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"Declarations of Aboriginal Title Are Not Discretionary"

By: Kent McNeil

Case Commented On: *JD Irving, Limited et al v Wolastoqey Nations,* 2025 NBCA 129 (CanLII); *Wolastoqey Nations v New Brunswick and Canada, et al.,* 2024 NBKB 203 (CanLII)

Robert Hamilton has already posted an ABlawg article on the recent New Brunswick Court of Appeal decision in the *Wolastoqey Nations* case. In it, he does an excellent job of summarizing the issues on the motion to strike the industrial defendants from the proceedings and of critically analyzing the Court of Appeal's decision. I will therefore focus my commentary on what I regard as another troubling aspect of the decision, namely that a judicial declaration does not necessarily follow from a factual finding of Aboriginal title.

This action was brought by the Wolastoqey Nations against Canada, New Brunswick, and a number of industrial, fee simple landowners who brought the motion to strike to avoid participation in the litigation. On such a motion, the facts alleged in the statement of claim are assumed to be established. The question was thus limited to whether these landowners were proper parties.

In the King's Bench where the motion was heard, Justice Katheryn Gregory decided that they were not and ordered the pleadings to be amended to remove them from the action. Her explanation for this was 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" (*Wolastoqey Nations v New Brunswick and Canada*, 2024 NBKB 203 (CanLII), at para 147) (*Wolastoqey* NBKB). Consequently, disputes over Aboriginal title's existence involve only the Crown and the Indigenous peoples concerned: "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" (*Wolastoqey* NBKB at para 138). However, she noted that "[t]his 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 [fee simple owners]" (*Wolastoqey* NBKB at para 151) (emphasis in original). The Crown, she said, "stands as a buffer, where appropriate, and a conduit, where necessary, between Aboriginal and settler societies" (*Wolastoqey* NBKB at para 152).

Justice Gregory was thus of the opinion that Aboriginal title could be declared over fee simple lands but could not be enforced directly against the fee simple owners. Accordingly, they should not be parties to the action. Her decision was a valiant attempt to achieve reconciliation by validating both Aboriginal title and fee simple interests and placing responsibility to resolve the potential conflict between them on the Crown. I think this is appropriate because it was the Crown

that created the conflict in the first place by wrongfully granting lands to private owners without first obtaining surrenders of Aboriginal title, as required by the Royal Proclamation of 1763 and the common law (see Kent McNeil, "Aboriginal Title, Private Property Interests, and Statutes of Limitation", (2024) All Papers at 2-8)

The New Brunswick Court of Appeal, in a decision delivered by Justice Ernest Drapeau, agreed that the industrial landowners should be removed from the litigation, but for reasons that differed from those of Justice Gregory. The Court of Appeal decided that, even after Aboriginal title has been established as a matter of fact by proving exclusive Indigenous occupation at the time of Crown assertion of sovereignty, this does not mean that a judicial declaration of title should follow. Declarations, according to Drapeau JA, are discretionary, and in exercising discretion in this context he was

> convinced no court would exercise its discretion in favour of a declaration of Aboriginal title over the appellants' [the industrial landowners'] lands for the following reasons. First, such a declaration would be granted without the appellants' participation in the process leading to its issuance. The special rules of procedure that are said to apply to Aboriginal rights' litigation do not exclude time-honoured principles of natural justice. Crucially, procedural fairness requires respect by the court for an affected party's right to be heard (*JD Irving, Limited et al v Wolastoqey Nations,* 2025 NBCA 129 CanLII, at para 200) (*Wolastoqey* NBCA).

It is, of course, unquestionable that procedural fairness requires that parties whose rights are involved have a right to be heard. But recall that Justice Gregory had held that, once the private landowners had been removed from the court proceedings, a declaration of Aboriginal title could only be issued against the Crown. If the rights of those landowners might be affected later, they could apply to intervene in the court proceedings at that time (*Wolastoqey* NBKB at para 204).

The second reason Drapeau JA gave for opining that no court would exercise its discretion in this regard was that "the declaration would vest in Wolastoqey Nation rights and entitlements with respect to the appellants' lands that are irreconcilable with their legal rights and entitlements (e.g. exclusive possession, occupancy, and use)" (*Wolastoqey* NBCA at para 204). This conclusion is inconsistent with Gregory J's ruling that a declaration of Aboriginal title would only be against the Crown and her decision, which the Court of Appeal upheld, that the industrial landowners be removed from the proceedings. Gregory J's ruling accords with the fundamental common law principle that title to real property is relative: in any judicial action over title, the issue is which of the parties in court has the better title, not who is the owner, which is why a *jus tertii* (a right of someone who is not a party to the legal proceedings) is irrelevant, unless one of the parties can claim under or through it: see *Perry v Clissold*, [1907] AC 73 (PC); AD Hargreaves, "Terminology and Title in Ejectment" (1940) 56 *Law Quarterly Review* 376. The proceedings can only resolve the issue of title as between the parties to the legal action because it is always possible that someone with a better right might show up later.

The reality of relativity of title is confirmed by the existence of quieting of title legislation, the whole purpose of which is to address this relativity and provide certainty to property rights by creating a judicial process to determine indefeasible ownership: see the *Quieting of Titles Act,*

RSNB 1973, c Q-4 (repealed by *Act to Repeal the Quieting of Titles Act*, SNB 2007, c 52), section 7 of which provided that public notice of the action must be given so that anyone claiming an interest in the land could appear.

So, with all due respect to the Court of Appeal, Justice Gregory was correct: once the industrial landowners were excluded from the litigation, any land rights they might have could not be in issue. It would be up to the Crown to try to arrive at a solution to any potential conflicts, but failing that further litigation would be necessary to resolve the matter (see also *Cowichan Tribes v Canada (Attorney General)*, 2025 BCSC 1490 (CanLII) at paras 2208, 3588, referred to by counsel in *Wolastoqey Nations* NBCA, para 102, but not discussed in the judgment).

Justice Drapeau's third reason for opining that no court would exercise its discretion by issuing a declaration of Aboriginal title over the industrial owners' lands was that "there is no allegation in the Statement of Claim of actionable wrongs by the appellants in relation to the lands over which the Wolastoqey Nation claim a declaration of Aboriginal title" (*Wolastoqey Nations* NBCA at para 200). Frankly, this reason makes no sense to me. Why should a declaration of title against the Crown require allegations of actionable wrongs against the industrial landowners whom the Court of Appeal agreed should be removed from the proceedings?

In any case, the deeper problem with the Court of Appeal's decision is its failure to distinguish between what are known as "pure" declaratory judgments, which are discretionary, and declaratory judgments that entail consequential relief, which are not. The purpose of a pure declaratory judgment is to provide judicial clarification of legal relationships and rights, not impose substantive relief (Lazar Sarna, *The Law of Declaratory Judgments*, 4th ed, Toronto: Thomson Reuters, 2016, at 1 (Sarna); Justice Malcolm Rowe and Diane Shnier, "The Limits of the Declaratory Judgment" (2022) 67:*3 McGill LJ* 295, at 297). Broad judicial acceptance of jurisdiction to issue pure declaratory judgments did not occur until early in the 20th century in England and Canada (Sarna at 8-12; Rowe and Shnier at 299-304). Before and since, declarations entailing consequential relief, such as a declaration of title to land, have automatically provided the claimant with all the rights associated with the title, including a right to possession and/or damages. Acceptance of discretionary judicial authority to issue pure declaratory judgments did not change the availability of these non-discretionary judgments that entail consequential relief. They continue to be available today (see discussion of *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 (CanLII), below). Although expressed as declarations, in substance these non-discretionary judgments are relief judgments because they have substantive effect. They are "self-executing in the sense that the parties and executing officer need no further direction or authorization than that contained in the judgment" (Sarna at 54). Rowe and Shnier (citing Sarna, 54-56), fittingly describe these as "examples of consequential relief framed as declaratory relief" (299 n5).

The requirements for a pure declaratory judgment were summarized by the Supreme Court of Canada in *Ewert v Canada*, 2018 SCC 30 (CanLII) at para 81 (quoted in *Wolastoqey* NBCA at para 188): "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." The Supreme Court made clear that a such 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" (para 81) (emphasis added).

Justice Gregory had held that, as the requirement of a legal relationship between the plaintiffs and industrial landowners did not exist, the *Ewert* requirement that those landowners have "an interest in opposing the declaration" had not been met. This was her main reason for removing those landowners from the litigation (see *Wolastoqey Nations* NBKB at paras 102-04, 131-32, quoted in *Wolastoqey Nations* NBCA at para 188). She was nonetheless of the view that a declaration of Aboriginal title to the lands of those industrial owners could be issued against the Crown, as the Crown did have an interest in opposing the declaration because of the potential availability of consequential relief against it (damages and compensation for alleged past wrongs; see para 203). The Court of Appeal exercised its assumed discretion to refuse this declaration, in part because it would create a conflict between the plaintiffs' rights and those of the industrial landowners, but, as already explained, that could not happen without the industrial landowners being parties to the action.

The Court of Appeal decided nonetheless that the

> Wolastoqey Nation may prosecute … its claim for a finding of Aboriginal title in respect of the privately owned lands in Schedule "A", including the appellants' [the industrial landowners'] lands in Schedule "B", for the purpose of substantiating its claim for damages and compensation against the Crown for its alleged wrongs, as particularized in the Statement of Claim. That claim against the Crown pertains to, not only the Crown lands identified in Schedule "C", but also the appellants' lands in Schedule "B", and the other privately owned lands in Schedule "A" (*Wolastoqey Nations* NBCA at para 203) (emphasis added).

The Court therefore seems to have been of the questionable view that a "finding of Aboriginal title" could substantiate claims against the Crown for damages and compensation without a declaration of Aboriginal title, which the Court held could not be issued in regard to privately-held lands.

The Court of Appeal opined that,

> [i]f Aboriginal title is established, it does not automatically follow that a judicial declaration of Aboriginal title will issue. The Superior Court is vested with a discretion regarding its issuance: *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, at para. 131 and *Shot Both Sides*, [2024 SCC 12] at para. 67 (*Wolastoqey Nations* NBCA at para 194).

In fact, neither of the Supreme Court cases Drapeau JA cited involved an Aboriginal title claim: the *Manitoba Metis Federation* case involved a claim to statutory land rights, and Drapeau JA himself distinguished *Shot Both Sides* in *Wolastoqey Nations* NBCA at para 74 because it was a treaty case. In *Manitoba Metis Federation*, the plaintiffs were not seeking personal relief, damages, or land; their claim was limited to "a declaration that a specific obligation set out in the Constitution was not fulfilled in the manner demanded by the Crown's honour … in order to assist

them in extra-judicial negotiations with the Crown in pursuit of the overarching constitutional goal of reconciliation" (para 137). As no consequential relief was asked for, this amounted to a request for a bare declaration, which is why the grant of it was discretionary. In *Shot Both Sides*, the Court exercised its discretion and issued a declaration that the Crown had breached its Treaty 7 reserve-land obligation to the Blood Tribe, which was also a bare declaration because the applicable statute of limitations barred any claim to consequential relief (e.g. damages).

To repeat, where Drapeau JA went wrong in this regard was in not recognizing the distinction between bare declarations that do not result in consequential relief and declarations that do – the former are discretionary, whereas the latter are not. A declaration of Aboriginal title against the Crown, which the plaintiffs sought in *Wolastoqey Nations*, would not be a bare declaration because consequential relief, such as damages and/or compensation, would necessarily result from it. In *Tsilhqot'in Nation*, the only Supreme Court decision in which declaration of Aboriginal title has been issued, the plaintiffs were entitled as against the Crown to all the rights associated with Aboriginal title once the Court accepted the trial judge's finding that it had been established on the facts. In her conclusion, McLachlin CJ stated simply: "I would allow the appeal and grant a declaration of Aboriginal title over the area at issue, as requested by the Tsilhqot'in" (para 153). Upon issuance, this declaration automatically "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 pro-actively use and manage the land" (para 73). This is precisely what Justice Malcolm Rowe and Diane Shnier described as an example of "consequential relief framed as declaratory relief." There is no suggestion in the McLachlin CJ's judgment that the issuance of the declaration of title was discretionary – in fact, the word discretion was not used once in the judgment. Nor should declarations of constitutional rights, such as a right to Aboriginal title, be discretionary. As Lord Shaw famously observed in *Scott v Scott*, [1913] AC 417 (HL) at 477, "[t]o remit the maintenance of constitutional right to the region of judicial discretion is to shift the foundations of freedom from the rock to the sand."

If declarations resulting in consequential relief were discretionary, proof of the facts on which property rights are based would only result in a declaration of title if judges exercised their discretion in favour of the claimant. In adverse possession cases, for example, judges could consider the behavior of adverse possessors and decide against them if they had deliberately taken advantage of statutes of limitation to acquire someone else's land. I am not aware of any cases in which judicial discretion has been exercised in this context, no doubt because it does not exist. See, for example, the classic case of *Asher v Whitlock*, (1865) LR 1 QB 1.

In sum, the declarations of Aboriginal title that the plaintiffs sought against the Crown in *Wolastoqey Nations* were not bare declarations because, as Justice Drapeau acknowledged at para 203, they were "for the purpose of substantiating its claim for damages and compensation against the Crown for its alleged wrongs" (not just "to assist them in extra-judicial negotiations with the Crown in pursuit of the overarching constitutional goal of reconciliation", as in *Manitoba Metis Foundation* and *Shot Both Sides*, the cases relied on by Drapeau JA). As the Aboriginal title claim against the Crown was made to obtain consequential relief, it should not have been subject to judicial discretion.

My hope is that the Supreme Court of Canada will grant leave to appeal the Court of Appeal decision in *Wolastoqey Nations* and reassess the issue of whether declarations of Aboriginal title can be made against the Crown in relation to privately-held lands. Justice Drapeau was of the opinion that "a declaration of Aboriginal title over privately owned lands, which, by its very nature, gives the Aboriginal beneficiary exclusive possession, occupation, and use would sound the death knell of reconciliation with the interests of non-Aboriginal Canadians" (para 192). This statement ignores the fact that the declaration that Justice Gregory held could be issued was against the Crown, not the private landowners, so would not give the Wolastoqey Nations rights of possession and use of the privately-held lands. Contrary to Justice Drapeau's opinion, I am of the view that reconciliation will never be achieved if the rights of non-Indigenous Canadians are always privileged in the way he envisaged. Reconciliation involves goodwill, respect, and compromise on all sides, which requires the Crown to stand, in Justice Gregory's words, "as a buffer, where appropriate, and a conduit, where necessary, between Aboriginal and settler societies" (*Wolastoqey* NBKB at para 152).

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