COURT OF APPEAL OF
NEW BRUNSWICK

COUR D'APPEL DU
NOUVEAU-BRUNSWICK

113-24-CA, 114-24-CA, 115-24-CA

J. D. IRVING, LIMITED, CHARLOTTE PULP AND PAPER CO. LTD., EASTCAN TRADING 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, THE NEW BRUNSWICK RAILWAY COMPANY, ROTHESAY PAPER HOLDINGS LTD., ST. GEORGE PULP & PAPER LIMITED, VAN BUREN-MADAWASKA CORPORATION, NEW BRUNSWICK SOUTHERN RAILWAY COMPANY LIMITED/LA COMPAGNIE DE CHEMIN DE FER DU SUD, NOUVEAU-BRUNSWICK LIMITÉE, BURNT HILL FISHING CLUB, ACADIAN TIMBER LIMITED PARTNERSHIP, BY ITS GENERAL PARTNER, ACADIAN TIMBER GP INC., and ACADIAN TIMBER GP INC. and H.J. CRABBE & SONS LTD.

APPELLANTS

- and -

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

RESPONDENTS

- and -

J. D. IRVING, LIMITED, CHARLOTTE PULP AND PAPER CO. LTD., EASTCAN TRADING 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, THE NEW BRUNSWICK RAILWAY COMPANY, ROTHESAY PAPER HOLDINGS LTD., ST. GEORGE PULP & PAPER LIMITED, VAN BUREN-MADAWASKA CORPORATION, NEW BRUNSWICK SOUTHERN RAILWAY COMPANY LIMITED/LA COMPAGNIE DE CHEMIN DE FER DU SUD, NOUVEAUBRUNSWICK LIMITÉE, BURNT HILL FISHING CLUB, ACADIAN TIMBER LIMITED PARTNERSHIP, REPRÉSENTÉE PAR SA COMMANDITÉE, ACADIAN TIMBER GP INC., ET ACADIAN TIMBER GP INC ET H.J. CRABBE & SONS LTD.

APPELANTES

- et -

NATION WOLASTOQEY À WELAMUKOTUK (PREMIÈRE NATION D'OROMOCTO), NATION WOLASTOQEY À SITANSISK (PREMIÈRE NATION DE SAINT MARY'S), NATION WOLASTOQEY À PILICK (PREMIÈRE NATION DE KINGSCLEAR), NATION WOLASTOQEY À WOTSTAK (PREMIÈRE NATION DE WOODSTOCK), NATION WOLASTOQEY À NEQOTKUK (PREMIÈRE NATION DE TOBIQUE) ET NATION WOLASTOQEY À MATAWASKIYE (PREMIÈRE NATION MALÉCITE DU MADAWASKA), AU NOM DE LA NATION WOLASTOQEY

INTIMÉES

- et -

ELSIPOGTOG FIRST NATION, CHIEF VINCENT LEBLANC AND THE MEMBERS OF THE BUCTOUCHE MIC MAC BAND, CHIEF GEORGE GINNISH AND THE MEMBERS OF THE NATOAGANEG FIRST NATION, CHIEF JOHN CLAUDE CAPLIN AND THE MEMBERS OF THE EEL RIVER BAR FIRST NATION, CHIEF REBECCA KNOCKWOOD AND THE MEMBERS OF THE FORT FOLLY FIRST NATION, CHIEF KENNETH BARLOW AND MEMBERS OF THE INDIAN ISLAND BAND, CHIEF BILL WARD AND THE MEMBERS OF THE METEPENAGIAG MI'KMAQ NATION, CHIEF ALVERY PAUL AND THE MEMBERS OF THE ESGENOOPETITJ FIRST NATION, CHIEF TERRY RICHARDSON AND THE MEMBERS OF THE PABINEAU FIRST NATION, AND THE DISTRICTS OF GESPE'GEWA'GI, SIGNIGTEWA'GI OF THE MI'GMAG NATION and EMS ENTERPRISE INC.

PREMIÈRE NATION ELSIPOGTOG, CHEF VINCENT LEBLANC, EN SON NOM ET AU NOM DES MEMBRES DE LA BUCTOUCHE MICMAC BAND, CHEF GEORGE GINNISH, EN SON NOM ET AU NOM DES MEMBRES DE LA PREMIÈRE NATION NATOAGANEG, CHEF JOHN CLAUDE CAPLIN, EN SON NOM ET AU NOM DES MEMBRES DE LA PREMIÈRE NATION D'EEL RIVER BAR, CHEFFE REBECCA KNOCKWOOD, EN SON NOM ET AU NOM DES MEMBRES DE LA PREMIÈRE NATION DE FORT FOLLY, CHEF KENNETH BARLOW, EN SON NOM ET AU NOM DES MEMBRES DE LA BANDE D'INDIAN ISLAND, CHEF BILL WARD, EN SON NOM ET AU NOM DES MEMBRES DE LA NATION MICMAQUE METEPENAGIAG, CHEF ALVERY PAUL, EN SON NOM ET AU NOM DES MEMBRES DE LA PREMIÈRE NATION ESGENOÔPETITJ, CHEF TERRY RICHARDSON, EN SON NOM ET AU NOM DES MEMBRES DE LA PREMIÈRE NATION PABINEAU, ET AU NOM DES DISTRICTS DE GESPE'GEWA'GI ET DE SIGNIGTEWA'GI DE LA NATION MICMAQUE ET EMS ENTERPRISE INC. :

ADDED PARTIES

PARTIES ADDITIONNELLES

J.D. Irving, Limited et al. v. Wolastoqey Nation, 2025 NBCA 129

J. D. Irving, Limited et autres c. Nation Wolastoqey, 2025 NBCA 129

CORAM:
The Honourable Justice Drapeau
The Honourable Justice Quigg
The Honourable Justice Green

CORAM :
l'honorable juge Drapeau
l'honorable juge Quigg
l'honorable juge Green

Appeal from a decision of the Court of King's Bench:
November 12, 2024

Appel d'une décision de la Cour du Banc du Roi :
le 12 novembre 2024

History of Case:

Historique de la cause :

Decision under appeal:
2024 NBKB 203

Décision frappée d'appel :
2024 NBBR 203

Preliminary or incidental proceedings:
2025 NBCA 16
2025 NBCA 17
2025 NBCA 18
2025 NBCA 59

Procédures préliminaires ou accessoires :
2025 NBCA 16
2025 NBCA 17
2025 NBCA 18
2025 NBCA 59

Appeal heard: June 18 and 19, 2025	Appel entendu : le 18 et 19 juin 2025
Judgment rendered: December 11, 2025	Jugement rendu : le 11 décembre 2025
Reasons for judgment by: The Honourable Justice Drapeau	Motifs de jugement : l'honorable juge Drapeau
Concurred in by: The Honourable Justice Quigg The Honourable Justice Green	Souscrivent aux motifs : l'honorable juge Quigg l'honorable juge Green
Counsel at hearing:	Avocats à l'audience :
For the appellants J.D. Irving, Limited, Charlotte Pulp and Paper Co. Ltd., Eastcan Trading 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, The New Brunswick Railway Company, Rothesay Paper Holdings Ltd., St. George Pulp & Paper Limited, VanBuren-Madawaska Corporation, New Brunswick Southern Railway Company Limited/La Compagnie de chemin de fer du Sud, Nouveau-Brunswick limitée, Burnt Hill Fishing Club:	Pour les appelantes J. D. Irving, Limited, Charlotte Pulp and Paper Co. Ltd., Eastcan Trading 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, The New Brunswick Railway Company, Rothesay Paper Holdings Ltd., St. George Pulp & Paper Limited, Van Buren-Madawaska Corporation, New Brunswick Southern Railway Company Limited/La Compagnie de chemin de fer du Sud, Nouveau-Brunswick limitée, Burnt Hill Fishing Club :
Catherine A. Lahey, K.C., R. Paul Steep and Thomas F. Isaac	Catherine A. Lahey, c.r., R. Paul Steep et Thomas F. Isaac
For the appellants Acadian Timber Limited Partnership by its general partner, Acadian Timber GP Inc., Acadian Timber GP Inc.:	Pour les appelantes Acadian Timber Limited Partnership, représentée par sa commanditée, Acadian Timber GP Inc., et Acadian Timber GP Inc. :
Hugh J. Cameron, K.C., and Evan S. MacKnight	Hugh J. Cameron, c.r., et Evan S. MacKnight
For the appellant H.J. Crabbe & Sons Ltd.:	Pour l'appelante H. J. Crabbe & Sons, Ltd. :
Alexander M. Cameron	Alexander M. Cameron
For the respondents 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	Pour les intimées Nation Wolastoqey à Welamukotuk (Première Nation d'Oromocto), Nation Wolastoqey à Sitansisk (Première Nation de Saint Mary's), Nation Wolastoqey à Pilick (Première Nation de Kingsclear), Nation Wolastoqey à Wotstak (Première Nation de Woodstock), Nation Wolastoqey à Neqotkuk (Première Nation de Tobique) et Nation

Nation at Matawaskiye (Madawaska Maliseet First Nation), on behalf of Wolastoqey Nation:

Renée L. Pelletier, Graeme Cook and Victoria Wicks

For the added parties (Rule 15.02):

Elsipogtog First Nation:

Kate Gunn and Caitlin Stockwell

Chief Vincent Leblanc on behalf of himself and the members of the Buctouche Mic Mac Band, Chief George Ginnish on behalf of himself and the members of the Natoaganeg First Nation, Chief John Claude Caplin on behalf of himself and the members of the Eel River Bar First Nation, Chief Rebecca Knockwood on behalf of herself and the members of the Fort Folly First Nation, Chief Kenneth Barlow on behalf of himself and the members of the Indian Island Band, Chief Bill Ward on behalf of himself and the members of the Metepenagiag Mi'kmag Nation, Chief Alvery Paul on behalf of himself and the members of the Esgenoopetitj First Nation, Chief Terry Richardson on behalf of himself and the members of the Pabineau First Nation, and on behalf of the districts of Gespe'gewa'gi and Signigtewa'gi of the Mi'gmag Nation:

Derek A. Simon, Ashley Hamp-Gonsalves and Andrew Paul

EMS Enterprise Inc.:

Megan Mara Mallory

THE COURT

The appeal is allowed for the purpose of setting aside the order greenlighting the prosecution of Wolastoqey Nation's claim against the Crown for a declaration of Aboriginal title with respect to the appellants' lands. It is plain and obvious that this claim has no chance of success at trial. Accordingly, the appellants' lands in Schedule "B" to the Statement of Claim are removed from the outstanding claim against the Crown for a declaration of Aboriginal title and all claims for

Wolastoqey à Matawaskiye (Première nation malécite du Madawaska), au nom de la Nation Wolastoqey :

Renée L. Pelletier, Graeme Cook et Victoria Wicks

Pour les parties additionnelles :

Première Nation Elsipogtog :

Kate Gunn et Caitlin Stockwell

Chef Vincent Leblanc, en son nom et au nom des membres de la Buctouche MicMac Band, chef George Ginnish, en son nom et au nom des membres de la Première Nation Natoaganeg, chef John Claude Caplin, en son nom et au nom des membres de la Première Nation d'Eel River Bar, cheffe Rebecca Knockwood, en son nom et au nom des membres de la Première Nation de Fort Folly, chef Kenneth Barlow, en son nom et au nom des membres de la Bande d'Indian Island, chef Bill Ward, en son nom et au nom des membres de la Nation micmaque Metepenagiag, chef Alvery Paul, en son nom et au nom des membres de la Première Nation Esgenoôpetitj, chef Terry Richardson, en son nom et au nom des membres de la Première Nation Pabineau, et au nom des districts de Gespe'gewa'gi et de Signigtewa'gi de la Nation micmaque :

Derek A. Simon, Ashley Hamp-Gonsalves et Andrew Paul

EMS Enterprise Inc. :

Megan Mara Mallory

LA COUR

L'appel est accueilli afin d'annuler l'ordonnance autorisant l'instruction de la demande de la Nation wolastoqey contre la Couronne sollicitant une déclaration de titre ancestral sur les terres des appelantes. Il est clair et évident que cette demande n'a aucune chance de réussite au procès. Par conséquent, les terres des appelantes figurant à l'annexe B de l'exposé de la demande sont retirées de la demande en cours contre la Couronne sollicitant une déclaration de titre ancestral, et

related consequential relief are struck. The formal judgment is to be amended accordingly.

In the result, Wolastoqey Nation is legally entitled to pursue its claim for a declaration of Aboriginal title and all appropriate consequential relief against the Crown in respect of the Crown lands in Schedule "C", to seek a finding of Aboriginal title in relation to the privately owned lands in Schedule "A", including the appellants' lands in Schedule "B", and to litigate its claim for an award of damages and compensation flowing from such a finding.

Wolastoqey Nation shall pay $10,000 to each of J.D. Irving, Limited, Acadian Timber GP Inc., and H.J. Crabbe & Sons Ltd. for costs in the underlying proceedings in the Court of King's Bench and on appeal. No costs are payable to or by the added parties.

We have been informed a translation of these reasons and decision will not be available for review by the panel before mid-March 2026. All proceedings have been conducted in the English language and there is an urgent need for the underlying litigation to promptly move forward. With the approval of the Chief Justice of New Brunswick, we invoke s. 24(2) of the *Official Languages Act*, S.N.B. 2002, c. O-0.5, and direct these reasons and decision be published in English and, thereafter, at the earliest possible time, in French.

toutes les demandes de mesures réparatoires en découlant sont radiées. Le jugement formel sera modifié en conséquence.

Par conséquent, la Nation wolastoqey est légalement habilitée à poursuivre sa demande sollicitant une déclaration de titre ancestral et toutes les mesures réparatoires appropriées en découlant contre la Couronne en ce qui concerne les terres de la Couronne figurant à l'annexe C, à solliciter une conclusion confirmant un titre ancestral sur les terres privées figurant à l'annexe A, y compris les terres des appelantes figurant à l'annexe B, et à faire valoir sa demande de dommages-intérêts et d'indemnisation découlant d'une telle conclusion.

La Nation wolastoqey est condamnée à verser à J. D. Irving, Limited, à Acadian Timber GP Inc. et à H. J. Crabbe & Sons, Ltd. la somme de 10 000 $ chacune au titre des dépens afférents à l'instance sous-jacente devant la Cour du Banc du Roi et à l'appel. Il n'y a aucune adjudication de dépens pour ou contre les parties additionnelles.

Nous avons été informés qu'une traduction des présents motifs et de la présente décision ne sera disponible pour examen par la formation qu'à partir de la mi-mars 2026. Toutes les procédures se sont déroulées dans la langue anglaise et il est urgent que le litige sous-jacent progresse rapidement. Avec l'approbation du juge en chef du Nouveau Brunswick, nous invoquons le par. 24(2) de la Loi sur les langues officielles, L.N. B. 2002, ch. O-0.5, et ordonnons que les présents motifs et la présente décision soient publiés d'abord en anglais, puis, dans les meilleurs délais, en français.

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The judgment of the Court is delivered by

DRAPEAU, J.A.

I. Case Overview, and Preview of Analysis and Outcome

[1] In the Statement of Claim under consideration in the Court of King's Bench, Wolastoqey Nation seeks, subject to some exceptions, a declaration of Aboriginal title against the Crown over the western half of the province, more specifically the 283,204 parcels of land captured by Schedule "A" to the Statement of Claim. Schedule "A" includes the 30,446 parcels of ungranted Crown lands identified in Schedule "C" and 252,758 parcels owned by private individuals and corporations, including the appellants. The latter are labeled "Industrial Defendants" in the Statement of Claim and their parcels are itemized in Schedule "B". In the Statement of Claim, Wolastoqey Nation also seeks a declaration of Aboriginal title against the appellants with respect to the parcels in Schedule "B", which Wolastoqey Nation concedes the appellants own in fee simple.

[2] The other private owners of parcels in Schedule "A" are not parties to the action; they are referred to as "Strangers to the Claim" in the Statement of Claim. As will be seen, Wolastoqey Nation did not seek a declaration of Aboriginal title with respect to the Strangers' lands. In essence, it is seeking a finding of Aboriginal title in respect of those lands with a view to fueling its claim for damages and compensation against the Crown.

[3] In a parallel, but separate proceeding, another Aboriginal claimant, a party added to the present appeal pursuant to Rule 15.02 of the *Rules of Court*, is seeking a declaration of Aboriginal title with respect to ungranted Crown lands in the eastern half of the province. The only defendants in that proceeding are the federal and provincial Crown. The actionability and validity of those claims are not in issue here. Rather, the debate in the case at hand concerns the availability, as a legal remedy, of a declaration of Aboriginal title against the Crown with respect to lands owned in fee simple by the appellants, notwithstanding their removal from the action by the judgment granted in first instance.

[4] I hasten to emphasize that, as I understand the pertinent law, the labeling of the appellants as "Industrial Defendants" adds nothing to their liability. The property rights of private corporations carrying out industrial undertakings are no different than those of other private titleholders in the province, including ordinary homeowners. While none of those homeowners is currently named as a defendant in the underlying action, and no declaration of Aboriginal title is sought against them in this litigation, Wolastoqey Nation has not conceded that such a declaration is unavailable, as a matter of law. One might be forgiven for inclining to the view that any legal jeopardy on the part of the appellants would apply to other private landowners, including homeowners.

[5] The appellants applied, by way of three separate motions, for an order under Rule 23.01(1)(b) striking the portions of the Statement of Claim that purported to assert a cause of action against them for a declaration of Aboriginal title over their lands and, either explicitly or implicitly, an order granting judgment accordingly, pursuant to Rule 37.10(a). The kernel of their grounds for the orders sought lay in the two-prong theory that declarations of Aboriginal title can only be obtained against the Crown, a state of affairs no amendment to the pleadings could change, and, in any event, the Statement of Claim did not feature the required allegations of fact for a declaration of Aboriginal title against them and their lands. The judge determined it was plain and obvious the claim against the appellants for a declaration of Aboriginal title and various consequential relief had no reasonable prospect of success at trial, and she granted judgment striking the claim and removing the appellants from the action as defendants. There is no appeal or cross-appeal against that determination and the related part of the judgment.

[6] However, the judge determined it was not plain and obvious Wolastoqey Nation was precluded from prosecuting its claim against the Crown for a declaration of Aboriginal title over the appellants' lands, as well as its claim for a bundle of consequential relief, including an order quashing the underlying Crown grants and an order for recovery of the lands in question. The part of the judgment that embodies this determination is under appeal. In my respectful opinion, the judge erred in law in making the last-mentioned determination and in rendering judgment accordingly, which purports to vest in the trial

judge jurisdiction to make a declaration of Aboriginal title against the Crown for the appellants' lands without their participation in the preceding process and in violation of their right to be heard. I say so while acknowledging the remarkable quality of the reasons for judgment produced by the motions judge and the impressive supporting submission on appeal by Wolastoqey Nation. As is well known, legal disagreements among jurists are commonplace occurrences. My duty is to call the case as I see it, in accordance with my oath of office. By the reasons and disposition provided in the text that follows, my purpose is, of course, to live up to my oath of office by rendering justice according to law for all interested parties, but also to minimize litigation costs and complexity (*Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4, [2020] 1 S.C.R. 15, at para. 51), and to open a clearer path to peaceful and respectful reconciliation between Aboriginal and non-Aboriginal Canadians in this province (*Southwind v. Canada*, 2021 SCC 28, [2021] 2 S.C.R. 450, at para. 55).

[7] It is trite law that the appellants' motions to strike stood to be determined on the assumption that the allegations of fact set out in the Statement of Claim were established. Despite the appellants' able submissions to the contrary and, solely for our present purposes and subject to all available defences, I am of the view those allegations, if proven, could support a finding of Aboriginal title over the Crown and private lands in Schedule "A". Thus, on proof of those facts, the judge charged with the final adjudication of the dispute between Wolastoqey Nation and the Crown could properly make a finding of Aboriginal title in favour of the former with respect to the appellants' lands, which would open the door to an award of damages and compensation against the Crown. Admittedly, such a finding, without a confirmatory judicial declaration, would not burden the appellants' title to the lands in question.

[8] Declaratory relief is warranted only where the criteria established in *Ewert v. Canada*, 2018 SCC 30, [2018] 2 S.C.R. 165, at para. 81, are satisfied and, more globally, where its issuance is not unjust. Applying that standard, I am of the view that no judge, acting judicially, could properly issue a declaration of Aboriginal title against the Crown over the appellants' lands. That conclusion is unavoidable where the appellants will not be

parties to the action and the declaration of Aboriginal title over their lands stands to be made without their participation in the preceding process and without hearing them, a clear breach of settled rules of procedural fairness. Relatedly, it bears noting that, on the motions judge's analysis and decision, Rule 15.02, which allows intervention in an action "as a party", would not allow the appellants' intervention at any time during the currency of the action for a declaration of Aboriginal title; as noted, the judge held the appellants cannot be parties to that action and, accordingly, they could only seek intervention as a party after any declaration is made.

[9] To repeat the accepted formula, it is plain and obvious to me that no declaration of Aboriginal title over the appellants' lands can be granted, having regard to the denial of procedural fairness to the appellants. However, and most significantly, it is not plain and obvious that a finding of Aboriginal title over the appellants' lands cannot be made if its purpose is solely to fuel Wolastoqey Nation's claim in damages and for compensation against the Crown, as articulated in the Statement of Claim, for any wrongs it may have committed in relation to those lands and for which it is answerable at law.

[10] I would therefore allow the appeal and set aside the order and related judgment under appeal, which greenlights Wolastoqey Nation's prosecution of its claim for a declaration of Aboriginal title against the Crown with respect to the appellants' lands. Needless to say, all claims for related consequential relief must also be struck. It follows the appellants' fallback request to set aside the entire decision in first instance, including the striking order under Rule 23.01(1)(b) and the conversion to judgment order under Rule 37.10(a), is not before us for adjudication. Moreover, in its written submission on appeal, Wolastoqey Nation supports those orders. Indeed, it has not filed a Notice of Appeal or Notice of Cross-Appeal against them. Once it is accepted the striking and conversion to judgment orders were properly rendered, there is no case for reversal and the orders in question must stand. It also follows the Notice of Contention filed by Wolastoqey Nation pursuant to Rule 62.08 is without legal significance in connection with the order under appeal, namely the order allowing Wolastoqey Nation to seek from the Crown a declaration of Aboriginal title to the appellants' lands. That is so because, in respect of that order,

Wolastoqey Nation does not meet the Rule's condition precedent: entitlement to "different relief than that given" by the motions judge.

[11] In the result, Wolastoqey Nation is entitled to pursue its claim for a declaration of Aboriginal title and all appropriate consequential relief against the Crown in respect of the Crown lands in Schedule "C" (30,446 parcels), to seek a finding of Aboriginal title, but not a declaration of Aboriginal title, in relation to all privately owned lands in Schedule "A" and to litigate its claim against the Crown for damages and compensation flowing from any finding of Aboriginal title.

II. Relevant Legislation

A. *Constitution Act, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, Part V*

[12] Section 35 of the *Constitution Act, 1982* states:

35 (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.	**35 (1)** Les droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada sont reconnus et confirmés.

[13] All agree the right to Aboriginal title is captured by s. 35(1).

B. *Rules of Court, NB Reg. 82-73*

[14] The *Rules of Court* have force of law by virtue of s. 73(1) of the *Judicature Act*, R.S.N.B. c. J-2.

[15] Rule 15.02 (Intervention as "Added Party"):

15.02 Leave to Intervene as Added Party	**15.02 Permission d'intervenir comme partie additionnelle**
(1) Where a person who is not a party claims	(1) Toute personne qui n'est pas partie à l'instance et qui

(a) an interest in the subject matter of a proceeding,	a) prétend avoir un intérêt dans le litige,
(b) that he may be adversely affected by a judgment in a proceeding, or	b) prétend qu'elle risque d'être lésée par le jugement éventuel, ou
(c) that there exists between him and one or more of the parties a question of law or fact in common with a question in issue in a proceeding, he may apply to the court by notice of motion for leave to intervene as an added party.	c) prétend qu'il existe entre elle et une ou plusieurs des parties à l'instance une question de droit ou de fait coïncidant avec une ou plusieurs des questions en litige, peut demander à la cour, sur avis de motion, la permission d'intervenir comme partie additionnelle.
(2) On a motion under paragraph (1), the court shall consider whether or not the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order as to pleadings, production and discovery and impose such conditions as to costs or otherwise as may be just. [Emphasis added]	(2) Après avoir pesé les répercussions d'une telle intervention en termes de retards ou de préjudices indus dans la détermination des droits des parties à l'instance, la cour peut, sur motion présentée en application du paragraphe (1), ajouter la personne comme partie à l'instance et rendre toute ordonnance qu'elle estime juste en ce qui concerne les plaidoiries, la production de documents et l'enquête préalable, et imposer toute condition qu'elle estime juste, notamment en matière de dépens. [Je souligne.]

[16] The authority of the court under Rule 15.02 is limited to adding the moving party as "a party to the proceeding". Once the motions judge determined the appellants were not proper parties in the Wolastoqey Nation's action for a declaration of Aboriginal title, no court could subsequently add the Industrial Defendants as parties to that action. The contention that court-ordered intervention provides the procedural fairness to which the appellants are entitled is without merit.

[17] Rule 23.01(1)(a) and Rule 23.01(1)(b), the primary striking rule:

23.01 (1) The plaintiff or a defendant may, at any time before the action is set down for trial, apply to the court	**23.01** (1) Le demandeur ou le défendeur peut, avant la mise au rôle de l'action, demander à la cour

(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,	a) que toute question de droit soulevée par une plaidoirie dans l'action en cours soit tranchée avant le procès, si la solution de cette question peut régler le litige, abréger le procès ou réduire considérablement les frais,
(b) to strike out a pleading which does not disclose a reasonable cause of action or defence, or	b) qu'une plaidoirie qui ne révèle aucune cause d'action ni de défense raisonnable soit radiée ou
[…]	[…]

[18] Rules 27.09(b) and (e), the alternative striking rules:

27.09 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	**27.09** La cour peut toujours annuler une plaidoirie ou un autre document en tout ou en partie, avec ou sans permission de les modifier et aux conditions qu'elle estime justes, au motif que l'écrit en question
[…]	[…]
(b) is scandalous, frivolous or vexatious,	b) est scandaleux, frivole ou vexatoire;
[…]	[…]
(e) is not in conformity with the Rules of Court.	e) ne se conforme pas aux Règles de procédure.

[19] Rule 37.10(a), the conversion to judgment rule:

37.10 On the hearing of a motion, the court may allow or dismiss the motion or adjourn the hearing, with or without terms; or, in the alternative or in addition, may direct	**37.10** À l'audition d'une motion, la cour peut accorder celle-ci, la rejeter ou ajourner l'audience avec ou sans conditions. La cour peut prescrire en outre ou dans l'alternative
(a) in a proper case, that the motion be converted into a motion for judgment, […]	a) que la motion soit transformée en une motion pour jugement, s'il y a lieu, […]

[20] Rule 62.08 ("Notice of Contention"):

62.08 Respondent's Notice of Contention	**62.08 Avis de désaccord de l'intimé**
A respondent who has not cross-appealed but who contends that	L'intimé qui n'a pas formé d'appel reconventionnel mais qui soutient
(a) the order or decision appealed from should be affirmed on grounds other than those given by the court appealed from, or	a) que l'ordonnance ou que la décision portée en appel devrait être confirmée pour des motifs autres que ceux donnés par le tribunal de première instance ou
(b) if the appeal is allowed in whole or in part, he is entitled to different relief than that given by the court appealed from,	b) qu'il a droit, si l'appel est accueilli en tout ou en partie, à des mesures de redressement différentes de celles accordées par le tribunal de première instance,
shall, within 15 days from the service on him of the Notice of Appeal, serve a Notice of Contention (Form 62E) upon all parties whose interests may be affected and file it with the Registrar forthwith after completion of service.	doit, dans les 15 jours de la signification qui lui est faite de l'avis d'appel, signifier à toutes les parties dont les intérêts peuvent être affectés un avis de désaccord (formule 62E). L'avis est ensuite déposé immédiatement auprès du registraire.
[Emphasis added.]	[Je souligne.]

III. A More Detailed Context

[21] Three separate motions to strike under Rule 23.01(1)(b) were filed in the Court of King's Bench and three separate appeals were launched against the order upholding the provisions of the Statement of Claim that allow the prosecution against the Crown of the claim for a declaration of Aboriginal title over the appellants' lands. The appeals were consolidated at the opening of the hearing in this Court. Nevertheless, the record features three Notices of Motion, three Notices of Appeal and three Appellants' Submissions, hence the summary for each document that follows. Ultimately, however, these reasons and the related single judgment cover the three consolidated appeals.

A. *Statement of Claim under Consideration*

[22] There is no gainsaying the importance of the pleadings in proceedings under Rule 23.01(1)(b), the primary striking rule, particularly where the dispute relates to a claim of Aboriginal title (see *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, [1997] S.C.J. No. 108 (QL)), where the majority ordered a new trial, after many years of litigation, on the grounds that the pleadings were deficient). Here, the Statement of Claim impugned in first instance is noteworthy for its careful and thorough contextual articulation of the case the respondents hope to prove at trial. As such, it bears reproduction in its entirety:

AMENDED AMENDED STATEMENT OF CLAIM

1. The Plaintiffs, Wolastoqey Nation at Matawaskiye (Madawaska Maliseet First Nation), Wolastoqey Nation at Neqotkuk (Tobique First Nation), Wolastoqey Nation at Pilick (Kingsclear First Nation), Wolastoqey Nation at Sitansisk (Saint Mary's First Nation), Wolastoqey Nation at Welamukotuk (Oromocto First Nation) and Wolastoqey Nation at Wotstak (Woodstock First Nation), on behalf of all members of Wolastoqey Nation, claim:

(a) a declaration that Wolastoqey Nation has Aboriginal title to the lands, including the land, airspace, land covered by water, offshore and inshore water bodies, foreshore, rivers, lakes and streams, described in Schedule "A", or to such portions thereof for which this Court may find the evidence sufficient ("Traditional Lands");

(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/Société D'énergie Du Nouveau-Brunswick against which the Plaintiffs do not seek certificates of pending litigation;

(c) damages and compensation from the Crown Defendants (as defined hereinbelow) for the Crown Defendants' breaches of the Crown's fiduciary obligations, and for the unlawful occupation, appropriation, removal of resources from, and infringement of, the Plaintiffs'

Aboriginal title over their Traditional Lands, including infringements arising from the Defendants and others being in occupation of the Traditional Lands without permission from the Plaintiffs;

(d) an Order of scire facias in respect of the properties bearing the property identification numbers set out in Schedule "B";

(e) in the alternative to (d), an Order of ejectment and recovery of land in respect of the properties bearing the property identification numbers set out in Schedule "B";

(f) in respect of lands purported to be Crown lands that are subject to a leasehold interest, the vesting of the reversion and any remainder in the Plaintiffs;

(g) vesting in possession in favour of the Plaintiffs of the lands purported to be Crown lands bearing the property identification numbers set out in Schedule "C";

(h) a determination, with respect to the lands purported to be Crown lands other than those bearing the property identification numbers set out in Schedule "C", of whether those lands should vest in possession in favour of the Plaintiffs;

(i) costs on a substantial indemnity basis; and,

(j) such further and other relief as this Honourable Court may deem just.

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

3. The Plaintiffs do not seek a declaration of Aboriginal title in paragraph 1(a) that binds Strangers to the Claim with respect to such Strangers to the Claims' property rights.

Parties

4. The Plaintiffs, who represent Wolastoqey Nation, are Matawaskiye (Madawaska Maliseet), Neqotkuk (Tobique), Pilick (Kingsclear), Sitansisk (Saint Mary's), Welamukotuk (Oromocto), and Wotstak (Woodstock) First Nations (collectively, the First Nations), being the six Wolastoqey First Nations in New Brunswick. They each have the capacity of an Indian Band within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5, as amended.

5. The Wolastoqey Nation, and the Plaintiff First Nations representing Wolastoqey Nation in this action, are Aboriginal peoples within the meaning of section 35 of the *Constitution Act, 1982*.

6. The Attorney General of Canada ("Canada") is joined pursuant to sections 3, 21(1) and 23(1) of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, as amended.

7. Canada has legislative jurisdiction in relation to "Indians and lands reserved for the Indians" pursuant to subsection 91(24) of the *Constitution Act, 1867*, subject to the rights and interests of the Plaintiffs.

8. The Province of New Brunswick ("New Brunswick") is joined pursuant to sections 3, 11, and 12 of the *Proceedings Against the Crown Act*, R.S.N.B. 1973, c, P-18, as amended.

9. New Brunswick is vested with the administration, control and beneficial interest in provincial Crown lands pursuant to section 109 of the *Constitution Act, 1867*, subject to the rights and interests of the Plaintiffs.

10. New Brunswick has legislative jurisdiction over lands in New Brunswick pursuant to subsections 92(5) and 92(13) of the *Constitution Act, 1867*, subject to the rights and interests of the Plaintiffs.

11. Together, Canada and New Brunswick are referred to in these pleadings as the Crown Defendants.

12. The Industrial Defendants are:

(a) New Brunswick Power Corporation/Société d'énergie du Nouveau-Brunswick, a corporation incorporated in the Province of New Brunswick, with the registered office located at 515 King Street P.O. Box 2000 Fredericton, NB E3B 4X1;

(b) Acadian Timber Limited Partnership, by its General Partner, Acadian Timber GP Inc., a corporation incorporated in the Province of Manitoba, with the registered office located at 181 Bay Street, Suite 200, Toronto, ON M5J 2T3;

(c) Acadian Timber GP Inc., a corporation incorporated in the Province of Ontario, with the registered office located at 181 Bay Street, Suite 300, Toronto, ON M5J 2T3;

(d) Twin Rivers Paper Company Inc., a corporation incorporated in the Province of Ontario, with the registered office located at 27 Rice Street, Edmundston, NB, E3V 1S9;

(e) H. J. Crabbe & Sons, Ltd., a corporation incorporated in the Province of New Brunswick, with the registered office located at 6 Lockhart's Mill Road, Bristol, NB E7L 2R2;

(f) AV Group NB Inc. / Groupe AV NB Inc., a corporation incorporated in the Province of New Brunswick, with the registered office located at Brunswick Square, 1 Germain Street, Suite 1500, Saint John, NB E2L 4V1;

(g) J.D. Irving, Limited, a corporation incorporated in the Province of New Brunswick, with the registered office located at 300 Union Street, P.O. Box 5777, Saint John, NB E2L 4M3; and

(h) The following entities which are related to and/or subsidiaries of J.D. Irving, Limited:

    i. 712414 N.B. Ltd., a corporation incorporated in the Province of New Brunswick, with the registered office located at 10 King Square S, Saint John NB E2L 0G3;

ii. Arcadia Sites Limited, a corporation incorporated in the Province of New Brunswick, with the registered office located at 10 King Square S, Saint John, NB E2L 0G3;

iii. Arctic Falcon Limited, a corporation incorporated in the Province of New Brunswick, with the registered office located at 10 King Square S, Saint John, NB E2L 0G3;

iv. Charlotte Pulp and Paper Co. LTD., a corporation incorporated in the Province of New Brunswick, with the registered office located at 300 Union Street, 12th Floor, Saint John, NB E2L 4M3;

v. Eastcan Trading Limited, a corporation incorporated in the Province of New Brunswick, with the registered office located at 300 Union Street, Saint John, NB E2L 4M3;

vi. Highlands Operations Limited, a corporation incorporated in the Province of New Brunswick, with the registered office located at 10 King Square S, Saint John, NB E2L 0G3;

vii. Irving Oil Limited, a corporation incorporated in the Province of New Brunswick, with the registered office located at 10 King Square S, Saint John, NB E2L 0G3;

viii. Irving Paper Limited Les Papiers Irving Limitée, a corporation incorporated in the Province of New Brunswick, with the registered office located at 300 Union Street, Saint John, NB E2L 4M3;

ix. Juniper Organics Limited Les Produits Organiques Juniper Limitée, a corporation incorporated in the Province of New Brunswick, with the registered office located at 300 Union Street, Saint John, NB E2L 4Z2;

x. K.C. Irving, Limited, a corporation incorporated in the Province of New Brunswick, with the

registered office located at 300 Union Street, Saint John, NB E2L 4M3;

xi. Miramichi Timber Holdings Limited Gestion Bois Miramichi Limitée, a corporation incorporated in the Province of New Brunswick, with the registered office located at 300 Union Street, Saint John, NB E2L 4Z2;

xii. The New Brunswick Railway Company, a corporation incorporated in the Province of New Brunswick, with the registered office located at 300 Union Street, P.O. Box 5777, Saint John NB E2L 4M3;

xiii. Pools Properties Limited Les Immeubles Pools Limitée; a corporation incorporated in the Province of New Brunswick, with the registered office located at 10 King Square S, Saint John, NB E2L 0G3;

xiv. Rothesay Paper Holdings Ltd., a corporation incorporated in the Province of New Brunswick, with the registered office located at 300 Union Street P.O. Box 5777, Saint John NB E2L 4M3;

xv. St. George Pulp & Paper Limited, a corporation incorporated in the Province of New Brunswick, with the registered office located at 300 Union Street, 12th Floor, Saint John, NB E2L 4M3;

xvi. Strescon Limited, a corporation incorporated in the Province of New Brunswick, with the registered office located at 400 Chesley Drive, Saint John, NB E2K 5L6;

xvii. Van Buren-Madawaska Corporation, a corporation incorporated in the State of Maine, with the registered office located at P.O. Box 1401, Bangor, ME 04402 1401;

xviii. New Brunswick Southern Railway Company Limited/La Compagnie de Chemin de fer du sud, Nouveau-Brunswick Limitee, which carries on business in New Brunswick, with the registered office located at 300 Union Street, Saint John,

NB E2L 4M3 (place of incorporation unknown); and

xix. Burnt Hill Fishing Club, which carries on business in New Brunswick, with the registered office located at 300 Union St., P.O. Box 5777, Saint John, NB E2L 4M3 (place of incorporation unknown).

13. The Industrial Defendants are industrial businesses and a Crown corporation that are in possession of the portions of the Traditional Lands as set out in Schedule "B", on the basis of Crown grants.

14. Pursuant to Rule 19.01, this statement of claim is being served on defendants located outside New Brunswick without leave, on the basis that the property in question is located in New Brunswick.

Possession of Traditional Lands Prior to the Assertion of Crown Sovereignty

15. The Plaintiffs are the First Nations residing in what is now New Brunswick that are part of the larger Wolastoqey Nation, which before the assertion of British sovereignty occupied vast tracts of territory, including territory in what are now New Brunswick, Québec and Maine.

16. The territory occupied included the Traditional Lands, being what is now known as the Wolastoq, also known as the St. John River, watershed and surrounding area, including the land, subsurface land and minerals, airspace, land covered by water, offshore and inshore water bodies, foreshore, rivers, lakes and streams situated within this area. The Plaintiffs only seek remedies in this litigation with respect to their Traditional Lands within New Brunswick, and not with respect to their Traditional Lands found within the present boundaries of the Province of Québec and the State of Maine. A map of the Traditional Lands within New Brunswick is included in Schedule "A".

17. The First Nations and members of the Wolastoqey Nation are the direct descendants of the Wolastoqey Nation which was present on the Traditional Lands prior to the British assertion of sovereignty.

18. Wolastoqey custom provided that members of each local group had use of its own local territory, including all of its lands, waters, and resources. However, Wolastoqey Nation as a whole had exclusive occupation of the entire Traditional Lands, and members of Wolastoqey Nation were able to travel and harvest freely throughout the Traditional Lands.

Possession at the Time of the Assertion of British Sovereignty

19. At the time of the British assertion of sovereignty in 1759, Wolastoqey Nation controlled, regularly used, exclusively occupied, and exercised exclusive stewardship and jurisdiction over their territory, including the Traditional Lands, in accordance with Wolastoqey law. Such law provided that a person from outside their territory was expected to seek permission to be present. Anyone seeking to pass through Wolastoqey Nation's territory or to otherwise use the Traditional Lands would require such permission. It was customary that permission, if requested, would often be granted to other friendly Indigenous persons to travel through or to temporarily stay in the territory and to hunt, fish and gather to feed themselves while doing so.

20. Permission was also granted to certain French groups to occupy certain lands within Wolastoqey Nation's territory. The Wolastoqey Nation generally had a friendly and allied relationship with the French and their presence in Wolastoqey Nation's Traditional Lands helped to facilitate alliance, trade, and related activities.

21. Prior to and at the assertion of British sovereignty and continuing to present day, Wolastoqey Nation has used their Traditional Lands for a variety of purposes including hunting, fishing, gathering and other resource-harvesting activities, trade, and cultural and spiritual practices.

22. At all relevant times, from the assertion of sovereignty in 1758-1759, to the Peace and Friendship Treaties between the British and Wolastoqey Nation from 1725 to 1778, the British Crown recognized Wolastoqey Nation as the Indigenous people who exclusively occupied their territory, including the Traditional Lands.

The Peace and Friendship Treaties

23. From 1725/1726 to 1778, Wolastoqey Nation negotiated and entered into Treaties with the Crown, known as the Peace and Friendship Treaties. These Treaties do not provide for the surrender of lands to the Crown.

24. In entering into the Peace and Friendship Treaties, Wolastoqey Nation did not cede or surrender their Aboriginal title to the Traditional Lands.

25. Wolastoqey Nation's title to the Traditional Lands has never been extinguished through surrender or legislation, and survives today.

26. Wolastoqey Nation reserves the right to claim Aboriginal title and rights in respect of the whole or any portions of their territory outside the Traditional Lands depicted in Schedule "A" in the future.

Infringement

27. Canada and New Brunswick and their predecessors had and have a duty to respect and protect Wolastoqey Nation's Aboriginal title.

28. The Defendants have infringed upon or otherwise breached the Defendants' constitutional duties in respect of Wolastoqey Nation's Aboriginal title in the Traditional Lands by alienating lands and undertaking, authorizing and/or permitting resource extraction and land use activities throughout the Traditional Lands without the Wolastoqey Nation's consent.

29. Such uses and alienations of land were in breach of the Defendants' duties to respect and protect Wolastoqey Nation's Aboriginal title and have unjustifiably infringed Wolastoqey Nation's Aboriginal title.

30. In particular, the Crown Defendants breached their duties to respect and protect Wolastoqey Nation's Aboriginal title by actions including, but not limited to:

(a) issuing, replacing and renewing licences, leases, permits, authorizations, grants and other tenures to third parties or otherwise occupying, managing and allocating lands and resources in a manner which interferes with Wolastoqey Nation's Aboriginal title;

(b) conveying land to themselves and to third parties without regard to Wolastoqey Nation's Aboriginal title;

(c) passing laws which purport to enable or authorize Canada and New Brunswick to alienate lands and resources to third parties or to use those resources for their own benefit;

(d) purporting to exercise management, ownership and control over lands and resources without regard to Wolastoqey Nation's Aboriginal title;

(e) committing or authorizing nuisances, trespass or other interferences which restrict or interfere with Wolastoqey Nation's Aboriginal title;

(f) deriving royalties and other benefits from the lands and resources and denying Wolastoqey Nation the right to receive benefits therefrom;

(g) failing to protect and sustainably manage the lands and resources; and

(h) failing to adequately consult and/or accommodate Wolastoqey Nation or otherwise discharge the Crown's fiduciary duties and/or the honour of the Crown in respect of the above activities.

31. Such infringements were not justified. These infringements were not made after the discharge of the Crown Defendants' procedural duty to consult and accommodate; the Crown Defendants' actions were not backed by a compelling and substantial objective; and the governmental actions were not consistent with the fiduciary obligations of the Crown Defendants.

32. In particular, the Crown Defendants' grants of the properties as set out in Schedule "B" were unjustified infringements of the Plaintiffs' Aboriginal title and contrary to law. These grants must be quashed and an Order of scire facias must be issued in respect of each of the properties set out in Schedule "B".

33. In the alternative to paragraph 29, the defendants as set out in Schedule "B" are currently in possession of the properties set out next to their names in Schedule "B". The

Plaintiffs were wrongly dispossessed of their Aboriginal title lands. The Plaintiffs intend on regaining possession of these lands. As such, the Plaintiffs petition this Court for an Order of ejectment and for recovery of land.

34. The Crown Defendants owe the Plaintiffs compensation for infringements on their Aboriginal title by parties other than the Crown Defendants, for the loss of use of their Traditional Lands, and for breach of fiduciary duty.

35. In respect of the lands in the Traditional Lands that are not held by the Crown Defendants and which are not set out in Schedule "B", the return of these lands is not sought by the Plaintiffs in this litigation, in spite of the unjustified infringements on them that have been authorized by the Crown Defendants. The compensation that the Crown Defendants owe the Plaintiffs in respect of these lands must concomitantly increase to account for the permanence of the Plaintiffs' loss of use of these lands.

36. Furthermore, the Crown Defendants themselves purport to have ownership of some of the Plaintiffs' Traditional Lands. Upon a declaration of Aboriginal title:

(a) all such lands immediately vest in interest in the Plaintiffs;

(b) the Plaintiffs are entitled to vesting in possession of all Crown lands within the parts of Schedule "A" which are declared to be Aboriginal title lands, but in the interest of furthering reconciliation with non-Indigenous people, the Plaintiffs only seek an order vesting them with possession of the Crown lands as set out in Schedule "C";

(c) with respect to Crown lands not in Schedule "C" and which are not the subject of a lease, whether these lands are to be returned shall depend on the Crown's ability to justify its infringements;

(d) with respect to Crown lands subject to a leasehold interest, the vesting of the reversion and any remainder in the Plaintiffs;

(e) compensation for infringement of Aboriginal title is due from each respective Crown Defendant, to be reduced where appropriate to account for lands that are returned to the possession of the Plaintiffs.

37. In addition, to the extent that resources, such as minerals and timber, have been removed from the Traditional Lands by the Defendants or by persons not involved in this litigation, where such removal was done with the permission of the Crown Defendants, the Crown Defendants owe the Plaintiffs compensation for the value of these resources.

38. In addition, to the extent that lands and resources within and on the Traditional Lands have been lost or damaged by Defendants or by persons not involved in this litigation, where such loss or damage was done with the permission of the Crown Defendants, the Crown Defendants owe the Plaintiffs compensation for the value of these resources and for the damage to the lands.

39. The amount of compensation that the Crown Defendants owe the Plaintiffs will be further particularized by the evidence to be adduced at trial.

40. Moreover, any statutes enacted by the Crown Defendants that meaningfully diminish ~~the right of~~ the Plaintiffs' Aboriginal title to~~ exclusively occupy~~ the Traditional Lands is constitutionally invalid, or constitutionally inapplicable to the Traditional Lands, to the extent that the statute diminishes the right.

41. Wolastoqey Nation pleads and relies on:

(a) Section 91(24) of the *Constitution Act, 1867;*

(b) Sections 25, 35 and 52 of the *Constitution Act, 1982;*

(c) The United Nations Declaration on the Rights of Indigenous Peoples. [All underlining in original document.]

B. *The Notices of Motion in the Court of King's Bench*

[23] As mentioned, three separate Notices of Motion for a striking order and related relief were filed by the appellants in the court below.

(1) JDI and affiliates ("JDI")

[24] JDI applied for an order striking the parts of the Statement of Claim that implicated it on the ground that they failed to disclose a reasonable cause of action within the meaning of Rule 23.01(1)(b) and, alternatively, that they were scandalous, frivolous and/or vexatious in contravention of Rule 27.09(b). I agree with the motions judge's order striking the claims against the appellants and removing them as parties to the action pursuant to Rule 23.01(1)(b). That being so, I abstain from considering the alternative ground rooted in Rule 27.09(b).

[25] JDI also sought an order converting the motion under Rule 23.01(1)(b) into a motion for judgment, pursuant to Rule 37.10(a) and, by necessary implication, an order granting judgment accordingly. The motions judge agreed, and I see no principled basis to overturn her order under Rule 37.10(a).

[26] In the alternative, JDI requested that Wolastoqey Nation provide further and better particulars with respect to specific allegations in the Statement of Claim, pursuant to Rule 27.08, and that the requirement that JDI file and serve a Statement of Defence be suspended pending the delivery of those particulars. Further, JDI requested that, should Wolastoqey Nation fail to provide the sought after particulars, the relevant paragraphs of the Statement of Claim be struck, in accordance with Rule 27.09(e). Given my conclusion that the judge correctly applied Rules 23.01(1)(b) and 37.10(a), but that she erred in keeping the appellants' lands in the action against the Crown for a declaration of Aboriginal title, I will abstain from dealing with this alternative claim for relief.

[27] Finally, JDI sought costs.

[28] JDI relied on several grounds for the relief sought.

[29] First, JDI pointed to Wolastoqey Nation's response to its Demand for Particulars regarding the basis for inclusion of its lands in the claim for a declaration of Aboriginal title; Wolastoqey Nation had simply replied that the Schedule "B" lands fell within Schedule "A" and the Schedule "A" lands were included in the Statement of Claim on the basis of a general claim of "exclusive occupation" prior to the assertion of British sovereignty. JDI submitted neither the Statement of Claim nor the responses to its Demand for Particulars provided material facts connecting the alleged occupation to JDI properties.

[30] Second, JDI underscored the following: (1) Wolastoqey Nation did not allege in its Statement of Claim that JDI owed it a duty of care; (2) Wolastoqey Nation acknowledged the duties alleged in paragraph 29 of the Statement of Claim (duties to respect and protect its Aboriginal title) were owed by the Crown only; and (3) it admitted JDI was only added in the Statement of Claim because of its possession of lands Wolastoqey Nation "would like returned". Correlatively, JDI emphasized the Statement of Claim did not allege: (a) a breach of duty on its part; or (b) any action by it that dispossessed Wolastoqey Nation of the lands in question or infringed their alleged constitutional right to Aboriginal title. In other words, it is not alleged JDI committed any actionable wrong.

[31] Third, JDI asserted a declaration of Aboriginal title was not available as a remedy against it because such a declaration could not be made against private parties and, even if it could, the Statement of Claim failed to disclose a reasonable cause of action, JDI's possession of the lands in question being insufficient to give rise to a reasonable cause of action against it.

[32] Fourth, JDI contended it is plain and obvious the Statement of Claim fails to disclose a reasonable cause of action against JDI, and that to allow the prosecution of an action that had no chance of success would be unjust and an abuse of process.

[33] JDI concludes by referring to its various Demands for Particulars and detailing Wolastoqey Nation's response to argue its inadequacy makes it fundamentally unfair and highly prejudicial to JDI's ability to make full answer and defence. Having regard to my proposed disposition of the appeal, there is no reason to delve into this complaint.

(2) Acadian Timber Limited Partnership and affiliates ("Acadian")

[34] Acadian applied, essentially on the grounds JDI invoked, for an order that the parts of the Statement of Claim implicating it be struck: (1) pursuant to Rule 23.01(1)(b) on the basis that it did not disclose a reasonable cause of action, and (2) alternatively, pursuant to Rule 27.09(b), on the grounds it was scandalous, frivolous and vexatious. Given my agreement with the crux of the motions judge's rationale for the striking order under Rule 23.01(1)(b) (the failure to plead the requisite legal relationship or interest between Wolastoqey Nation and the Industrial Defendants makes it plain and obvious that the claim cannot succeed against the latter), there is no need to consider these alternative grounds. Acadian also requested the conversion of its motion for a striking order into a motion for judgment in accordance with Rule 37.10(a), and, implicitly, an order granting judgment accordingly. Acadian was successful in securing this relief, and I see no principled basis for reversal.

[35] Alternatively, Acadian sought relief in connection with its Demand for Particulars, arguing the particulars provided were inadequate. Acadian claimed to have unsuccessfully sought, on multiple occasions, particulars with respect to the claim for a declaration of Aboriginal title, particularly the Crown grants at issue. Once again, given my proposed disposition of the appeal, there is no reason to delve into this complaint.

[36] Finally, Acadian requested costs of the motion.

(3) HJ Crabbe

[37] HJ Crabbe also applied for an order striking the claim against them and their lands in Schedule "A" and "B" primarily on the grounds the Statement of Claim did not disclose a reasonable cause of action against it. Correlatively, Crabbe objects to the "claim to territory" in the Statement of Claim, arguing the law does not recognize any such claim. Moreover, the Statement of Claim does not disclose a reasonable cause of action, because it does not allege material facts establishing the use, possession and control of Crabbe's lands by Wolastoqey Nation at the time of British assertion of sovereignty. Nor were such facts alleged in any of the answers to Crabbe's Demands for Particulars. Crabbe contended that, without specific allegations of those material facts, it would be forced to defend the claim for a declaration of Aboriginal title to the entire disputed territory, which Crabbe asserted is contrary to the *Rules of Court*, as well as vexatious, oppressive and manifestly unfair. For the reasons provided hereinabove, there is no need to determine the last-mentioned complaint although, and as will be seen, I agree it would be unjust to issue a declaration of Aboriginal title against the Crown with respect to the appellants' lands.

[38] Crabbe also submitted, pursuant to Rule 23.01(1)(a), that the decision in *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257, was *per incuriam*, because it anchored a finding of Aboriginal title to the common law doctrine of general occupancy, which had been abolished by legislation and, as such, was not binding in New Brunswick. Like the motions judge, I would summarily reject this submission. Simply put, *Tsilhqot'in Nation* does not link the existence of Aboriginal title to the doctrine of general occupancy and, to the extent *Tsilhqot'in Nation* has application in the case at hand, it is binding on this Court.

C. *First decision – Wolastoqey Nations v. New Brunswick and Canada, et al., 2024 NBKB 21, [2024] N.B.J. No. 80 (QL)*

[39] In this decision, the judge allowed a motion by the appellants to strike the claim in paragraph 1(b) of the Statement of Claim for certificates of pending litigation against their lands. The judge agreed with the appellants' contention that Aboriginal title is not an "interest in land" contemplated by the Province's *Registry Act*, R.S.N.B. 1973, c.

R-6, or *Land Titles Act*, S.N.B. 1981, c. L-1.1, and was therefore not registrable. It was the judge's conclusion that the Wolastoqey Nation's claim for the issuance of certificates of pending litigation did not rest upon a reasonable cause of action. Interestingly, the judge made the following, albeit incidental, observation regarding the obligations of the appellants with respect to disclosure of the underlying action to third parties: "[a]s an aside, it is in the interests of any commercial landholder to disclose the fact of the [claim for a declaration of Aboriginal title], in any event, to any prospective purchasers and financiers to protect against future liability. The difference is of course, the [appellants] will decide what type of notice and disclosure suffices for their own protection" (para. 148).

[40] This decision has not been appealed, and I decline to deal with any of its facets, including the matter of costs.

D. *Decision under appeal – Wolastoqey Nation v. New Brunswick and Canada, et al., 2024 NBKB 203, [2024] N.B.J. No. 323 (QL)*

[41] The decision deals extensively with the appellants' motions under the primary striking rule, Rule 23.01(1)(b), and the conversion to judgment rule, Rule 37.10(a). It also deals with a motion by the Attorney General of New Brunswick for the determination of questions of law pursuant to Rule 23.01(1)(a). I will first deal with the decision's treatment of the latter.

(1) <u>The motions by the AGNB pursuant to Rule 23.01(1)(a)</u>

[42] The judge paraphrased the AGNB's motions as follows:

> The AGNB Motion seeks the following relief on their motion, as paraphrased by me:
>
> 1. Questions of law:

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

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

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

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

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

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

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

2. Additional/Alternative Relief:

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

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

3. Additional/Alternative:

(a) Should the Plaintiffs be required to file an amended Claim removing all claims against the Strangers and plead that the Plaintiffs had Aboriginal title as at the

> time of sovereignty and that damages are owed by the federal and provincial Crowns only, removing all references to *scire facias*, and pleading material facts relating to their claim of Aboriginal title.
>
> 4. Costs [Emphasis in original; para. 50]

[43] The judge found there was "no basis for any reference to the Strangers in the pleadings" (para. 184). She noted that no declaration of Aboriginal title was sought against them in the Statement of Claim and that, in any event, none could issue having regard to her reasons for striking the claim for a declaration against the appellants, which I will address shortly.

[44] However, the judge noted the lands owned by the Strangers to the Claim were included in Schedule "A" and were thus the subject of the claim for a declaration of Aboriginal title. It followed, in her view, that the claim for declaratory relief against the Crown for those lands was not "without a reasonable prospect of success" (para. 187). I respectfully disagree. While the AGNB has not appealed the dismissal of his motion, the correctness of the underlying reasons is challenged in the within appeal and, in my view, the motions judge's reasons and conclusion overlook the fact that Wolastoqey Nation declines in the Statement of Claim, in explicit terms, to seek a declaration of Aboriginal title against the Strangers to the Claim and their lands. While it is true the Strangers' lands are included in Schedule "A" and the Statement of Claim features a general claim of Aboriginal title for all Schedule "A" lands, the provision in question must not be viewed in isolation; rather, we must distil the substance of the claim from the totality of the provisions of the Statement of Claim.

[45] Wolastoqey Nation stated unequivocally in the Statement of Claim it drafted that it is not seeking to deprive the Strangers of any rights in their lands (see paras. 2 and 3). As the motions judge correctly states, insofar as the Strangers are concerned, the Statement of Claim is no more than a statement of non-claim (see para. 58).

[46] In my view, on a fair reading of the Statement of Claim in its entirety, Wolastoqey Nation is seeking a finding of Aboriginal title over the Strangers' lands for the sole purpose of underpinning its claim for damages and compensation against the Crown for its alleged wrongs in relation to those lands. That view is grounded notably in the provisions of paragraph 1 of the Statement of Claim that follow the general claim in sub-paragraph a:

> a. [Wolastoqey Nation seeks] a declaration that Wolastoqey Nation has Aboriginal title to the lands, including the land, airspace, land covered by water, offshore and inshore water bodies, foreshore, rivers, lakes and streams, described in Schedule "A", or to such portions thereof for which this Court may find the evidence sufficient ("Traditional Lands");
>
> b. [It seeks] 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/Société D'énergie Du Nouveau-Brunswick against which the Plaintiffs do not seek certificates of pending litigation; [**N.B.: there is no such claim against the Strangers**]
>
> c. [It seeks] damages and compensation from the Crown Defendants (as defined hereinbelow) for the Crown Defendants' breaches of the Crown's fiduciary obligations, and for the unlawful occupation, appropriation, removal of resources from, and infringement of, the Plaintiffs' Aboriginal title over their Traditional Lands, including infringements arising from the Defendants and others being in occupation of the Traditional Lands without permission from the Plaintiffs; [**N.B.: the claim for damages and compensation against the Crown applies to wrongs committed in relation to the Strangers' lands**]
>
> d. an Order of scire facias in respect of the properties bearing the property identification numbers set out in Schedule "B";
> **[N.B.: this claim aimed to secure an order quashing the Crown grants for the appellants' lands; it does not apply to the Strangers' lands]**

> e. in the alternative to (d), an Order of ejectment and recovery of land in respect of the properties bearing the property identification numbers set out in Schedule "B"; [**N.B.: once again, no order of ejectment and recovery is sought for the Strangers' lands**] […] [Emphasis added.]

[47] The view that Wolastoqey Nation is effectively seeking no more than a finding of Aboriginal title in relation to the Strangers' lands to oxygenate its claim for damages and compensation against the Crown is equally manifest from the following provisions of the Statement of Claim, as drafted by Wolastoqey Nation:

> The Plaintiffs seek no relief as against fee simple holders not named as Defendants who hold fee simple in the Traditional Lands ("Strangers to the Claim"). The incidents of fee simple title enjoyed by Strangers to the Claim, including the incident of peaceable possession, are not placed in issue by the Plaintiffs. As outlined in paragraph 1(c), however, the Plaintiffs seek damages and compensation from the Province and Canada for the breach of Aboriginal title in the granting of fees simple in the Traditional Lands to Strangers to the Claim.
>
> The Plaintiffs do not seek a declaration of Aboriginal title in paragraph 1(a) that binds Strangers to the Claim with respect to such Strangers to the Claims' property rights. [paras. 2 and 3]

[48] True, paragraphs 2 and 3 were struck by the motions judge. But that striking order was made because the "Strangers to the claim" were not parties to the action and, more generally, were not a suable group. The order reflects the determination that no order for a declaration of Aboriginal title could issue against the "Strangers", but the acknowledgements in paragraphs 2 and 3 are part of the record, and they plainly demonstrate Wolastoqey Nation was not seeking a declaration of Aboriginal title that would have bound the Strangers with respect to their lands. Although the Statement of Claim may be read as advancing a claim for a finding of Aboriginal title in relation to the Strangers' lands, the judge erred in law in drawing from the Statement of Claim a claim for a declaration of Aboriginal title against those lands.

[49] As regards the claim for *scire facias*, the judge agreed it should be struck as this "ancient and outdated legal construct […] has been overtaken by provisions allowing for the judicial review of Crown grants of land" (paras. 188-189). Nonetheless, she granted Wolastoqey Nation's request for leave to amend the Statement of Claim to claim a remedy "in the nature of *scire facias*" (para. 190). The target of this prayer for relief is an order quashing the Crown grants upon which rests the fee simple title to the privately owned lots in Schedule "A".

[50] As mentioned, the judge went on to strike paragraphs 2 and 3, as well as paragraphs 12 and 13 of the Statement of Claim, and any references to the Strangers in the Statements of Particulars. However, she dismissed the AGNB's motion to strike paragraphs 1, 15, 16, 18, 26, 35, 36, 40 and Schedule "A". Later in these reasons, I try to facilitate a contextual understanding of the effect of those orders by setting out the version of the Statement of Claim that emerges from the judge's decisions and the formal judgment for the last one.

(2) <u>The appellants' motions to strike</u>

[51] The judge paraphrased the motions as follows:

> The [Industrial Defendants'] Motion (recall it is in fact three motions all seeking essentially the same relief, as between themselves, with some exceptions noted below) seeks the following relief, again, as paraphrased by me:
>
> 1. to strike the pleadings against them pursuant to *Rule 23.01(1)(b)* of the *Rules of Court* on the basis that they fail to disclose *a reasonable cause of action*
>
> 2. to strike the pleadings against them pursuant to *Rule 27.09(b)* and *(c)* on the basis that they are scandalous, frivolous or vexatious and/or are an abuse of the Court
>
> 3. on a finding by this Court that the pleadings should be struck as against all three Moving Defendants (and all

> IDs by implication), convert the motions to motions for judgment pursuant to *Rule 37.10(a)*
>
> 4. should the pleadings not be struck, require Wolastoqey to provide further and better particulars pursuant to *Rule 27.08(1)* (**JDI and Crabbe only**); should Wolastoqey fail to do so, strike the pleadings pursuant to *Rule 27.09(e)* (**JDI only**)
>
> 5. Should particulars be ordered, suspend the requirement to file a *Statement of Defence* for a period of time after the delivery of the particulars (**JDI only**)
>
> 6. A determination of a question of law pursuant to *Rule 23.01(1)(a)* that the decision of the Supreme Court in *Tsilhqot'in Nation,* is *per incuriam* in failing to reference received law including the *Statute of Frauds, 1677* 29 Car 2, c. 3, the *Real Property Limitation Act*,1833 3 & 4 Will 4, the *Wills Act*, 1837 7 Will 4 & 1 Vic c. 26 and like provincial legislation, and related law (**Crabbe only**)
>
> 7. **Acadian** (in its additional capacity as a *Stranger to the Claim*) seeks the same relief as requested in the AGNB Motion, heard on March 25-28, 2024, to determine questions of law; to strike the Claim as against the Strangers; and, to file an amended Claim (this is essentially a supportive response to the AGNB Motion but raised in the IDs Motion)
>
> 8. Costs (the parties request a separate hearing on costs to follow the decision of this Court on the merits of this motion). [Emphasis in original; para. 51]

[52] The judge reframed the arguments of the moving parties as founded upon "the absence of the grounds for a declaration" as opposed to "the absence of a reasonable cause of action" (para. 90). She did so because Wolastoqey Nation is seeking declaratory relief and, on her understanding of the applicable law, a cause of action is unnecessary in cases like the present one. The judge found the common thread in the submissions of the moving parties was that they were the wrong parties to defend the claim for a declaration of Aboriginal title. In the judge's view, the moving parties were challenging the existence

of a legal relationship between themselves and the Wolastoqey Nation, which she posited was a requirement for declaratory relief.

[53] The judge concluded the motions for a striking order posed the following question: do the moving parties (and all Industrial Defendants by implication) have a legal relationship and/or an interest in dispute with the Wolastoqey Nation such that they are proper parties to oppose the declaration sought? The judge rested her decision on a negative answer. I pause to make the point that, if the negative answer is correct, as I believe it is, intervention as added parties under Rule 15.02 would be permissible only after a declaration of Aboriginal title is made. I will return to this point.

[54] The judge concluded Wolastoqey Nation's claim for a declaration of Aboriginal title had no reasonable prospect of success as against the Industrial Defendants. This was so because there was no legal relationship and/or interest between them and Wolastoqey Nation. The requisite legal relationship existed only between the Wolastoqey Nation and the Crown. It followed a declaration of Aboriginal title could not be secured against the Industrial Defendants. The judge also opined the inclusion of private parties would be prohibitive from a procedural standpoint, given that joining private parties to Aboriginal title litigation would no doubt make it more complex, lengthy, and expensive.

[55] While the judge affirmed there is no legal relationship between the Wolastoqey Nation and the Industrial Defendants, she asserted this does not mean the repossession of land held by the Industrial Defendants will be denied. She pointed to the radical Crown title underlying the fee simple title, and mentioned the Crown's expropriation powers. She adverted to the possibility that, in future, the Crown may be directed or ordered by the adjudicating court to use its expropriation powers, should reconciliation efforts fail. The judge added the Industrial Defendants did not have information that could help mount a defence to the claim for a declaration of Aboriginal title to their lands, a proposition strongly disputed by the appellants in this Court.

[56] As mentioned, paragraphs 2, 3, 12 and 13 of the Statement of Claim were struck pursuant to Rule 23.01(1)(b). The judge also ordered modifications to certain paragraphs of the Statement of Claim, and directed changes be made by Wolastoqey Nation to make clear the declaration of Aboriginal title and all consequential relief are sought against the Crown only. The judge found Schedule "A" did not need to be amended, as the declaration sought against the Crown concerned all lands in that schedule. The judge left open the possibility of intervention requests from the Industrial Defendants during the "declaration and relief phases" of the litigation. However, it is apparent from the decision as a whole that she contemplated the possibility of intervention only after a declaration of Aboriginal title over the appellants' lands. Written submissions were requested concerning costs.

E. *Formal judgment*

[57] The formal judgment in the Court of King's Bench provides as follows:

> 1. in relation to the Province's Motion for a determination of questions of law pursuant to Rule 23.01(1)(a), the remedy of *scire facias* is unavailable in New Brunswick, but the Plaintiffs may claim a remedy in the nature of *scire facias;*
>
> 2. in relation to the Motions generally pursuant to Rules 23.01(1)(a) and 23.01(1)(b):
>
> (a) any references to the "Strangers to the Claim" in the Statement of Claim, as currently amended (the **"Statement of Claim"),** are struck, with the exception of the map attached thereto as Schedule A;
>
> (b) the request to strike paragraphs 1, 15, 16, 18, 26, 35, 36 and 40 of the Statement of Claim and Schedule A to the Statement of Claim is denied;
>
> (c) paragraphs 2, 3, 12 and 13 of the Statement of Claim, and any related references thereto in the Statements of Particulars, are struck pursuant to Rule 23.01(1)(a) and (b) of the ***Rules of Court;***

(d) the Statement of Claim, and any related Statement of Particulars, must be modified as follows:

i. remove the reference to "Defendants" in sub-paragraph 1(c) of the Statement of Claim;

ii. add "an Order *in the nature of scire facias* as against the Crown Defendants in respect of the properties... " to sub-paragraph 1(d) of the Statement of Claim;

iii. add "in the alternative to (d) an order for the recovery of land as against the Crown defendants in respect of the property identification numbers" to sub-paragraph 1(e) of the Statement of Claim;

iv. refer to an "Order *in the nature of scire facias"* in paragraph 32 of the Statement of Claim;

v. correct the erroneous reference to paragraph 29 in paragraph 33 of the Statement of Claim;

vi. remove any reference to "'Defendants' (referring to non-Crown defendants)" in paragraph 33 of the Statement of Claim;

vii. add to paragraph 33 of the Statement of Claim a request as against the Crown defendants in words to the effect as follows: "the recovery of land set out in Schedule B, by any such means in its power and authority and to place the Plaintiffs in possession of such lands in accordance with any declaration of Aboriginal title";

viii. remove the reference to "parties" in paragraph 34 of the Statement of Claim and insert "persons"; and

ix. remove the words "by the Defendants" from paragraphs 37 and 38 of the Statement of Claim;

(e) any remaining pleadings must reflect the requirement that any declaration and relief sought is only against the Defendant, the Province, and/or the Defendant, Attorney General of Canada; and

> (f) there is no requirement to amend the map attached as Schedule A to the Statement of Claim or to remove Schedule B to the Statement of Claim;
>
> 3. pursuant to Rule 37 of the ***Rules of Court,*** the Decision is converted to judgment and judgment is granted to the JDI Defendants, Acadian and H.J. Crabbe (and by implication, to all of the Industrial Defendants), as requested, on the basis that the pleadings cannot be amended to establish a legal relationship or interest such that the Industrial Defendants are proper parties to oppose the Plaintiffs' claims; and
>
> 4. intervention requests, if any, from fee simple rights holders whose lands may fall within the scope of any factually and legally determined Aboriginal title land may be considered at the legal "declaration and relief phases" of the litigation.
>
> Submissions on costs payable on these Motions as well as those payable on the motions of December 2023 in this matter will be entertained by written submission only and shall be assessed at a later date.

[58] As a result of the first decision (2024 NBKB 21), the decision under appeal and the latter's formal judgment, the Statement of Claim - with the striking mandated by the court below and my explanatory annotations - reads as follows:

> **AMENDED AMENDED STATEMENT OF CLAIM**
>
> **Request to Strike para. 1 denied (para. 2(b) of formal judgment)**
>
> [1] The Plaintiffs, Wolastoqey Nation at Matawaskiye (Madawaska Maliseet First Nation), Wolastoqey Nation at Neqotkuk (Tobique First Nation), Wolastoqey Nation at Pilick (Kingsclear First Nation), Wolastoqey Nation at Sitansisk (Saint Mary's First Nation), Wolastoqey Nation at Welamukotuk (Oromocto First Nation) and Wolastoqey Nation at Wotstak (Woodstock First Nation), on behalf of all members of Wolastoqey Nation, claim:

(a) a declaration that Wolastoqey Nation has Aboriginal title to the lands, including the land, airspace, land covered by water, offshore and inshore water bodies, foreshore, rivers, lakes and streams, described in Schedule "A", or to such portions thereof for which this Court may find the evidence sufficient ("Traditional Lands");

(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/Société D'énergie Du Nouveau-Brunswick against which the Plaintiffs do not seek certificates of pending litigation~~;

(c) damages and compensation from the Crown Defendants (as defined hereinbelow) for the Crown Defendants' breaches of the Crown's fiduciary obligations, and for the unlawful occupation, appropriation, removal of resources from, and infringement of, the Plaintiffs' Aboriginal title over their Traditional Lands, including infringements arising from [~~**the Defendants and**~~] others being in occupation of the Traditional Lands without permission from the Plaintiffs;

(d) an Order ***[in the nature of]*** *scire facias* [**as against the Crown Defendants**] in respect of the properties bearing the property identification numbers set out in Schedule "B";

(e) in the alternative to (d), an Order [~~**of ejectment and**~~] [**for the**] recovery of land [**as against the Crown Defendants**] in respect of the properties bearing the property identification numbers set out in Schedule "B";

(f) in respect of lands purported to be Crown lands that are subject to a leasehold interest, the vesting of the reversion and any remainder in the Plaintiffs;

(g) vesting in possession in favour of the Plaintiffs of the lands purported to be Crown lands bearing the property identification numbers set out in Schedule "C";

(h) a determination, with respect to the lands purported to be Crown lands other than those bearing the property identification numbers set out in Schedule "C", of whether

those lands should vest in possession in favour of the Plaintiffs;

(i) costs on a substantial indemnity basis; and,

(j) such further and other relief as this Honourable Court may deem just.

Paragraph 2 has been struck (para. 2(c) of formal judgment)

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

Paragraph 3 has been struck (para. 2(c) of formal judgment)

[3] ~~The Plaintiffs do not seek a declaration of Aboriginal title in paragraph 1(a) that binds Strangers to the Claim with respect to such Strangers to the Claims' property rights.~~

[4] The Plaintiffs, who represent Wolastoqey Nation, are Matawaskiye (Madawaska Maliseet), Neqotkuk (Tobique), Pilick (Kingsclear), Sitansisk (Saint Mary's), Welamukotuk (Oromocto), and Wotstak (Woodstock) First Nations (collectively, the First Nations), being the six Wolastoqey First Nations in New Brunswick. They each have the capacity of an Indian Band within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5, as amended.

[5] The Wolastoqey Nation, and the Plaintiff First Nations representing Wolastoqey Nation in this action, are Aboriginal peoples within the meaning of section 35 of the *Constitution Act, 1982*.

[6] The Attorney General of Canada ("Canada") is joined pursuant to sections 3, 21(1) and 23(1) of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, as amended.

[7] Canada has legislative jurisdiction in relation to "Indians and lands reserved for the Indians" pursuant to subsection 91(24) of the *Constitution Act, 1867*, subject to the rights and interests of the Plaintiffs.

[8] The Province of New Brunswick ("New Brunswick") is joined pursuant to sections 3, 11, and 12 of the *Proceedings Against the Crown Act*, R.S.N.B. 1973, c, P-18, as amended.

[9] New Brunswick is vested with the administration, control and beneficial interest in provincial Crown lands pursuant to section 109 of the *Constitution Act, 1867*, subject to the rights and interests of the Plaintiffs.

[10] New Brunswick has legislative jurisdiction over lands in New Brunswick pursuant to subsections 92(5) and 92(13) of the *Constitution Act, 1867*, subject to the rights and interests of the Plaintiffs.

[11] Together, Canada and New Brunswick are referred to in these pleadings as the Crown Defendants.

Paragraph 12 has been struck (para. 2(c) of the formal judgment)

[12] ~~The Industrial Defendants are:~~

(a) ~~New Brunswick Power Corporation/Société d'énergie du Nouveau-Brunswick, a corporation incorporated in the Province of New Brunswick, with the registered office located at 515 King Street P.O. Box 2000 Fredericton, NB E3B 4X1;~~

(b) ~~Acadian Timber Limited Partnership, by its General Partner, Acadian Timber GP Inc., a corporation incorporated in the Province of Manitoba, with the registered office located at 181 Bay Street, Suite 200, Toronto, ON M5J 2T3;~~

(c) ~~Acadian Timber GP Inc., a corporation incorporated in the Province of Ontario, with the registered office located at 181 Bay Street, Suite 300, Toronto, ON M5J 2T3;~~

(d) ~~Twin Rivers Paper Company Inc., a corporation incorporated in the Province of Ontario, with the registered office located at 27 Rice Street, Edmundston, NB, E3V 1S9;~~

(e) ~~H. J. Crabbe & Sons, Ltd., a corporation incorporated in the Province of New Brunswick, with the registered office located at 6 Lockhart's Mill Road, Bristol, NB E7L 2R2;~~

(f) ~~AV Group NB Inc. / Groupe AV NB Inc., a corporation incorporated in the Province of New Brunswick, with the registered office located at Brunswick Square, 1 Germain Street, Suite 1500, Saint John, NB E2L 4V1;~~

(g) ~~J.D. Irving, Limited, a corporation incorporated in the Province of New Brunswick, with the registered office located at 300 Union Street, P.O. Box 5777, Saint John, NB E2L 4M3; and~~

(h) ~~The following entities which are related to and/or subsidiaries of J.D. Irving, Limited:~~

i. ~~712414 N.B. Ltd., a corporation incorporated in the Province of New Brunswick, with the registered office located at 10 King Square S, Saint John NB E2L 0G3;~~

ii. ~~Arcadia Sites Limited, a corporation incorporated in the Province of New Brunswick, with the registered office located at 10 King Square S, Saint John, NB E2L 0G3;~~

iii. ~~Arctic Falcon Limited, a corporation incorporated in the Province of New Brunswick, with the registered office located at 10 King Square S, Saint John, NB E2L 0G3;~~

iv. ~~Charlotte Pulp and Paper Co. LTD., a corporation incorporated in the Province of New Brunswick, with the registered office located at 300 Union Street, 12th Floor, Saint John, NB E2L 4M3;~~

v. ~~Eastcan Trading Limited, a corporation incorporated in the Province of New Brunswick, with the registered office located at 300 Union Street, Saint John, NB E2L 4M3;~~

vi. ~~Highlands Operations Limited, a corporation incorporated in the Province of New Brunswick, with the registered office located at 10 King Square S, Saint John, NB E2L 0G3;~~

vii. ~~Irving Oil Limited, a corporation incorporated in the Province of New Brunswick, with the registered office located at 10 King Square S, Saint John, NB E2L 0G3;~~

viii. ~~Irving Paper Limited Les Papiers Irving Limitée, a corporation incorporated in the Province of New Brunswick, with the registered office located at 300 Union Street, Saint John, NB E2L 4M3;~~

ix. ~~Juniper Organics Limited Les Produits Organiques Juniper Limitée, a corporation incorporated in the Province of New Brunswick, with the registered office located at 300 Union Street, Saint John, NB E2L 4Z2;~~

x. ~~K.C. Irving, Limited, a corporation incorporated in the Province of New Brunswick, with the registered office located at 300 Union Street, Saint John, NB E2L 4M3;~~

xi. ~~Miramichi Timber Holdings Limited Gestion Bois Miramichi Limitée, a corporation incorporated in the Province of New Brunswick, with the registered office located at 300 Union Street, Saint John, NB E2L 4Z2;~~

xii. ~~The New Brunswick Railway Company, a corporation incorporated in the Province of New Brunswick, with the registered office located at 300 Union Street, P.O. Box 5777, Saint John NB E2L 4M3;~~

xiii. ~~Pools Properties Limited Les Immeubles Pools Limitée; a corporation incorporated in the Province of New Brunswick, with the registered office located at 10 King Square S, Saint John, NB E2L 0G3;~~

xiv. ~~Rothesay Paper Holdings Ltd., a corporation incorporated in the Province of New Brunswick, with the registered office located at 300 Union Street P.O. Box 5777, Saint John NB E2L 4M3;~~

xv. ~~St. George Pulp & Paper Limited, a corporation incorporated in the Province of New Brunswick, with~~

~~the registered office located at 300 Union Street, 12th Floor, Saint John, NB E2L 4M3;~~

xvi. ~~Strescon Limited, a corporation incorporated in the Province of New Brunswick, with the registered office located at 400 Chesley Drive, Saint John, NB E2K 5L6;~~

xvii. ~~Van Buren Madawaska Corporation, a corporation incorporated in the State of Maine, with the registered office located at P.O. Box 1401, Bangor, ME 04402 1401;~~

xviii. ~~New Brunswick Southern Railway Company Limited/La Compagnie de Chemin de fer du sud, Nouveau-Brunswick Limitee, which carries on business in New Brunswick, with the registered office located at 300 Union Street, Saint John, NB E2L 4M3 (place of incorporation unknown); and~~

xix. ~~Burnt Hill Fishing Club, which carries on business in New Brunswick, with the registered office located at 300 Union St., P.O. Box 5777, Saint John, NB E2L 4M3 (place of incorporation unknown).~~

Paragraph 13 has been struck (para. 2(c) of the formal judgment)

[13] ~~The Industrial Defendants are industrial businesses and a Crown corporation that are in possession of the portions of the Traditional Lands as set out in Schedule "B", on the basis of Crown grants.~~

[14] Pursuant to Rule 19.01, this statement of claim is being served on defendants located outside New Brunswick without leave, on the basis that the property in question is located in New Brunswick.

Possession of Traditional Lands Prior to the Assertion of Crown Sovereignty

Request to strike paragraph 15 denied (para. 2(b) of the formal judgment)

[15] The Plaintiffs are the First Nations residing in what is now New Brunswick that are part of the larger Wolastoqey

Nation, which before the assertion of British sovereignty occupied vast tracts of territory, including territory in what are now New Brunswick, Québec and Maine.

Request to strike paragraph 16 denied (para. 2(b) of the formal judgment)

[16] The territory occupied included the Traditional Lands, being what is now known as the Wolastoq, also known as the St. John River, watershed and surrounding area, including the land, subsurface land and minerals, airspace, land covered by water, offshore and inshore water bodies, foreshore, rivers, lakes and streams situated within this area. The Plaintiffs only seek remedies in this litigation with respect to their Traditional Lands within New Brunswick, and not with respect to their Traditional Lands found within the present boundaries of the Province of Québec and the State of Maine. A map of the Traditional Lands within New Brunswick is included in Schedule "A".

[17] The First Nations and members of the Wolastoqey Nation are the direct descendants of the Wolastoqey Nation which was present on the Traditional Lands prior to the British assertion of sovereignty.

Request to strike paragraph 18 denied (para. 2(b) of the formal judgment)

[18] Wolastoqey custom provided that members of each local group had use of its own local territory, including all of its lands, waters, and resources. However, Wolastoqey Nation as a whole had exclusive occupation of the entire Traditional Lands, and members of Wolastoqey Nation were able to travel and harvest freely throughout the Traditional Lands.

Possession at the Time of the Assertion of British Sovereignty

[19] At the time of the British assertion of sovereignty in 1759, Wolastoqey Nation controlled, regularly used, exclusively occupied, and exercised exclusive stewardship and jurisdiction over their territory, including the Traditional Lands, in accordance with Wolastoqey law. Such law provided that a person from outside their territory was expected to seek permission to be present. Anyone seeking

to pass through Wolastoqey Nation's territory or to otherwise use the Traditional Lands would require such permission. It was customary that permission, if requested, would often be granted to other friendly Indigenous persons to travel through or to temporarily stay in the territory and to hunt, fish and gather to feed themselves while doing so.

[20] Permission was also granted to certain French groups to occupy certain lands within Wolastoqey Nation's territory. The Wolastoqey Nation generally had a friendly and allied relationship with the French and their presence in Wolastoqey Nation's Traditional Lands helped to facilitate alliance, trade, and related activities.

[21] Prior to and at the assertion of British sovereignty and continuing to present day, Wolastoqey Nation has used their Traditional Lands for a variety of purposes including hunting, fishing, gathering and other resource-harvesting activities, trade, and cultural and spiritual practices.

[22] At all relevant times, from the assertion of sovereignty in 1758-1759, to the Peace and Friendship Treaties between the British and Wolastoqey Nation from 1725 to 1778, the British Crown recognized Wolastoqey Nation as the Indigenous people who exclusively occupied their territory, including the Traditional Lands.

The Peace and Friendship Treaties

[23] From 1725/1726 to 1778, Wolastoqey Nation negotiated and entered into Treaties with the Crown, known as the Peace and Friendship Treaties. These Treaties do not provide for the surrender of lands to the Crown.

[24] In entering into the Peace and Friendship Treaties, Wolastoqey Nation did not cede or surrender their Aboriginal title to the Traditional Lands.

[25] Wolastoqey Nation's title to the Traditional Lands has never been extinguished through surrender or legislation, and survives today.

Request to strike paragraph 26 denied (para. 2(b) of the formal judgment)

[26] Wolastoqey Nation reserves the right to claim Aboriginal title and rights in respect of the whole or any

portions of their territory outside the Traditional Lands depicted in Schedule “A” in the future.

Infringement

[27] Canada and New Brunswick and their predecessors had and have a duty to respect and protect Wolastoqey Nation’s Aboriginal title.

[28] The Defendants have infringed upon or otherwise breached the Defendants’ constitutional duties in respect of Wolastoqey Nation’s Aboriginal title in the Traditional Lands by alienating lands and undertaking, authorizing and/or permitting resource extraction and land use activities throughout the Traditional Lands without the Wolastoqey Nation’s consent.

[29] Such uses and alienations of land were in breach of the Defendants’ duties to respect and protect Wolastoqey Nation’s Aboriginal title and have unjustifiably infringed Wolastoqey Nation’s Aboriginal title.

[30] In particular, the Crown Defendants breached their duties to respect and protect Wolastoqey Nation’s Aboriginal title by actions including, but not limited to:

(a) issuing, replacing and renewing licences, leases, permits, authorizations, grants and other tenures to third parties or otherwise occupying, managing and allocating lands and resources in a manner which interferes with Wolastoqey Nation’s Aboriginal title;

(b) conveying land to themselves and to third parties without regard to Wolastoqey Nation’s Aboriginal title;

(c) passing laws which purport to enable or authorize Canada and New Brunswick to alienate lands and resources to third parties or to use those resources for their own benefit;

(d) purporting to exercise management, ownership and control over lands and resources without regard to Wolastoqey Nation’s Aboriginal title;

(e) committing or authorizing nuisances, trespass or other interferences which restrict or interfere with Wolastoqey Nation's Aboriginal title;

(f) deriving royalties and other benefits from the lands and resources and denying Wolastoqey Nation the right to receive benefits therefrom;

(g) failing to protect and sustainably manage the lands and resources; and

(h) failing to adequately consult and/or accommodate Wolastoqey Nation or otherwise discharge the Crown's fiduciary duties and/or the honour of the Crown in respect of the above activities.

[31] Such infringements were not justified. These infringements were not made after the discharge of the Crown Defendants' procedural duty to consult and accommodate; the Crown Defendants' actions were not backed by a compelling and substantial objective; and the governmental actions were not consistent with the fiduciary obligations of the Crown Defendants.

[32] In particular, the Crown Defendants' grants of the properties as set out in Schedule "B" were unjustified infringements of the Plaintiffs' Aboriginal title and contrary to law. These grants must be quashed and an *Order [**in the nature**] of scire facias* must be issued in respect of each of the properties set out in Schedule "B".

[33] In the alternative to paragraph [**32**], [~~**the defendants as set out in Schedule "B" are currently in possession of the properties set out next to their names in Schedule "B".],**~~ [**t**]he Plaintiffs were wrongly dispossessed of their Aboriginal title lands. The Plaintiffs intend on regaining possession of these lands. As such, the Plaintiffs petition this Court for an Order of ejectment and for recovery of land [**set out in Schedule B, by any such means in its power and authority and to place the Plaintiffs in possession of such lands in accordance with any declaration of Aboriginal Title.]**

[34] The Crown Defendants owe the Plaintiffs compensation for infringements on their Aboriginal title by [~~**parties**~~] [**persons**] other than the Crown Defendants, for the

loss of use of their Traditional Lands, and for breach of fiduciary duty.

Request to strike paragraph 35 denied (para. 2(b) of the formal judgment)

[35] In respect of the lands in the Traditional Lands that are not held by the Crown Defendants and which are not set out in Schedule "B", the return of these lands is not sought by the Plaintiffs in this litigation, in spite of the unjustified infringements on them that have been authorized by the Crown Defendants. The compensation that the Crown Defendants owe the Plaintiffs in respect of these lands must concomitantly increase to account for the permanence of the Plaintiffs' loss of use of these lands.

Request to strike paragraph 36 denied (para. 2(b) of the formal judgment)

[36] Furthermore, the Crown Defendants themselves purport to have ownership of some of the Plaintiffs' Traditional Lands. Upon a declaration of Aboriginal title:

(a) all such lands immediately vest in interest in the Plaintiffs;

(b) the Plaintiffs are entitled to vesting in possession of all Crown lands within the parts of Schedule "A" which are declared to be Aboriginal title lands, but in the interest of furthering reconciliation with non-Indigenous people, the Plaintiffs only seek an order vesting them with possession of the Crown lands as set out in Schedule "C";

(c) with respect to Crown lands not in Schedule "C" and which are not the subject of a lease, whether these lands are to be returned shall depend on the Crown's ability to justify its infringements;

(d) with respect to Crown lands subject to a leasehold interest, the vesting of the reversion and any remainder in the Plaintiffs;

(e) compensation for infringement of Aboriginal title is due from each respective Crown Defendant, to be reduced

where appropriate to account for lands that are returned to the possession of the Plaintiffs.

[37] In addition, to the extent that resources, such as minerals and timber, have been removed from the Traditional Lands [**~~by the Defendants or~~]** [**para. 2(d)(ix) of the formal judgment**] by persons not involved in this litigation, where such removal was done with the permission of the Crown Defendants, the Crown Defendants owe the Plaintiffs compensation for the value of these resources.

[38] In addition, to the extent that lands and resources within and on the Traditional Lands have been lost or damaged [**~~by Defendants or~~]** [**para. 2(d)(ix) of the formal judgment**] by persons not involved in this litigation, where such loss or damage was done with the permission of the Crown Defendants, the Crown Defendants owe the Plaintiffs compensation for the value of these resources and for the damage to the lands.

[39] The amount of compensation that the Crown Defendants owe the Plaintiffs will be further particularized by the evidence to be adduced at trial.

Request to strike paragraph 40 denied (para. 2(b) of the formal judgment)

[40] Moreover, any statutes enacted by the Crown Defendants that meaningfully diminish the right of the Plaintiffs' to exclusively occupy the Traditional Lands is constitutionally invalid, or constitutionally inapplicable to the Traditional Lands, to the extent that the statute diminishes the right.

[41] Wolastoqey Nation pleads and relies on:

(a) Section 91(24) of the *Constitution Act, 1867*-,

(b) Sections 25, 35 and 52 of the *Constitution Act, 1982*-,

(c) The United Nations Declaration on the Rights of Indigenous Peoples.

F. *Notices of Appeal and grounds*

(1) JDI

[59] JDI asks that the decision of the motions judge to strike the pleadings against it be confirmed, but that any claims in relation to its properties, including any claim for a declaration of Aboriginal title, an order in the nature of *scire facias*, and an order of ejectment and recovery, be struck. Alternatively, if the Court chooses not to strike all the aforementioned claims, JDI requests that the entire decision be set aside and the action proceed with JDI and other private landowners as defendants with full rights of participation.

[60] JDI grounds its appeal on several alleged errors of law: (1) the motions judge erred by allowing the claims in relation to the lands of JDI remain in the action without giving notice to JDI; (2) the judge erred in allowing the inclusion of their private lands in an action for a declaration of Aboriginal title, a position fundamentally inconsistent with her finding that the pleadings against JDI did not disclose a reasonable cause of action; (3) the judge erred in failing to recognize that there is no possible middle ground: either JDI's land must be struck, or JDI must remain in the action with full rights to defend the claim against their land; (4) to prohibit JDI from participating in an action in which the claims made would impact its property rights, including exclusive possession, violates the basic principles of procedural fairness, natural justice and the *audi alteram partem* rule; (5) the judge wrongly determined that the trial judge can compel the Crown to utilize its expropriation powers; (6) she wrongly issued a staging order when no request for such an order was before her and JDI was not given notice or the opportunity to vindicate its position on any such potential order; and (7) the judge failed to determine the motion under Rule 23.01(1)(b) and, instead, ordered the remedy of excluding JDI from the proceeding without also removing its lands, a remedy which was neither requested nor contemplated by the motion.

(2) Acadian

[61] Acadian requests the decision be varied by striking Schedule “B” and any reference to Schedule “B” and its properties from the Statement of Claim. Acadian raises the following grounds: (1) the motions judge erred in failing to strike Schedule “B” after dismissing the claim against Acadian and the other Industrial Defendants, and by allowing Wolastoqey Nation to continue to seek relief as against the Industrial Defendants. On this score, the judge would have failed to properly follow relevant and determinative case law; (2) the judge failed to accept and adopt judicial admissions by Wolastoqey Nation that there exists no cause of action against the Industrial Defendants and that land other than that owned by the Industrial Defendants could be used to satisfy its claim for loss of land; (3) the judge erred in granting relief not requested nor addressed by any party, including issuing a staging order, as well as by finding the trial court could compel the Crown in the Right of the Province of New Brunswick to use its expropriation power; and (4) the judge erred in determining the adjudicating court has jurisdiction to issue a declaration of Aboriginal title over fee simple lands and that it could order the dispossession of fee simple land owners in favour of Aboriginal claimants.

(3) H.J. Crabbe

[62] Crabbe also requests the decision of the motions judge be varied. Correlatively, it requests the claim relating to its land be struck and its motion be converted to a motion for judgment, pursuant to Rule 37.10(a), and that judgment be granted accordingly.

[63] Crabbe bases its appeal on the following grounds: (1) the motions judge’s decision to remove it as a defendant while maintaining the claim against their lands errs in law. Crabbe contends it is not correct that lands granted by the Crown and comprising private fee simple titles can be subject to Aboriginal title or to an order dispossessing private owners of those lands; (2) the decision deprives Crabbe of the ability to defend its property, and also deprives it of the right to a fair hearing, natural justice, fundamental

justice and due process; (3) the motion judge erred in finding the protection provided by s. 35(1) of the *Constitution Act, 1982* is such that Crabbe cannot defend the claim to its land. The judge further erred in finding Crabbe's ownership of the lands claimed does not constitute an interest in opposing the declaratory relief sought such that Crabbe is not a proper party to oppose the claim; (4) the motions judge also erred in finding the trial court could order the Crown to dispossess it or expropriate its lands, as well as, in striking Crabbe from the claim and ordering that they could only participate at a later stage. The judge granted an order that was not requested, not argued, and not warranted by the *Rules of Court*; (5) the motions judge erred by relying on the doctrine of general occupancy to deny a striking order for Wolastoqey Nation's territorial claim.

[64] According to Crabbe, general occupancy cannot be used to found a territorial claim, because the doctrine was abolished by the *Statute of Frauds*, 1677, 29 Car 2 c. 3, s. 12, and subsequent legislation such that it has never been the law in New Brunswick. Crabbe submits the Supreme Court of Canada's decision in *R. v. Marshall; R. v. Bernard*, 2005 SCC 43, [2005] 2 S.C.R. 220, found that a claim of Aboriginal title could only succeed on the basis of the doctrine of adverse possession, and the motions judge should have struck the claim because the Statement of Claim did not set out allegations of fact for a finding of adverse possession; (6) the motions judge should have struck Crabbe's lands from the action for a declaration of Aboriginal title for failing to disclose a *lis*; and (7) the judge erred in applying *Tsilhqot'in Nation* because it is *per incuriam* for failure to reference received British Columbia law abolishing the doctrine of general occupancy.

G. *Highlights of the written submission on appeal by JDI*

[65] JDI asserts that there are two avenues for the appeal's resolution. First, that "the private landowners and their lands must be fully out of this action with no claim to their properties remaining", which they suggest is the correct outcome; or (2) those private landowners be "fully in the action with full rights of participation", should their property continue to be at risk.

(1) The standard of review

[66] JDI submits the standard of review is correctness, as both the question as to whether the Statement of Claim discloses a reasonable cause of action, and whether the motions judge respected procedural fairness, attract a correctness standard.

(2) Argument One: The motions judge correctly struck the pleadings as against JDI and the other Industrial Defendants

[67] JDI submits Wolastoqey Nation is seeking a remedy without establishing a cause of action on which to ground that remedy. The lack of such a cause of action and the absence of wrongdoing on the part of the Industrial Defendants precludes a declaration of Aboriginal title against any of the Industrial Defendants or their land.

[68] The motions judge correctly applied Rule 23.01(1)(b) in striking the claim against the Industrial Defendants and removing them from the action, but then erred by leaving open a potential remedy implicating JDI's land through the claim against the Crown.

(3) Argument Two: The motions judge erred in holding that JDI and the other Industrial Defendants remain in jeopardy of a finding of Aboriginal title on their private land in a proceeding in which they do not participate

[69] JDI argues the motions judge erred in three ways when leaving open the possibility of a declaration of Aboriginal title against the private lands of the Industrial Defendants, despite having struck the pleadings against them: (1) The result violates basic principles of procedural fairness, which is not curable through the possibility of intervenor status; (2) The mechanism of a court-ordered expropriation by the Crown does not exist; and (3) The decision itself was procedurally unfair, because it granted relief that was neither requested nor argued.

(a) *The result violates basic principles of procedural fairness*

(i) The procedural fairness problem

[70] JDI submits that it was a violation of "fundamental principles of the legal system" to leave open the potential for a declaration of Aboriginal title over the Industrial Defendants' land, while also excluding them as parties to the action. JDI contends the motions judge created a new claim when she held Wolastoqey Nation could pursue their action against the Crown for a declaration of Aboriginal title concerning JDI lands, without JDI as a party. JDI asserts this puts its property in jeopardy, because a declaration of Aboriginal title "would grant the respondents a bundle of rights in respect of the land over which the declaration is made, including over the privately owned lands of the Industrial Defendants … [which] takes effect immediately upon a declaration of Aboriginal title and would immediately conflict with and deleteriously impact JDI's property rights." Further, the remedies of ejectment and recovery could also be a consequence. JDI states that, once granted, a declaration of Aboriginal title would mean that, should it wish to use the land, it would have to get consent from Wolastoqey Nation, and without consent, the government would have to justify infringement under s. 35 of the *Constitution Act*, 1982.

[71] JDI submits it is a violation of fundamental principles of our legal system for there to be potential consequences to JDI's interests without its participation in the process. It argues the law requires they be allowed to participate if there are potential consequences to their property rights. The failure to allow JDI's participation as a party in at least the factual and legal phases of the action deprives it of the right to put forward any defences. In particular, JDI asserts that, in a Statement of Defence, it would plead the defence of *bona fide* purchaser, which is applicable to claims for a declaration of Aboriginal title. JDI also complains the motions judge erred in finding that it was only "along for the ride" and that it could not contribute to the defence of the action. JDI states it would provide relevant information pertaining to their lands.

(ii) The procedural fairness problem is not resolved by focusing on "direct legal relationship"

[72] The motions judge erred in focusing on a direct legal relationship in determining if the Industrial Defendants have the right to participate in the action, because procedural fairness rights are triggered by an interest in the outcome of the proceeding, not the existence of a direct legal relationship.

(iii) The procedural fairness problem does not go away because a declaration is sought

[73] Where a party is potentially affected or impacted by the declaration being sought in an action, that party has the right to be given notice, to be heard and to participate in the action.

(iv) Procedural fairness violations are not justified by recent Supreme Court of Canada cases regarding "negotiation and reconciliation"

[74] The motions judge erred in using the cases of *Shot Both Sides v. Canada*, 2024 SCC 12, [2024] S.C.J. No. 12 (QL) and *Ontario (Attorney General) v. Restoule*, 2024 SCC 27, [2024] S.C.J. No. 27 (QL), in structuring the claim to include a "negotiation and reconciliation" phase after a declaration of Aboriginal title. The cases are distinguishable having regard to the type of declaration sought, a declaration of treaty rights, versus a declaration of Aboriginal title, which is the case here. A declaration of Aboriginal title immediately grants the bundle of rights associated with the land, and JDI argues there can then be no future negotiation phase.

(v) The procedural fairness problem is not fixed by potential future intervention orders

[75] There is no guarantee intervention orders will be granted and, in any event, they would confer more limited participation rights, and would be available only after a declaration of Aboriginal title is made. JDI submits an uncertain intervenor status this late in the proceedings does not meet the requirements of procedural fairness, nor can the rights of an intervenor meet the participatory rights that JDI would have as a party.

(vi) The mechanism of a court-ordered Crown expropriation does not exist

[76] The motions judge's proposition that the adjudicating court could order the government to use its statutory expropriation powers does not exist as a mechanism for the recovery of land that is subject to a declaration of Aboriginal title. First, this proposition violates the separation of powers doctrine, as the judicial branch cannot force the executive branch to use its powers to fashion a remedy. Second, JDI contends it would be contrary to the pursuit of reconciliation, as it is the Crown's onus to balance Indigenous and non-Indigenous interests during reconciliation, *not* that of the Court.

(b) *The decision itself was procedurally unfair because it granted relief that was neither requested nor argued*

[77] JDI submits the motions judge did not answer the question before her, but instead effectively granted a staging order dividing the action into four stages, excluding the Industrial Defendants from at least the first two stages, without giving the parties an opportunity to address whether a staging order is appropriate. The motions judge was not entitled to devise a remedy not requested by the parties. This flawed procedure is enough for the order to be set aside.

(c) *Relief sought*

[78] JDI sought the following relief:

(a) The order striking the claim against JDI (and the other Industrial Defendants) should be affirmed;

(b) However, that order ought to be varied to preclude the possibility of a declaration of Aboriginal title against the private lands of JDI (and the other Industrial Defendants) through an action against the Crown.

(c) Alternatively, if that relief is not granted such that the ability to claim a declaration of Aboriginal title against the Crown for private lands is entitled to proceed, then JDI (and the other Industrial Defendants) need to be reinstated as defendants so they have full rights to defend the claim against their private lands. In other words, the order of the Court of King's Bench ought to be set aside and JDI's motion under Rule 23.01(1)(b) ought to be dismissed.

[79] JDI also requested costs.

H. *Highlights of the written submission on appeal by Acadian*

(1) Standard of review

[80] The issue before the motions judge was a pure question of law, and the error alleged, permitting references to Acadian's properties after concluding the action could not continue against it, was an error in law, and subject to review on a correctness standard.

(2) The failure to strike Schedule "B" and the properties of the Industrial Defendants, after finding the claim against them should be dismissed, is an error of law

[81] The motions judge correctly concluded that, in a claim for a declaration of Aboriginal title, only the Crown is responsible for breaches of constitutional Aboriginal

rights. However, the judge contradicted herself by allowing Schedule "B" to remain part of the Statement of Claim, and by concluding the Crown could be compelled by the trial court to use its expropriation powers to secure Aboriginal repossession of the land owned by the Industrial Defendants. The effect of this decision is to prevent the Industrial Defendants from mounting a defence against an action that squarely implicates their right to ownership of their properties. This is a denial of procedural fairness and natural justice, as it violates Acadian's right to be heard. Acadian posits any remedy which involves their land cannot be granted in an action in which it is not involved. That said, Acadian does not wish to participate in the action but argues their lands should have been removed from the claim for a declaration of Aboriginal title against the Crown.

(3) The motions judge failed to follow relevant and determinative case law

[82] Acadian relies on *Chippewas of Sarnia Band v. Canada (Attorney General)*, [2000] O.J. No. 138 (QL), in which a plaintiff First Nation sought to void Crown grants with respect to land that had been reserved to the plaintiff. The Ontario Court of Appeal dismissed the action for delay as well as because the private landowners had relied on the underlying Crown grants, as *bona fide* purchasers for value, without notice. Acadian submits the motions judge wrongly rejected this case due to its age, which constitutes an error in law. Acadian further submits *Chippewas of Sarnia* was recently confirmed in *Chippewas of Saugeen First Nation v. South Bruce Peninsula (Town)*, 2024 ONCA 884, [2024] O.J. No. 5607 (QL). Although the Court ordered the dispossession of an innocent third party as a remedy for historical wrongs committed by the Crown, Acadian contends this case is distinguishable as the land at issue was reserve land, which had been in dispute for decades. Acadian further submits that both aforementioned cases serve as examples wherein private landowners participated fully in the litigation.

[83] Further, the motions judge's decision is contrary to *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, where the Supreme Court held that third parties have no duty or obligation to Aboriginal groups claiming a

declaration of Aboriginal title. The concern is that the continued inclusion of Schedule "B" could be used to remedy the Crown's alleged wrongs.

(4) The motions judge failed to accept and properly adopt the judicial admissions made by Wolastoqey Nation

[84] Acadian contends Wolastoqey Nation admitted at the hearing in the court below that it does not allege liability on the part of the Industrial Defendants and that land other than the land owned by them would satisfy the claim. That being so, the continued inclusion in the action of Acadian's lands is unjustified and unnecessary to achieve a just result, and constitutes an error.

(5) The motions judge erred in allowing Wolastoqey Nation to seek any relief as against the Industrial Defendants

[85] The motions judge contradicted herself in ruling that "any remaining pleadings must reflect the requirement that any declaration and relief sought is only against the AGNB and/or AGCan", while ordering Wolastoqey Nation amend its Statement of Claim to request that the Crown use the means in its power to place Wolastoqey Nation in possession of the land set out in Schedule "B".

(6) The motions judge erred in granting relief, including a "staging order", that was neither requested by motion from any party, nor addressed in argument on the motion

[86] Acadian submits the motions judge effectively issued a staging order when she described what she saw as the likely "separate phases to this litigation". Further on, the motions judge ruled the Industrial Defendants could seek intervention at the "declaration and relief phases". Acadian states the motions judge's rationale for the staging order was that the Industrial Defendants had "no evidence or alleged facts to contribute to the 'factual and legal phases' of this litigation." Acadian argues that, while the Industrial Defendants

did not participate in the wrongs done by the Crown, their defences will gather and present evidence and argument relating to their purchase, continuity of possession, and ability to enforce exclusive possession of their land, which are relevant to findings and declarations of Aboriginal title.

(7) The motions judge erred in determining the adjudicating court could compel the Crown to exercise its statutory expropriation power

[87] The motions judge's statement that "the Crown may be directed or ordered to use its expropriation powers" to dispossess the Industrial Defendants is legally unsound. The Crown cannot be compelled by a court to exercise a statutory power, as the Crown is immune from coercive orders. In support of this proposition, Acadian cites *Daniels v. Daniels*, 2011 MBCA 94, [2011] M.J. No. 398 (QL). Relatedly, it invokes *Ontario (Attorney General) v. Restoule*. The forced use of the expropriation power subverts the legislative scheme of the *Expropriation Act*, R.S.N.B. 1973, c. E-14, notably by stripping private landowners of the ability to oppose expropriation.

(8) The court lacks jurisdiction to issue a declaration of Aboriginal title over fee simple lands and to order possession of fee simple lands in an Aboriginal claimant

[88] Acadian asserts that, prior to bringing its motion to strike under Rule 23.01(1)(b), it demanded Wolastoqey Nation provide particulars of the material facts underlying its claim, and did not receive any. On this basis, Acadian submits the motions judge lacked jurisdiction to order Wolastoqey Nation may continue to seek a declaration of Aboriginal title over its fee simple lands.

(9) Relief sought

[89] Acadian requests that Schedule "B" as well as any reference to Schedule "B" and the properties of the Industrial Defendants be struck from the Statement of Claim.

They further seek any and all consequential and necessary amendments flowing from this relief, as well as costs.

I. *Highlights of the written submission on appeal by HJ Crabbe*

(1) The decision to strike Crabbe as a defendant while maintaining their lands in the claim for a declaration of Aboriginal title against the Crown errs in law

[90] Crabbe adopts the arguments made by JDI and Acadian, while adding several points. The motions judge erred: (1) in asserting the Industrial Defendants do not have an interest and are not proper parties to oppose the declaration sought. When declaratory relief is sought with respect to title to land, the suggestion that the property rights underlying the title in question are not "interests" warranting defence is misplaced; (2) in ruling the constitutional protection of Aboriginal title under s. 35 of the *Constitution Act, 1982* deprived Crabbe of its right to defend the claim; and (3) in deciding this case is between the Crown and Wolastoqey Nation alone despite the assertion by Crabbe that Aboriginal title rights are a creation of the common law, and that "nothing in s. 35 ousts the fundamental common law rights of private parties to defend their interests". In support of this point, Crabbe relies on *Chippewas of Sarnia* and *Saugeen* where private land owners participated in the litigation involving a claim of Aboriginal title over their lands.

(2) The refusal to strike the claim for failure to disclose a reasonable cause of action constitutes an error in law

[91] Crabbe submits that, per *Tsilhqot'in Nation*, the required standard of occupation by the Indigenous group claiming Aboriginal title is general occupancy. In confirming this standard, the Supreme Court of Canada made reference to the estate *pur autre vie*. Crabbe explains this was a tenancy granted to an individual for the life of a third party and that the doctrine of general occupancy arose to resolve the void which resulted when the tenant died and the grantor was still alive. The general occupant was the person

who seized the estate following the death of the tenant. This seizure was effectuated by a bare entry and a formal or ceremonial statement. Because the bounds of Aboriginal title claims can be fluid, Crabbe fears the doctrine of general occupancy can "support a nearly limitless, and certainly very liberal, territorial claim". Crabbe contends the doctrine of general occupancy was abolished by the English *Statute of Frauds*, in which estates *pur autre vie* were made estates of inheritance. New Brunswick followed suit by enacting similar legislation throughout the 18th century, which carried forward to the *Wills Act*, R.S.N.B. 1973, c. W-9. It follows courts in New Brunswick cannot apply the general occupancy doctrine test, because general occupancy has never been the law in New Brunswick.

[92] Crabbe submits *Marshall*; *Bernard* rejected the use of general occupancy as a basis for a finding of Aboriginal title. It contends adverse possession is the standard adopted in *Marshall*; *Bernard*. That ruling was binding on the motions judge and she erred in rejecting it, and in relying on *Tsilhqot'in Nation*.

[93] Alternatively, if this Court determines it is also bound by *Tsilhqot'in Nation*, Crabbe submits it is inconsistent with *Marshall; Bernard*, as *Tsilhqot'in Nation* adopted a general occupancy standard and *Marshall; Bernard* adopted adverse possession as the applicable standard. Crabbe argues that, in the face of conflicting higher court decisions, the lower court is entitled to follow the ruling it thinks is correct. Given that *Tsilhqot'in Nation* adopts an abolished doctrine, *Marshall; Bernard* should be applied. Crabbe further contends *Marshall; Bernard* should be preferred because *Tsilhqot'in Nation* does not address the distinction between territory and property. Crabbe states that the St. Johns and Passamaquoddy Treaty, which binds Wolastoqey Nation, vested the territories of the Province of Nova Scotia or Acadia in the Crown and protected "native properties". It argues territory is the subject matter of sovereignty and property is the subject matter of title to land. Wolastoqey Nation's claim over a territory is defective in light of this distinction, which was not addressed in the court below. In assessing a claim for Aboriginal title, the court must compare the practices of Aboriginal people at the time

of the British assertion of sovereignty to the standard of adverse possession. The Statement of Claim does not include a claim of adverse possession and must be struck on that basis.

[94] Crabbe further submits that Wolastoqey Nation seeks to enforce its claim for a declaration of Aboriginal title by pleading ejectment and recovery of lands. Crabbe contends the Statement of Claim does not make allegations of fact in support of these causes of action, nor does it disclose a *lis* supporting declaratory relief. Crabbe argues that, to establish a claim for ejectment or the recovery of lands, Wolastoqey Nation would have to establish that its possession of the land is wrongful or unlawful, but the Statement of Claim merely states the Industrial Defendants are in possession. Further, Wolastoqey Nation admitted the Industrial Defendants are not wrongdoers. Given that the Industrial Defendants are not wrongfully in possession of the lands, there is no *lis*, or dispute, between the parties and no role for the Court. This lack of dispute also supports the finding that there is no space for declaratory relief.

(3) Alternatively, the decision of the Supreme Court of Canada in *Tsilhqot'in Nation* is *per incuriam* for failing to reference received British Columbia law abolishing general occupancy

[95] Crabbe contends *Tsilhqot'in Nation* overlooked legislation abolishing general occupancy such as the *Statute of Frauds* and argues the decision would have been different if this legislation had been considered. Crabbe argues the doctrine of *stare decisis* is subordinate to parliamentary sovereignty, and that the legislature abolished general occupancy, such that the Supreme Court had no authority to resurrect it.

[96] Further, Crabbe submits the decision in *Tsilhqot'in Nation* is inconsistent with the Constitution by disregarding the doctrine of *stare decisis* when it adopted Cromwell J.A.'s analysis from *R. v. Marshall*, 2003 NSCA 105, [2003] N.S.J. No. 361, which it had rejected in *Marshall; Bernard*. Nowhere in the *Tsilhqot'in Nation* decision is there an analysis of when the Supreme Court of Canada can overturn an earlier decision.

(4) Relief Sought

[97] Crabbe requests the decision below be varied to strike the territorial claim. Once Crabbe's lands are struck from the Statement of Claim, as I would order, Crabbe lacks authority to challenge the scope of the outstanding claim against the Crown. Crabbe also requests its lands be struck from the Statement of Claim and an order converting its motion to strike into a motion for judgment, with costs.

J. *Wolastoqey Nation's Response to JDI's Submission on appeal*

(1) Standard of review

[98] Wolastoqey Nation submits the motions were decided in the exercise of the discretionary power granted in Rule 23, and that a high degree of deference is owed to the "case management" judge, who has an informed appreciation of the facts of the proceeding. The respondents do not dispute JDI's submission of correctness as the standard of review on questions of procedural fairness but contend no procedural unfairness resulted from the decision.

(2) Impermissible appeal against reasons for decision

[99] Wolastoqey Nation contends the appellants are appealing a decision which granted the relief they wanted, and that the errors they raise constitute improper attacks on the reasons provided by the motions judge. Appeals cannot be brought against reasons. JDI's request to vary the order under appeal is actually a request to vary the reasons for judgment.

(a) *The motions judge was correct to strike the Claim against the Industrial Defendants*

[100] According to Wolastoqey Nation, JDI has mischaracterized the motions judge's basis for the rejection of the claim against it as being the absence of a cause of action. The judge correctly stated that declaratory relief does not require a cause of action and that the Industrial Defendants were not proper parties to defend the claim for a declaration of Aboriginal title. The lack of allegations of breach of duty by the Industrial Defendants is irrelevant as the claim is against the Crown. For the same reason, Wolastoqey Nation is not required to plead any facts with respect to JDI.

(b) *The motions judge was correct to allow Wolastoqey Nation to seek a declaration of Aboriginal title over fee simple lands as well as for the return of certain fee simple lands through the Crown*

[101] Wolastoqey Nation submits JDI advances the "untested and incorrect legal theory that once fee simple title is granted, Aboriginal title can no longer exist", and argues the removal of the Industrial Defendants' lands would not be the proper remedy for JDI's procedural fairness concerns, as it would validate an untenable legal position: that fee simple title displaces Aboriginal title. There is no support in law for this position and, further, settled principles weigh against it. Aboriginal title attaches to the Crown's underlying title at the assertion of British sovereignty and continues to exist, unless extinguished. Extinguishment by implication, for example by the Crown's grant of the land to a fee simple holder, is impossible. Unilateral extinguishment was only possible before 1982 through legislation with a clear intent to do so, a high standard that has not been met over the lands at issue in the litigation. The argument that the government's right to grant fee simple extinguished Aboriginal title was rejected in *Delgamuukw*. JDI's underlying theory that Aboriginal title and fee simple interest cannot both exist should be rejected because these rights already co-exist elsewhere in Canada. In Haida Gwaii, the Provincial and Federal Crown have signed agreements with the Haida Nation recognizing the Nation's Aboriginal title, while fee simple interests continue to exist, and British Columbia enshrined the co-existence of Aboriginal title and fee simple title in the *Haida Recognition Act*, S.B.C. 2023, c. 24.

[102] There is no procedural unfairness to JDI because its contention that a declaration would "immediately conflict with and deleteriously impact JDI's property rights" is wrong. The motions judge was clear that the declaration sought is against the Crown only, which is consistent with pertinent jurisprudence. The impact of Aboriginal title on other interests in the land, such as fee simple interest, is a secondary question, that the motions judge said should be left to the Crown to resolve in the negotiation and reconciliation stage. *Cowichan Tribes v. Canada (Attorney General),* 2017 BCSC 1575, [2017] B.C.J. No. 1761 (QL) is cited as a case where the court dismissed the application for court-ordered notice to fee simple holders as the Aboriginal plaintiffs did not seek to invalidate fee simple interests. Parenthetically, it bears noting that Wolastoqey Nation does seek to invalidate the appellants' fee simple interests by an order quashing the underlying Crown grants. At any rate, Wolastoqey Nation points to *The Council of the Haida Nation v. British Columbia*, 2017 BCSC 1665, [2017] B.C.J. No. 1874 (QL) where the court ruled there was no need to join fee simple holders. A declaration of Aboriginal title in the present case will lead to Crown-led reconciliatory negotiations, and the declaration will not immediately impact JDI's interests. Finally, on the point of procedural fairness, Wolastoqey Nation submits JDI is wrong in stating that, if a declaration were issued, it would be duty bound to consult with Wolastoqey Nation; the duty to consult and accommodate applies to the Crown only. Any change that might result to the government approval process for actions on JDI's lands is not a reason for JDI to participate in the litigation as these processes do not invalidate or diminish JDI's fee simple rights. It is not an incident of fee simple title to be free of regulation.

(i) <u>The decision is consistent with recent jurisprudence</u>

[103] By striking the Industrial Defendants from the Statement of Claim, the motions judge properly focused on the relief against the Crown and future Crown-led reconciliatory negotiations, in line with jurisprudence such as *Tsilhqot'in Nation*. The jurisprudence referenced by JDI, in which declarations could result in the immediate impact on fee simple holder rights, such as in *Sarnia* and *Saugeen*, are distinguishable because declarations in those cases would have triggered the application of the *Indian Act*,

R.S.C. 1985, c. I-5, as the lands were reserve lands. Under the *Indian Act*, a declaration confirming land to be un-surrendered Aboriginal land triggers immediate relief and the court does not have jurisdiction to allow for the continuation of third-party interests. In *Sarnia* and *Saugeen*, the private parties needed to be named in the action because of the potential for this immediate relief. No direct relief is sought against the Industrial Defendants and, as such, they are not required parties.

(ii) Mere indirect impact is insufficient to join the litigation as a defendant

[104] Wolastoqey Nation contends it is well known that Aboriginal rights litigation commonly affects private parties. However, different litigation principles apply, as the goal of the litigation is reconciliation. One of these principles is that impact is not enough to allow a private party to join the litigation. Courts have recognized that this would open the floodgates in already complex litigation. Wolastoqey Nation refers to *Calder v. British Columbia (Attorney General)*, [1969] B.C.J. No. 53 (QL), where the judge characterized the possibility of joining all parties who had an interest in the land as a "frustratory proposition". The principles of proportionality, access to justice and reconciliation must guide the inclusion of parties in Aboriginal rights litigation.

[105] Wolastoqey Nation acknowledges private parties may seek intervenor status. It refers to *Tsilhqot'in Nation, Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2018 BCSC 633, [2018] B.C.J. No. 717 (QL), and *Marshall; Bernard*, in which third parties were given intervenor status. It submits the motions judge's statement that the Industrial Defendants could seek intervener status in the future was consistent with this jurisprudence. Wolastoqey Nation contends the motions judge's decision is consistent with the principle of *audi alteram partem*, which establishes the right to be heard, but not the right to be a defendant.

(iii) There was no basis for JDI to participate as a defendant in this claim

[106] None of JDI's complaints of procedural unfairness justify the relief it seeks, the removal of its fee simple lands from the claim; the motions judge correctly found the Industrial Defendants have no knowledge of the facts alleged in the Statement of Claim. While JDI asserts they can present evidence regarding the claim, the specifics of this evidence are unclear as they were not the owners of the land at the assertion of British sovereignty. Further, the defences that JDI suggests they could advance, such as *bona fide* purchaser for value, are not relevant as to whether Aboriginal title exists.

(c) *The motions judge did not make any legal determination regarding court-ordered Crown expropriation*

[107] Wolastoqey Nation submits JDI's assertion that the motions judge made an error in law in concluding that court-ordered expropriation was an available remedy, is flawed. It contends the motions judge made a passing comment in *obiter dicta* that "the Crown may be directed or ordered to use its expropriation powers". By using the term "may", the judge was highlighting she was not deciding the issue. Wolastoqey Nation re-iterates the point that appeals may not be brought against the reasons given for an order or judgment. JDI's assertion that court-ordered expropriation is unavailable is no longer settled law, having regard to the recognized exception to Crown immunity in respect of injunctions and mandamus orders to prevent a *Charter* violation.

(d) *The motions judge did not grant a staging order*

[108] Wolastoqey Nation submits the motions judge did no more than comment on the likely phases of the litigation, and that her reference to a potential intervention at the declaration and relief phases was directed at the issue of procedural fairness for parties no longer in the action. The motions judge's decision is consistent with the Claim as originally pleaded (the initial Statement of Claim did not include the Industrial Defendants

as parties) and with existing case law. The removal of JDI's lands is inconsistent with current jurisprudence.

(i) Additional issues raised by Wolastoqey Nation

[109] In the alternative, Wolastoqey Nation submits that, if this Court believes that JDI must be included as a party, the Court should vary the order below and dismiss the original motions to strike. If JDI is added back into the action, then that would undo the motions judge's decision that the sought after declaration is against the Crown only. Once parties are added, the disposition may be enforceable against them. In this case, should the Industrial Defendants be re-added to the action, the adjudicating court would be able to order relief that directly impacts them.

(ii) Relief Sought

[110] Wolastoqey Nation asks that JDI's appeal be dismissed, with costs.

K. *Wolastoqey Nation's response to Acadian's written submission on appeal*

(1) Standard of review

[111] As noted above, Wolastoqey Nation submits the standard of review for decisions under Rule 23 is highly deferential. It contends Acadian is mistaken in suggesting correctness is the standard of review for the legal question of "whether the [Wolastoqey Nation] could continue their Action against Acadian where the Claim discloses no cause of action against Acadian." Here, the decision not to strike Schedule "B" is what is at issue, and that decision is discretionary. I should immediately register my disagreement with that view: the appropriateness of striking Schedule "B" is indeed what is at issue in the present appeal, but this is a question of law for which the standard of review on appeal is correctness (see *Jones v. Attorney General of Canada (RCMP)*, 2018 NBCA 86, [2018]

N.B.J. No. 328 (QL), at para. 13 and *Tingley v. Attorney General of Canada*, 2021 NBCA 18, [2021] N.B.J. No. 105 (QL) at para. 51).

[112] Wolastoqey Nation argues Acadian is appealing the reasons for the decision instead of the final order. Seeking the removal of the Schedule "B" lands from the Statement of Claim is an attack on the reasons for the decision, not the decision itself. Once again, I must express my disagreement: the continued inclusion of the Schedule "B" lands in the Statement of Claim for the purposes of litigating Wolastoqey Nation's claim for a declaration of Aboriginal title against the Crown is the result of a legal determination by the motions judge and forms part of the judgment rendered by her. As such, it is appealable.

(2) <u>The motions judge was right not to strike Schedule "B"; there is no procedural unfairness to Acadian</u>

[113] Wolastoqey Nation contends there is no procedural unfairness towards Acadian because, having succeeded on the motions and been removed as a party, there will not be a final order enforceable against Acadian. Any decision concerning land will be against the Crown alone and that, even if there is an indirect impact against Acadian's lands, this possibility is consistent with s. 35 litigation principles governing Aboriginal rights claims, where it has been acknowledged private parties may be impacted by constitutional claims against the Crown. The Industrial Defendants may have a place as intervenors in the future, but not as parties. As well, the motions judge could not foreclose the possibility of repossession of the lands at issue.

(a) *With the Crown remaining as the only defendant, the Wolastoqey Nation's claim is primarily for declaratory relief and reconciliatory negotiations*

[114] The claim seeks declaratory relief and is one of constitutional proportions. That being so, the motions judge was correct in determining the Industrial Defendants were not proper parties.

(i) The decision is consistent with recent jurisprudence

[115] Wolastoqey Nation submits the motions judge's decision is in line with the relevant jurisprudence. In *Haida Nation* and in *Tsilhqot'in Nation* , it was determined that claims for a declaration of Aboriginal title in respect of fee simple lands were between the Aboriginal claimants and the Crown only. The motions judge denied an avenue for direct relief against the Industrial Defendants, in line with the jurisprudence of *Shot Both Sides* and *Restoule*, which called for declaratory relief and reconciliatory negotiations as opposed to direct, immediate, court-ordered relief. *Tsilhqot'in Nation* provides an example of this approach.

(ii) There is a distinction when claims involve the *Indian Act*, which is not applicable here

[116] Acadian's reliance on *Sarnia* and *Saugeen* is unjustified because both concerned reserve land, which automatically triggers provisions in the *Indian Act* that causes immediate, consequential relief, even when impacting third parties. Because of the immediate nature of the declaration in those cases, private parties needed to be named. However, the claim here is now only against the Crown, and a declaration of Aboriginal title will lead to Crown-led reconciliatory negotiations. Accordingly, the Industrial Defendants do not need to be parties.

(b) *Aboriginal remedies against the Crown can affect third parties, and sometimes that effect can warrant being granted intervenor status*

[117] Any declaratory relief will bind the Crown alone, but this does not mean it cannot impact the Industrial Defendants.

(i) Different litigation principles apply

[118] It is "indisputable that a remedy against the Crown may affect third parties". The Court in *Calder* affirmed that not every party who had an interest in any of the lands in dispute should be allowed as parties, because this would preclude litigation from going forward from a practical standpoint. The motions judge was aware of the need for fairness, and balanced the interests of the Industrial Defendants appropriately by allowing for future intervention requests.

(ii) Where warranted, a private party may seek intervenor status

[119] Wolastoqey Nation acknowledges that claims against the Crown can indirectly impact the rights of third parties to the point that intervenor status is warranted, pointing to the cases of *Tsilhqot'in Nation*, *Ahousaht*, and *Marshall; Bernard*, where impacted third parties were granted intervenor status, but not party status, as this would frustrate the reconciliation process. The motions judge's decision is in line with these cases, and the basic principles of *audi alteram partem*, or a right to be heard, to be represented, or to state your case, which is fulfilled by allowing intervenor status. Parenthetically, I note this is a critical point in countering the complaint of procedural unfairness. The problem with this countering argument is that an intervention order under Rule 15.02 will not be available to the appellants.

(c) *The court cannot strike the Wolastoqey's Claim for the return of fee simple lands through the Crown*

[120] Wolastoqey Nation submits Acadian is not seeking a remedy to ensure procedural unfairness, as it does not wish to participate in the process, but instead seeks to have its land removed from the action. This would require a ruling that fee simple lands cannot be returned through the Crown in Aboriginal title cases, which ruling is not permissible at law. The motions judge did not have jurisdiction to deny the possibility of fee simple lands being returned to Wolastoqey Nation.

(i) There is precedent for the return of land

[121] *Sarnia* and *Saugeen* are precedents for the return of fee simple lands following a declaration of Aboriginal title, and Acadian admitted this in first instance. While these cases are different because they involve the application of the *Indian Act* and declaratory relief with immediate effect, there is nothing in them to suggest reserve land is somehow different than other land insofar as land return is concerned. *Sarnia* and *Saugeen* both hold that "the same legal principles governed the Aboriginal interest in reserve lands and lands held pursuant to Aboriginal title."

(ii) UNDRIP supports the return of land

[122] Articles 26, 27, and 28 of the *United Nations Declaration on the Rights of Indigenous People* ("UNDRIP") recognize the right to repossession of fee simple lands through the Crown, with a prioritization of restitution as a remedy. The Supreme Court of Canada has affirmed that UNDRIP should be incorporated into domestic law. Wolastoqey Nation contends Acadian's suggested remedy, of denying the return of fee simple lands, would violate UNDRIP.

(iii) The deep importance of land to Indigenous Nations supports the return of land

[123] The importance of land to Indigenous nations means that depriving them of remedies that include the repossession of land would be contrary to principles underlying Aboriginal law. From a cultural and spiritual perspective, "no amount of money can compensate for its loss." There is no authority to suggest that fee simple land holders should always hold onto their lands with Indigenous claimants limited to monetary compensation.

(iv) The motions judge followed the relevant and determinative case law

[124] The motions judge did not err in applying the pertinent legal principles. Acadian argued the motions judge failed to follow *Sarnia* and *Saugeen*, but Wolastoqey Nation contends these cases are distinguishable, because the declaration sought in those cases would have immediate impact, and that is not the case here. It submits that, even if there were an error, the proper remedy would be adding Acadian back into the action, not striking Schedule "B".

[125] Acadian misunderstood *Haida* in suggesting the Industrial Defendants are being held accountable for Crown failures. It argues the motions judge correctly used *Haida* to show that the Crown is responsible for breaches of the right to Aboriginal title, not the Industrial Defendants. The motions judge noted the Crown has powerful tools by which to implement its legal obligations, and that this might impact third parties. The motions judge was noting what was possible, not dictating to the Crown what it must do. This is consistent with relevant case law.

(v) Acadian's allegations of "judicial admissions" are distractions

[126] Acadian's contention that the motions judge erred in failing to accept and properly adopt critical admissions by Wolastoqey Nation is unfounded. No such admissions were made. This is a "haphazard" tactic of Acadian, and should be rejected as a ground of appeal. In particular, Wolastoqey Nation denies it ever described the Industrial Defendants as "innocents" in the court below. In any event, given that the motions judge has determined the only proper party is the Crown, Acadian's liability and innocence are irrelevant.

[127] Wolastoqey Nation's submissions in first instance regarding double recovery are not admissions that it would be satisfied with the return of land or some other "equivalent". The underlined statement was made in reference to the Specific Claims Tribunal that is limited to awarding compensation for the value of lost lands. It is

inappropriate to raise this argument for the first time on appeal. Finally, Wolastoqey Nation contends it did not request a staging order, nor did the motions judge issue one.

(vi) The motions judge did not allow the Wolastoqey to seek any relief as against the Industrial Defendants

[128] The motions judge correctly allowed for the possibility of fee simple lands being returned through the Crown. This is in line with existing principles of Aboriginal law, and thus the motions judge's amendments to the Statement of Claim reflect the correct state of the law, and provide notice to the Crown of what the Wolastoqey Nation would view as an adequately honourable result in line with reconciliation. This decision is entitled to deference. Once again, I disagree. The contested decision results from a determination of law, for which the standard of appellate review is correctness.

(vii) The motions judge granted relief requested by the Industrial Defendants; she did not issue a staging order

[129] The motions judge did not issue a staging order, but instead identified what would "most likely be" separate phases in line with what occurs in "most Aboriginal rights litigation". This includes, in line with *Shot Both Sides* and *Restoule*, a "negotiation and reconciliation" phase. Wolastoqey Nation submits that informing the Industrial Defendants of their potential right to intervene at that stage does not amount to a staging order.

[130] Acadian's contention that it should be a party in the factual and legal phases is in direct contrast to their submissions in the court below. All of Acadian's suggested defences are moot, but its interest in land may be of interest to the court at a later stage. This is accounted for by their potential participation as intervenors.

[131] Acadian's demonstration of continued possession of its lands would not negate the claim for a declaration of Aboriginal title, as Aboriginal title is found in demonstrating exclusive and sufficient occupation at the time of the assertion of British

sovereignty. The motions judge found the Crown was suited to present the evidence relevant to the claim for a declaration of Aboriginal title, which is in the line with the court's mandate to find solutions for the complexities inherent to s. 35 litigation, and to avoid impediments to access to justice that can arise in that context.

(viii) The motions judge did not decide that the adjudicating court can compel the Crown to enforce its statutory expropriation power against the Industrial Defendants

[132] Contrary to Acadian's contention, the motions judge did not determine the adjudicating court could compel the Crown to exercise its statutory expropriation powers to implement any repossession order. The judge merely stated the Crown *may* be ordered to do so, but this is yet to be decided. Further, the formal judgment does not make any mention of expropriation, and the appeal cannot be decided on the basis of this "passing comment". It remains an open question whether the court can order expropriation, and it would have been inappropriate for the motions judge to foreclose the possibility. Crown immunity does not prevent the court from ordering the Crown to use its expropriation powers. Crown immunity is not absolute and includes exceptions to prevent a violation of the Constitution. *Restoule* acknowledged the court's ability to order the Crown to exercise its discretion (without exactly saying how it should) when it comes to restoring the Crown's honour. Flexibility is needed in crafting a remedy in proceedings focused on reconciliation and the honour of the Crown. Finally, and contrary to Acadian's argument, the motions judge's decision does not subvert the *Expropriation Act* or impair the ability of private landowners to oppose expropriation. The motions judge left the availability of expropriation for debate in subsequent proceedings.

(ix) The motions judge was correct to find the adjudicating court has jurisdiction to issue a declaration of Aboriginal title in relation to land owned in fee simple; this has nothing to do with particulars

[133] The motions judge did not err when she rejected the submission that judicial authority to issue a declaration of Aboriginal title was excluded, because Wolastoqey Nation failed to properly plead Aboriginal title. The decision is in line with what is known about Aboriginal title, which is that it applies to the Crown's underlying title unless validly extinguished. Further, Wolastoqey Nation contends it properly pleaded the elements of Aboriginal title.

[134] This proceeding is not a motion for particulars, even though Acadian is demanding particulars. When asked to strike portions of the Statement of Claim on the basis they failed to disclose the requisite material facts and insufficient particulars had been provided, the judge denied the request. The motions judge provided a path for the claim to be resolved, and this is in the broader public interest.

(x) Submissions on the Notice of Contention

[135] Wolastoqey Nation submits that, if this Court concludes Acadian should be included as a party, it must set aside the decision of the motions judge and dismiss the appellants' motions to strike. That disposition would require overturning the determination that a declaration of Aboriginal title can only be sought against the Crown. This would mean there is no Crown buffer between the Industrial Defendants and Wolastoqey Nation, and it would necessitate rejecting the conclusion that it is the Crown's responsibility to provide consequential relief for any declaration of Aboriginal title. Instead, any consequential relief would be directly enforceable against the Industrial Defendants. If this were to occur, the forward path would be similar to the one adopted in *Sarnia* and *Saugeen*, with the trial court being able to order direct relief against the Industrial Defendants.

[136] In my view, the Notice of Contention filed by Wolastoqey Nation does not provide it with an avenue for relief. That is so because: (1) the motions judge's striking order is correct in law, the appellants not being proper parties to the action for a declaration of Aboriginal title. It follows that the striking order is not reversible, and it must stand; and (2) setting aside the order by which a declaration of Aboriginal title can nonetheless be

made against the Crown in relation to the appellants' lands does not open the door to the application of Rule 62.28, the Notice of Contention Rule, because Wolastoqey Nation is not entitled "to different relief than that given" by the motions judge.

(xi) Relief Sought

[137] Wolastoqey Nation asks the Court to dismiss Acadian's appeal, with costs.

L. *Wolastoqey Nation's position concerning Crabbe's appeal*

(1) Standard of review

[138] Wolastoqey Nation submits the highest level of deference is owed in reviewing the motions judge's decision, as it was made on the basis of Rules 23.01(1)(a) and (b). As mentioned, I respectfully disagree with that view. The applicable standard of review is correctness.

[139] Wolastoqey Nation underscores Crabbe is not asking to be reinstated as a party. Rather, Crabbe contends the judge erred in law in failing to strike its fee simple lands from the action. Wolastoqey Nation submits the decision to let stand Schedule "B" is in line with the law of Aboriginal title. It also submits the motion's judge's reasons for deciding not to strike the lands is not a proper ground of appeal, and that she was correct in not departing from *Tsilhqot'in Nation*.

(2) Impermissible appeal against reasons

[140] Crabbe is attacking the motions judge's reasons, as opposed to the final order; it argues against reinstatement as a party but in favour of an order striking its lands from the claim. The motions judge rendered her limited striking order because the Crown was the only party against which a declaration of Aboriginal title could be made, *not* because the Industrial Defendant's lands could not be subject to such a declaration.

Wolastoqey Nation submits the variation sought by Crabbe is a challenge to the reasons for the order striking the Industrial Defendants, which are not appealable.

(3) Issue 1 – The motions judge was correct to remove Crabbe as a defendant

[141] Wolastoqey Nation relies on its response to the submissions of Acadian and JDI for most points raised by Crabbe. Crabbe makes two additional points: first, that the motions judge precluded Crabbe from defending the claim because she decided the claim was "in part, declaratory" and, second, by finding that Aboriginal title is a public law matter and that private parties cannot participate, in any related litigation.

[142] Wolastoqey Nation submits both points are incorrect. First, the motions judge determined that the sought after Aboriginal title declaration must be against the Crown, which is in line with the positions taken by Crabbe and the other appellants in the motions below. Second, the motions judge did not determine private parties cannot participate. Rather, she stated the Industrial Defendants might be able to participate as intervenors, but the declaration itself is against the Crown, the only proper party.

[143] Wolastoqey Nation reiterates its submission that the decisions in *Sarnia* and *Saugeen* are not helpful.

(4) Issue 2 – The Wolastoqey's Claim is properly grounded in the existing law of Aboriginal title, which permits a territorial-use standard and does not require proof of adverse possession

[144] Wolastoqey Nation submits Crabbe's argument that *Tsilhqot'in Nation* does not apply in New Brunswick, because the decision adopted an abolished doctrine – *pur autre vie* – as the standard of occupation necessary to establish Aboriginal title is simply wrong. That is likewise the case for Crabbe's argument that *Marshall; Bernard* established adverse possession as the proper standard of occupation. This Court does not have the authority to find the Supreme Court of Canada wrongly decided *Tsilhqot'in Nation*. I agree.

(a) *Territorial use may ground a claim of Aboriginal title; adverse possession is not required*

[145] Contrary to Crabbe's submission, proof of Aboriginal title does not require adverse possession, and it is not limited to specific sites of intensive use or settlement. *Tsilhqot'in Nation* confirmed that regular and exclusive use of lands by hunting, fishing and resource gathering over a larger territory is sufficient use to ground Aboriginal title, and "does not demand notorious or visible use akin to proving a claim for adverse possession".

(b) *Tsilhqot'in Nation and Marshall; Bernard are consistent*

[146] Crabbe is mistaken when it states *Tsilhqot'in Nation* and *Marshall; Bernard* set different standards, and that *Marshall; Bernard* sets adverse possession as the appropriate standard. *Marshall; Bernard* did not use the standard of adverse possession, but instead found that a determination of occupation must consider both Aboriginal and common law perspectives. In *Marshall; Bernard*, the Court stated that showing title under the common law was "context-specific". In *Tsilhqot'in Nation*, the Court rejected a site-specific approach and confirmed *Marshall; Bernard* did not reject the territorial approach. Moreover, the Court relied on *Marshall; Bernard* for the proposition that whether "[t]he evidence in a particular case supports Aboriginal title is a question of fact for the trial judge". It would be illogical for one standard to apply in British Columbia and another in New Brunswick. Citing *Delgamuukw*, Wolastoqey Nation makes the point that Aboriginal title "arises from the prior occupation of Canada by Aboriginal peoples". There should therefore be one nationwide test.

(c) *Tsilhqot'in Nation is binding*

[147] Crabbe's argument that the Supreme Court of Canada applied an abolished doctrine – *pur autre vie* – is inaccurate. The Court mentioned general occupancy at

common law, but concluded the inquiry is contextual, fact-specific, and must consider both the common law and Aboriginal perspectives. That determination is binding.

(5) Issue 3 – Neither the court below nor this Court have the jurisdiction to depart from *Tsilhqot'in*

(a) *The narrow exceptions to stare decisis*

[148] Crabbe is asking this Court not to apply *Tsilhqot'in Nation*, which necessitates a review of *stare decisis*. Briefly, Wolastoqey Nation has identified two relevant narrow circumstances for revisiting legal precedent of the higher courts (vertical *state decisis*): "if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate." Horizontal *stare decisis* is different, and not at issue here.

(b) *There is no basis to depart from vertical stare decisis*

[149] I agree.

(c) *This Court cannot decide that Tsilhqot'in Nation was decided per incuriam*

[150] I agree.

(6) Submissions on the Notice of Contention filed by Wolastoqey Nation

[151] As mentioned, I am of the view the Notice of Contention filed by Wolastoqey Nation does not provide it with an avenue for relief because the striking order is correct in law and setting aside the order by which a declaration of Aboriginal title can nonetheless be made against the Crown in relation to the appellants' lands does not open the door to some other term favourable to the Wolastoqey Nation.

(7) Relief Sought

[152] Wolastoqey Nation asks the Court to dismiss Crabbe's appeal, with costs.

M. *Similarities between the Wolastoqey Nation's Submissions*

[153] The following points can be distilled from the three Respondents' Submissions:

- The motions judge correctly struck the claim for a declaration of Aboriginal title and consequential relief against the Industrial Defendants, and correctly ordered the claim move forward against the Crown only.

- The motions judge correctly allowed Wolastoqey Nation to seek from the Crown a declaration of Aboriginal title over the Industrial Defendants' fee simple lands, and a return of those lands.

- The motions judge did not make any determination regarding expropriation, but only noted it was a possibility during the negotiation and reconciliation stage of the action (wherein the Industrial Defendants could potentially be granted intervenor status).

- There is no procedural unfairness because the claim is against the Crown's underlying interest in land only.

- UNDRIP supports the return of land subject to a declaration of Aboriginal title, and UNDRIP is part of domestic law.

N. *Written submissions by the Added Parties*

(1) Elsipogtog First Nation

[154] It would be contrary to the doctrine of judicial forbearance, established law and the objectives of reconciliation for the Court to resolve the constitutional issues raised by the appellants. Elsipogtog has no position on whether the appellants may be entitled to participate in the underlying claim. It is unnecessary for the Court to address the constitutional issues raised, including the test for Aboriginal title in New Brunswick, the relationship between Aboriginal title and fee simple lands, and the relief available. To the extent that the Court finds it necessary to answer these questions, Elsipogtog adopts the submissions of Wolastoqey Nation.

(a) *The appellants raise constitutional issues which should not be determined on this appeal*

[155] These questions do not need to be answered for the resolution of the appeal and could have far reaching implications. The contention that Aboriginal title may be extinguished by Crown grants has never been accepted at law. Rather, courts have repeatedly confirmed that Aboriginal title survived British assertion of sovereignty and continues to exist as a burden on the Crown's allodial title.

[156] The Court should not make findings that limit the relief available to Indigenous groups, as this area of law is unsettled and it is critical that relief availability be considered on a proper evidentiary record and with the benefit of argument from all parties. A ruling respecting the Court's jurisdiction to determine the implications of a declaration of Aboriginal title over fee simple lands would directly affect Wolastoqey Nation as well as other Indigenous groups, such as Elsipogtog, who are seeking a declaration of Aboriginal title. Elsipogtog relies in part on *Taseko Mines Limited v. Canada (Minister of Environment)*, 2019 FCA 320, [2019] F.C.J. No. 1502 (QL), where courts were urged to

exercise restraint in deciding cases on constitutional grounds, where non-constitutional grounds are available.

(b) *The appellants mischaracterize the motions judge's findings on expropriation*

[157] The motions judge did not find a court can order the expropriation of fee simple lands which are the subject of Aboriginal title. As such, the issue has no bearing on whether the motions judge's decision violates the appellants' rights to procedural fairness. A finding by this Court that the trial judge lacks jurisdiction to order expropriation would have far reaching consequences and should not be decided on an appeal of a procedural decision.

(c) *The relief sought by the appellants is premature and disproportionate*

[158] The appellants' concerns regarding the impact of a declaration will only crystallize if the adjudicating court issues such a declaration. As such, to remove the fee simple lands, a large portion of the claim, would be a remedy that is disproportionate to the alleged wrongs, as it would fundamentally change the scope of the underlying proceeding and foreclose the ability of the Wolastoqey Nation to fully enforce their constitutional rights. Rather, if the Court finds the order contested on appeal violates the appellants' procedural rights, the violation should be remedied by clarifying the basis on which the appellants are entitled to participate.

(d) *The relief sought by the appellants is contrary to reconciliation*

[159] Redressing historical wrongs is critical to reconciliation. The removal of the appellants' fee simple lands from the claim would preclude the possibility of rectifying harm that flows from colonization and the Crown's assertion of sovereignty.

(e) *The relief sought by the appellants would undermine the basis of Aboriginal title*

[160] Aboriginal title is *sui generis* in part because it exists by virtue of the prior occupation by Indigenous people of the lands in Canada. An order which denies the ability of Aboriginal people to seek the return of these lands would undermine the objective of reconciling their occupation with the assertion of Crown sovereignty. Elsipogtog submits that Aboriginal title is distinct from other property interests in part because it has both physical and cultural elements which tie Indigenous groups to the land. The relief sought disregards the significance of this relationship and fails to account for the non-economic harms which would result from a decision denying Wolastoqey Nation the ability to pursue the return of the land.

(f) *The relief sought is contrary to the principles of the United Nations Declaration on the Rights of Indigenous People (UNDRIP)*

[161] UNDRIP, which has been incorporated into Canada's positive law, is binding and can be used to interpret Canadian law. Decisions relating to Aboriginal title must be consistent with UNDRIP principles. UNDRIP emphasizes the right of Indigenous peoples to fair and effective remedies for dispossession of land as well as the importance of restitution. An order preventing the Wolastoqey Nation from pursuing a claim for a declaration of Aboriginal title on fee simple lands would limit the remedies available to Wolastoqey Nation, and directly conflict with UNDRIP principles. I respectfully disagree; nothing in those principles supports the view that a declaration of Aboriginal title in relation to privately owned lands is a proper remedy where the preludial process is tainted by breaches of the procedural fairness owed to the private owners.

(g) *Relief Sought*

[162] Elsipogtog makes no request for costs and requests no order for costs against it.

(2) Buctouche Mic Mac Band, Natoaganeg First Nation, Eel River Bar First Nation, Fort Folly First Nation, Indian Island Band, Metepenagiag Mi'kmaq Nation, Esgenoôpetitj First Nation, and Pabineau First Nation (MTI First Nations)

[163] MTI First Nations disagree with the characterization of this appeal as concerning questions of procedural fairness and adopt the submissions of Wolastoqey Nation on that point. The appellants seek to argue constitutional issues which are raised prematurely and unnecessarily. To the extent the Court deems these issues must be addressed, MTI First Nations adopt the position of Wolastoqey Nation and its submissions.

(a) *The motions judge found that Aboriginal title burdens the Crown's underlying title*

[164] Relying notably on *Delgamuukw* and *Tsilhqot'in Nation*, MTI First Nations submit it is well established law that declarations of Aboriginal title burden the Crown's interest. The motions judge's decision does not inherently affect the rights of third parties, as these rights are already subject to the Crown's underlying title, which is burdened by Aboriginal title.

(b) *The motions judge did not determine how Aboriginal title affects freehold interests*

[165] The motions judge clearly stated that the interplay of Aboriginal title and fee simple title to lands would be resolved at a later stage, if and when Wolastoqey Nation's Aboriginal title has been judicially declared.

(c) *The submissions of the appellant Crabbe are incorrect in law*

[166] The arguments by Crabbe on the applicability of the *Statute of Frauds* as well as the regionality of a test for Aboriginal title fail to reflect the unique nature of Aboriginal title and are not grounded in law, as the Supreme Court has never found that the test for Aboriginal title is site specific. The MTI First Nations submit Aboriginal title is *sui generis* and, although it is recognized at common law, it is not directly analogous to other proprietary interests. Its unique features include its inalienability, its source in the prior occupation of Canada by Aboriginal people and its communal nature. In *Tsilhqot'in Nation*, the Supreme Court stated Aboriginal title cannot be understood solely from a common law perspective. Academics have commented that it is more akin to allodial title. MTI First Nations submit it is incorrect to analogize Aboriginal title to other common law doctrines which may have been extinguished by the *Statute of Frauds*. With respect to Crabbe's argument regarding adverse possession, the MTI First Nations adopt the position of Wolastoqey Nation.

[167] The MTI First Nations also adopt the principles and test for Aboriginal title set out by Wolastoqey Nation. Assessing occupation does not require the claimant to demonstrate notorious or visible use. The MTI First Nations also adopt the position of Wolastoqey Nation with respect to the source of Aboriginal title, as well as the binding nature of *Tsilhqot'in Nation*. With respect to the *Marshall; Bernard* decision, MTI submits the comments by the Supreme Court upon which the appellants rely were made in the context of a regulatory prosecution and, as such, evidence before the trial court was necessarily limited. Further, the Supreme Court declined to make any determination on the issue of extinguishment, meaning that the Court's finding that the title in that case had not been extinguished was not disturbed; *Tsilhqot'in Nation* echoed the appeal court decisions in *Marshall; Bernard* and clarified that the territorial approach to Aboriginal title was not rejected in its prior decision in *Marshall; Bernard*. The test for Aboriginal title in New Brunswick is the test consistently articulated by the Supreme Court of Canada, most recently clarified in *Tsilhqot'in Nation*.

(d) *Relief Sought*

[168] The MTI First Nations seek no order as to costs and ask that no order be made against them.

(3) EMS Enterprise Inc.

[169] The motions judge erred in law by concluding the doctrine of Aboriginal title applicable to Crown lands applies to private lands, such as those owned by JDI, Acadian, Crabbe, and EMS as an unnamed fee simple landowner whose lands are included in Schedule "A" of the Statement of Claim. EMS agrees with the grounds of appeal advanced by JDI, Acadian, and Crabbe. The crux of EMS's argument is that a declaration of Aboriginal title is not available over private lands.

[170] EMS raised the following three issues: (a) Is a declaration of Aboriginal title over fee simple lands available at law? (b) Can fee simple title and Aboriginal title co-exist, such that a declaration of Aboriginal title can issue over fee simple lands without disturbing the rights of the private landowner? (c) Can the Canadian constitutional framework support the co-existence of fee simple and Aboriginal title?

(a) *Is a declaration of Aboriginal title in fee simple lands available at law?*

[171] EMS contends the decision in first instance is based on a version of Aboriginal title that does not exist at law, as the doctrine concerning Aboriginal title created by the Supreme Court of Canada concerns Crown land only.

[172] The framework regarding justifications for infringing Aboriginal title only functions prospectively, as related to Crown objectives, and Crown decision-making concerning those things over which the Crown has power. EMS argues such a framework does not exist in relation to fee simple lands because the land is no longer under Crown control. The doctrine of Aboriginal title applicable to Crown land should not have been

applied to fee simple land, as the motions judge did not have the judicial authority to do so. EMS submits this is something only the Supreme Court of Canada can do.

(b) *Can fee simple title and Aboriginal title co-exist such that a declaration of Aboriginal title can issue over fee simple lands without disturbing the rights of the private landowner?*

[173] Aboriginal title as articulated by the Supreme Court of Canada does not allow for the co-existence of Aboriginal title and fee simple ownership in the same land, because the rights under Aboriginal title and fee simple overlap and cannot exist in tandem. EMS submits the Wolastoqey Nation wants the trial court to issue a declaration of Aboriginal title that is binding on the Crown over the land that is held by those impacted under Schedule "A", and this is problematic both practically and at law. First, in *Tsilhqot'in Nation*, the Supreme Court stated that a declaration of Aboriginal title invalidates other rights to the land. While this was in relation to Crown land, EMS submits it would be the same result for fee simple land holders. Second, EMS submits the version of Aboriginal title to be litigated is unknown at law and would have fee simple land holders resting on both the Crown's radical title and Aboriginal title, which would encumber the fee simple land holder's ability to defend their interests. EMS submits many questions arise concerning how Aboriginal title and fee simple land title could co-exist.

(c) *Can the Canadian constitutional framework support the co-existence of fee simple and Aboriginal title?*

[174] EMS uses this argument to question what would occur should there be a declaration of Aboriginal title over lands owned in fee simple. For instance, EMS asks whether "private landowners within the Aboriginal title lands [would be] subject to the governance of the Aboriginal title holder." Aboriginal rights, including title, must be reconciled with Canadian sovereignty and constitutional law. EMS posits multiple questions about how Aboriginal authority over lands held in fee simple might act as a "third order of government for non-Aboriginal people". As related to the division of powers, EMS

raises questions about what a declaration of Aboriginal title would mean concerning New Brunswick's control over its own lands under s. 92 of the *Constitution Act, 1867*, R.S.C. 1985, App. II, No. 5. This uncertainty is problematic for businesses in New Brunswick, and risks jeopardizing economic stability.

[175] Part of reconciliation may include placing limits on Aboriginal rights. EMS quotes *Delgamuukw*, which emphasizes the words from *R. v. Gladstone*, [1996] 2 S.C.R. 723, [1996] S.C.J. No. 79 (QL): "Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a necessary part of that reconciliation" (para. 73). Aboriginal rights are not absolute, and exist within Canadian society and Canada's constitutional framework. EMS quotes *Chippewas of Sarnia* to underscore this point: "a court must take into account the perspective of the Aboriginal people claiming the right … while at the same time taking into account the perspective of the common law" such that "[t]rue reconciliation will, equally, place weight on each". The accommodation is to be done in a manner that does not strain "the Canadian legal and constitutional structure". The co-existence of Aboriginal title and fee simple title is not supported by Canada's constitutional framework.

(d) *Order Sought*

[176] EMS requests the Court vary the decision of the motions judge to exclude privately held lands from the claim for a declaration of Aboriginal title, and to amend the Statement of Claim to make plain the claim for a declaration is only over Crown lands in the areas under Schedule "A". There is no request for costs.

IV. Analysis and Decision

[177] The parties have left no stone unturned in marshalling the arguments in support of their respective positions. However, the appeal turns on this question: is it plain

and obvious that the order under appeal – greenlighting the prosecution against the Crown of Wolastoqey Nation's claim for a declaration of Aboriginal title with respect to the appellants' lands – is unsustainable? In the text that follows, I do not deal with any of the parties' arguments unless they are relevant to the resolution of that critical question, which is answered affirmatively.

A. *The Standard of Review*

[178] All issues that are critical to the disposition of the appeal are legal in nature. The applicable standard of review is therefore correctness. In this regard, I disagree with Wolastoqey Nation's argument that deference is owed on the review of the order under appeal, because it was rendered by the judge qua case management judge. That is simply not the case; the order determined the rights of the parties in connection with the merits of the action as pleaded.

B. *Rules 23.01(1)(b) and 37.10(a)*

[179] Rule 23.01(1)(b) provides a defendant may, at any time before the action is set down for trial, apply for an order striking out the Statement of Claim that does not disclose "a reasonable cause of action". The motions judge acknowledged the framework for the application of Rule 23.01(1)(b) is articulated in *Sewell v. ING Insurance Co. of Canada* (2007), 314 N.B.R. (2d) 330, [2007] N.B.J. No. 219 (C.A.) (QL):

> The question before the motion judge was not whether Ms. Sewell's action was factually meritorious, an issue determinable prior to trial on a motion for summary judgment under Rule 22.01(3), but whether her Statement of Claim disclosed a reasonable cause of action. I emphasize, once again, that Rule 23.01(1)(b) authorizes the striking of the Statement of Claim, not the striking of a Notice of Action or the dismissal of the action (regarding the last point, see *Norris v. Lloyd's of London* (1998), 205 N.B.R. (2d) 29 (C.A.), [1998] N.B.J. No. 351 (QL) at para. 13).
>
> […]

> 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 et al.* (2001), 243 N.B.R. (2d) 263, [2001] N.B.J. No. 382 (QL), 2001 NBCA 97, para. 38 and *Boisvert v. LeBlanc* (2005), 294 N.B.R. (2d) 325, [2005] N.B.J. No. 561 (QL), 2005 NBCA 115, para. 21). To expand the exercise beyond those limits would operate to morph the motion under Rule 23.01(1)(b) into an application for summary judgment under Rule 22, the appropriate vehicle to determine prior to trial whether there is factual merit to a claim; (3) the Statement of Claim is to be read generously to accommodate drafting deficiencies; and (4) where a generous reading of its provisions fails to breath life into a pleading, all suitable amendments should be allowed (see Rule 27.10(1) and *LeDrew et al. v. Conception Bay South (Town)* (2003), 231 Nfld. & P.E.I.R. 61, [2003] N.J. No. 276 (QL), 2003 NLCA 56). Those principles reflect the Legislature's injunction that the Rules be "liberally construed to secure the just, least expensive and most expeditious determination of every proceeding on its merits": Rule 1.03. [paras. 23 and 26]

[180] The judge noted a reasonable cause of action is not required before declaratory relief may be granted. Construing broadly Rule 23.01(1)(b), in accordance with Rules 1.02.1 and 1.03(2), she found Rule 23.01(1)(b) was engaged, in the context of a claim for declaratory relief, where there was "the absence of the grounds for a declaration" (para. 90). That interpretation is not challenged on appeal, and I do not doubt its correctness.

[181] Rule 37.10(a) states that, on the hearing of a motion, the court may, in a proper case, order the motion be converted into a motion for judgment. Unlike the situation in other jurisdictions, a striking order under Rule 23.01(1)(b), by itself, does not yield a judgment dismissing the action or a claim; that outcome can only be attained by a conversion order under Rule 37.10(a). The importance of that rule is explained in *Lloyd's*

of London v. Norris (1998), 205 N.B.R. (2d) 29, [1998] N.B.J. No. 351 (C.A.) (QL), at paras. 13, 17-18 and 19-20, and *Gillis v. Cities of Bathurst and Fredericton*, 2020 NBCA 16, [2019] N.B.J. No. 401 (QL), at paras. 39-40. I agree with the following observations on point by the motions judge:

> At least one party has requested judgment following the requested striking of the pleadings pursuant to *Rule 37*. I am mindful that such relief in the form of judgment, is a matter of discretion but only exercisable where an amendment to the pleadings will not correct the pleadings deficiency. Judgment does not always follow as a matter of course in motions for *Rule 23.01(1)(b)* relief:
>
> > Under our Rules of Court, where relief is granted under Rules 23.01(1)(a) or (b), judgment does not automatically follow. Indeed, an amendment to the pleadings might cure the problem and breathe life into the action or defence, hence the option, in a proper case, of a conversion order and judgment pursuant to Rule 37.10(a). For statement of claim purposes, that relief is warranted where no amendment giving rise to a reasonable cause of action is appropriate: see *Tingley*, at para. 39 [para. 83]

[182] Since no amendment to the Statement of Claim could provide grounds for a declaration of Aboriginal title, at least "directly" against the appellants, the motions judge applied Rule 37.10(a) and granted judgment in favour of the appellants. In my view, she did not commit any error in rendering that order. That being so, reversal is not an option.

C. *Facts assumed for purposes of the ruling under Rule 23.01(1)(b)*

[183] It is axiomatic that motions for a striking order under Rule 23.01(1)(b) are to be determined on the basis that the allegations of fact in the subject pleading are assumed to be proven. There are exceptions to that general rule but none have application here.

[184] The following allegations of fact in the Statement of Claim were deemed proven for the purposes of determining the appellants' motions to strike:

(a) Before the British assertion of sovereignty in 1759, the Wolastoqey Nation occupied vast tracks of territory, including territory in what is now New Brunswick (para. 15 of the Statement of Claim);

(b) The territory occupied by the Wolastoqey Nation included the "Traditional Lands", being what is now known as the Saint John River watershed and surrounding area, including the land, subsurface land and minerals, air space, land covered by water, offshore and inshore water bodies, foreshore, rivers, lakes and streams situated within the area (para. 16);

(c) The Wolastoqey Nation was present on the "Traditional Lands" prior to the British assertion of sovereignty (para. 17);

(d) The Wolastoqey Nation, as a whole, had exclusive occupation of the entire "Traditional Lands", and members of the Wolastoqey Nation were able to travel and harvest freely throughout the "Traditional Lands" (para. 18);

(e) At the time of the British assertion of sovereignty in 1759, Wolastoqey Nation controlled, regularly used, exclusively occupied, and exercised exclusive stewardship and jurisdiction over their territory, including the "Traditional Lands", in accordance with Wolastoqey law. That law provided that anyone from outside the territory was expected to seek permission to be present. Likewise, anyone seeking to pass through Wolastoqey Nation's territory or to otherwise use the "Traditional Lands" would require permission. It was customary that permission would be granted to other friendly Indigenous persons to travel through or to temporarily stay in the territory and to hunt, fish and gather to feed themselves while doing so (para. 19);

(f) Permission was also granted to French groups to occupy certain lands within Wolastoqey Nation's territory (para. 20);

(g) Prior to and at the British assertion of sovereignty and continuing to present day, Wolastoqey Nation has used the "Traditional Lands" for a variety of purposes including hunting, fishing, gathering and other resource-harvesting activities, trade, and cultural and spiritual practices (para. 21);

(h) At all relevant times, from the British assertion of sovereignty in 1759, to the peace and friendship treaties between the British and Wolastoqey Nation from 1725-1778, the British Crown recognized Wolastoqey Nation as the Indigenous people who exclusively occupied their territory, including the "Traditional Lands" (para. 22).

[185] The test for a finding of Aboriginal title is set out in *Marshall; Bernard*. It is reiterated, for all intents and purposes, in *Tsilhqot'in Nation*:

> The claimant group bears the onus of establishing Aboriginal title. The task is to identify how pre-sovereignty rights and interests can properly find expression in modern common law terms. In asking whether Aboriginal title is established, the general requirements are: (1) "sufficient occupation" of the land claimed to establish title at the time of assertion of European sovereignty; (2) continuity of occupation where present occupation is relied on; and (3) exclusive historic occupation. In determining what constitutes sufficient occupation, one looks to the Aboriginal culture and practices, and compares them in a culturally sensitive way with what was required at common law to establish title on the basis of occupation. Occupation sufficient to ground Aboriginal title is not confined to specific sites of settlement but extends to tracts of land that were regularly used for hunting, fishing or otherwise exploiting resources and over which the group exercised effective control at the time of assertion of European sovereignty. [para. 50]

[186] In my view, there is no merit to the contention that it is plain and obvious the Statement of Claim does not set out a sufficient factual foundation for a finding of Aboriginal title. The allegations of fact, which are deemed proven, suffice to preclude the contrary view. If it were otherwise, I would have invited the Wolastoqey Nation to propose suitable amendments to its Statement of Claim.

[187] The motions judge allowed, in part, the appellants' motions to strike, removed them from the action and granted judgment confirming those determinations. She did so on the ground that the requisite direct "legal relationship or interest" between Wolastoqey Nation and the moving parties did not exist (para. 104). This being the case, Wolastoqey Nation's direct claim against the moving parties for a declaration of Aboriginal title over their lands had "no reasonable prospect of success" (para. 109). In my opinion, that determination is correct.

[188] The four criteria for the issuance of declaratory relief were settled in *Ewert* where the Court stated: "A court may, in its discretion, grant a declaration [1] where it has jurisdiction to hear the issue, [2] where the dispute before the court is real and not theoretical, [3] where the party raising the issue has a genuine interest in its resolution, and [4] where the respondent has an interest in opposing the declaration sought […]" (para. 81). The judge's rationale for the conclusion that the pleaded claim against the appellants for a declaration of Aboriginal title over their lands did not have a reasonable prospect of success references the criteria adopted in *Ewert*:

> As stated, I find that the real issue in the [Industrial Defendants'] motion before me, is the fourth ground required [by *Ewert*] for a declaration against the IDs and the Crown, rephrased by me, as follows: *do the Moving Defendants (and all IDs by implication) have a legal relationship and/or an interest in dispute with the Plaintiffs such that they are proper parties to oppose the declaration sought*?
>
> It may well be that the Plaintiffs cannot meet the second ground [in *Ewert*] supporting a declaration against the IDs. That is, any dispute between the Plaintiffs and the IDs is theoretical, and not real, based essentially upon the same

issue that arises on the fourth ground [set by *Ewert*], namely that a declaration of Aboriginal title to the claimed lands to which fee simple title is held cannot resolve any apparent conflict between the two interests as such resolution in the form of reconciliation and relief can only come through the Crown (as guided and perhaps directed, if need be, by the Court).

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

[…]

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

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

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

There is thus no private law direct legal connection or relationship between the private party IDs and the Plaintiffs, other than that the IDs own the lands sought by the Plaintiffs based on their assumed (for the purposes of this motion) Aboriginal title to the same land.

[…]

There is nothing in the pleadings that converts the Claim to one in private law arising from a *direct* legal relationship

between the non-Crown Moving ID Defendants and the Plaintiffs.

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

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

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

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

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

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

I agree with the submission from JDI that the Claim as filed against the IDs seeks private, property law-based remedies

directly against private third parties for alleged constitutional breaches by the Crown. Their presence in this litigation is a distraction and a detraction from the constitutional nature of the action.

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

Indeed, this "routine" motion by the IDs to strike pleadings before me took four hearing days to complete with post-hearing briefs. In this motion, only three of the seven corporate defendants sought to file materials and make submissions. All but two corporate defendants were in attendance. It is to be expected that as the Claim advances, more of the corporate defendants may wish to weigh in with materials and submissions. The pace of this litigation will no doubt be even more glacial than most Aboriginal rights cases.

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

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

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

> The Moving ID Defendants, as I interpret their complaint with the pleadings, dispute that the pleadings establish that they have an interest or a legal relationship *directly* with the Plaintiffs making them proper parties to oppose the action alongside the Crown. In essence, the argument is that the pleadings against them do not establish this fourth necessary ground for a declaration directly against them [*Ewert*].
>
> Claims such as the one before me are, I believe, misconceived in their attempt to claim Aboriginal title directly against fee simple owners without any pleadings of a *direct legal* relationship between the Aboriginal group and the fee simple owners. The private parties are only involved in the litigation because they hold fee simple title to land granted by the Crown that may be burdened with Aboriginal title. [paras. 102-104, 109-112, 119-132]

[189] Wolastoqey Nation agrees with the judge's rationale for the striking order under Rule 23.01(2)(b) and the confirmatory judgment under Rule 37.10(a). So do I. Wolastoqey Nation also agrees with the order that allows the continued prosecution of the claim for a declaration of title against the Crown in relation to the appellants' lands in Schedule "B", despite their removal from the action. Here, we part ways for the reasons that follow.

D. *What is the content of Aboriginal title?*

[190] The incidents of Aboriginal title were enunciated by the former Chief Justice of Canada in *Tsilhqot'in Nation*:

> Aboriginal title 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]

[191] As I understand the law, those incidents acquire legal significance for title purposes only if a judicial declaration of Aboriginal title is made. Thus, in this case, a

finding of Aboriginal title, unaccompanied by a confirmatory judicial declaration, would not confer ownership rights in the appellants' land, such as "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." However, a judicial declaration of Aboriginal title would confer those ownership rights, and I am unable to see how those rights can co-exist with the very same rights vested in fee simple owners. That said, and as asserted, a finding of Aboriginal title would open the door to consideration of an award of damages and compensation against the Crown, in accordance with paragraphs 1(c), 2, 31, 33(e), 34, 35 and 36 of the Statement of Claim.

[192] In *Tsilhqot'in Nation*, the Supreme Court of Canada ruled the framework for the application of s. 35, which recognizes and affirms existing Aboriginal rights, contemplates a principled reconciliation of Aboriginal rights and the interests of all Canadians. In my view, 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.

E. *The conditions precedent for the discretionary remedy of a declaration of Aboriginal title*

[193] I distil from the jurisprudence the following conditions precedent for a declaration of Aboriginal title: (1) A finding of Aboriginal title; (2) Satisfaction of the criteria set by *Ewert*; (3) The absence of a valid defence; and (4) No resulting injustice.

F. *The discretionary nature of a judicial declaration of Aboriginal title*

[194] Aboriginal title is a collective right recognized and affirmed by s. 35 of the *Constitution Act, 1982*. If 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*, at para. 67.

[195] Our system of law is founded on the primacy of the rule of law. The "requirement for procedural regularity […] in civil proceedings […] is inherent within the rule of law," and it "is the responsibility of a civil court to ensure that in its proceedings, the rules of fundamental justice and due process of law are followed" (see Abrams, McGuinness *Canadian Civil Procedure Law*, 2nd ed., at p. 72, para. 1.147). The notion of completely unbridled discretionary powers is the antithesis of the rule of law: Justice Michael Barker and Alice Nagel, AIAL Forum No. 79, *Legal Unreasonableness: Life after Li*, p. 3. In *Sharp v. Wakefield*, [1891] A.C. 173, at 179, Lord Halsbury L.C. underscored the longstanding principle that a discretionary power stands to be exercised "according to the rules of reason and justice, not according to private opinion; […] according to law, and not humour […] [and] not arbitrary, vague, and fanciful, but legal and regular." In *House v. The King* (1936), 55 C.L.R. 499, at 503, Starke J. described the nature of judicial discretion: it is "very wide, but it must be exercised judicially, according to the rules of reason and justice, and not arbitrarily or capriciously or according to private opinion." That view of the restraint on the judicial exercise of discretion is well-settled in this jurisdiction: *Doiron v. Haché*, 2005 NBCA 75, 290 N.B.R. (2d) 79, at para. 57, Richard J.A. (now C.J.N.B.) writing for a unanimous panel.

[196] I make mine the view that judicial discretion may be exercised only after "affording all interested parties an opportunity to be heard" (see *Canadian Civil Procedure Law*, at p. 105, para. 2.30). The appellants are unquestionably "interested" in the claim for a declaration of Aboriginal title. After all, it targets their fee simple lands and their rights in relation to those lands. The fact that the claim is now against the Crown does not erase the appellants' interest since, if and when a declaration is granted, those rights will cease to be exclusive, and the Crown will undoubtedly turn to the appellants to ensure compliance. Additionally, Wolastoqey Nation is seeking an order quashing the Crown grants upon which the appellants rely for title.

G. *Reconciliation*

[197] Reconciliation is the fundamental objective of the modern law of Aboriginal rights: *Restoule* at para. 68. Along the same lines, it has been written that reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship is the grand purpose of s. 35 of the *Constitution Act, 1982* (see *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, at para. 10, and *Tsilhqot'in*, at para. 82). Reconciliation "is a balancing process that does not involve the subordination of all other public rights to Aboriginal rights": *Wesley v. Albert*, 2024 ABCA 276, [2024] A.J. No. 1011 (QL), Slatter J.A., at para. 45. The honour of the Crown "does not require that every decision be made in the way most favourable to the Aboriginal interest" (*ibid*, at para. 57).

[198] There is an important difference between a finding of Aboriginal title and a judicial declaration of Aboriginal title. As stated, perhaps too often, a finding of Aboriginal title does not necessarily justify a declaration of Aboriginal title. In *Shot Both Sides*, the Supreme Court of Canada confirmed the criteria identified in *Ewert v. Canada* continue to govern the availability of declaratory relief. Those criteria are set out in the following excerpt from *Ewert*: "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 […]" (para. 81).

[199] In my view, once judgment was granted confirming there was no basis in law for the claim for a declaration of Aboriginal title against the appellants, and removing them as parties to the action, the Court of King's Bench relinquished jurisdiction to make any such declaration against the Crown over the appellants' lands. I repeat: judicial discretion may be exercised only after "affording all interested parties an opportunity to be heard" (see *Canadian Civil Procedure Law*, at p. 105, para. 2.30). As a result of the determination the appellants were not proper parties to the action for a declaration of Aboriginal title against their lands and the judgment removing them as parties, thereby

depriving them of their right to be heard in connection with that action, the trial court lacks jurisdiction to grant any such declaration against the Crown. Moreover, there is no longer any legal dispute between the appellants and Wolastoqey Nation. Although Wolastoqey Nation, the party raising the issue of Aboriginal title over the appellants' lands, has a genuine interest in its resolution, that interest is fairly satisfied by a finding of Aboriginal title and an award of damages and compensation for any wrong committed in relation to the lands in question by the Crown. Finally, while the appellants would have an interest in opposing the declaration sought, their removal from the action precludes them from vindicating any such interest. It bears re-emphasis that, by virtue of the judgment under appeal, intervention by the appellants can only take place after a declaration of title is rendered. By that time, it would be too late for meaningful opposition.

[200] That said, even if the *Ewert* criteria were met in this case or ceased to govern because the Crown is the only defendant, I am convinced no court would exercise its discretion in favour of a declaration of Aboriginal title over the appellants' 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: *Canadian Civil Procedure Law*, at p. 105, para. 2.30. Second, 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). In this regard, Wolastoqey Nation has not persuasively countered Acadian's submission that it explicitly acknowledged in first instance "some equivalent" to the "return of land" could satisfy the claim of Aboriginal title, in addition to compensation for loss of use. In other words, a remedy other than the return of land could be acceptable (see footnote 27 at p. 20 of Acadian's Appellant's Submission). Third, 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. In fact, the appellants have been described as "innocents"

in relation to the dispute between Wolastoqey Nation and the Crown. As the motions judge underscored:

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

[201] In an article entitled "How can Canada reconcile Aboriginal title and the rights of people with property on that land?" and published in *The Globe and Mail* on September 9, 2024, Professor Kent McNeil expresses the following opinion:

> Dispossessing the current beneficiaries of government land grants would not be just, especially when the land has passed through numerous innocent hands. Instead, compensation should be paid to the Indigenous nations concerned.

[202] I endorse this commonsensical and reconciliation-friendly conclusion. In my view, remedial justice favours compensation from the Crown over dispossession of private fee simple owners in all cases although, admittedly, that is especially the case "when the land has passed through numerous innocent hands".

V. Conclusion and Disposition

[203] I would reverse the decision to let stand: (1) the claim against the Crown for a declaration of Aboriginal title over the appellants' lands; and (2) all relief consequential to any such declaration. In the result, the appellants' lands (Schedule "B" to the Statement of Claim) are removed from the claim against the Crown for a declaration of Aboriginal title. However, Wolastoqey Nation may prosecute: (1) its claim for a declaration of Aboriginal title over the ungranted Crown lands identified in Schedule "C" to the Statement of Claim (30,446 parcels); and (2) its claim for a finding of Aboriginal title in respect of the privately owned lands in Schedule "A", including the appellants' 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” .

[204] Having considered the fulsome submissions of the parties, I would make the following order of costs with respect to the underlying proceedings in the Court of King’s Bench and in this Court: Wolastoqey Nation shall pay costs of $10,000 to each of J.D. Irving Limited, Acadian Timber GP Inc. and H.J. Crabbe & Sons Ltd., and no costs are payable to or by the added parties (Rule 15.02(2)).