Crown, and it may be affected only in such ways as are reconcilable with future generations.

92. As for the land titles system, in *CG Group Ltd. v. Girouard et al.,* 2018 NBCA 59, Quigg J.A. sets out in great detail the background to and purpose of this system in New Brunswick. She makes the following comparison between the registry system and the land titles system as follows:

> Under the previous Registry System, the lawyer was required to conduct a historical title search of at least forty (40) years from an acceptable root and provide his or her client with an opinion as to the state and marketability of title setting out the nature and quality of the land ownership as well as any liens, restrictions or encumbrances that affect the title. Of course, before the lawyer could formulate an opinion on the specific title and issue a Certificate of Title, he or she had to first complete a series of title/ownership inquiries and searches on behalf of the purchaser to identify all rights, interests, responsibilities and restrictions that affect the use and enjoyment of a particular property, such as deeds, mortgages, easements, liens, restrictive covenants and so on. Under the

> old Land Registry system, this was done for every single real property transaction. For any subsequent sale, a new lawyer would have to do the same historic search again.
>
> In the Land Titles System, the above-described title search is only done once, during the conversion process and through the application for first registration. It is the lawyer converting the property into the new system who is responsible for the conventional title search, along with the conversion and opinion of such property title in accordance with Part III of the Standards and the relevant provisions under the Act. This option forms the basis for SNB guaranteeing title and is the last historic search that will be done for the specific property. Any subsequent lawyer is entitled to rely on the guarantee of title issued by SNB by way of the CRO without the need to conduct any title search. (paras. 50-51)

93. Quigg, J.A. refers to the Act being based on three principles for the purpose of providing "...commercial certainty..." regarding land interests. Referencing *McKinney v. Tobias*, 2006 NBQB 290, Quigg, J.A. states the following:

> In New Brunswick, as confirmed in *McKinney v. Tobias*, 2006 NBQB 290, 306 N.B.R. (2d) 282 (N.B. Q.B.), the Land Titles System operates on three basic principles, namely: the mirror principle, the curtain principle and the insurance principle. These basic principles are known to be the doctrine of indefeasibility of title, and constitute the main pillars of the Land Titles System embodied by the *Act*. This was specifically addressed by Glennie J. in McKinney:
>
> > Land Titles legislation operates on three basic principles, namely: the mirror, curtain, and insurance principles. The mirror principle requires that the registrar of title reflect accurately and completely all facts material to the title. The curtain principle means that the register is the sole source of information and purchasers need not concern themselves with trust and other equities which lie behind this curtain. The insurance principle requires that if the application of the legislation, through some error or flaw, causes loss to a person, that person be compensated from an insurance fund created under the legislation.... [emphasis removed.]
>
> Glennie J. further articulated the following tenets of the Land Titles System:
>
> As noted per Sigurdson J. in *Vancouver City Savings Credit Union v. Hu* (2005), 31 R.P.R. (4th) 309 (B.C.S.C.) at para. 32:

> The classic statement of the purpose of our land title system appears in *Gibbs v. Messer* (at 254):
>
> > The main object of the *Act*, and the legislative scheme for the attainment of that object, appear to be equally plain. The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity. That end is accomplished by providing that every one who purchases, in bona fide and for value, from a registered proprietor, and enters his deed or transfer of mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title.
> >
> > ....
> >
> > The system of examining and opining on titles has become simplified and more exact, in accordance with one of the main purposes of the *Act*: *to promote commercial certainty* and to simplify the task of title searching for a lawyer to render an opinion on title. (paras. 34-35 and 37) [emphasis added]

94. Aboriginal title, despite sharing some characteristics, is *not* a fee simple interest: "Aboriginal title 'is not equated with fee simple ownership; nor can it be described with reference to traditional property law concepts'." (*Tsilhqot'in, supra* at para. 72)

95. The provincial land registration systems are based on fee simple interests and do not anywhere appear to contemplate Aboriginal title interests. Conversely, Aboriginal title, by its nature, cannot not be constrained by such legislation, given its constitutional and *sui generis* status:

> > Aboriginal title has been described as sui generis in order to distinguish it from "normal" proprietary interests, such as fee simple. However, as I will now develop, it is also sui generis in the sense that its characteristics 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. As with other aboriginal rights, it must be understood by reference to both common law and aboriginal perspectives. (*Delgamuukw*, *supra* at para. 112)

96. I recognize the urging of the Supreme Court of Canada toward the principle of reconciliation; however, I also acknowledge the limitations imposed thereon.

> Although explained in the context of evidentiary principles applicable to Aboriginal rights, I find it also applies to a Court interpreting legislation and its intended application to Aboriginal title such that it "...must be done in a manner that does not strain 'the Canadian legal and constitutional structure.'" (*Delgamuukw*, *supra* at para. 82)

97. The constitutional structure, as I understand it, expects a Court to interpret legislation in accordance with legislative intent and not to expand it beyond that intention of the Legislature.

98. Given the incompatibility of the nature of Aboriginal title with the stated object, purpose and language in both *Acts*, I conclude that the Legislature did not intend to include Aboriginal title in its references to an "interest in land".

99. Whether in the spirit of reconciliation, as recommended by the Supreme Court of Canada, the Legislature *should* consider amendments to its legislation to include Aboriginal title is not for this Court to contemplate or to consider.

100. The Plaintiffs' argument that *Tsilhqot'in* has added to the understanding of the concept of Aboriginal title in such a way as to render it more akin to an interest in land such that it fits within the scope of the provincial registry and the land titles system, simply does not withstand scrutiny.

101. The Plaintiffs argue that there is nothing in the legislation that specifically prohibits it from registration, but this fails to take into account the purpose and object of both the *Registry Act* and the *Land Titles Act* as stated above.

102. 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)

103. 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 likely found or contemplated in those Eurocentric concepts.

104. As such, it is simply not possible to read either the *Registry Act* or the *Land Titles Act*, the stated application of each is to *create* or *transfer* an interest in land, as having intended or contemplated an interest such as Aboriginal title.

105. I find the case law on point, although it is not New Brunswick jurisprudence, persuasive to the questions before me. I further find that there is nothing in *Tsilhqot'in* that impacts what has been previously stated in the decisions on point regarding CPLs and Aboriginal title.

Rule 23

106. The moving Defendants reference and rely on *Rule 23* of the *Rules of Court* for *declaratory* relief (as I inferred above) and to strike the pleading in the Claim for failing to disclose a reasonable cause of action.

107. *Rule 23* states the following:

> *Determination of Questions Before Trial*
> 23.01 Where 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,
> (b) to strike out a pleading which does not disclose a reasonable cause of action or defence, or…
>
> 23.02 Evidence
> Except with leave of the court, on applications under Rule 23.01(1), evidence shall not be admitted except
> (a) a transcript of a relevant examination, and
> (b) affidavits which are necessary to identify a document or prove its execution.

108. In *Brooks v. Fredericton City Police Force et.al.*, 2017 NBQB 083, Justice Morrison set out the test to strike a pleading under this Rule. He stated at paragraph 7:

> The correct approach to a motion to strike pleadings under Rule 23.01(1)(b) was set out in *Sewell v. ING Insurance Co. of Canada*, 2007 NBCA 42 at paragraph 26:
>
> > 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[e] 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.)).

109. Having considered this approach to *Rule 23*, I find that the relevant questions of law and my conclusions thereto, namely that Aboriginal title is not an "interest in land" such that a CPL can be "registered" under the relevant legislation, the pleading does not disclose a reasonable cause of action and should be struck.

Rule 27

110. The moving Defendants also rely and refer to *Rule 27* to strike the pleading in the Claim for being scandalous and an abuse of process. Having already struck the pleading, I only consider this *Rule* in relation to the moving Defendants' request for costs on their motions.

111. *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.

112. The moving Defendants argue that the Plaintiffs' inclusion of a pleading requesting CPLs in the face of the case law existing on the matter, renders the pleading scandalous and vexatious. They further argue that in the context of a claim for Aboriginal title, given its constitutional status, CPLs serve no purpose. The request for same is improperly intended as leverage in the litigation given the injunctive nature of CPLs and the negative commercial impact such CPLs would have.

113. I disagree. Considering the overall nature of a claim to Aboriginal title, the fact that the case law on point is *not* from New Brunswick and that the case law considers differently worded legislation, I do not find that the pleading for CPLs is scandalous, vexatious or an abuse of the process.

114. I take the message from the Supreme Court in *Tsilhqot'in* to be that cases such as these are complex, concern evolving legal concepts and constructs, and are set in the context of reconciliation between Aboriginal and non-Aboriginal groups. While stated in the context of pleadings generally, I take the following statement to apply to the pleading for CPLs specifically:

> ...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. (*Tsilhqot'in, supra* at para. 23)

CPLs as Injunctions

115. I agree with the Plaintiffs that the Court is being asked primarily to resolve legal questions and that those questions should not be conflated with or informed by the separate and discretionary question of whether CPLs *should* issue here (assuming the legislation did contemplate Aboriginal title as an interest in land).

116. Despite this not being an issue for me to consider here, there was much debate between the parties about whether a CPL is injunctive relief by nature or whether evidence is required, as argued by the Plaintiffs, to establish this as fact in the particular circumstances.

117. While the Plaintiffs maintained that I should not concern myself with the discretionary question of whether CPLs *should* issue, all parties tendered some evidence in that regard and argued the point to some extent during the course of the three-day hearing.

118. While it is true that a CPL is, in theory, a method for the formal notification of a dispute impacting land and the establishment of priority in interest to land, in practice it is injunctive and can be punitive in effect. In *Ross v Toronto-Dominion Bank*, 2016 NBQB 75, cited with approval in *O'Neill et al v Edmanson*, 2017 NBCA 33, Glennie J. stated at paragraph 21 that:

> Once the Certificate of Pending Litigation is filed, notice to all the world is given that title of the land is being questioned and warns all against dealing with the defendant with respect to that land until the contest is determined: *McTaggart v. Toothe* (1884), 10 P.R. 261.
>
> Although it has been held that a certificate of pending litigation is not an encumbrance, *its practical effect is to act as an injunction so as to prevent the defendant from dealing with the land until the lawsuit is finished*: *Mactan Holdings Ltd. v. 431736 Ontario Ltd.* (1980) 118 D.L.R. (3d) 91 (Ont. H.C.J.).
> [emphasis added]

119. If I am wrong in my conclusion on the legal question of whether Aboriginal title is an "interest in land" contemplated and intended under the provincial land registration systems, and such an interest *could* be registered, I point the Plaintiffs to comments made in *Haida Nation v. British Columbia*, 2004 SCC 73, regarding injunctive relief at this early stage of the litigation.

120. The Court in *Haida* discusses injunctive relief in the context of an Aboriginal title claim and comments generally on the pre-title-declaration process from pleading stage to resolution stage.

121. In *Haida*, Aboriginal title was claimed but not yet proven. The Haida sought a declaration that the government and Weyerhauser, a third-party company issued cutting licenses on the claimed land, owed a legal duty to consult them regarding their interest before title was proven. The government argued such duty only arises once title is declared.

122. At the Court of Appeal, the decision of the chambers judge finding the government owed a *moral* duty to consult and not a *legal* one, was overturned and the appellate court decided that not only did the government have a legal duty to consult pre-title but so too did the third party, Weyerhauser.

123. At the Supreme Court, this decision was overturned with a finding that the government owed a legal duty to consult pre-title but that non-Crown third parties do not owe any such duty. In fact, it found that "[t]he Crown alone remains legally

responsible for the consequences of its actions and interactions with third parties, that affect Aboriginal interests." (*Haida, supra* at para. 53)

124. When arguing against the duty to consult pre-title, the government argued that the more appropriate remedy is the interlocutory injunction as opposed to the duty to consult and to accommodate pre-title. The Court disagreed stating that the interlocutory injunction in such a context constitutes "imperfect relief" for the Haida.

125. While not prohibited or improper, the Court referred to such relief as constituting an "...all or nothing solution." Comparatively, a government duty to consult, pre-title, "...entails balancing Aboriginal and other interests and thus lies closer to the aim of reconciliation at the heart of Crown-Aboriginal relations..." (*Haida, supra* at para. 14)

126. Further, the "balance of convenience test tips the scales in favour of protecting jobs and government revenues...instead of being balanced appropriately against conflicting concerns..." (para. 14). While this is a criticism of the injunction, it nonetheless reflects the difficulty courts have balancing the impact on jobs and revenue against a claim that is in its infancy, being at the pleadings stage only.

127. Both *Haida* and *Tsilhqot'in* discuss the sliding scale of strength of a title claim as it progresses through the court system. Set again in the context of consultation, the Court in *Tsilhqot'in* states the following at paragraph 91:

> At the claims stage, prior to establishment of Aboriginal title, the Crown owes a good faith duty to consult with the group concerned and, if appropriate, accommodate its interests. As the claim strength increases, the required level of consultation and accommodation correspondingly increases. Where a claim is particularly strong — for example, shortly before a court declaration of title — appropriate care must be taken to preserve the Aboriginal interest pending final resolution of the claim.

128. In *Haida*, the Court goes on further with respect to injunctive relief referring to it as a "...stop-gap remedy pending litigation of the underlying issue." Because Aboriginal title claims are complex and may take decades to resolve, "[a]n interlocutory injunction over such a long period of time might work unnecessary prejudice and may diminish incentives on the successful party to compromise." (*Haida, supra* at para. 14)

129. In any event, given my findings on the questions of law, I need not consider this issue at this time.

The Disposition

130. Given the above-noted analysis and findings, I conclude that Aboriginal title is not an "interest in land" as that term is intended in either the *Registry Act* or the *Land Titles Act* in New Brunswick. As such, CPLs based on a *sui generis* Aboriginal interest in land, are not registerable under the *Registry Act* or the *Land Titles Act.*

131. I, therefore, grant the relief sought by the moving Defendants to strike the pleading set out in paragraph 1(b) of the Claim that seeks CPLs.

132. All three moving parties have requested costs on the motions but no party 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

133. As additional motions have been filed by the IDs to strike more of the Claim, I reserve any decision on costs on these motions at this time pending the hearing of the additional motions and in anticipation of submissions specific to costs in the context of this unusual litigation.

Plaintiffs' Motion for Alternate Relief in Form of Notice by Other Means

134. Subsequent to the filing of the *Motions to Strike-CPLs* addressed above, the Plaintiffs filed their *Motion for Alternate Notice* in the event the Court granted the moving Defendants' motions to strike the impugned pleading.

135. According to the Plaintiffs' brief, they seek the following alternative relief to CPLs (I have labelled each with a letter for ease of reference):

    a. an order (with the Statement of Claim and reasons for this decision attached) that this proceeding questions some title or interest in the land, to be registered against the properties in Schedule B that are registered under the *Registry Act (Notice A)*; and

    b. an order that the Industrial Defendants (excluding NB Power) shall provide notice of this proceeding to prospective purchasers and lenders in a specific form for the properties in Schedule B that are registered under the *Land Titles Act (Notice B);* or, in the alternative

    c. an order that the Industrial Defendants (excluding New Brunswick Power) provide notice of this Claim to Interested Third Parties in a specific form for all Schedule B parcels. Such notice must be provided regardless of whether the parcels are under the *Registry Act* and *Land Titles Act (Notice C)*.

136. While the Plaintiffs reference a number of *Rules of Court*, none are direct authority for the relief requested. They rely primarily on this Court's inherent jurisdiction in the context of the protected rights of the Indigenous pursuant to s. 35 of the *Constitution Act, 1982*.[2]

137. The concern underlying the request for CPLs in the Claim, namely, to protect against interests that may be acquired by third parties in relation to the claimed land who have not been formally notified of the Claim pending its resolution, underlies the request for alternate notice.

138. The Plaintiffs maintain that they will be at a disadvantage if the alternate forms of notice are not granted. *Bona fide* purchasers for value without notice will have a defence to the Claim and to the remedies requested therein.

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[2] Section 35(1) of the *Constitution Act, 1982 Part II:*
The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

139. I agree with the Defendants that the alternate form of notice, in the form of *Notice A* is a CPL by another name.

140. The underlying premise of this form of alternate notice is that Aboriginal title is a registrable "interest in land" pursuant to both the *Registry Act* and the *Land Titles Act*.

141. For reasons noted above in relation to the *Motions to Strike-CPLs*, I disagree with this premise and have found otherwise.

142. Having concluded above that the Legislature did not intend to include Aboriginal title within the construct of either the *Registry Act* or the *Land Titles Act*, that finding by consequence impacts and determines the outcome in this *Motion for Alternate Notice*.

143. Therefore, with respect to *Notice A,* for the same reasons for striking the paragraph in the Claim requesting CPLs, I decline to grant the alternate notice requested by the Plaintiffs.

144. With respect to *Notices B and C*, I find that these notices are unnecessary and incompatible with the *sui generis* nature of Aboriginal title.

145. As stated in *Haida*, a dispute over Aboriginal title and its resolution implicates two constitutional entities: the Crown and the Aboriginal groups claiming title. Third parties owe no duty or obligation, let alone one of constitutional proportion, to Aboriginal groups claiming title (this is of course leaving aside available claims in negligence or in contract as referenced in *Haida*: see paragraph 56[3]).

146. I have further considered the request for alternate notice in the context of a clear and unequivocal concession by counsel for the Plaintiffs, that they do not allege liability on the part of the IDs. The Plaintiffs seek a remedy *only* from the IDs.

147. Leaving aside the admonition in *Haida*, that the "...remedy tail cannot wag the liability dog..." (*Haida, supra* at para. 55), the imposition on third party landholders, operating commercial operations, to notify prospective purchasers and financiers of a 500 plus statement of claim, along with a court decision attached, as part of negotiations and disclosure relating to land, an interest in which if proven to be

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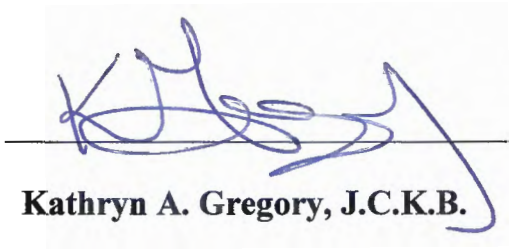
[3] *"The fact that third parties are under no duty to consult or accommodate Aboriginal concerns does not mean that they can never be liable to Aboriginal peoples. If they act negligently in circumstances where they owe Aboriginal peoples a duty of care, or if they breach contracts with Aboriginal peoples or deal with them dishonestly, they may be held legally liable. But they cannot be held liable for failing to discharge the Crown's duty to consult and accommodate." Haida, supra* at para. 56.

Aboriginal title is of constitutional status, is unnecessary and an undue burden over the course of the many years in which this Claim will be litigated.

148. As an aside, it is in the interests of any commercial landholder to disclose the fact of the Claim, in any event, to any prospective purchasers and financiers to protect against future liability. The difference is of course, the IDs will decide what type of notice and disclosure suffices for their own protection.

149. I, therefore, additionally dismiss the Plaintiffs' motion for alternate forms of notice of the Claim, namely *Notices B and C*.

150. As with the *Motions to Strike-CPLs*, I reserve any decision on costs on the Plaintiffs' motion pending the hearing of the additional motions to strike pleadings.



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