Aboriginal title – an 'interest in land'?

Stage one of the Wolastoqey Nations Land Claim

BY JOHN SHEVCHUK
Litigation Counsel, C.Arb, AACI (Hon)

Is Aboriginal title an 'interest in land' capable of registration under a land registry or land title system? This was the question before Justice Gregory of the New Brunswick Court of King's Bench in *Wolastoqey Nations v. New Brunswick and Canada*, 2024 NBKB 21 [*Wolastoqey*]. To answer the question, the court delved into underlying principles of law affecting Aboriginal title and considered whether that law was reconcilable with provincial legislation addressing the registration of title to real property interests. Specifically, Justice Gregory was asked to decide if Certificates of Pending Litigation (CPLs) can be filed against the privately owned land parcels that are part of the disputed properties in a land claim initiated by the Wolastoqey Nations.

Background

In 2020, six Wolastoqey Nations initiated a lawsuit that lays claim to over 50% of the lands in New Brunswick. The claim affects lands held by the provincial and federal Crown, Crown corporations, as well as the freehold interests of private corporations. The number of land parcels caught up in the litigation is stated to be 16,500, 5,028 of which are privately held. Amended in 2021, the court reports that the claim document exceeds 500 pages.

In December 2023, Justice Gregory heard an application brought by the private corporations seeking an order to strike the portion of the Wolastoqey Nations' claim seeking CPLs.[1] A CPL is a court document that, once registered in a land titles system, puts the world on notice that rights to the land are the subject of a lawsuit. The corporate defendants asserted that the CPL would cause them great prejudice, tying up their lands for the years during which the litigation would be outstanding. But that assertion was not enough to thwart the issuance of a CPL. It was necessary to persuade the court that Aboriginal title is not an interest that is captured by land title legislation and, therefore, the claim for CPLs should be struck on the basis it had no reasonable chance of succeeding.

In reasons for judgement dated February 1, 2024, Justice Gregory concluded that Aboriginal title is not an 'interest in land' as contemplated by the *Registry Act* or the *Land Titles Act*. It is important to note that the application before the court was not to establish if the Wolastoqey Nations had an interest in the subject lands; the question was limited to whether Aboriginal title supports the issuance and registration of a CPL under the *Registry Act* and the *Land Titles Act*. But, to answer the question, the development of the law relating to Aboriginal title needed review.

Aboriginal title

Justice Gregory set the backdrop for her decision by referring to rulings in previous decisions of the Supreme Court of Canada addressing Aboriginal land claims:[2]

> "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 judgements 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]

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*"

Of particular importance in understanding the court's decision in *Wolastoqey* is the *sui generis* (of its own kind – unique) nature of rights and obligations of First Nations. Aboriginal title is unique in that it has existed since before the assertion of British sovereignty. In contrast, common law real property rights and real property rights created by legislation have arisen with and from the assertion of British sovereignty.

Turning to the issue at hand, Justice Gregory took a deeper dive into the existing jurisprudence related to Aboriginal title to land starting with the Supreme Court of Canada decision in *Delgamuukw v. British Columbia*[3] where it was held that:[4]

- Aboriginal title is a right in land;
- Aboriginal title is a unique interest in land different from normal proprietary interests such as fee simple;
- the characteristics of Aboriginal title cannot be fully explained by common law rules of property;
- Aboriginal title is:
  - inalienable – it can only be transferred, sold or surrendered to the Crown;
  - derived from prior occupation of Canada by Aboriginal peoples;
  - held communally by all members of an Aboriginal nation;
- Aboriginal title grants an exclusive use and occupation of the land for a variety purposes.

The Supreme Court of Canada decision in *Tsilhqot'in Nation* sets out that:[5]

- Aboriginal title is an independent legal interest;
- Aboriginal title is a beneficial interest in land with the right to the benefits from the land;
- other forms of land ownership do not precisely mirror Aboriginal title;
- Aboriginal title is held for present generations, but also for all succeeding generations.

Justice Gregory observed that Aboriginal title is an 'interest in land,' but it is an interest like no other. For example, it has inherent limits distinct from fee simple. It is not a concept of private law and does not deal with the rights of private entities. It is a public law concept.[6] Further, Aboriginal title is not created; it has existed prior to Crown sovereignty. It cannot be transferred and is inalienable except to the Crown.[7]

In contrast, "The 'creation' and 'transfer' of interests in land is the very object and purpose of the *Registry Act* and the *Land Titles Act*." Aboriginal title and the New Brunswick land registry system are incompatible.[8] The court's conclusion in this regard was fortified by a review of the language and purpose of the New Brunswick land registry and titles legislation. Justice Gregory concluded as follows:

"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)

...

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.

...

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."

Closing

We can expect that Justice Gregory's decision in the *Wolastoqey* litigation is the first in a series of court decisions in what is likely to be a long road ahead. It will be an interesting journey as the courts consider once more the interplay between Aboriginal title and the common law relating to real property rights. For appraisers, the question continues to be what impact this evolution in the law is having on the valuation of real property interests.

End notes

1 As proof that Aboriginal title claims are lawyer and document intensive, the court observed that fifteen lawyers attended the application hearing; the record filed for the application was 2,700 pages.

2 *Wolastoqey*, para. 3

3 [1997] 3 S.C.R. 1010, para. 186

4 *Wolastoqey*, para. 48

5 *Wolastoqey*, para., 51

6 *Wolastoqey*, paras. 74, 75

7 *Wolastoqey*, para. 77

8 *Wolastoqey*, para. 78, 80

This article is provided for the purposes of generating discussion and to make practitioners aware of certain challenges presented in the law. It is not to be taken as legal advice. Any questions relating to the applicability of expropriation legislation in particular circumstances should be put to qualified legal and appraisal practitioners.