Wolastoqey **Litigation Update: New Brunswick Court of Appeal Narrows Available Remedies; Supreme Court of Canada Denies Leave**

Readers of *Property Law: Cases and Commentary* may recall the discussion of *Wolastoqey Nations v. New Brunswick and Canada, et al.*, 2024 NBKB 203, a significant trial-level decision addressing the relationship between asserted Aboriginal title claims on the one hand, and privately-owned fee simple lands in New Brunswick, on the other.

By way of background: "Aboriginal title" is a constitutionally protected proprietary interest in land arising from an Indigenous nation's historic occupation of territory prior to Crown sovereignty. It includes the right to exclusive use, occupation, possession, and control of the land, and is recognized by Canadian law as distinct from – and not derived from – a Crown grant of land.

The litigation in *Wolastoqey* arose after six Wolastoqey Nations asserted Aboriginal title over more than 50 percent of the land in the province of New Brunswick. Specifically, the asserted claim covered approximately 283,204 parcels, and included not only Crown lands, but also lands currently held in fee simple by private individuals and corporations.

The lawsuit attracted considerable attention and media coverage because it raised a specific question that has remained largely unresolved in Canadian law: How should claims for Aboriginal title be addressed where the claimed territory includes extensive *privately-owned lands*?

At Trial

Before the trial court, the core Aboriginal title claims against the Crown were permitted to proceed, but the claims advanced directly against certain private corporate landowners were struck. The court emphasized that the Supreme Court of Canada has not yet definitively resolved the legal interplay between existing fee simple ownership and Aboriginal title rights, when both are asserted in relation to the same lands.

Nonetheless, in the procedural circumstances before it, the trial court concluded that the present claims for declarations and consequential relief affecting private lands could not proceed directly against private landowners, and that any remedy flowing from the asserted Aboriginal title claim had to be pursued against the Crown alone.

While the claimed territory encompassed hundreds of thousands of privately-owned parcels held by both individuals and corporations, the court ordered that the named corporate defendants were to be removed from the proceeding. As for the individual landowners, their potential involvement was at an end; no direct relief had been sought against them in the litigation, and they were not parties to the proceeding.

Appeal Ruling

The New Brunswick Court of Appeal has now revisited that trial-level result. In *J.D. Irving, Limited et al. v. Wolastoqey Nation*, 2025 NBCA 129, the Court allowed the appeal in part and further narrowed the scope of the claims that could proceed.

The Appeal Court held that the Wolastoqey Nations may continue to seek declarations of Aboriginal title in relation to Crown lands, and may pursue claims for damages and compensation against the Crown arising from alleged Aboriginal title affecting privately-owned lands. However, the Court went on to conclude that it was plain and obvious that no declaration of Aboriginal title could be granted in respect of privately-owned lands belonging to the private landowner appellants, where those owners were no longer parties to the proceeding.

In doing so, the court drew an important distinction between a judicial finding that Aboriginal title may exist in relation to privately-owned lands and a formal judicial declaration of Aboriginal title affecting those lands.

While findings regarding Aboriginal title may remain relevant to claims for damages and compensation against the Crown, the Court held that declarations affecting private lands could not be granted in the absence of the affected landowners, because doing so would offend basic principles of procedural fairness.

Supreme Court of Canada Denies Leave to Appeal

The Supreme Court of Canada has now declined leave to appeal from the Court of Appeal's judgment: *Wolastoqey Nation at Welamukotuk (Oromocto First Nation) et al. v. J.D. Irving Limited et al.*, 2026 CanLII 50180 (SCC). As is customary, the Court provided no reasons.

This leaves the New Brunswick Court of Appeal's decision as the governing authority in the case, and brings this phase of the litigation to an end.

What It All Means

The practical significance of the decision lies in what it does – and does not – decide. The courts have not determined whether the Wolastoqey Nations can *ultimately establish* Aboriginal title to any of the lands in issue. Nor have they finally resolved the broader theoretical question of whether Aboriginal title and fee simple ownership can ever coexist.

Instead, the decisions in *Wolastoqey* simply focus on the proper procedural framework for advancing such claims. It reinforces the central role of the Crown in any future reconciliation of the competing legal interests.

What the Court of Appeal did, however, determine was that, in the absence of the affected private landowners as parties to the proceeding, a court cannot grant a declaration of Aboriginal title over their lands. At the same time, findings concerning Aboriginal title may still be relevant to claims for damages and compensation advanced against the Crown.

The litigation in *Wolastoqey* remains important for property lawyers, governments, Indigenous communities, resource-sector participants, and others with interests in land subject to potential Aboriginal title claims. The underlying title claims continue, but the procedural framework now endorsed by the New Brunswick Court of Appeal places significant limits on the remedies available in relation to privately-owned lands.

Future developments will likely be watched closely, particularly as Canadian courts continue to confront the interaction between constitutionally protected Aboriginal title claims and long-established private property interests.