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Private Land Owners can Argue "Extinguishment" in Aboriginal Title Cases

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On May 17, 2018, the British Columbia Supreme Court upheld that “extinguishment” is a viable defence to argue in cases of claims of Aboriginal title to fee simple lands.

The Plaintiff, Kwikwetlem First Nation, commenced a claim for Aboriginal title on February 9, 2016, seeking, among other things, a declaration of Aboriginal title over a “claim area within the Coquitlam watershed.”[1] Notably, the “claim area” includes both Crown Land and lands held in fee simple title.

Accordingly, and in response to the relief sought by the Plaintiff, the Defendants, the Government of British Columbia, and the fee simple landowners, Metro Vancouver, among others, advanced the following defences:

- that any Aboriginal title had been “displaced” by the granting of fee simple title;
- that any Aboriginal title had been “extinguished” by the granting of fee simple title; and
- that Aboriginal title and fee simple title are incompatible interests in land.

On March 5, 2018, the Plaintiff brought an application to strike these defences, in their entirety, on the basis that it was “plain and obvious” these defences would fail. In this regard, the Plaintiff advanced three primary arguments:

1. Aboriginal title and fee simple title are compatible interests[2];

2. the defence “displacement” of Aboriginal title “is a doctrine unknown to the law and therefore unavailable” to the Defendants[3]; and

3. in order to demonstrate “lawful extinguishment” of Aboriginal title, the Defendants “must satisfy the court that [the Crown] had the clear and plain legislative intent to extinguish the aboriginal right.”[4] The Defendants could not merely rely on the grants of title as evidencing the intent to extinguish, but must be able to point to express statutory provisions enacted by a “constitutionally competent legislature.”[5]

On May 17, 2018, the British Columbia Supreme Court in its decision of *Giesbrecht v British Columbia*, 2018 BCSC 822 (*Giesbrecht*) dismissed, in its entirety, the Plaintiff’s application to strike the defences of displacement and extinguishment of Aboriginal title on the basis that it was not plain and obvious these

defences would fail.

In dismissing the Plaintiff's application, the Honourable Justice Affleck stated that he agreed "with the submissions of the defendants" because:

1. the Court was not "referred to binding authority in which the relationship between existing Aboriginal title to land and Crown grants of title in fee simple to that same land has been squarely addressed"[6];

2. the "legal theory [of displacement] may fail but it has not been tested in the courts", nor was there any "basis on which to determine that it [displacement] is devoid of merit"[7];

3. the law has not reached "a state of stasis on the relationship between Aboriginal title and fee simple title"[8]; and

4. the issues relating to the relationship between "Aboriginal title to land and the validity of fee simple title to that land have long been looming in the background of aboriginal land claim litigation in British Columbia" and the "attempt to remove or attenuate those issues" in a summary way "would be inappropriate."[9]

Accordingly, Justice Affleck concluded that the Plaintiff had not met its onus of establishing that it was "plain and obvious" that the defences, raised by the Defendants in response to the claim of Aboriginal title, would fail.

This decision is significant because it serves as a reminder that the relationship between Aboriginal title and fee simple title remains largely unresolved. While many governments are avoiding the use of the term and concept of extinguishment, it is clear that this legal principle is still relevant in understanding the relationship, if any, between the rights of fee simple land owners with those of Aboriginal peoples claiming Aboriginal title.

Read the full decision here.

**** Thomas Isaac and Jared Enns, Cassels Brock & Blackwell LLP, are counsel of record for the Defendant, Metro Vancouver, in these proceedings***.

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[1] *Giesbrecht v British Columbia*, 2018 BCSC 822, at para 2

[2] Ibid, at para 55

[3] Ibid, at para 44

[4] Ibid, at para 24

[5] Ibid, at para 71

[6] Ibid, at para 76

[7] Ibid, at para 78

[8] Ibid, at para 79

[9] Ibid, at para 80
