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Memorandum

Date: February 17, 2021 Our file: 2151
To: Adam Olsen, MLA
From: John W. Gailus
Re: **Background to Tsawout James Island Claim**

The James Island Claim was filed in the BC Supreme Court on January 24, 2018, naming as defendants the Attorney General of Canada ("**Canada**"), Her Majesty the Queen in Right of BC ("**BC**") and the fee simple owner of James Island, JI Properties Inc. ("**JI Properties**"). Since then, Canada and BC have filed their responses, and the Claim has been amended to discontinue the specific performance claim against JI Properties. We are currently in the document discovery phase.

Theory of the Case

Prior to and at sovereignty – 1846 for the purposes of claims of Aboriginal title – Tsawout exclusively used, occupied and exercised effective control over significant terrestrial and marine territory, which included, *inter alia*, the Saanich Peninsula and Southern Gulf Islands as well as significant portions of the San Juan Islands ("Tsawout Territory"). Prior to and at sovereignty, Tsawout used Tsawout Territory for a variety of purposes including hunting, fishing, gathering and other resource-harvesting activities, trade, and cultural and spiritual practices, and managed such activities pursuant to its own laws and legal traditions.

James Island or LEL,TOS was one of the islands exclusively occupied by Tsawout at the time of Sovereignty. By Letters Patent dated January 13, 1849, the Imperial Crown granted Vancouver Island to the Hudson's Bay Company for the purposes of settlement and colonization. On or about February 11, 1852, Governor James Douglas concluded a treaty with representatives of the Saanich Tribe (the "Treaty"). Tsawout is a beneficiary and successor to the Treaty.

In exchange for a 'sale' of lands on the Saanich Peninsula, the Treaty provided that any "village sites and enclosed fields" would be surveyed and set aside for Tsawout. In addition, the Treaty promised that the Tribes would be free to continue their hunting on unoccupied lands and fisheries as formerly. At the time of the Treaty, Tsawout extensively used and occupied James Island. In breach of the Treaty, James Island was never set aside as a reserve and through a series of transactions fell into private hands.

Tsawout sued the Province of British Columbia and Canada (collectively the "**Crown**") seeking declarations that James Island, or portions thereof, are a village site or enclosed field within the meaning of the Treaty or, in the alternative, Aboriginal title lands. In addition, Tsawout seeks equitable compensation for breach of Treaty and damages of loss of use and unjustified infringement of Tsawout treaty rights and Aboriginal title. Tsawout initially named JI Properties, the fee simple owner of the Island, as a party but reached an agreement to discontinue against them. The claim for an order of specific performance against James Island was discontinued.

The Crown has raised a variety of defences to the claim, the majority of which may be dismissed summarily. Claims that the reserve promises only related to the Saanich Peninsula or the "surrender" covered James Island or that there was no settlement there or Tsawout is not the proper rights holder will not, in our view, be successful. The legal description under the Treaty only includes lands on the Peninsula. If the Crown is correct that the reserve promise only relates to lands on the Peninsula, then James Island remains burdened with Aboriginal title. If the reserve promise extends beyond the Peninsula, then James Island (as well as other locations throughout the Gulf Islands and on the Mainland) ought to have been surveyed and set aside as reserve lands. There is no dispute that Tsawout is a successor to the Saanich Tribe and members of Tsawout are descendants of the signatories to the Treaty. Finally, the evidence, particularly the archaeological evidence of JI Properties' own consultants, confirms at least two village sites and several other burial and harvesting sites are present on LEL,TOS.

There may be limitations or laches issues that may affect the quantum of damages that might be awarded to Tsawout. Importantly, the claims for declaratory relief, ie. that the Island is a village site within the meaning of the treaty or burdened with Aboriginal title, are not subject to a limitation period.

The unanswered question is how to reconcile such a declaration – whether it be a village site or Aboriginal title declaration – with fee simple title. In our view, the law generally operates on the "first in time" principle, which would mean that the declaration would trump any fee simple title. Of course, any dispossessed fee simple title holder could seek compensation for receiving a defective title from the Crown. Importantly, we think it likely that the Crown would not want a court to answer that question as it would potentially expose it to unlimited liability, particularly in British Columbia where most of the Province is not subject to 'cede and surrender' treaties.