IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Gamlaxyeltxw v. British Columbia (Minister of Forests, Lands & Natural Resource Operations),* 2018 BCSC 440

Date: 20180320
Docket: S159630
Registry: Vancouver

Between:

Gamlaxyeltxw also known as Wilhelm Marsden,
Wii'litsxw, also known as Gregory Rush,
Luuxhon also known as Don Russell,
Gwass Hlaam also known as George Philip Daniels,
Malii also known as Glen Williams,
Haizimsque also known as Ken Russell,
Gwinuu also known as Phyllis Haizimsque,
Watakhayetsxw also known as Agatha Bright
on behalf of themselves and in their capacity as the Gitanyow Hereditary Chiefs and on behalf of all Gitanyow persons

Petitioners

And

Minister of Forests, Lands and Natural Resource Operations
and Nisga'a Nation

Respondents

Corrected Judgment: The second page of the judgment was corrected on March 21, 2018

Before: The Honourable Madam Justice Sharma

(On judicial review pursuant to the *Judicial Review Procedures Act*, RSBC 1996, c. 241)

Reasons for Judgment

(In Chambers)

Counsel for the Petitioners:	P. Grant J. Huberman K. Williams
Counsel for the Minister of Forests, Lands and Natural Resource Operations:	K. Phillips A. Peacock
Counsel for the Nisga'a Nation:	J.R. Aldridge, QC M.S. Clark
Place and Date of Hearing:	Vancouver, B.C. July 17-19, 2017
Place and Date of Judgment:	Vancouver, B.C. March 20, 2018

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I. OVERVIEW

[1] The parties informed me that the main issue in this case is being litigated for the first time. That issue is how to resolve a potential conflict between the constitutional duties of the Crown to one group of Aboriginal people with whom it has entered a modern treaty, and to a different group of Aboriginal people, who have asserted claims for Aboriginal rights and title. The potential conflict arises because land subject to one group's claim for Aboriginal title overlaps a portion of land where the wildlife resources are regulated by the modern treaty.

[2] The petitioners are eight hereditary chiefs of the Gitanyow peoples who bring the case in that capacity, and on behalf of the Gitanyow. The petitioners allege that the Crown failed in its duty to adequately consult them about two decisions made by the respondent, the Minister of Forests, Lands and Natural Resource Operations (for convenience I refer to this respondent as "the Province") regarding moose hunting in the Nass Wildlife Area (NWA). The NWA is a geographical area defined in the Nisga'a Final Agreement (the "Treaty"). The petitioners assert Aboriginal title and rights within the NWA.

[3] The two decisions at issue are: the Minister's decision setting the total annual harvest of moose in the NWA (the "TAH decision"), and the Minister's approval of the annual management plan (the "AMP decision") for the Nisga'a Nation's moose harvest within the NWA. Both decisions are made pursuant to specific paragraphs in the Treaty.

[4] In this litigation, the Province concedes that it has a duty to consult the Gitanyow with regard to the TAH decision, but submits it has complied with that duty. With regard to the AMP decision, the Province's position is that it does not trigger or engage the duty to consult because it does not adversely impact the Gitanyow's asserted rights.

[5] The respondent, Nisga'a Nation's, position is the Treaty does not, and cannot, trigger the Crown's duty to consult the Gitanyow. It submits the Treaty must be strictly applied, which necessarily precludes the existence of a duty to consult other

Aboriginal peoples when decisions are made under it. It also argues that because the Treaty is a treaty and land claims agreement within the meaning of ss. 25 and 35 of the *Constitution Act, 1982,* the Treaty must take precedence over any other asserted Aboriginal rights within the NWA. Lastly, the Nisga'a Nation submits that the Treaty provides within it a complete legal framework for resolving any potential conflict between it and other Aboriginal peoples' rights.

[6] The issue is complicated, and important, because both the Treaty and the duty to consult evoke the Crown's fiduciary duties to Aboriginal peoples, duties flowing from the honour of the Crown. In virtually all the cases cited to me by the parties addressing the duty to consult, the Crown was not faced with these dual constitutional duties. That is why, in my view, the current test regarding the duty to consult must be modified in this case in order to recognize the twin constitutional obligations placed on the Crown. I explain that modification in this judgment.

[7] After applying the existing jurisprudence with that modification, I conclude that the Province has adequately met its duty to consult the Gitanyow about the TAH decision, and imposing that duty does not have the potential to negatively impact the Nisga'a Nation's Treaty rights.

[8] However, I conclude that requiring the Province to consult with the Gitanyow regarding the AMP decision would be inconsistent with the Treaty, and the Crown's obligations to the Nisga'a Nation, and because of that, the duty to consult is not triggered.

[9] I therefore conclude that the petition should be dismissed.

II. PRELIMINARY ISSUES

[10] Three preliminary issues arise: an evidentiary objection, the standard of review, and the ability of the Gitanyow to preserve a right to challenge the validity of the Treaty in a future proceeding while seeking rights of consultation for decisions made under it.

A. Objections to the Admissibility of Evidence

[11] The Province objects to the admissibility of some documents attached to the affidavits of Glen Williams (one of the individual petitioners), filed in this proceeding. The Gitanyow do not contest that objection with regard to three of the documents and therefore I exclude them from the evidence. Those documents, contained in various exhibits to the affidavits of Glen Williams are:

a) an email dated February 2, 2006, from George Schultze, Regional Wildlife Technician, Ministry of Environment and Nass Wildlife Committee member to Mark Price, Assistant Negotiator for the Ministry of Aboriginal Relations and Reconciliation, and Dana Atagi, Section Head, Fish and Wildlife [Exhibit C to the affidavit of Glen Williams #2];

b) an email dated November 22, 2013, from Mark Williams, Senior Wildlife Biologist, Ministry of Forests, Lands and Natural Resource Operations to Robert MacKenzie, Senior Implementation Analyst of the Implementation and Legislation Branch of the Ministry of Aboriginal Relations and Reconciliation [Exhibit D to the affidavit of Glen Williams #2]; and,

c) a guide to Aboriginal Harvesting Rights issued by the Legal Services Society dated December 2013 [Exhibit C to the affidavit of Glen Williams #6].

[12] The Gitanyow do oppose the Province's objections to the rest of the documents which are:

a) an email dated February 3, 2010 from George Schultze to Robert MacKenzie addressing whether to give, as requested, minutes of the Nass Wildlife Committee meetings to the Gitanyow. In the email Mr. Schultze states he is "inclined to make a copy of the minutes available" to the Gitanyow because he understood the Wildlife Committee's minutes should be a matter of public record [Exhibit H to the affidavit of Glen Williams #2];

b) a number of documents attached to the affidavit of Glen Williams #4, dated February 27, 2017, including:

    (i) a draft briefing note forwarded from Mr. Schultze to Rick Marshall, Senior Wildlife Biologist, Ministry of Environment. The draft briefing note contains some text under the following headings: 'Issue', 'Background' and 'Discussion'. There is no text following the headings 'Options', 'Recommendations', and 'Conclusions' [Exhibit E to the affidavit of Glen Williams #4]; and,

(ii) a collection of documents prepared by Mark Williams, which, were released to the petitioners pursuant to a request they made under the *Freedom of Information and Protection of Privacy Act,* R.S.B.C. 1996, c. 165 (*FOI*). Included in that bundle, are another draft briefing note dated December 15, 1999, an appendix that appears to be attached to a different version of the same draft briefing note, another version of the draft briefing note dated January 12, 2000, with attachments, a June 20, 2001 draft decision by the Minister of Water, Land and Air Resources and three other undated draft briefing notes [Exhibit G to the affidavit of Glen Williams #4]; and,;

c) an email dated March 31, 2017, which forwards a March 30, 2017 email that Tom Ethier, Assistant Deputy Minister, Ministry of Forests, Lands and Natural Resource Operations sent to the Union of British Columbia Indian Chiefs [Exhibit D to the affidavit of Glen Williams #6]. Mr. Ethier's comments in the email refer directly to a news release, which is not attached to the email in the record before me.

[13] The parties agree that if the issue of duty to consult arises within a petition for judicial review, the record before the court will be broader than typical when statutory decisions are reviewed: *Chartrand v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2015 BCCA 345. Thus, the fact that documents were not before the Minister, or considered by the Minister, in making the impugned decisions will not automatically render them inadmissible.

[14] The petitioners submit that the documents to which the Province objects are directly relevant to the existence and extent of the duty to consult raised in this case. They also submit any concerns about the admissibility of the documents are better addressed by my assigning reduced weight to the documents.

[15] In terms of admissibility of documents, probative value is the controlling factor.

[16] With regard to the email attaching draft minutes described above at para. 12(a), the petitioners concede that the opinion expressed by Mr. Schultze in the email (that the minutes of the Wildlife Committee should be publically available) does not bind the Province. They say, however, that should only reduce the weight I place on it rather than render it inadmissible.

[17] I do not agree. Because the opinion of Mr. Schultze does not bind the Province in this litigation it cannot be helpful to me. More importantly, it represents only his opinion of whether draft committee minutes should be available publically, which is not a material issue before me. Given that his opinion is not probative, and given the following comments about the unhelpful nature of "draft" documents, I do not admit the email or its attachment (which is a draft document) because I find neither are relevant.

[18] With regard to the documents described above at para. 12 (b), the petitioners submit I must take into account the circumstances under which they received the documents. Over 500 pages of documents were redacted when they were released under a request pursuant the *FOI*. The petitioners believe the final version of the contested drafts were not released or were heavily redacted.

[19] The Province's objection to most of these documents is that the documents are in draft form, and therefore irrelevant. The Gitanyow submit the fact a document is a draft does not mean it is inadmissible.

[20] I do not agree with the Gitanyow's position. If the petitioners complain that finalized versions of documents were not but should have been released in response to their *FOI* request, they have remedies under the applicable statute.

[21] In any event, disclosure under *FOI* is not determinative of relevance in litigation. The legal rules regarding disclosure under *FOI* are set out in the statute. The statute is a complete code and stipulates the conditions under which documents may or must be withheld. The two legal regimes are entirely separate and distinct.

[22] Again, the controlling issue for me is the probative value of the documents. I cannot see how a draft briefing note would be helpful to any analysis I have to conduct. The main issue before me is largely, although not exclusively, a legal one: whether the Minister is precluded from engaging, or required to engage, in consultation with the Gitanyow when making certain decisions under the Treaty. Draft briefing notes are a type of policy document most likely authored by more than

one person, and shared electronically. There may be many versions of the same "draft". Both the content and purpose of the note may change over time during the drafting process.

[23] While I can conceive that it might be possible that specific changes among the drafts might be relevant to some issue in litigation, the petitioners did not point to any such change as being potentially relevant. In my view, there is no probative value in the draft briefing notes in this case and I therefore exclude them.

[24] While the documents themselves are not admissible, the petitioners' underlying point is that they were forced to proceed with a *FOI* request because they did not receive directly from the Province documents to which they believed they were entitled pursuant to the Crown's duty to consult. That fact is relevant to my consideration of the adequacy of the Province's consultation, and I will consider it when I conduct that analysis.

[25] With regard to the email described above at para. 12 (c), the Gitanyow argue that the statement of the Assistant Deputy Minister can reasonably be understood to represent the Province's position. Counsel for the Province submits that comments by Ministry employees or representatives (even the Assistant Deputy Minister) do not necessarily bind the Province in terms of its legal position in court. So even if I were to find the document relevant, counsel submits I should not place much weight on it in relation to whether a duty to consult exists in this context.

[26] The problem with the email's admissibility is more fundamental; Mr. Ethier is clearly commenting on a "new agency" as described in a news release that is not before me. Without the attachment, I cannot fairly interpret the significance of his comments. Even if I am wrong about that, his comments are very general in nature: recognizing "First Nations' rights to hunting and trapping and your strong ties to the land", and assuring the Union of British Columbia Indian Chiefs that the Province "will be engaging with you and ensuring you have a say in helping define" the role of the new agency. The comments do not differ in any significant way from the

Province's position before me and therefore they are not helpful. I do not admit the email into evidence.

[27] In conclusion, I do not admit into evidence the documents objected to by the Province because I find they are not relevant.

B. Standard of Review

[28] In *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73, the Court decided that the standard of review as to whether a duty to consult has been triggered is correctness. However, the case law is not consistent on this point as illustrated in the Supreme Court of Canada decisions in *Beckman v. Little Salmon/Carmacks First Nation,* 2010 SCC 53 ("*Little Salmon*"), at para. 48 and *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, at para. 78. In *Little Salmon,* the Court applied the correctness standard reasoning that whether the duty to consult is triggered is primarily a question of law. However, in *Rio Tinto,* the Court notes that the existence of the duty to consult typically depends upon an assessment of the facts and to the extent the duty is inextricably intertwined with fact findings, the standard of review is reasonableness.

[29] The Province relies on the recent decision of Justice Skolrood in *Blueberry River First Nations v. British Columbia (Minister of Natural Gas Development)*, 2017 BCSC 540, at paras. 62-65. In that case, Skolrood J. analyzes the apparent conflict in *Little Salmon* and *Rio Tinto* and concludes the two cases can be reconciled. In his view, the Supreme Court of Canada in *Little Salmon* was "…drawing a distinction between the proper application of the consultation test, which is a question of law reviewable on a correctness standard, and the determination of whether the test has been met in a particular case, which is a question of mixed fact and law reviewable on a reasonableness standard" (para. 62). This analysis is sound and I apply it to the facts before me.

[30] In this case, both standards are invoked. The Province and the Nisga'a Nation deny that the AMP decision triggers a duty to consult, whereas the Gitanyow

argue it does. The Nisga'a Nation also argues that no duty arises when setting the TAH, whereas the Province and the Gitanyow contend that it does. Clearly, these issues involve questions of law, and therefore the standard of review is correctness.

[31] If a duty to consult exists with regard to the TAH, the Province argues that it has adequately met that duty. The Gitanyow deny this. This issue is a question of mixed law and fact and analyzed under a standard of reasonableness.

C. Preservation of a Challenge to the Validity of the Treaty

[32] At p. 5, para. 10 of the Further Amended Petition, the Gitanyow deny that any part of the *Nisga'a Final Agreement Act*, S.B.C. 1999, c. 2 (*NFAA)* or the Treaty governs the management of the lands or wildlife within their traditional territory. The petition then purports to be "under reserve of and without prejudice to the right of the Gitanyow to argue in a future proceeding" that the Treaty is invalid insofar as it impacts its Aboriginal rights or title (p. 5, para. 11).

[33] The Nisga'a Nation argues the Gitanyow's position is untenable. In its Further Amended Response to the Petition, the Nisga'a Nation claims the Gitanyow cannot preserve a right to "reprobate in a future proceeding that which they are currently approbating" (p. 23, para. 34), and that by seeking a course of action (to require consultation for decision made under the Treaty) they are thereby prevented in the future from seeking to invalidate the Treaty as being *ultra vires* or invalid: *Cliffs Over Maple Bay Investments Ltd. (re)*, 2009 BCSC 869, at para. 47, and *Findlay v. Findlay,* [1952] 1 S.C.R. 96, at 103-104.

[34] Those cases arose in very different circumstances. In *Cliffs Over Maple Bay,* the issue was entitlement to funds that were paid out pursuant to a court order. One issue that arose was whether a party's interpretation of a term in the order at an earlier hearing regarding an injunction precluded the party from arguing the wording of the order had the opposite impact in a later proceeding (para. 40).

[35] The Court held the party was precluded from taking that position because of the doctrine of "election". At para. 47, the Court stated that the law was clear that a

plaintiff cannot “approbate and reprobate”, or “[a] plaintiff cannot take a position in order to secure some advantage, and then take an opposite position to obtain some other advantage…”. In *Findlay*, the Court stated in the context of a spousal support dispute, that one spouse was precluded from collecting excess support outside the terms of their separation agreement while simultaneously demanding the terms of that agreement be fulfilled by the other party.

[36] As a starting point, I see no basis upon which I can purport to make any declaration about the legitimacy of a potential, future application by the Gitanyow; it would be for the judge hearing that application to decide if the current petition precludes that application. Nor do I think much guidance can be gained from the “doctrine of election” as applied in commercial and family law cases to the ability of Aboriginal peoples to challenge a modern treaty to which they are not a signatory. The former do not involve questions of the Crown’s honour and fiduciary duties nor principles of constitutional law.

[37] Having said that, there may be a fundamental, and possibly insurmountable, illogic in the Gitanyow’s attempting to gain the benefit of a constitutional right to consultation for decisions under the Treaty, which they say is invalid. Nor would it be wise for this Court to ignore the fact that there is an extensive history of disagreement between the Nisga’a Nation and the Gitanyow about their respective hereditary territories and rights. I acknowledge however that the Gitanyow’s assertion of title over land now subject to wildlife regulation under the Treaty pre-dates by at least decades the negotiations that led to the Treaty. So from their perspective, consistently asserting that position is important. Nevertheless, it would be imprudent, in assessing the legal issues before me, to place any weight on or treat as relevant the Gitanyow’s reservation of a purported right to challenge the validity of the Treaty and I have not done so.

III. FACTS

[38] Many facts directly relevant to the precise legal issue before me are not disputed. However, it is important to provide a factual background in order to give context to the issues raised.

A. The Gitanyow

[39] The Gitanyow comprise eight matrilineal units organized into houses (Wilp, collectively Huwilp), which form the social, political, and governing units of the Gitanyow peoples. The individual petitioners are the Gitanyow Chiefs who together represent all of the Gitanyow Huwilp and all the Gitanyow. They are:

a) Malii, Gitanyow Chief in the House of Malii (Glen Williams);

b) Gamlaxyeltxw, Head Chief of the House of Gamlaxyeltxw, also recognized as leading Chief of the Lax Ganeda (Frog clan) (Wilhelm Marsden);

c) Wii'litswx, Head Chief of the House of Wii'litswx (Gregory Rush);

d) Luuxhon, Head Chief of the House of Luuxhon (Don Russell);

e) Gwass Hlaam, Head Chief of the House of Gwass Hlaam and leading Chief of all Gitanyow Huwilp, as well as Head of the Lax Gibuu (Wolf) Clan (George Philip Daniels);

f) Haizimsque, Head Chief of the House of Haizimsque (Ken Russell);

g) Gwinuu, Head Chief of the House of Gwinuu (Phyllis Haizimsque); and

h) Watakhayetsxw, Head Chief of the House of Watakhayetsxw (Agatha Bright).

[40] The Gitanyow have a tradition of oral history (Adaawk), crests (Ayuuks) and totem poles (Getimgan), which demonstrate their relationship to their land[1]. Mr. Williams describes the Ayuuks and Getimgan like their "title deeds".

[41] The Daxgyet is the parent authority that a Gitanyow person carries and passes from generation to generation. The Gitanyow Hereditary Chief holds the

[1] In addition to the Gitanyow's affidavits and submissions, historical background of the Gitanyow is discussed at paras. 21-23 in *Wii'litswx v. British Columbia*, 2008 BCSC 1139.

Daxgyet over the territories of his house on behalf of the Wilp territories (the "Territories of the Houses"). The Chief's Daxgyet is dependent on the ability to provide resources within his Wilp territory to guests at a feast.

[42] Under Gitanyow law (Ayookxw), the Gitanyow can hunt, fish, and gather resources, but only within their traditional lands. Even amongst the Huwilp, a person must seek permission to hunt on the territory of a Wilp of which he or she is not a member. Mr. Williams describes that he was taught the Gitanyow Ayookxw by his maternal grandfather, Lelt, who took him out on the territory. Other Gitanyow Chiefs showed Mr. Williams the Gitanyow Lax'yip (traditional territories), including the boundaries of each Gitanyow Wilp.

[43] Mr. Marsden has provided an affidavit in this proceeding and he paraphrases one aspect of Gitanyow Ayookxw which is enforced very strictly within Wilp Gamlaxyeltxw: "I cannot tell another person what to do on their side of the creek – all I can do is look him in the eye and tell him my history".

[44] Mr. Marsden also describes that the Gitanyow are "taught to take what we need from the Lax'yip – nothing more". The importance of this limitation to the Gitanyow methods of harvesting cannot be overstated, because it ensures the sustainability of resources for future generations. By protecting natural resources in this manner, the Gitanyow have been able to sustain themselves for thousands of years within their territory.

[45] Mr. Williams describes that "[u]ntil the latter stages of the negotiations of the [Treaty] the Gitanyow had long and peaceful relationships with their Nisga'a neighbours", and that hereditary Chiefs from both the Gitanyow and Nisga'a Nation were "well aware of the boundary" between their traditional territories, which "crosses the Nass River just west of the mouth of the Kinskusch River". The Nisga'a Nation disputes these facts.

[46] Wildlife harvesting, specifically moose harvesting, plays a pivotal role in the Gitanyow's culture and way of life. To the Gitanyow, moose is not just a food source;

it also serves a socio-cultural function in that the moose hunt is seen as an opportunity for the elders to impart knowledge to the youth. Mr. Marsden describes it thus at para. 12 of his affidavit:

> For me as a Gitanyow, hunting is not just getting a moose. It is a communal experience with other Gitanyow and it is being on our territory – learning from each other and teaching each other. It is very important to teach the younger Gitanyow, including my younger brothers, Leon and Eddie Morgan, and their children, while out on the territory. Just as my grand uncle, Ivan and his son, Glen, taught me about the territory when we went hunting, I try to pass that knowledge to the younger generation. The best way to do that is to be on the land – fishing and hunting.

[47] The pivotal fact underlying this dispute is that the Gitanyow claim Aboriginal title and rights throughout their traditional territory (Gitanyow Lax'yip), the majority of which is located within the NWA. They have always asserted that they have used and occupied those lands and resources since long before the arrival of Europeans.

[48] The Gitanyow say that the Crown has been aware of their assertion of exclusive use since at least 1958. In that year, the British Columbia Provincial Museum published "*Histories, Territories and Laws of the Kitwancool*" by William Duff. In the preface, Mr. Duff wrote on p. 3: "[t]he authors of this book are the Kitwancool themselves, for it contains their own statement of what they consider to be their histories, territories, and laws" which Mr. Duff attempted to transfer on the printed page "with as little alteration as possible".

[49] The Gitanyow have asserted those rights in other litigation before the court: *Gitxsan v. British Columbia (Minister of Forests*), 2002 BCSC 1701 (*Gitxsan*), *Malii v. Her Majesty the Queen,* Vancouver Registry No. S036687 (*Malii*) and *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1139 (*Wii'litswx*). I discuss those cases later in this judgment.

[50] In 2012, the Gitanyow entered into a government-to-government agreement with the Province (the Gitanyow Huwilp Recognition and Reconciliation Agreement, the "RRA"), the purpose of which is stated at s. 2.1 as building the relationship between the parties to "guide land and natural resource management on the

Gitanyow Lax'yip". The RRA is intended to provide the foundation for a respectful government-to-government relationship, create increased certainty in regard to land and resource management, establish a clear and reliable decision-making framework for land and resource decisions, and achieve meaningful engagement to promote well-informed decision-making (s. 2.2).

[51] The RRA is comprehensive. Section 6 of the RRA is titled "Recognition" and it states:

> 6.1 British Columbia acknowledges that Mr. Justice Tysoe and Madam Justice Nielson of the British Columbia Supreme Court have affirmed that Gitanyow has a good to strong *prima face* claim of aboriginal title and a strong *prima facie* claim of aboriginal rights to at least part of the Gitanyow Lax'yip.
>
> 6.2 British Columbia acknowledges and enters into this Agreement on the basis that Gitanyow has Aboriginal Rights in the Gitanyow Lax'yip.
>
> 6.3 British Columbia recognizes that the Gitanyow's Aboriginal Interests are linked to Gitanyow's good prima facie claim of aboriginal title and strong prima facie claim of aboriginal rights.
>
> 6.4 British Columbia recognizes that the historic and contemporary use and stewardship of land and resources by Gitanyow are integral to the maintenance of Gitanyow society, governance and economy within the Gitanyow Lax'yip.
>
> 6.5 British Columbia recognizes that in the absence of a treaty that defines the responsibilities and rights of the Parties, its duty to consult and to seek workable accommodation of Gitanyow's Aboriginal Rights within the Gitanyow Lax'yip is an ongoing duty.
>
> 6.6 British Columbia acknowledges that it and Canada provides in modern Treaties with British Columbia First Nations that those Treaties do not "affect any rights under Section 35 of the *Constitution Act, 1982* for any Aboriginal people other than" the Nation with whom it has made a Treaty.
>
> …

[52] Section 8.4 confirms that the parties' to the RRA intend that "resource decisions"[2] will be consistent with a number of things including "the Province's constitutional duties" (s. 8.4 (d)). Section 9.4 states that the land planning process

[2] A term defined in the RAA to mean "strategic, administrative or operational decisions related to land and resource use, which may impact Gitanyow Aboriginal Rights including plans approvals or renewals of tenure, permits, or other authorizations".

set out in the RAA is a step towards recognition of, among other things, "the administrative boundaries of British Columbia with Gitanyow Lax'yip boundaries".

[53] To achieve the goals in the RRA, a Joint Resources Governance Forum (Governance Forum) is established to "oversee and monitor the implementation" of the RRA (s. 11.1). Section 12 specifically acknowledges that the Province and the Gitanyow's perspectives on sustainability may differ, but they are committed to furthering their common interest and the section establishes the Gitanyow Lax'yip Land Use Plan Monitor (s. 12.2).

[54] Part 3 sets out the parties' commitment to shared decision making. It also states that developing a framework for shared decision making is also a step in the reconciliation process between the Province and the Gitanyow (s. 13.7).

[55] Part 5 sets out a dispute resolution process, the final step of which is to appoint an independent mutually agreeable mediator to resolve the dispute (s. 20.4). Section 23 sets out the general provisions of the RRA, two of which confirm the RRA is not a treaty or land claims agreement pursuant to the *Constitutional Act, 1982* (s. 22.7(a))[3] but that it is legally binding on the parties (s. 22.6). Other general provisions include:

> 23.2 Except as the Parties may agree otherwise in writing, this Reconciliation Agreement will not limit the positions that either Party may take in any further negotiations or court actions.
>
> 23.3 This Reconciliation Agreement does not change or affect the positions either Party has, or may have, regarding its jurisdiction, responsibilities and/or decision-making authority, nor is it to be interpreted in a manner that would affect or unlawfully interfere with that decision-making authority.

[56] Since 2013, the Gitanyow and the Province have been engaged in discussions at the Governance Forum regarding the Gitanyow's concerns about moose management in the NWA.

[3] There is an anomaly in the numbering of s. 23; within that section, the subparagraphs are numbered consecutively 23.1 to 23.4, then 22. 5 to 22.7, then 23.8 to 23.13. I refer to the subparagraphs of s. 23 as they appear on the signed document.

B. The Nisga'a Nation

[57] The Nisga'a Nation is defined as the collectivity of those Aboriginal peoples who share the language, culture and laws of the Nisga'a in large swathes of northwestern British Columbia. It is undisputed that the Nisga'a have lived, migrated, hunted, and fished over a territory consisting of approximately 1000 square miles in the Nass River Valley, Observatory Inlet, Portland Inlet and the Portland Canal: *Campbell v. British Columbia (Attorney General)*, 2000 BCSC 1123 at para. 20.

[58] As early as 1888, the Nisga'a asserted absolute ownership of the land within their boundaries: *Calder v. British Columbia (Attorney General),* [1973] S.C.R. 313, at para. 7. After years of negotiations and litigation commencing formally in the late 1970's, the Nisga'a became self-governed under the terms of the Treaty, which came into effect in May 2000. Therefore, the Nisga'a Nation is a distinct legal entity and it acts through the Nisga'a Lisims Government.

[59] Harry Nyce is Director of Fish and Wildlife for the Nisga'a Lisims Government, and a member of the Nisga'a Tribal Council, which negotiated the Treaty on behalf of the Nisga'a Nation. He was also a member of the Wildlife Committee. He stated at para. 48 of his March 11, 2016 affidavit:

> The Adaawak (oral histories) told by our Simgigat and Sigidimhaanak (hereditary chief and matriarchs) relating to their Ango'oskw (family hunting, fishing and gathering territories) confirm that the Nisga'a Nation has owned, occupied, used and exercised sovereignty over the entire Nass watershed since time immemorial – long before the arrival of the Europeans. They also confirm that the harvesting and stewardship of wildlife with the Nisga'a Nation's traditional territory has been integral to the Nisga'a Nation's distinctive aboriginal culture since time immemorial.

[60] He also deposed that assertion of use and occupation is "one of the reasons the Nisga'a Tribal Council pushed hard for many of the rights recognized in Chapter 9 not only within Nisga'a Lands...but the entire Nass Wildlife Area and Nass Area" (para. 49). He also disputed the Gitanyow's statement that "the Nisga'a Nation was 'well aware of' any boundary between the Nisga'a and Gitanyow traditional territories crossing the Nass River just west of the mouth of the Kinskuch River" (para. 50).

The Nisga'a Nation acknowledges that it has had a long-standing disagreement with the Gitanyow as to the boundaries of their respective traditional territories.

[61] The Nisga'a Nation submits that since the date the Treaty came into force, the nature and location of the Nation's rights and title as recognized and guaranteed under s. 35(1) of the *Constitution Act, 1982* are clearly stated by the terms of the Treaty. Accordingly, the Nisga'a Nation opposes the Gitanyow's assertion of title in the NWA.

C. The Treaty

[62] The Treaty came into effect on May 11, 2000. As required by the Treaty, the Province passed the *NFAA*. The Treaty itself is a schedule to the *NFAA*.

[63] Among the clauses in the preamble to the *NFAA* are:

> WHEREAS the reconciliation between the prior presence of aboriginal peoples and the assertion of sovereignty by the Crown is of significant social and economic importance to all British Columbians;
>
> AND WHEREAS Canadian courts have stated that this reconciliation is best achieved through negotiation and agreement, rather than through litigation or conflict;
>
> AND WHEREAS the Nisga'a Nation, Canada and British Columbia have negotiated the Nisga'a Final Agreement to achieve this reconciliation, and to establish a new relationship among them;
>
> ...

[64] The federal government also enacted legislation to give effect to the Treaty: *Nisga'a Final Agreement Act,* S.C. 2000, c. 7. It too has a preamble replicating the provincial legislation's preamble with appropriate modifications to reflect the Agreement is between the Nisga'a Nation and the federal government. Many provisions are similar or identical to the *NFAA*.

[65] Section 3 of the *NFAA* states that, "[t]he Nisga'a Final Agreement is approved, given effect, declared valid and has the force of law." People who are given powers, rights or privileges, must perform them in accordance with the Treaty. Section 5 states the Treaty is "…binding on, and can be relied on by, all persons".

The Nisga'a Lisims Government, the Attorney General of British Columbia and the Attorney General of Canada have a right to be heard in any judicial or administrative proceeding if the interpretation or validity of the Treaty or the *NFAA* arises (s. 8).

[66] The Treaty itself is comprised of 22 Chapters and a large number of appendices, which includes maps and documents. Chapter 2 of the Treaty contains "General Provisions" and the following paragraphs are important:

> NATURE OF AGREEMENT
>
> 1. This Agreement is a treaty and a land claims agreement within the meaning of sections 25 and 35 of the *Constitution Act, 1982*.
>
> AGREEMENT IS BINDING
>
> 2. This Agreement is binding on the Parties.
>
> 3. The Parties are entitled to rely on this Agreement.
>
> 4. Canada and British Columbia will recommend to Parliament and the Legislature of British Columbia, respectively, that settlement legislation provide that this Agreement is binding on, and can be relied on by, all persons.
>
> …
>
> NISGA'A SECTION 35 RIGHTS
>
> 23. This Agreement exhaustively sets out Nisga'a section 35 rights, the geographic extent of those rights, and the limitations to those rights, to which the Parties have agreed, and those rights are:
>
> a. the aboriginal rights, including aboriginal title, as modified by this Agreement, in Canada of the Nisga'a Nation and its people in and to Nisga'a Lands and other lands and resources in Canada;
>
> b. the jurisdictions, authorities, and rights of Nisga'a Government; and
>
> c. the other Nisga'a section 35 rights.
>
> MODIFICATION
>
> 24. Notwithstanding the common law, as a result of this Agreement and the settlement legislation, the aboriginal rights, including the aboriginal title, of the Nisga'a Nation, as they existed anywhere in Canada before the effective date, including their attributes and geographic extent, are modified, and continue as modified, as set out in this Agreement.

> ...
>
> OTHER ABORIGINAL PEOPLE
>
> 33. Nothing in this Agreement affects, recognizes, or provides any rights under section 35 of the *Constitution Act, 1982* for any aboriginal people other than the Nisga'a Nation.
>
> 34. If a superior court of a province, the Federal Court of Canada, or the Supreme Court of Canada finally determines that any aboriginal people, other than the Nisga'a Nation, has rights under section 35 of the *Constitution Act, 1982* that are adversely affected by a provision of this Agreement:
>
> a. the provision will operate and have effect to the extent that it does not adversely affect those rights; and
>
> b. if the provision cannot operate and have effect in a way that it does not adversely affect those rights, the Parties will make best efforts to amend this Agreement to remedy or replace the provision.
>
> ...
>
> INTERPRETATION
>
> 56. Except as set out in this Agreement, in the event of an inconsistency or conflict between a provision of this Chapter and any other provision of this Agreement, the provision of this Chapter prevails to the extent of the inconsistency or conflict.

[67] Chapter 3 is entitled "Lands", and para. 3 states:

> 3. On the effective date, the Nisga'a Nation owns Nisga'a Lands in fee simple, being the largest estate known in law. This estate is not subject to any condition, proviso, restriction, exception, or reservation set out in the *Land Act*, or any comparable limitation under any federal or provincial law. No estate or interest in Nisga'a Lands can be expropriated except as permitted by, and in accordance with, this Agreement.

[68] The decisions in dispute in this case were made pursuant to Chapter 9 of the Treaty, which is entitled "Wildlife and Migratory Birds". Paragraphs 1 and 2 state:

> 1. Nisga'a citizens have the right to harvest wildlife throughout the Nass Wildlife Area, in accordance with this Agreement, subject to:
>
> a. measures that are necessary for conservation; and
>
> b. legislation enacted for the purposes of public health and public safety.

> 2. The entitlement set out in paragraph 1 is a right to harvest in a manner that:
>
> a. is consistent with:
>
> i. the communal nature of the Nisga'a harvest for domestic purposes, and
>
> ii. the traditional seasons of the Nisga'a harvest; and
>
> b. does not interfere with other authorized uses of Crown land.

[69] Crown use of Crown land has been preserved, with important limitations:

> 3. Notwithstanding paragraphs 1 and 2, the Crown may authorize uses of or dispose of Crown land, and any authorized use or disposition may affect the methods, times and locations of harvesting wildlife under Nisga'a wildlife entitlements, provided that the Crown ensures that those authorized uses or dispositions do not:
>
> a. deny Nisga'a citizens the reasonable opportunity to harvest wildlife under Nisga'a wildlife entitlements; or
>
> b. reduce Nisga'a wildlife allocations.

[70] The NWA is illustrated in Appendix J to the Treaty, and consists of just over 16,000 $km^{2.}$ It is much larger than the land over which the Nisga'a Nation has title. I note that the parties differ in characterizing the proportion of land within the NWA to which the Gitanyow's title claim applies. The Gitanyow's submissions state they claim title over the "vast majority" of the NWA (see para. 8, Part 2, Further Amended Petition), but only 32% of the NWA is subject to the Gitanyow's assertion of rights and title, leaving 68% of the NWA that is not. What I understand is that the 84% of the land over which the Gitanyow claim title is located within the NWA.

D. Total Allowable Harvest

[71] Chapter 1 of the Treaty defines the "total allowable harvest" (TAH) as "the maximum number of a designated species, as determined by the Minister, that may be harvested in the Nass Wildlife Area in each year, commencing on April 1 and ending on March 31". "Designated species" is defined as a species determined by the Minister that should be subject to a TAH, or an initial designated species in the NWA. Moose were identified initially in the Treaty as a designated species.

Basically, the TAH represents the maximum amount of animals that may be harvested by anyone within the NWA for each year.

[72] Chapter 9, para. 45 of the Treaty establishes the Wildlife Committee, which facilitates wildlife management in the NWA. The Committee's responsibilities are stipulated in paras. 45(a) to (l), and are comprised primarily of making recommendations to the Minister and the Nisga'a Lisims Government. Each of the three parties to the Treaty have members on the Committee (para. 46).

[73] Under para. 21, the Minister will request and consider the Wildlife Committee's recommendations regarding the TAH for each designated species. The Minister is also required to take into account the population of the species within the NWA, and the population of the species within its normal range or area of movement outside the NWA (para. 22).

[74] Pursuant to para. 65, the Minister is obliged, in a timely manner, to either approve or reject the Committee's recommendations for the TAH. If the Minister rejects the recommendation, he or she must provide written reasons.

[75] Paragraph 1 bestows on Nisga'a citizens the "right to harvest wildlife through the [NWA] in accordance with [the Treaty]". Schedule A to Chapter 9 sets out the Nisga'a Nation wildlife entitlements. Paragraph 2 states the Nisga'a Nation's allocation from the TAH for moose is the sum of 80% of the first 50 moose (40), 32% of the next 50 moose (16), and 56% of all remaining moose, to a maximum of 170.

[76] The Treaty does not prescribe allocation limits of wildlife resources to any other person or group. Despite being rights granted by the Treaty, the Nisga'a Nation's wildlife entitlements have the same priority as recreational and commercial harvests of the total allowable harvest of any species (Chapter 9, para. 6).

E. The Moose Population

[77] Population surveys are conducted approximately every five years in order to provide the Wildlife Committee with data to inform its TAH recommendation. Thus,

the TAH does not necessarily change from year to year. It is updated as new information becomes available from recent population surveys. Moose surveys commissioned by the Nisga'a Lisims Government were most recently done in 2001, 2007, 2011 and 2017.

[78] There was evidence before me about the moose population between the years 2000 and 2016 and a lot of that evidence was directed at the decline experienced by the moose population starting in 2007, as identified in the 2007 Moose survey commissioned by the Nisga'a Nation. The parties dispute what caused that decline, and whether I have evidence before me upon which I can make a finding or inference about the decline.

1. Redressing the Moose Population's Decline

[79] As a result of the information from the 2007 survey, the Wildlife Committee's recommendation for the moose TAH was drastically reduced. The 2011 survey concluded the population remained low or had declined. Following that survey, the Wildlife Committee again reduced its TAH recommendation.

[80] The Nisga'a Nation adduced evidence about measures it has implemented to protect the moose population including a proposed recovery strategy. Those measures are described at paras. 25 to 39 in the affidavit of Harry Nyce made March 11, 2016.

[81] Upon learning of the moose decline, the Nisga'a Lisims Government recommended to the Wildlife Committee that it reduce the TAH and that further reductions during certain seasons be incorporated in the AMP. The Nisga'a Lisims Government also made efforts to enhance enforcement of conservation measures, issuing documents to assist Nisga'a hunters to distinguish moose bull from cows. The Nisga'a' Lisims Government also engaged with the Province in its efforts to respond to the moose decline.

[82] Despite having an allocation of 46 in 2011, the Nisga'a Nation reported harvest of only 13 moose; similarly, the following years' allotment versus harvest

numbers were: 2012, 25 allotted, 6 harvested; 2013, 25 allotted, 9 harvested; 2014, 25 allotted, 9 harvested and 2015, 25 allotted, 9 harvested.

[83] The Gitanyow rely on the evidence of Kevin Koch, who was a fish and wildlife biologist employed by the Gitanyow Fisheries Authority. In his affidavit #1 made November 19, 2015, he described the moose harvest monitoring and permitting system that the Gitanyow, with the support of the Province, established for the Gitanyow's harvest of moose within the Gitanyow Lax'yip.

[84] That monitoring revealed that Gitanyow Wilp members harvested one moose in 2011/2012 and two in 2012/2013 (Koch affidavit #1, para. 8). Mr. Koch prepared a 2013/2014 moose harvest and monitoring report in which it was reported 29 permits were issued by the Gitanyow and five harvested, three of which were by Gitanyow Wilp members (para. 11). In 2014/2015, the estimated total harvest was 14, three of which were by Gitanyow Wilp members (para. 12). He also refers to other reports which stated that 30 moose were harvested in 2000/01 season and 38 in 2001/02 (para. 13).

[85] The Province took measures to combat the decline of the moose population in the NWA, recognizing that management of moose in the NWA is distinct from other areas in B.C. given the terms of the Treaty. In 2012, the Minister closed the NWA to moose hunting by resident and guided non-resident hunters (it was also closed for the 2016/2017 season).

[86] The Province proposed developing a Nass Moose Management Plan (MMP), which would involve both the Gitanyow and the Nisga'a Nation. The Minister proposed a recovery plan that would include the establishment of a population objective for the NWA that addressed strategies for habitat management and non-hunting mortality as well as proposed monitoring requirements. The proposal suggested that individual action plans for implementation could then be developed by the Gitanyow and the Nisga'a Nation.

[87] In 2015, the Minister developed the Moose Management Framework to address the declining moose population and to formulate management techniques. According to the Province's submissions, the Moose Management Framework "provides strategic guidance and direction to wildlife biologists and managers respecting the management of moose populations" and "recommends the development of moose management action plans developed at the regional level in consultation with First Nations".

[88] In March 2015, the Minister prepared the Nass Moose Scoping Document in consultation with Nisga'a Nation and Gitanyow representatives (including face-to-face meetings). This document addressed various topics relating to moose management and gave recommendations in regard to priority issues including unregulated harvest, population estimates, access management, predatory density and management, and habitat capability and suitability mapping.

[89] The Province submits it has taken other steps to encourage recovery of the Nass moose population:

- including conditions on environmental assessment certificates of mining projects requiring certificate holders to make financial contributions to support Nass moose recovery efforts;
- developing and implementing Nass South and Cranberry Sustainable Resource Management Plans;
- protecting moose winter range through designations under the *Forest and Range Practice Act* and *Oil and Gas Activities Act;* and
- providing $40,000 to the Conservation Officer Service to support enhanced enforcement activities.

[90] As I address below, not only do the parties disagree on the efficaciousness of the above measures, the Gitanyow say they have not been adequately consulted in respect to those measures.

2. The Cause of the Moose Population's Decline

[91] The Gitanyow say the evidence shows both that the TAH was set too high and that the Nisga'a Nation harvested too many moose in specific years, which led directly to a drastic drop in the moose population. The Province and Nisga'a Nation say that the fact that there was a decline in moose population cannot be proof of anything, other than the moose population declined. They also say I should not make a finding since the 2017 survey revealed that the moose population in the NWA was recovering.

[92] In his affidavit made March 22, 2017, Anthony Pesklevits (Director of Resources Management for the Skeena Region of the Ministry of Forests Lands and Natural Resources Operations) stated that a stratified random block survey was conducted on January 3 to 8, 2017 within an area including the NWA. The Province also received raw data from LGL Ltd., which it subjected to qualify assurance and qualify control review. Based on that information, Mr. Pesklevits deposed that "the analysis has not yet been finalized, the Preliminary Survey Results indicate that there has been an increase in the moose population estimate within the NWA since the last survey was conducted in 2011". He also confirmed that the data set from the 2017 population survey and Preliminary Survey Results were provided to Mr. Koch in March 2017.

[93] The materiality of identifying a cause of the moose population decline relates directly to the Gitanyow's assertion of the right to be consulted about both the TAH and the AMP. They contend that there is no doubt their rights have been negatively impacted by the impugned decisions, relying on their argument that the TAH and/or the Nisga'a Nation's harvest of moose caused the decline.

[94] With regard to the TAH, the Province has conceded that it owes a duty to consult the Gitanyow. Therefore, the Gitanyow do not need the evidence on that issue. Thus, the issue has narrowed. The question is whether knowing the cause of the moose population decline is probative to deciding the level of TAH consultation owed, as well as whether the Gitanyow have a right to be consulted about the AMP.

It is in that context alone, that the evidence before me about the decline in the moose population may be relevant.

[95] However, the issue of what caused the moose population to decline is not straight forward. The Province adduced evidence from Mark Williams, who was Skeena Region's Senior Wildlife Biologist from 1995 to 2014, and one of the Province's representatives on the Wildlife Committee in 2013. He is a registered professional biologist with a Master of Sciences in zoology. In his January 13, 2016 affidavit, he describes at para. 4 how moose harvest rates are determined:

> The harvest rate is established using a model that takes into account such factors as population size, population structure, productivity and natural mortality rates. Scenarios are developed to predict the rate at which the population should grow in the absence of human caused mortality. Estimates of human caused mortality are then factored into the model to evaluate how that mortality alters population growth rates. A general management objective is to manage for a stable to slightly increasing population, and to establish harvest objectives that will meet that management objective. The rate at which a population can be harvested is influenced by the composition of the harvest. For example, the harvest rate drops significantly if there is a desire to harvest cows because removing cows from the population reduces population growth rates to a greater extent than harvesting only bulls. A moose population needs only a limited number of bulls (moose not being monogamous) to ensure full "reproductivity", whereas a reduction in cows (assuming the cow is capable of calving) immediately reduces the potential number of calves that the herd can produce in support of maintaining or increasing its numbers.

[96] The Province also relies on affidavits from Anthony Pesklevits whose responsibilities as Director of Resources Management for the Skeena Region include overseeing 40 professional staff in the Skeena region. He is also a Regional Manager pursuant to the *Wildlife Act*. He describes in his January 14, 2016 affidavit the provincial system for moose management, including the distinct regime in the NWA because of the Treaty. Stuart Gale is the Acting Chief Negotiator with the Ministry of Aboriginal Relations and Reconciliation and he provided an affidavit dated January 18, 2016 also addressing wildlife management, communication with the Gitanyow and process under the Treaty.

[97] The petitioners rely on the affidavits of Kevin Koch. He attaches to his affidavits a number of studies and other documents about moose in the Nass River Watershed, including:

a) *A Stratified Random Block Survey of Moose in the Nass River Watershed,* by M.W. Demarchi*,* prepared for the Nisga'a Lisims Government and dated January 2007;

b) *A Stratified Random Block Survey of Moose in the Nass River Watershed, Final Report, prepared on behalf of the Nisga'a Lisims Government dated February 2011;*

c) *Moose Winter Browse Capability Mapping in Gitanyow's Traditional Territory: Kitwanga-Cranberry Study Area*, prepared jointly for the Gitanyow Fisheries Authority and the Ministry of Forests, Lands and Natural Resources by McElhanney Consulting Services Ltd. (Brad Pollard), dated August 15, 2014;

d) *Nass Moose Scoping Document: Phase 1 in the Development of a Nass Moose Management Plan*, Prepared by McElhanney (Brad Pollard) for the Province, dated March 31, 2015; and

e) *Kispiox Valley Moose SRB Survey 2014*, prepared by Krystal Kerckhoff for the Province.

[98] These documents are scientific in nature, and their interpretation is not within the normal knowledge base of a judge. While Mr. Koch comments extensively on his interpretation of these and other documents, his evidence was not tendered as expert evidence[4]. The Province and the Nisga'a Nation do not agree with his interpretation, thus there are disputes on critical aspects of the studies and what inferences can be drawn from them. These disputes cannot be resolved on the basis of affidavit evidence.

[99] I cannot make such a finding about what caused the decline in the moose population in the NWA absent expert opinion evidence, which was not tendered. It is also unclear whether it would have even been appropriate in this petition to embark

[4] I am not questioning Mr. Koch's expertise; he is a registered professional biologist.

upon a factual enquiry about the cause of decline in the NWA moose population. Given the factual disputes identified, *viva voce* evidence may be necessary.

[100] Accordingly, I cannot and do not find that the TAH and/or AMP combined with Nisga'a Nation's harvest caused the decline in moose population, as asserted by the Gitanyow.

[101] It is incumbent upon me to comment further on the nature of Mr. Koch's evidence. Apart from not adhering to the evidentiary requirements for a court to accept opinion (or expert) evidence, large portions of Mr. Koch's evidence contain argument and opinion on issues I am being asked to decide (for example, adequacy of consultation). In addition to responding to affidavits filed by the other parties, he commented on the parties' Responses. He was also an attendee at many meetings at which the parties' dispute what was discussed, and the significance that should be attached to comments made.

[102] No party asked me to exclude his evidence, but is it within the exclusive purview of the trial judge to determine admissibility of evidence. I place no weight on those portions of Mr. Koch's evidence that are argument and opinion, which comprise large portions of the narrative in his affidavits.

[103] There are however portions of his evidence that are both admissible and relevant. In particular, he identifies statements made in documents (which I cannot accept for their truth, but for the fact they were made) that are consistent with the Gitanyow's assertion about the impact of the TAH and Nisga'a Nation harvest on moose population. That in turn, establishes that there is some basis for the Gitanyow's having a genuine belief that the TAH and Nisga'a Nation's harvest levels caused a decline. While I make no finding about what caused moose population decline, the Gitanyow's reasonable basis for that belief may be relevant to their claim that consultation was inadequate. That issue is addressed later in this judgment.

[104] In the Nass Moose Recovery Plan, prepared by the Nisga'a Fish & Wildlife Committee, Draft 1, July 2013, the Executive Summary stated that, "[t]he cause of the decline is uncertain, but a number of potential factors have been identified, including overharvest and predation" and that "management actions taken in 2007 to reduce moose harvests do not appear to have been effective in reversing the decline…" (Exhibit C to Mr. Koch's affidavit #1). The summary goes on to state that there remained poor understanding as to what caused the decline despite population modelling, and it was "conceivable that even in the absence of predation, the population would have declined…". However, it noted:

> Clearly, the 2001 [AMP'S] predictions of a population increase were inaccurate. A closer examination of the available information suggests that the model results and recommended TAH in the 2001 plan were based on key assumptions that may have been in error, including an overestimation of reproductive output and an under estimation of mortality from unregulated harvests, poaching, predation, roadkill or some combination thereof. As a result, regulated harvest levels beginning in 2001-2002 were set at what turned out to be an unsustainably high level....

[105] In the meeting record of the September 19, 2013, Governance Forum, the Province is recorded as agreeing that the TAH was set too high in the years immediately following implementation of the Treaty, but did not accept that was the primary cause of the decline in population. This is consistent with the Province's submissions to me.

[106] In his affidavit of March 11, 2016, Mr. Nyce refers to the following statement from p. 13 of the Nisga'a Nation's 2007 moose population survey completed by LGL Ltd., environment consultants to the Nisga'a Lisims Government (which I rely on for the fact the statement was made, not for its truth):

> ...it is highly probable that the moose population in the Nass River watershed has declined substantially since 2001. It is important to note that survey data alone do not permit a conclusive assessment of the causes of any decline. Potential factors that could alone, or in combination, conceivably reduce the moose population include: (1) overharvest by hunters; (2) higher than normal predation rates by wolves, grizzly bears, and black bears; (3) one or more harsh winters from 2002-2007; (4) intrinsic population factors; and (5) reduced habitat suitability (e.g., natural and silviculturally enhanced forest succession).

[107] In conclusion, I am not in a position to make any finding as to whether the TAH and/or Nisga'a Nation's harvest levels in any specific year caused a decline in the moose population, and I decline to do so. I am satisfied, however, that based on statements made, the Gitanyow held a genuine belief that there was a causative link between those events.

F. Annual Management Plan

[108] Chapter 9 of the Treaty also sets out at paras. 56 to 67, provisions that govern the preparation, consideration and approval of the Nisga'a Nation's annual management plan (AMP) for its harvest of designated species. The AMP applies only to harvesting by the Nisga'a Nation.

[109] Paragraph 55 states that an annual management plan "will set out the management provisions in respect of the Nisga'a harvest under this Agreement of designated species and other species that the Nisga'a Nation and British Columbia or Canada, as the case may be, have agreed should be included in the annual management plan." Each AMP is required to include a number of specific items as stipulated at paragraphs 55(a) to (h).

[110] The Nisga'a Lisims Government proposes an AMP for designated species each year, and that AMP must: be consistent with the Nisga'a wildlife entitlement; set out any preferences for methods, timing and locations of harvest; and take into account any management concerns identified by either the Minister or the Nisga'a Lisims Government (para. 56). The Nisga'a Lisims Government forwards its proposed AMP to the Wildlife Committee which then considers the proposed plan and how it takes into account matters stipulated in para. 59, makes appropriate adjustments and then makes recommendations to the Minister and the Nisga'a Lisims Government (para. 58).

[111] Paragraph 59 states that "[i]n considering the recommendations of the Wildlife Committee or its members, the Minister will take into account" seven listed factors, most of which are aimed at sustainability of the species. If the AMP is consistent with the Treaty, the Minister must approve it (para. 62). If the AMP is not approved, the

Minister must provide written reasons and "specify what changes are necessary for its approval" (para. 64). Unlike with the TAH, the Minister does not have the explicit power to reject an AMP recommended by the Wildlife Committee (paras. 64 and 65(a)).

G. The Decisions under Review

[112] The Wildlife Committee met on April 13, 2016 to consider recommendations about the 2016/2017 TAH and AMP for moose. The Committee proposed recommendations for the TAH in June 2016. On October 11, 2016 the Committee provided its final recommendations on the 2016/2017 TAH and AMP. On October 18, 2016 the Minister approved the Wildlife Committee's recommendation for the 2016/2017 AMP and determined the TAH for moose for 2016/2017 would be 32, restricted to bull moose. Although these are the decisions challenged in the petition, I understood the parties to treat this judgment as applicable also to future TAH and AMP decisions regarding moose.

IV. LEGAL PRINCIPLES

[113] Numerous Supreme Court of Canada cases have addressed issues relating to Aboriginal rights and title and the duty to consult, which I briefly review before analyzing the issues. There is no dispute amongst the parties about the principles stated in these cases, but they disagree what principles I can or should extrapolate from them to apply to the facts before me.

A. Aboriginal Rights

[114] In *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, the Tsilhqot'in Nation brought an action seeking Aboriginal title to land located in central British Columbia. The trial judge held that the Nation had adduced sufficient evidence to establish Aboriginal title, but the Court of Appeal reversed that finding on the basis that the Nation was required to prove sufficient occupation for title to land by proving its ancestors intensively used a definite tract of land with reasonably defined boundaries. The Supreme Court of Canada allowed the appeal, and in doing so,

reviewed the jurisprudential background to the establishment of Aboriginal land rights beginning with the landmark ruling in *Calder.*

[115] In *Calder*, the Court affirmed that Aboriginal land rights survived European settlement and remained valid unless extinguished by treaty, or otherwise (*Tsilhqot'in* para. 10). Section 35 of the *Constitution Act, 1982* "recognized and affirmed' existing Aboriginal rights and case law subsequent to that enactment in 1982 further clarified the meaning of that section (*Tsilhqot'in* para. 11). In *Guerin v. Canada*, [1984] 2 S.C.R. 335 Justice Dickson (as he then was) commented on the nature of Aboriginal title. He held that while the Crown had acquired "radical" or underlying title to all land in British Columbia at the time of sovereignty, that title was burdened by the "pre-existing legal rights" of Aboriginal peoples to the land based on their use and occupation before Europeans arrived (*Tsilhqot'in* para. 12). That burden resulted in the Crown having a *sui generis* fiduciary duty to protect Aboriginal rights that had not been extinguished prior to the coming into force of the *Constitution Act, 1982* (*Tsilhqot'in* para. 13).

[116] In *R. v. Sparrow*, [1990] 1 S.C.R. 1075, Chief Justice Dickson and Justice La Forest described how the Crown's fiduciary duty to Aboriginal peoples is anchored in s. 35(1) of the *Constitution Act, 1982* at para. 62:

> There is no explicit language in the provision that authorizes this Court or any court to assess the legitimacy of any government legislation that restricts aboriginal rights. Yet, we find that the words "recognition and affirmation" incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power. Rights that are recognized and affirmed are not absolute…. In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights. Such scrutiny is in keeping with the liberal interpretive principle enunciated in *Nowegijick*, *supra*, and the concept of holding the Crown to a high standard of honourable dealing with respect to the aboriginal peoples of Canada as suggested by *Guerin v. The Queen*, *supra*.

[117] That fiduciary duty implicates the honour of the Crown: *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14 at para. 65. In *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director),* 2004

SCC 74 at para. 24, the Supreme Court of Canada expanded on the relationship between the Crown's honour and its obligations under s. 35(1):

> …The duty of honour derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation. It has been enshrined in s. 35(1) of the Constitution Act, 1982, which recognizes and affirms existing Aboriginal rights and titles. Section 35(1) has, as one of its purposes, negotiation of just settlement of Aboriginal claims. In all its dealing with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question. The Crown's honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1). At para. 67, of *Manitoba Metis,* the Supreme Court of Canada noted that the honour of the Crown must recognize the impact that superimposing European laws and customs has had on pre-existing Aboriginal societies. As stated in that case, Aboriginal peoples were here first, and they were never conquered… yet, they became subject to a legal system that they did not share.

[118] That fundamental precept underlies the requirement that any Crown legislation that infringes upon Aboriginal rights must be justified at law. Justification first arose in *Sparrow*, where the Court set out a two-step inquiry: first, does the legislation in question interfere with an existing Aboriginal right? If so, the legislation is a *prima facie* infringement of s. 35 (1), and second, if a *prima facie* interference is found, was that infringement justified? The *Sparrow* test has been refined and clarified in subsequent cases, and Aboriginal law principles have expanded to recognize that the Crown has a duty to consult and accommodate Aboriginal concerns, even prior to judicial determination of an asserted claim to Aboriginal title or rights. That duty arises directly from the honour of the Crown.

B. Aboriginal Title

[119] Because the Gitanyow assert title to a portion of the NWA and rely on that assertion in this case (in part as evidence that the Crown's duty to consult them requires deep consultation given what they say is their good *prima facie* case for Aboriginal title), I briefly review the cases that have also commented on the nature of Aboriginal title. In *Delgamuukw v. British Columbia,* [1997] 3 S.C.R. 1010, the Court confirmed the *sui generis* nature of the Crown's fiduciary duties to Aboriginal peoples at para. 113. The duty arose because Aboriginal peoples possessed the land before the assertion of British sovereignty. This distinguished Aboriginal title

land from other estates in land, such as fee simple ownership, because the latter only arose after sovereignty (para. 114).

[120] At para. 74 of *Tsilhqot'in*, the Court stated that Aboriginal title is collective in nature and held for the present and also future generations. Thus, it cannot be alienated except to the Crown, or encumbered in ways that would prevent future generations being able to benefit from the land. While some modifications of the land can still occur, even if permanent, the proposed use must not be irreconcilable with the ability of future generations to benefit from the land. However, like all landowners, Aboriginal title holders can use the land in modern ways as they see fit, so long as it does not derogate from the future generations' ability to use the land.

[121] At para. 15 of *Tsilhqot'in,* the Chief Justice provided a synopsis of *Delgamuukw's* definition of the content of Aboriginal title:

> The Court in *Delgamuukw* summarized the content of Aboriginal title by two propositions, one positive and one negative. Positively, "[A]boriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those [A]boriginal practices, customs and traditions which are integral to distinctive [A]boriginal cultures" (para. 117). Negatively, the "protected uses must not be irreconcilable with the nature of the group's attachment to that land") ...that is, it is group title and cannot be alienated in a way that deprives future generations of the control and benefit of the land.

[122] In order to successfully establish Aboriginal title, the Aboriginal peoples asserting title must demonstrate with evidence the land was occupied prior to sovereignty, and if present occupation is relied on as proof of occupation pre-sovereignty, there must be continuity between past and present occupation, and that occupation must have been exclusive at the time of sovereignty: *Tsilhqot'in* at para. 26. That exclusivity means "intention and capacity to control the land" and "the fact that other groups or individuals were on the land does not necessarily negate exclusivity of occupation" (para. 48). In *Tsilhqot'in*, the trial judge specifically noted the significance of evidence that showed the Tsilhqot'in repelled other peoples from their land and granted permits for the use. That was strong evidence of exclusivity (para. 58). Importantly, the dual perspectives of the common law and Aboriginal

group rights bear equal weight when evaluating a claim for Aboriginal title to prove sufficiency, continuity and exclusivity of occupation (*Delgamuukw* at para. 112).

[123] A natural corollary of establishing Aboriginal title is that any other groups – including the Crown – must seek permission to use the land. Without consent, only the Crown can seek to justify an incursion (*Tsilhqot'in* at para. 90).

[124] With regard to the scope of consultation when title is asserted, the Supreme Court of Canada stated in *Tsilhqot'in* (para. 91) that "…as the claim strength increases, the required level of consultation and accommodation correspondingly increases", and "…once title is established, the Crown cannot proceed with development of title land not consented to be the title-holding group unless it has discharged its duty to consult and the development is justified…".

C. Duty to Consult

[125] The framework for the Crown's duty to consult and accommodate is set out in *Haida Nation* and *Taku River*. In *Haida Nation,* development was proposed on land over which Aboriginal title had been asserted but not yet established. The Court stated at para. 64 that the duty to consult is triggered when three elements exist: (i) the Crown's actual or constructive knowledge of a potential Aboriginal claim or right; (ii) contemplated Crown conduct that engages that claim or right, and; (iii) the potential that the contemplated conduct may adversely affect an Aboriginal right or title. In respect to assessing impacts as potentially adverse, the Court in *Rio Tinto* stated at para. 47:

> Adverse impacts extend to any effect that may prejudice a pending Aboriginal claim or right. Often the adverse effects are physical in nature. However, as discussed in connection with what constitutes Crown conduct, high-level management decisions or structural changes to the resource's management may also adversely affect Aboriginal claims or rights even if these decisions have no "immediate impact on the lands and resources": Woodward, at p. 5--41. This is because such structural changes to the resources management may set the stage for further decisions that will have a direct adverse impact on land and resources. For example, a contract that transfers power over a resource from the Crown to a private party may remove or reduce the Crown's power to ensure that the resource is developed in a way that respects Aboriginal interests in accordance with the honour of the Crown. The Aboriginal people would thus effectively lose or find diminished their

> constitutional right to have their interests considered in development decisions. This is an adverse impact: see Haida Nation, at paras. 72-73.

[126] In *Tsilhqot'in,* the Court stated that at the claims stage, prior to establishing Aboriginal title, the Crown still owes a good faith duty to consult if the triggering test as articulated in *Haida Nation* is engaged (para. 9). In *Haida Nation*, the Court also stated that the honour of the Crown mandated that even if Aboriginal rights have not been declared to exist judicially, the Crown still may owe that Aboriginal peoples a duty to consult (para. 25). In *Rio Tinto,* the Court stated at para. 48 that the "duty to consult is designed to prevent damage to Aboriginal claims and rights while claim negotiations are underway".

[127] The Court confirmed in *Haida Nation* at paras. 43-45, and *Taku River* at para. 32 that the extent of consultation necessary is fact-specific and ranges on a spectrum. The Crown's duty to consult and accommodate is proportionate to a preliminary assessment of the *prima facie* strength of the Aboriginal peoples' case for right or title, as well as the seriousness of the potential adverse effect.

[128] The spectrum ranges from minimal consultation (such as giving notice, disclosing information, and discussing issues raised in response to the notice) where the claim to title is weak, Aboriginal right limited, or potential interference minimal. At the other end of the spectrum is deep consultation where it may require the opportunity for the affected Aboriginal group to give submissions, formally participate in the decision-making process, and written reasons demonstrating the Crown fairly considered Aboriginal concerns. Many fact-scenarios will fall in the middle of the two ends of the spectrum. The Court emphasized that the consultation processes (i.e. giving notice, written reasons, etc.) it describes at both ranges is not exhaustive or mandatory for any case: *Haida Nation* at paras. 43-45.

[129] The Supreme Court of Canada has noted that while a generous and purposive approach is required, "mere speculative impacts" will not be sufficient to trigger the right; there must be "an appreciable adverse effect on the First Nations' ability to exercise their aboriginal right": *Rio Tinto* at para. 46. The threshold for

triggering the duty to consult is low, but hypothetical or speculative impacts are insufficient: *Hupacasath First Nation v. Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4 at paras. 102-117. Furthermore, the claimant has to be able to show causal relationship between the proposed conduct or decisions and the potential for an adverse impact (*Hupacasath First Nation* at para. 114; *Rio Tinto* at para. 45).

[130] These pivotal cases, and others, set the landscape for a wholesale change in the manner of government decision-making regarding land and resources on areas where Aboriginal peoples have asserted rights or title. The overriding mandate for the Crown emanating from s. 35 of the *Constitution Act, 1982* is to act honourably and in a fiduciary capacity in order to respect the fact that Aboriginal peoples were never conquered. The Crown's sovereignty must be reconciled against that fact.

V. ISSUES

[131] The further amended petition seeks four specific declarations:

a) that the Minister has a constitutional obligation to consult the Gitanyow and, where appropriate, accommodate Gitanyow rights and/or title, with regard to the TAH and AMP decisions;

b) that when the Minister consults with the Gitanyow, and, where appropriate, accommodates Gitanyow rights and/or title with regard to the TAH and AMP decisions, he must take into account Gitanyow law which requires that the Gitanyow exercise their Aboriginal right to hunt only within the Gitanyow Lax'yip (territory);

c) that the Gitanyow wildlife harvest in the Gitanyow Lax'yip (territory) has constitutional priority over the Nisga'a wildlife allocations set out in the NFA; and

d) that the Minister is required to comply with his obligations under the *NFAA*, Chapter 2 and either approve or reject the Wildlife Committee's recommendation in whole or in part and set the TAH for each hunting season and either approve or reject the Wildlife Committee's recommendations for an annual management plan for the NWA in whole or in part each hunting season after fulfilling his constitutional obligation to consult with the Gitanyow and, where appropriate, accommodate Gitanyow Aboriginal rights and/or title.

[132] Based on how the parties argued this case, there are two central issues that must be addressed with respect to the first declaration sought by the petitioners:

a) does the Minister have an obligation to consult (and accommodate where appropriate) the Gitanyow when setting the TAH for moose and if so, was that duty met? and;

b) does the Minister have an obligation to consult (and accommodate where appropriate) the Gitanyow with regard to the setting of the AMP for moose, and if so, was that duty met?

[133] The Gitanyow submit that the duty to consult and accommodate is triggered with regard to both impugned decisions and the Minister failed to meet the duty for either.

[134] The Nisga'a Nation's position is that the court can only refer to the wording of the Treaty to resolve the legal issues in this case. It argues that until the Gitanyow's title or rights are finally declared, there is no obligation to consult the Gitanyow when the Minister makes decisions under the Treaty. It says the Treaty alone defines what considerations the Minister can consider when making decisions about the TAH and AMP for designated species within the NWA.

[135] The Province acknowledges it owes the Gitanyow a duty to consult with regard to the TAH decision, but it contends that it has discharged that duty adequately. The Province denies, however, that the Minister's decision to approve or suggest changes to the AMP adversely affected any of the petitioners' asserted rights and, therefore, the duty to consult the Gitanyow with respect to the AMP is not engaged.

[136] Underlying both issues is the fundamental question of what impact a modern day treaty has on the assertion by Aboriginal peoples, who are not party to that treaty, of their Aboriginal title and rights over parts of the same land and resources to which the treaty applies. That question is related to the third and fourth declarations sought by the Gitanyow.

[137] In my view, the last two declarations, which both address priority (substantively and in terms of timing) for the Gitanyow harvest over the Treaty allocations, are beyond the scope of this petition, as framed. The third declaration implicitly seeks, or is factually dependent upon, two conclusions that are unavailable in this litigation: a declaration that the Gitanyow have an Aboriginal right to harvest moose in the Gitanyow Lax-yip; and, a declaration invalidating, reading down or reading in provisions of the Treaty.

[138] With regard to the first conclusion about Aboriginal rights, that relief is not, and could not, be sought in this litigation. I agree with the Province that a petition is not the appropriate proceeding in which to determine the existence of Aboriginal rights pursuant to s. 35 of the *Constitution Act, 1982* because they "must be determined after a full hearing that is fair to all the stakeholders" which includes a discovery process and well-crafted pleadings: *Lax Kw'alaams Indian Band v. Canada (Attorney General),* 2011 SCC 56 at paras. 11-12; *Prophet River First Nation v. British Columbia (Minister of Environment),* 2017 BCCA 58 at para. 37. With regard to the second conclusion, the Gitanyow confirm they are not seeking to challenge the validity of the Treaty in this petition.

[139] In any event, the parties did not frame their arguments as if those declarations were being sought in the terms worded. Instead, they addressed this issue: does the Gitanyow's right to be consulted take priority over the Nisga'a Nation's rights under the Treaty? The Gitanyow say yes, the Nisga'a Nation says no, and the Province takes no position.

[140] The Nisga'a Nation submits its position that the Treaty must serve as the sole legal framework in this dispute, is the only approach consistent with one of the purposes of signing the Treaty -- to provide certainty to both levels of Crown, the Nisga'a Nation and the world at large about the Aboriginal rights of the Nisga'a. It contends that if competing groups of Aboriginal peoples can successfully assert rights to consultation and accommodation about decisions made under the Treaty, it inevitably leads to uncertainty and unpredictability, both of which clearly raise the

potential for a negative impact on the rights granted, in this case, to the Nisga'a Nation under the Treaty. That being the case, the Nisga'a Nation asks why any group of Aboriginal peoples would enter into a treaty? Given that treaties negotiated in good faith are clearly the preferred method advanced by the Supreme Court of Canada for the Crown to begin reconciliation with Aboriginal peoples, bearing that question in mind, is crucial to the analysis in this case.

[141] However, the Gitanyow submit that to accede to the Nisga'a Nation's position would ignore years of Supreme Court of Canada jurisprudence, which emphasizes the Crown's fiduciary duty to Aboriginal peoples embodied in the duty to consult doctrine. There is no doubt that the duty to consult is a hallowed obligation of the Crown and no party suggested otherwise. The difficulty is that obligation has not yet directly confronted the Crown's obligations to a different Aboriginal group under the Treaty.

[142] I acknowledge that the petitioners also seek a declaration requiring the Minister, when consulting the Gitanyow, to take into account that aspect of Gitanyow Ayookxw that dictates Gitanyow harvest only within Gitanyow Lax'yip. I decline to consider that relief. The Court can declare whether a duty to consult exists, and decide if that duty was met, but cannot direct the parties' positions that they must take on substantive issues. I did not understand, however, the Province to question the fundamental importance of that tenet of Gitanyow Ayookxw to the petitioners.

VI. ANALYSIS OF THE DUTY TO CONSULT ABOUT THE TAH DECISION

[143] The standard of review applicable to the issue of the existence of a duty to consult the Gitanyow about the TAH and AMP decisions is correctness. To succeed in the argument that the Crown's duty to consult is triggered by those decisions, the Gitanyow must meet the test from *Haida Nation,* as further elaborated upon in *Rio Tinto,* and prove that:

a) the Crown had real or constructive knowledge of the Gitanyow's claim of an Aboriginal right to hunt moose in the NWA;

b) the Minister's decisions equate to contemplated Crown conduct that engage that Aboriginal right; and

c) there is a causative link between the Minister's decisions and the potential for adverse impacts on the Gitanyow's asserted right to harvest moose.

A. Knowledge of Claims and Engagement of Interests

[144] The first step of the three part test is easily met for both the TAH and AMP decisions. There can be no doubt that the Crown had knowledge of the Gitanyow's assertion of its Aboriginal right to hunt moose in the NWA with respect to the TAH decision and the AMP decision for some time, and I did not understand any party to contest that.

[145] It is also clear that the TAH decision engages moose harvest in the NWA at the core of its directive. Its function is to set, limit and control the number of moose that can be harvested with Treaty-dictated proportions being allocated to the Nisga'a Nation. The TAH engages the Aboriginal right asserted by the Gitanyow, thus easily meeting the second step.

B. Potential for Adverse Impact

[146] The Supreme Court of Canada discussed the third step of the duty to consult test at paras. 45 to 50 of *Rio Tinto*. Importantly, the Court noted (at para. 46) that, "the adverse effect must be on the future exercise of the right itself; an adverse effect on a First Nation's negotiating position does not suffice". The Court emphasized that it is current Crown conduct that may trigger a duty to consult because "…the purpose of consultation is to protect unproven or established rights from irreversible harm as the settlement negotiations proceed: *Newman*, at p. 30, citing *Haida Nation*, at paras. 27, 33" (para. 41).

[147] This articulation of the purpose of consultation is important; it must guide the analysis. The duty to consult does not arise merely because there is *a prima facie* case that a group of Aboriginal peoples has a claim to title or rights in any particular area. The duty to consult flows from the Crown's fiduciary responsibility to Aboriginal peoples to protect the land or resources claimed by them from possible deterioration

until claims are finalized, and to encourage a negotiation process about those claims. In that way, the duty to consult does not hover over every potential Crown decision in the area over which there are Aboriginal claims. The Supreme Court of Canada commented on this issue in *Wewaykum v. Indian Band v. Canada*, 2002 SCC 79 at para. 81:

> … The appellants seemed at times to invoke the "fiduciary duty" as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship. This overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests.
>
> See also *Rio Tinto* at paras. 52 to 54.

[148] The Province acknowledges that the TAH decision engages the duty to consult, meaning it also admits that the TAH decision has the potential to adversely impact Gitanyow rights. That does not, however, resolve the issue for several reasons.

[149] The Nisga'a Nation submits the Gitanyow cannot meet the test as articulated in *Haida* and *Rio Tinto,* but its primary position is that there is a more fundamental hurdle to the Gitanyow's success in this case. The Nisga'a Nation submits that decisions made under the Treaty *cannot possibly* adversely affect the Gitanyow's asserted rights because the Treaty only addresses its relationship with the two levels of the Crown. Its contention is the Treaty takes priority over the Gitanyow's asserted claims.

[150] In my view, applying the existing jurisprudence does not address the fundamental dilemma posed by the Nisga'a Nation's submissions. Failing to address that dilemma leaves open the potential that the Province will breach its fiduciary and treaty obligations to the Nisga'a Nation by fulfilling a constitutional duty to the Gitanyow. It is untenable that the correct application of legal principles about the duty to consult one Aboriginal group, may result in the Crown failing to fulfill its honour and fiduciary duty to another group of Aboriginal peoples. That is why I conclude it is necessary to modify the applicable legal test about the duty to consult.

1. Evidence of Adverse Impact

[151] The Nisga'a Nation submits the Gitanyow have failed to meet the third step of the *Haida* test with regard to the TAH decision on an evidentiary level. It submits that the Province has not regulated or otherwise limited harvesting of moose by the Gitanyow. The Nisga'a Nation submits since the Gitanyow have never been subjected to the TAH or the AMP, that proves the Gitanyow have not, and will not, suffer any adverse impact by the impugned decisions. The Nisga'a Nation relies on the affidavit of Mr. Nyce who deposed that "as far as he knew", the Province does not consider the TAH set under Chapter 9 to be a limit on moose harvest by non-Nisga'a Aboriginal hunters. Nor is he aware of any steps taken by the Province to restrict Gitanyow moose harvest.

[152] The Gitanyow take a different view. They point to a number of statements in documents that imply the Province views the moose available for Gitanyow harvest to be whatever is "left over" once the Nisga'a Nation allocation has been calculated. On the other hand, the Province's legal submission states no efforts have been made to enforce limits on Gitanyow harvest, and it is referred to as part of the "unregulated" moose harvest. The Province acknowledges, however, that the Gitanyow have set up their own measures and processes for their moose harvest.

[153] The Nisga'a Nation points to the Gitanyow's own moose hunting management processes as substantiating its position that the TAH has no adverse effect. It submits that in the 2012/2013 harvest year, the amount of the TAH available for non-Nisga'a harvest was seven moose. Yet, in October 2012, the Gitanyow issued permits for up to 25 bull moose. It was not clear to me how many of those 25 were harvested because Mr. Koch stated only that two were harvested by the Gitanyow, and I understood permits may have been issued to non-Gitanyow hunters. In any event, the Nisga'a Nation's position is this demonstrates that the Gitanyow moose harvest is not restricted in any way by the TAH.

[154] The Province also points out that it has repeatedly asked the Gitanyow to identify the anticipated adverse effects flowing from the impugned decisions, and

they had not done so. That submission, in my view, does not establish that the Gitanyow failed to adduce evidence of an adverse impact. It is more appropriately considered under the adequacy of consultation.

[155] The respondents' submissions on this point are unpersuasive because they do not reveal a lack of "evidence" *per se*. Instead, they simply re-state one of the legal disputes in the case about the applicability of the Treaty and the TAH to the Gitanyow.

[156] As discussed above, the Gitanyow allege that the TAH was set too high and that it caused a decline in moose population, which proved their rights were negatively impacted. I declined to make that finding. But the Gitanyow also make the simple point that the more moose other people are allowed to harvest, the less that will be available for them. They say that is sufficient to meet the third step of the *Haida* test.

[157] The purpose of consultation is to protect the resource pending final determination of Aboriginal rights so that the asserted right does not become worthless because decisions made in the meantime have diminished the resource. Thus, on a basic analysis, the number of moose available for the Gitanyow to harvest could be negatively impacted by the Minister's decision of the maximum number of moose that can be harvested in the NWA, regardless of whether the TAH is enforced against the Gitanyow.

[158] Therefore, I do not agree with the respondents that the Gitanyow have failed to meet the third step because of a lack of evidence.

2. Applying the Duty to Consult Jurisprudence to the TAH Decision

[159] The Gitanyow's position is that any decision that purports to regulate the total harvest available in an area where Aboriginal peoples claim rights or title necessarily carries the potential to adversely affect rights, triggering rights to consultation. The Gitanyow support this position by relying on the statements affirming their strong *prima facie* claim to title and rights within portions of their traditional territories as

stated in *Gitxsan, Maii* and *Wii'litswx.* They contend that those cases are essentially determinative to the issues before me, although they do rely on other cases. Among others, they rely on *Ross River Dena Council v. Yukon (Government of*), 2015 YKSC 45, at paras. 54-58.

[160] That case was a petition for judicial review involving a territory-wide hunting and seals licensing program under the *Wildlife Act*. The Court found that the issuance of annual hunting licenses and seals could potentially impact the amount of wildlife available for the subsistence hunt of members of the Ross River Dena Council. The Court reasoned that issuing hunting licenses can have obvious impacts on wildlife resources, in that the annual harvest leads to wildlife being depleted, which could adversely affect the First Nations' underlying title claim.

[161] However, the Court in *Ross River* made an important distinction between potential adverse effects on the Aboriginal group's exercise of its rights within its traditional territory as opposed to any exercise of its rights in lands outside of their asserted land claim. At para. 89, the Court said that the licenses affected "*who* can hunt, not *where* they can hunt" (emphasis in original). Therefore, there was the potential that the Ross River Dena Council's Aboriginal right to hunt could have been adversely affected, insofar as the decision allowed the harvesting of wildlife within the area covered in their traditional territory. However, the decision could not adversely affect their rights outside of that claimed area on a territory-wide basis.

[162] Thus, a dissonance between the area of land to which the decision under review applied, and the area of land subject to claims by the Aboriginal peoples, was pivotal to the Court's conclusion as to the scope of any potential adverse effects. The Gitanyow point out that unlike that case, the AMP and the TAH decisions involve a designated area of land, the NWA, a portion of which is included in their claim to title.

[163] While that is true, only 32% of the NWA lies within their traditional territory. The Nisga'a Nation submits that is insufficient to amount to the potential for an appreciable adverse impact. Regardless of whether that position is correct, it is

reasonable to enquire if that fact influences the scale of the potential adverse impacts flowing from the TAH decision. That is important because the scope of any duty of consultation that may exist is tailored to reflect the strength of the claims, and the potential seriousness of the adverse impacts. Combined with that question, the existence of the Treaty distinguishes this case from virtually all the cases the parties referred to me. That is why I have found it necessary to modify the legal test about the existence of the duty to consult in this case.

C. The Unique Circumstances Affecting the Duty to Consult in this Case

[164] The existing case law on the duty to consult does not address the situation in this case. In my respectful view, the submissions of the Nisga'a Nation will go unanswered unless further analysis is undertaken to address the following considerations.

1. Prior Judicial Pronouncements about the Gitanyow Claims

[165] The Gitanyow rely on *Gitxsan, Maii* and *Wii'litswx* as being virtually determinative of the existence of the duty to consult in this case. Those cases do firmly state the Gitanyow have a strong *prima facie* claim for title and rights in the Gitanyow Lax'yip. However, none of those cases concerned moose hunting in the NWA. Accordingly, and with respect, those judicial pronouncements do not absolve the Gitanyow of their obligation to demonstrate in this case that the impugned decision may adversely affect their claim of an Aboriginal right to harvest moose in the Gitanyow Lax'yip.

[166] Because this case involves the potential complicating factor identified by Justice Tysoe in *Gitxsan* (the issue of overlapping claims) and its potential effects on the strength of the Gitanyow's claim for Aboriginal rights in their traditional territory, it is prudent to review what that case actually decided.

[167] In *Gitxsan,* the Gitanyow brought a petition for judicial review of a decision about the management of a forestry company upon which they were not consulted. Justice Tysoe assessed the evidence put forward in support of the claim for

Aboriginal title and held that the Gitanyow had established a "good *prima facie* claim of Aboriginal title and a strong *prima facie* claim of Aboriginal rights with respect to at least part of the areas claimed by them and that these parts are included within the lands covered by the Skeena's tree farm and forest licenses" (para. 72). However, he also stated that while the Gitanyow had a strong *prima facie* claim of Aboriginal title and rights to some of its traditional territory claimed, overlapping claims with another Aboriginal group in relation to other portions of its claimed territory severely complicated the claim to those overlapping areas (paras. 73 - 76).

[168] The Province had argued that no *prima facie* case had been proven because of the existence of overlapping claims. Justice Tysoe dismissed that submission at paras. 74 and 75. In doing so, he commented on the potential effects of overlapping title claims and how the Court should evaluate Aboriginal rights in that context:

> 74 The overlapping claims certainly preclude each competing group from being successful in proving aboriginal title to the areas which are the subject matter of the overlapping claims because, as stated at para. 155 of *Delgamuukw*, it would be absurd for two or more groups to have the right of exclusive use and occupation to the same area…in the event that the overlapping claims result in a finding that aboriginal title to a disputed area has not been established, it is still possible for the Court to conclude that the competing groups have each established aboriginal rights in respect of the area.
>
> 75 *Haida*, for instance, the Haida Nation claimed title to all of the Queen Charlotte Islands. The chambers judge concluded that there was a reasonable probability that the Haida would be able to establish aboriginal title to some parts of the Islands and that there was a reasonable possibility that they would be able to establish aboriginal title to other parts of the Islands. He also concluded that there was a substantial probability that the Haida would be able to establish the aboriginal right to harvest red cedar trees in areas covered by the tree farm licence in question. Roughly speaking, I would equate (i) the term "reasonable possibility" to a *prima facie* case, (ii) the term "reasonable probability" to a good prima facie case and (iii) the term "substantial probability" to a strong prima facie case. The fact that the Haida Nation did not have a good *prima facie* claim of aboriginal title in respect of all of the territory claimed by it was of no consequence because they had established good or strong prima facie claims of aboriginal title and rights in respect of some of the lands covered by the tree farm licence. The same situation exists in this case.

[169] That analysis applied to the facts in this case, means that the Gitanyow cannot have a claim to title or rights in the Nisga'a Lands. However, it also means

that their claim to "rights" (including the specific right to harvest moose) is limited to that part of the NWA area subject to their claim to title. This fact is relevant to my consideration as to whether the Province has a duty to consult and if so, the extent of that duty.

[170] Thus, even though the Gitanyow probably cannot succeed in a claim of title to any portion of the Nisga'a Lands, that fact does not necessarily prevent the Court from recognizing *prima facie* Aboriginal rights to activities, such as hunting, in portions of the NWA. But that recognition is nothing more than a preliminary and general assessment of the strength of the claim.

[171] Similar comments and analysis were made by Justice Neilson in *Wii'litswx* at para. 155: "…while overlapping claims between First Nations may have some impact on their claims to aboriginal title, they do not preclude a successful claim for aboriginal rights…" because non-exclusive occupation is sufficient to prove the existence of Aboriginal rights. The Court concluded in *Wii'litswx* that the Crown representative placed too much weight on the fact that the Gitanyow claim had not been formally proven.

[172] The Gitanyow say that reasoning applies to the facts before me, and the Province cannot disavow a duty to consult because there is no judicial determination of their rights. However, the Province did not make that legal submission; it denies a duty to consult only with respect to the AMP decision based on the lack of an adverse impact on the Gitanyow's rights.

[173] The difficult issue is what precedential value *Gitxsan* and *Wii'litswx* have on this case both on the existence of the duty to consult and on the depth of that duty. The Gitanyow submit that there can be little question that their title and rights claim is a strong one and thus, any duty to consult must be at the deep end of the spectrum. Their position implies that the strength of their claim also means an adverse impact is more readily found by any decision made under the Treaty concerning wildlife in the NWA.

[174] However, those cases were fundamentally different than the case before me. In those cases, the Gitanyow were faced with arguments diminishing the Crown's duty to consult, and the extent of that duty, based on the Gitanyow's problematic overlapping title claim. Importantly in those cases, the overlapping title claims of both Aboriginal groups were not finalized. This case, in contrast, involves an overlap between finalized rights guaranteed under a modern day treaty, and asserted, but non-finalized rights of the petitioners.

[175] In the previous cases, imposing on the Crown a duty to consult the Gitanyow based on a preliminary assessment of their claim for title or rights, when the Crown is exercising a statutory power did not present the Court with dual or competing constitutional mandates. There is only one constitutional directive: the Crown's duty to consult in order to preserve an Aboriginal peoples' ability to effectuate through treaty or judicial pronouncement their Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*.

[176] The crucial difference in the case at bar is the existence of the Treaty that is a land claims agreement, a treaty affirmed by the *Constitution Act, 1982* and a treaty that has finally determined the Nisga'a Nation's title to land and Aboriginal rights to area of land, some of which includes portions of the land over which the Gitanyow also assert title and rights. While I take judicial notice that other courts have found the Gitanyow have established a strong *prima facie* claim to rights and title in their traditional territory sufficient to trigger a duty to consult where the Crown was making decisions under its statutory duties, I cannot, with respect, assume that is determinative on the facts before me.

[177] If I accept without question that the Gitanyow have a strong *prima facie* title claim within parts of the NWA that fall within Gitanyow Lax'yip (I will refer to this as the "Overlap Area"), that implies they have a strong case of a history of exclusivity of use of resources in that area, which is potentially incompatible with Treaty rights. Also, in such a scenario, the Crown may be required to consult the Gitanyow with respect to the Overlap Area, but not the rest of the NWA, or must engage in deep

consultation in respect to the Overlap Area and not the rest of the NWA. Moose are animals that travel and roam across the NWA and therefore such a result would be absurd.

[178] In other words, it does not help me to use those cases as evidence of the Gitanyow's strong *prima facie* title claim in order to inform my decision as to whether the Minister has a duty to consult, and if so, the extent of that duty. However, those cases are useful for the principle that even if the strength of an Aboriginal title claim is uncertain, asserted Aboriginal rights within that uncertain claim area are not precluded from being made.

2. The Significance of the Treaty

[179] The Treaty grants to the Nisga'a Nation ownership in fee simple of the lands identified in the Treaty ("Nisga'a Lands", Chapter 3, paras. 1, 2 and 3). However, the Treaty also "exhaustively" sets out "the aboriginal rights, including aboriginal title... in and to Nisga'a Lands and other lands and resources in Canada" (emphasis added; Chapter 2, para. 23).

[180] This exhaustion is a critical element of this case. The Treaty is a final determination of all of the Nisga'a Nation's rights and claims, and is a modern treaty and land claims agreement as defined by ss. 25 and 35 of the *Constitution Act, 1982.* The Treaty is not legislation; like the *Constitution Act, 1982,* legislation was necessary to enact it (in that case United Kingdom legislation), but that does not mean that the *Constitution Act, 1982* or the Treaty are simply statutes. The Treaty is part of Canada's constitutional landscape. It is binding on all persons, including the Crown, and all Aboriginal peoples. More importantly, it is both an expression and the embodiment of the Crown's fiduciary duty to the Nisga'a Nation. It is different in character, impact and substance from the statutes under which Crown decisions were examined in the duty to consult cases cited to me.

[181] I agree with the Nisga'a Nation that given its constitutional status and the consequences it has had on the Nisga'a Nation's Aboriginal rights (exhausting them), the Treaty must be interpreted liberally, but applied strictly. Doing so is

consistent not only with the fiduciary duties the Crown acted under when entering into the Treaty, but also with the recognition that the Treaty is an important step in the Crown's reconciliation with the Nisga'a Nation.

[182] Furthermore, the Treaty does not necessarily exhaust the Crown's fiduciary duties to the Nisga'a Nation. In *Little Salmon*, the Yukon government argued that it had no duty to consult the First Nation with which it had a treaty about a decision to grant surrendered land to a Yukon resident. The surrendered land bordered on the settlement lands of the First Nation and formed part of its traditional territory, to which the Treaty granted the First Nation right of access for hunting and fishing for subsistence. That treaty contemplated that surrendered land could be taken up for other purposes[5]. The Yukon government's position was that no consultation was required because the treaty was a complete code, referring to consultation in some provisions but not others. Since the provisions referencing grants of surrendered land did not mention consultation, the Yukon government submitted no consultation was required.

[183] The Supreme Court of Canada held that the duty to consult did exist for land grant applications, notwithstanding the provisions in that treaty addressing land grants did not mention consultation. That treaty contained an express right for the First Nation to hunt and fish on its traditional lands, even though those lands were surrendered and classified as Crown land. Thus, the treaty did not prevent the Crown from allowing land grants out of the surrendered land; but the Crown was still required to consult and accommodate since it was obvious the grant might adversely affect the First Nations' rights (paras. 62 and 69).

[184] The importance of this case is that it reaffirms that the approach to treaty interpretation is not akin to interpreting legislation, which was a submission of the Gitanyow. It also confirms that the Crown's fiduciary duties to the Nisga'a Nation are ongoing, and not limited or constricted by the terms of the Treaty.

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[5] While the Treaty contemplated surrendered land could be given up by the Crown, the procedure to do so was said to be a matter of "general law" outside the text of the treaty.

3. Addressing Other Aboriginal Rights

[185] The Nisga'a Nation submitted that the Treaty is a complete code, and contains specific processes to address claims by other Aboriginal groups. I agree.

[186] Chapter 2, para. 34 provides specific direction "[i]f a superior court of a province, the Federal Court of Canada, or the Supreme Court of Canada finally determines that any Aboriginal peoples, other than the Nisga'a Nation, has rights under section 35 of the *Constitution Act, 1982* that are adversely affected by a provision" of the Treaty (emphasis added). In that situation, either "the provision will operate or have effect to the extent that it does not adversely affect those rights"; or, if that is not possible, the parties to the Treaty "will make best efforts to amend" the Treaty to remedy or replace the offending provision.

[187] Equally important is Chapter 2, para. 35. That paragraph specifically contemplates the scenario where the Province enters into a treaty or land claims agreement with another group of Aboriginal peoples that adversely affect Nisga'a Nation rights as set out in the Treaty. Notably, it is clear from that section that the remedy is not a modification or an amendment to the Treaty terms, but rather that the Nisga'a Nation will be provided "additional or replacement rights". It is true that "other appropriate" remedies are also a possibility, but in my view, that simply highlights that the amendment provisions in paras. 36 to 43 can always be invoked, all of which require the Nisga'a Nation's consent (para. 36). Importantly, para. 35 does not contemplate judicial or administrative modification of treaty terms in such circumstances.

[188] The Nisga'a Nation's position is that para. 34 (and presumably para. 35) is the only mechanism by which the Gitanyow (or any other Aboriginal peoples) could require that interests not specifically identified in the Treaty have any influence on decisions about the TAH or the AMP.

[189] The Gitanyow submit that the Treaty is not exhaustive of their potential remedies in the scenario where a treaty provision adversely affects its rights. It points out that the case law is clear that they do not have to wait for a final

determination of their rights to trigger the Crown's duty to consult. Because Aboriginal rights do not depend upon proof of exclusive occupation of an area of land, it is possible for more than one Aboriginal group to have rights within the same geographical area, such as the NWA. The Gitanyow says the jurisprudence setting out the duty to consult and accommodate must prevail over a strict reading of the Treaty.

[190] The duty to consult in fulfillment of the Crown's fiduciary obligation to the Gitanyow is a key imperative, but so is the Crown's obligation to abide by the terms of the modern Treaty. The Nisga'a Nation has compromised claims to territory and rights in exchange for the Treaty. It says its process of reconciliation articulated in the Treaty will be jeopardized if rights asserted (but not finally determined) by the Gitanyow are allowed to influence any decision under the Treaty.

[191] Also relevant is Chapter 2, para. 33, which explicitly states that nothing in the Treaty "affects, recognizes, or provides any rights under section 35 of the *Constitution Act, 1982* for any Aboriginal peoples other than the Nisga'a Nation". Ironically, both the Nisga'a Nation and the Gitanyow submit this paragraph supports their position.

[192] The Nisga'a Nation submits that Chapter 2, para. 33 is determinative and declaratory: it reads the paragraph to mean the Gitanyow's Aboriginal rights "are not" affected by the Treaty. The Gitanyow read the paragraph as prospective, and as a measure meant to restrict or modify treaty terms as necessary: they read it as meaning "the Treaty cannot affect the recognition of our *prima facie* claim to rights, including the duty to be consulted". These disparate interpretations are the crux of the dispute in respect to priority.

[193] I do not agree that para. 33 supports the Gitanyow's claim that its asserted rights take priority over the Treaty. Paragraph 33 confirms the Treaty is a neutral instrument with regard to the claims made by other Aboriginal peoples because it does not purport to regulate anyone other than Nisga'a citizens. That does not, however, diminish the Treaty's constitutional status as applied to the rights

contained within it. The Treaty grants to the Nisga'a Nation title and a number of rights that are, with respect, unassailable except as the Treaty itself allows. Its neutrality with regard to its influence on the asserted rights of other Aboriginal peoples, does not mean the Treaty is subsumed to those asserted rights. Simply put, it has "no affect" on the existence or the pursuit of other Aboriginal peoples' claims to title or rights.

[194] Given the preceding discussion, I cannot see how rights granted, or processes articulated in the Treaty are secondary to asserted, but not yet finalized, rights.

[195] In my respectful view, the Gitanyow have conflated its assertion of claims to title and rights, with the duty to consult. The Crown's duty to consult is obviously integrally related to an Aboriginal peoples' assertion of rights. And, its purpose is to protect and enhance that assertion. However, asserted but not finalized rights, and the concomitant duty to consult, cannot have the capacity to influence the Treaty in any way except as prescribed under Chapter 2, paras 34-35. An objective interpretation of paras. 33, 34 and 35 buttresses that conclusion, and is the interpretation that best adheres to constitutional principles when the Crown is faced with the possibility of conflicting duties because of overlapping claims.

[196] I also conclude this analysis applies to the Gitanyow's assertion that Chapter 9, para. 6 is strong support for its assertion that its rights take priority to the Nisga'a Nation's rights. Paragraphs 6 states that: "Notwithstanding that Nisga'a wildlife entitlements are treaty rights, a Nisga'a wildlife allocation that is set out as a percentage of the total allowable harvest has the same priority as the recreational and commercial harvest of the total allowable harvest of that species".

[197] The Gitanyow assert the law is clear that Aboriginal rights to harvest clearly take priority over any recreational and commercial harvest rights, and by implication the Gitanyow rights supersede Nisga'a Treaty rights. I do not agree with that position. Among other things, the Gitanyow do not have a right to harvest, they have asserted the right to do so.

[198] The Nisga'a Nation's *right* to harvest moose is not contained in para. 6; it comes from para. 1. The Nisga'a wildlife allocation for moose is set out in Schedule A to Chapter 9, para. 2. All para. 6 does is confirm that whatever number is generated from the formula contained in Schedule A to Chapter 9, para. 2, will have the same priority of whatever number is allocated to the recreational and commercial harvest. But those harvests (if they exist, and on the facts in this case they have not for many years) are not granted under the Treaty. They would presumably come from authorizations issued under the *Wildlife Act*, or some other provincial authority. Paragraph 6 does not elevate anyone's *right* to receive a recreational or commercial right to harvest under the *Wildlife Act*. Similarly, the Crown's duty to consult the Gitanyow due to its strong *prima facie* asserted rights, does not transform those asserted rights into harvest allocations that have any status under the Treaty.

4. The Regulation of Wildlife under the Treaty

[199] The Nisga'a Nation submits that looking at the Treaty as a whole confirms its position that the Treaty does not contemplate consultation with the Gitanyow when the Minister sets the TAH or assesses the AMP. Chapter 9 is a comprehensive code for regulating the Nisga'a Nation's rights to harvest wildlife in the NWA. It contains details of procedures to be followed, and articulates factors that must be considered in setting both the TAH and the AMP.

[200] Chapter 9, para. 36 requires the Minister's management in the NWA to be consistent with the TAH and harvesting objectives established under the Treaty. The Nisga'a Nation has a treaty right to harvest wildlife throughout the NWA subject (according to the Nisga'a Nation, *subject only*) to the Treaty and measures necessary for conservation, or legislation enacted for the purpose of public health or public safety (Chapter 9, para. 1). The Nisga'a Nation's position is that the Gitanyow's asserted Aboriginal rights are neither measures necessary for conservation, nor public health or safety legislation. I agree, but that does not resolve the dispute.

[201] The Treaty explicitly spells out the parties' (to the Treaty) duties respecting management of wildlife in the NWA. Chapter 9, para. 7 states that the Treaty is not intended to alter federal or provincial laws of general application with respect of property in wildlife. Thus, the Crown retains ownership of all wildlife in the NWA pursuant to s. 2 of the *Wildlife Act*, R.S.B.C. 1996, c. 488. The Minister must manage "all wildlife harvesting" within the NWA consistent with the TAH and "harvesting objectives" set out in the Treaty (para. 36), but importantly, the Treaty does not directly regulate anyone else's rights or methods of harvest.

[202] The Minister has responsibility for the management of wildlife harvest in the NWA, but the Wildlife Committee facilitates that management (para. 45). Only representatives from the Crown and the Nisga'a Nation are members of the Wildlife Committee (para. 46). The Wildlife Committee has responsibility to make recommendations about the TAH with reference to the following objectives set out in Chapter 9, para. 45(c) (which I assume must be "harvesting" objectives as per para. 36): "i. the geographic distribution of the harvest within the Nass Wildlife Area, ii. the sex and age composition of the harvest, iii. monitoring, reporting, and auditing requirements, and iv. other similar matters". When determining the TAH for a designated species, para. 22 requires the Minister to take into account the population of the species within the NWA, and that species' population within its normal range of movement outside the NWA. Although I am unclear if this is true, it seems likely that the range of moose movement would include portions of the Gitanyow Lax'yip that are not in the Overlap Area.

[203] What is notable about the listed considerations in these paragraphs is that they pertain to general management and sustainability of the designated species. These are not Nisga'a-specific guidelines. They are general in nature and focus on principles of wildlife sustainability. The character of these factors support the respondents' position.

[204] The Treaty grants only to the Nisga'a citizens the right to harvest wildlife within the NWA. But that does not mean other rights to harvest do not or cannot

exist within the NWA. However, the Treaty is not the mechanism under which those rights are granted or regulated. Thus, the Nisga'a Nation says those other mechanisms regulating wildlife may impact the Gitanyow's rights, but the Treaty does not.

[205] Similarly, the Treaty does not purport to regulate wildlife harvest outside of the NWA. For instance, Chapter 9, para. 4, states that the wildlife entitlements in the Treaty mean "Nisga'a citizens may harvest wildlife" on fee simple lands outside of the Nisga'a Lands, but in doing so, "that harvesting will be in accordance with laws of general application in respect of harvesting wildlife on fee simple lands" (see also Chapter 9, paras. 12 and 27(b)).

[206] Only designated species are subject to a TAH. Other than the initially designated species (moose, grizzly bear and mountain goat), species are designated to "address a significant risk to a wildlife population" (para. 17). Therefore, maximum harvest levels are set to ensure a species' sustainability.

[207] Allowing harvest of a designated species is not incompatible with ensuring its continuity. Conversely, there could be years where the species' population cannot withstand any or very little hunting in order to sustain its continued population. In my view, reading Chapter 9 as a whole, it is clear that the determination of the TAH is motivated primarily, if not exclusively, to ensure the sustainability of a designated species.

[208] To put it another way, there is nothing in the Treaty requiring the Minister, when setting the TAH, to assume he or she must ensure there is a harvest to which the Nisga'a Nation have a Treaty-entitled allotment. Nor do I have evidence that this is the case. The TAH only sets a maximum level of animals that can be harvested in any particular year; it does not allocate among groups any entitlement for harvesting. Once the TAH is set, the Nisga'a Nation's exercise of their treaty rights to harvest moose are expressed as a percentage of the applicable TAH. If the TAH is 0, Nisga'a citizens cannot hunt any moose, and neither can anyone else.

[209] The Gitanyow say that does not answer their argument. The Gitanyow say when Nisga'a citizens harvest moose, it is possible there will be inadequate moose available for them. They point out Gitanyow Ayookxw dictates they only harvest within Gitanyow Lax'yip, and take no more than they need.

[210] There is a logical appeal to the argument: if one group is given the right to harvest moose, and it exercises that right, there will be less moose available for everyone else. But that potential adverse impact does not flow from the TAH decision; it flows from the right granted to the Nisga'a Nation to harvest designated species in the NWA (Chapter 9, para. 24) and the allotment in the Treaty (Schedule A to Chapter 9).

[211] The focus of the Gitanyow's legal challenge is not Nisga'a Nation's harvest rights or the Nisga'a Nation moose harvesting allotment. Because those are entrenched in the Treaty, there is no "decision" into which consultation can be sought, and the validity of the Treaty itself is not challenged. Instead, they challenge the decision about how many moose can be hunted in total.

[212] The Gitanyow argue differentiating the Nisga'a Nation's harvest rights and moose allotment from the TAH is artificial because the allotment is always a certain percentage of the TAH. The respondents disagree. The Nisga'a Nation submits to accept the Gitanyow line of argument would be allowing them to get through a back door, what they cannot get through the front: direct input into the Nisga'a Nation's harvest rights and moose allotment.

[213] I agree that the distinction between the TAH decision on the one hand, and the Nisga'a harvest rights and allotment on the other, is not an artifice. They are different in character in a way that is legally relevant. Thus, the intuitive argument the Gitanyow raise (that the TAH clearly affects their availability of moose and constitutes a potential adverse interest) does not answer the submissions of the Nisga'a Nation, and therefore the analysis about the duty to consult cannot end here. To cease analysis at this stage raises the possibility that the Crown's

obligation to consult the Gitanyow about the TAH, would amount to allowing non-Crown, non-Nisga'a input into the Nisga'a Nation's treaty right.

[214] On the other hand, the TAH applies throughout the NWA. Logic suggests that in order to make environmentally sound decisions about the TAH and adhere to the harvesting objectives in the Treaty, the Minister should take a holistic approach and would benefit from as much information relevant to sustainability as possible. This is confirmed by para. 22 which instructs the minister to take into account the population of the designated species within the NWA as well as its normal range or area of movement outside the NWA. This ensures the TAH accords with "proper wildlife management".

[215] The Treaty's regulation of wildlife prioritizes sustainability, generally. Sustainability is not only a common aim of both the Nisga'a Nation and the Gitanyow, it is inherent to their culture in a way unique to many Aboriginal peoples. It is difficult in that milieu to understand how engaging Gitanyow input in respect to the maximum number of animals to be harvested in a given year is counter to the overriding general objective of wildlife sustainability and management.

[216] Certainly, there are provisions that support the idea that interests other than those guaranteed in the Treaty to the Nisga'a Nation should be considered in setting the TAH. The Wildlife Committee facilitates management in the NWA and is assigned specific responsibilities to do so: Chapter 9, para. 45. That includes recommending to the Minister and Nisga'a Lisims Government measures of conservation for species within the NWA; whether the AMP should be set for species other than designated species; developing long-term wildlife management plans; advising the Minister and Nisga'a Lisims Government on wildlife management policies, projects and programs; and facilitating the sharing of information that could affect or be affected by Nisga'a wildlife harvesting. These are high-level planning and regulatory actions, which are consistent with sound wildlife management.

[217] None of these considerations directly impact the TAH or the Nisga'a Nation's moose allotment; the process and considerations for the TAH are detailed in the

Treaty, and the Nisga'a Nation's allotment is specifically set out. But the considerations identified in para. 45, do engage the Gitanyow's asserted hunting rights. The Wildlife Committee is responsible both for recommending the TAH, and making recommendations about "long-term wild life management", and clearly these responsibilities intersect.

[218] Overall, the preceding discussion supports a conclusion that the Gitanyow should be consulted about the TAH, but the analysis cannot end there. The duty to consult may require a duty to accommodate. As noted at para. 47 of *Haida Nation*, a strong *prima facie* claim that triggers the duty to consult raises the possibility that the effect of "good faith consultation may be to reveal a duty to accommodate" because "the consequences of the government's proposed decision may adversely affect [the claim] in a significant way" ultimately requiring the government to address those concerns by "taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim".

[219] Because of that, the Nisga'a Nation has every reason to insist on strict adherence to the processes articulated in the Treaty. It says strict adherence does not allow for the Minister to consult the Gitanyow because of the potential that accommodating the asserted Gitanyow claims will negatively impact the Nisga'a Nation's treaty rights.

[220] The submissions of the Gitanyow justify the Nisga'a Nation's concern. One of their submissions was that the Nisga'a Nation's allotment should be halved with an equal number being given to the Gitanyow. Furthermore, the narrative of the Gitanyow's affidavit evidence and legal submissions went beyond the assertion of a right to be consulted. The Gitanyow case clearly strayed into challenging both the Nisga'a Nation's exercise of its rights and its allotment, both guaranteed by the Treaty, the validity of which is not at issue in this litigation.

[221] In my view, this is another reason why the existing jurisprudence on the duty to consult should be modified. The analysis of the duty to consult as articulated in *Rio Tinto* and *Haida Nation* did not involve the issue presented here. There was no

competing constitutional imperative on the Crown when the Court was asking if the Aboriginal peoples were entitled to be consulted. Furthermore, only the Crown's statutory duties were at issue.

5. Modifying the Test for the Duty to Consult

[222] In my respectful view, it is appropriate to modify the analysis of the duty to consult to accommodate the nature of interests at stake in this case. This must be done in order to resolve the very real conflict presented on these facts to the fundamental nature of the Crown's duty to each of the Nisga'a Nation and the Gitanyow.

[223] If one only asks if the TAH decision may adversely impact the Gitanyow's asserted rights, the potential negative impact on the Nisga'a Nation's rights is ignored. The concern is not theoretical; the Gitanyow explicitly submit they are entitled to share in the Nisga'a Nation's allotment.

[224] That is why in deciding if a duty to consult the Gitanyow exists, I find it necessary to ask an additional question: would recognizing that the Crown owes a duty to consult the Gitanyow about to the TAH decision, be *inconsistent* with the Minister's duties and responsibilities under the Treaty, or the Crown's fiduciary duties to the Nisga'a Nation *in a way that may negatively impact the Nisga'a Nation's rights*?

[225] If the answer is yes, then in my respectful view, the treaty right must prevail over the duty to consult, which is triggered upon a preliminary assessment of the strength of an asserted Aboriginal claim. I cannot see how a common law constitutional right created to protect the ability of Aboriginal peoples <u>to further pursue</u>, by treaty or litigation, a final determination of their rights, can possibly override another Aboriginal peoples' <u>finalized</u> Aboriginal rights, as expressed in a constitutional document. To find otherwise would directly contradict provisions of the Treaty and the Crown's ongoing fiduciary duty to the Aboriginal peoples with whom it has entered into a treaty.

[226] Equally important, it almost certainly will be detrimental to the process of reconciliation between the Crown and the Aboriginal peoples with whom it negotiates treaties. The question posed by the Nisga'a Nation is powerfully apt: of what benefit is agreeing to a treaty if the terms negotiated regarding conflict with other Aboriginal rights are not respected? The Nisga'a Nation submits that if I apply the duty to consult triggering test as currently stated in the jurisprudence unaltered, it would send the message that the benefits negotiated under the Treaty are impermanent and malleable. In such a scenario, such a ruling would be antithetical to the concept that negotiated treaties can, and should, finalize asserted rights.

> ***6. Would recognizing a duty to consult the Gitanyow about the TAH decision, be* inconsistent *with the Minister's duties and responsibilities under the Treaty, or the Crown's fiduciary duties to the Nisga'a Nation* in a way that may negatively impact the Nisga'a Nation's rights*?***

[227] I conclude the answer to this question is no. Accordingly, I do find that the Province has an obligation to consult the Gitanyow when making the TAH decision.

[228] As noted above, the Treaty mandates an approach to wildlife management that focusses on sustainability and responsible stewardship. The evidence in this case, and logic, requires that the Minister seek information from anyone interested in hunting moose in the NWA or its environs.

[229] Obviously the Gitanyow's claim to moose harvest rise well above the level of general "interest". Although I do not make any findings about the connection between the TAH and moose population decline, I did find the evidence certainly justified the Gitanyow's concerns about the impact the TAH has on the moose population.

[230] It seems self-evident to me that engaging Gitanyow perspectives on adequate levels of harvest the moose population can withstand to ensure sustainability would be valuable to the Minister. This Court has stated, in different contexts, that there is a strong *prima face* case that the Gitanyow have lived in at least a portion of the NWA for thousands of years, adhering to a system of law, cultural ethics and way of life that values sustainability of resources, including wildlife, above almost everything

else. Their knowledge about managing moose strikes me as being vital to fulfill the sustainability goals articulated in the Treaty.

[231] Nothing in the Treaty precludes the Minister from consulting the Gitanyow about the moose TAH. Nor do I find affirming the duty to consult will place the Minister or the Province in conflict with the Crown's ongoing duties to the Nisga'a Nation under the Treaty. In being consulted, the Gitanyow would be asserting their claim to hunt moose in the Gitanyow Lax'yip. What they cannot do, however, is to seek to modify or influence the Nisga'a Nation's treaty rights or allotment under the guise of that consultation. The Minister is duty bound not to accept or consider input of that nature.

VII. ANALYSIS OF THE DUTY TO CONSULT ABOUT THE AMP

[232] As noted above in my analysis of the TAH decision, I have found that the Province has had knowledge of the Gitanyow's assertion of an Aboriginal right to hunt moose in the NWA for some time, and so the first of the three steps of the *Haida* test is easily met with regard to the AMP decision. I repeat that the standard of review on the issue of the existence of the duty to consult about the AMP decision is correctness

A. Engagement of Interests

[233] The AMP's purpose and implementation is distinct from the TAH. The Nisga'a Nation submits it is *impossible* for the AMP to adversely affect the Gitanyow's assertion of its right to harvest moose in the NWA, which is akin to saying it does not concern or relate to the Gitanyow's rights.

[234] An AMP is required for designated species under the Treaty. Chapter 9, para. 55 of the Treaty sets out what must be addressed in the AMP, including in part, the methods, timing and locations of the Nisga'a harvest (para. 55(b)), the sex and age composition of that harvest (para. 55 (c)), the monitoring of harvest and data collection (para. 55 (d)), and any other matters respecting wildlife that the Nisga'a Nation or Canada agree to include in the plan (para. 55 (h)).

[235] The Gitanyow submit that even though the AMP purports to only manage Nisga'a citizens' moose harvesting, its interests are engaged because the management plan regulates how moose are harvested in the Overlap Area.

[236] The Crown conduct in relation to the AMP is different than in relation to the TAH. The Minister can approve the AMP; if it is not approved, the Minister can offer suggestions as to how it can be changed to receive approval, but he or she cannot reject it. In that sense, the AMP that is ultimately approved results from the joint efforts of the Wildlife Committee and the Minister. But it is implemented, monitored and enforced solely by the Nisga'a Nation. In that way, the Nisga'a Nation submits it does not engage the Gitanyow's interest in hunting moose in their traditional territory.

[237] Although I find these submissions are sound and reasonable, I understand the threshold to meet this aspect of the test for the duty to consult to be low. Therefore, I am satisfied that the AMP meets it.

B. Potential for Adverse Impact

[238] The respondents submit the AMP does not trigger the duty to consult because it does not meet the third and final step of the *Haida* test.

[239] The Gitanyow submit because the AMP determines the methods, timing and location of the Nisga'a Nation annual moose harvest [Chapter 9, para. 55(b)], it has the potential to adversely affect its hunting rights. The Gitanyow point out that all but one of the AMP's approved between 2002 to 2009 stated that, "[m]ost moose are harvested from the eastern portion of the NWA which consists primarily of the Nass Valley including the upper reaches, the Cranberry River area and the Meziadin Lake area". Both areas fall within the Overlap Area.

[240] The Gitanyow also say that Chapter 9, para. 59 of the Treaty requires the Minister to take into account conservation requirements and availability of wildlife resources, the utilization of the resources for the benefit of all Canadians and other

relevant considerations. It argues that these factors demonstrate that the AMP's impact extends beyond the singular harvesting rights of the Nisga'a Nation.

[241] The considerations listed in para. 59 (which apply to all recommendations of the Wildlife Committee, including the TAH) are applicable to the AMP, but only to the extent the AMP applies to Nisga'a Nation citizens. The AMP only concerns and addresses harvest of moose by Nisga'a citizens; it applies to no one else. The AMP manages how Nisga'a citizens will exercise their allotment of the TAH for moose in the NWA, and as such, it is an element of the Nisga'a Nation's internal governance.

[242] Like the TAH, the AMP does not operate independently. The potential negative impact of the AMP described by the Gitanyow, emanates from the combination of the Nisga'a Nation's treaty rights to harvest wildlife, the TAH, the Nisga'a allotment, and the AMP. However, the Treaty is not and cannot be challenged in this proceeding. Thus, from a conceptual perspective, the contribution of the AMP to the potential adverse impact the Gitanyow describe is marginal. In my view, that conceptual impact diminishes entirely in practice because the AMP is only an internal governance mechanism of the Nisga'a Nation over its citizens.

[243] The Gitanyow submit that para. 55(d), which states the AMP will include monitoring of the harvest and data collection, may also negatively impact its rights. As I understand it, this submission is premised on the inability of the Gitanyow to access this data. The Gitanyow argue that the lack of access to that data means it has no way of confirming the "reliability and accuracy of the Nisga'a reported harvest" so as to know whether they are in agreement with the TAH allotment.

[244] I do not agree with the Gitanyow's submission that a duty to consult would give them any right or role in confirming the "reliability and accuracy of the Nisga'a reported harvest". Among other things, this submission requires me to assume the Nisga'a Nation's reporting is inaccurate or unreliable; that allegation is unwarranted. The submission is presumably based on the Gitanyow's assertion that it was the TAH and/or Nisga'a Nation hunting practices that caused the decline in moose population. I have already concluded that fact has not been proven.

[245] More fundamentally, I know of no legal principle that would give one group of Aboriginal peoples supervisory rights over the manner in which a different group of Aboriginal peoples exercise their rights. The point is acute in light of the fact that the Nisga'a Nation's rights are finalized, treaty rights.

[246] Accordingly, I conclude that the AMP decision does not trigger the Crown's duty to consult the Gitanyow under the *Haida* test. The Gitanyow have not persuaded me that the AMP decision adversely affects their claim to rights or title. However, I also refer to and adopt my reasoning of why a modification of the legal test is necessary (see paras. 150 and 164 to 226) to conclude the duty to consult cannot be imposed on the AMP decision. Indeed, the need to modify the legal test is even clearer when applying the *Haida* test to the AMP decision. The AMP decision is an element of the Nisga'a Nation's regulation of its own citizens. Without modification to the current legal test, that element of the Nisga'a Nation's self-government would be ignored.

C. Would recognizing a duty to consult the Gitanyow about the AMP decision, be *inconsistent* with the Minister's duties and responsibilities under the Treaty, or the Crown's fiduciary duties to the Nisga'a Nation *in a way that may negatively impact the Nisga'a Nation's rights?*

[247] The answer to this question is yes.

[248] In my view, even if I am wrong about whether the AMP triggers the Crown's duty to consult based on the *Haida* test, I find it would be incongruous with the Treaty and the Crown's fiduciary duties to the Nisga'a Nation to enforce a duty to consult the Gitanyow about how the Nation regulates and manages its own harvest.

[249] Consulting the Gitanyow about the AMP would clearly have a negative impact on the Nisga'a Nation's finalized rights. That is because the Minister does not have the ability to reject the AMP; the Minister can only suggest ways in which an AMP that is not approved, can be changed in order to receive approval. Accordingly, in order to meet the duty to consult the Gitanyow in good faith, the Minister would be obliged to consider in good faith changes to the AMP based on the Gitanyow's input. That directly conflicts with Chapter 2, para. 33, because the Gitanyow rights are not

finalized. More importantly, it would sanction interference with the Nisga'a Nation's internal governance by a party that is not a signatory to the Treaty, and therefore not bound by any other provisions.

[250] To conclude that the Gitanyow have a right to be consulted as to how Nisga'a Nation citizens exercise their treaty rights is, frankly, an anathema to the Treaty, the Crown's continuing fiduciary duties to the Nisga'a Nation under that Treaty, and generally.

[251] I find that the Crown's duty to consult the Gitanyow on the AMP decision would be not only inconsistent with the Crown's duties under the Treaty, it is incompatible with them. It would also be like a step backward in the process of reconciliation between the Crown and the Nisga'a Nation. If I were to grant the relief sought in this regard, it would amount to ordering the Minister to breach constitutional and treaty obligations it owes to the Nisga'a Nation. Since those rights are finalized and enforceable under a constitutional document, that relief cannot and is not granted.

VIII. ADEQUACY OF CONSULTATION ABOUT THE TAH DECISION

[252] I have concluded that the Crown has a duty to consult the Gitanyow with respect to the TAH decision. Now, I will analyze the extent of that duty and whether or not the Crown adequately discharged that duty, which is reviewable on the reasonableness standard (see paras. 28 to 30 of this judgment). The Province submits that the duty to consult the Gitanyow with regard to the 2016/2017 TAH decision lies at the low end of the spectrum, and that it adequately met that duty.

[253] In analyzing whether the duty to consult was triggered, I noted it is crucial in this case to identify the precise mechanism by which the Gitanyow's claims are potentially adversely affected; that is because this case involves a treaty and not just the Province's exercise of statutory authority. I have modified the *Haida* test because of that crucial difference, as discussed earlier in this judgment.

[254] That precision, however, does not necessarily apply with the same vigour to the analysis about the scope and content of the duty. The focus at this stage is on the potential consequences of the TAH decision upon the Gitanyow's ability to exercise its asserted Aboriginal rights. Without diminishing in any way the prohibition of the Crown engaging the Gitanyow in consultation about Nisga'a Nation's rights or allotment granted under the Treaty, it is appropriate to take a slightly broader view of how the TAH decision may adversely affect the Gitanyow's claims to title and rights in the context of setting the scope of consultation.

A. The Scope of the Duty to Consult about the TAH

[255] Deciding where on the spectrum the duty to consult and accommodate lies is a fact-specific inquiry. The scope of the duty is proportionate to a preliminary assessment of the *prima facie* strength of the Gitanyow's claims for rights, as well as the seriousness of the potential adverse effect.

[256] The Province's position is that the Gitanyow have never particularized the potential adverse impacts of the TAH decision, which illustrates that the duty is at the low end of the spectrum. I do not agree that is necessarily true. The extent to which the Gitanyow responded to opportunities for consultation offered to them is not a significant factor in assessing the degree of consultation required, even if it may be relevant to determining whether the Province met the requisite duty.

[257] In this case, the evidence reveals that the Province's position on important questions relevant to the duty to consult with the Gitanyow was, at times, confused and inconsistent. It was reasonable in those circumstances for the Gitanyow to seek from the Province confirmation, or at least a clear definition, of the process of consultation being offered before committing to identifying the adverse impacts.

[258] The Nisga'a Nation emphasizes since the Overlap Area is about one third of the NWA, the potential impact of the TAH decision will not be serious. I do not find that submission persuasive. The size and location of the Overlap Area has no bearing on the location or distribution of moose throughout the NWA. To put it bluntly, the moose do not care what proportion of the NWA the Overlap Area

comprises; neither should the Province when it comes to determining the scope of the duty to consult the Gitanyow. Furthermore, one third is not a majority but it is still a significant portion of the NWA.

[259] The focus of the analysis should be centred on the consequences produced by the TAH decision. While nothing about the TAH number directly dictates where, when or how moose can be harvested, those considerations are embedded within the process that leads to the TAH decision; I refer and rely on the discussion earlier in this judgment about that process (see paras. 200 to 217). Also, it is significant that in most years, the majority of the Nisga'a moose harvest has taken place within the Overlap Area (see para. 239). Furthermore, I found that the Gitanyow had a genuine concern that the TAH was set too high and that contributed to a decline in the moose population (even though I did not find that causative link was proven).

[260] The TAH decision's impact on the moose population, however, is only one dimension of the negative impact perceived by the Gitanyow. The TAH decision essentially activates the harvest season because no harvest is supposed to occur until the TAH is proclaimed. Once the TAH decision is made, then the Nisga'a Nation allotment is calculated, and the Minister knows how many permits or licenses are available to be granted to non-Nisga'a citizens. It is at that point, that non-Nisga'a people might be given rights under a statute to harvest moose throughout the Overlap Area.

[261] Gitanyow Ayookxw (law) commands that non-Wilp members seek and obtain permission from the Hereditary Chief before harvesting in the territory over which that Chief has Daxgyet (spiritual and lawful authority). The presence of non-Gitanyow hunters within Gitanyow Lax'yip, when those hunters have not obtained from the Hereditary Chief permission to be on the land to harvest moose, is an affront to the Gitanyow. That impact cannot be quantified, but the potential injury to such a fundamental edict of Gitanyow Ayookxw is serious.

[262] I am persuaded by the foregoing, that the potential seriousness of the TAH decision's impact on the Gitanyow's exercise of its asserted right to harvest moose justifies a degree of consultation placed higher on the spectrum than at the low end.

[263] Turning to the strength of the claim, previous cases have held that on a preliminary assessment, the Gitanyow's claim to title and rights within at least part of their traditional territory is strong. However, that assessment must be tempered in light of the circumstances in this case. Included in those circumstances is the Gitanyow's underlying legal position that the Treaty itself is invalid. Their submissions and evidence included details about their objections to the Treaty before it was finalized (their narration of what happened is disputed by the Nisga'a Nation).

[264] This is noteworthy; it underscores that weighing the strength of claims and seriousness of consequences must be animated by the reality that the TAH decision is not the sole source of the potential infringement to the Gitanyow's claims. Consultation and accommodation will not be efficacious unless they are tailored to the measure that is responsible for the potential adverse impact.

[265] In this case, for instance, deep consultation would be fruitless and ultimately unsatisfying for the Gitanyow because the Province cannot accommodate their concerns about the size of the Nisga'a Nation's allotment or the Nisga'a Nation right to harvest wildlife in the Overlap Area, both of which emanate from the Treaty itself, not decisions made under it.

[266] Viewing all of the factors together, I find that the extent of the Crown's duty to consult in this case is higher than the low end of the spectrum, but does not amount to deep consultation. In many decisions where the scope of the duty to consult is analyzed, the court adopts a formalistic approach of identifying exactly where on the spectrum the duty lies. Other than situations where the duty clearly lies at one end of the spectrum or another, with respect, I do not see how that labelling is helpful. Deciding whether the crown has met its duty is a fact-specific enquiry, and there is no set model of consultation at any range (see above at paras. 127 to 128). Thus,

what is required to meet a “moderate” duty in one case may be of little assistance in assessing what is needed to meet a “moderate” duty in another. Rather than affix a label to the scope of consultation, I turn to identify the manner in which the Province did, or did not, meet the duty, bearing in mind that I am reviewing the Province’s conduct on a standard of reasonableness.

B. Adequacy of the Province’s Consultation about the TAH Decision Prior to 2016

[267] Having reviewed the entire record, some initial observations are in order.

[268] I am struck by the degree to which the Gitanyow were clearly frustrated and impatient by what they saw as the failure to take seriously their concerns about the negative impact of the TAH decision. I am satisfied there was a valid basis for that frustration for a period of time. That frustration perhaps explains why large portions of the affidavits, and correspondence attached to them, are akin to legal submissions, and often stray into being argument and opinion. Rather than discounting that evidence, I have treated it as comprising submissions.

[269] The evidence in this case about consultation is too voluminous (and the content too dense) to summarize. In addition, a large majority of the evidence adduced by the Gitanyow addresses concerns about process and semantics, and is repetitive and duplicative of their position on the legal issues in this litigation. The Province’s and Gitanyow’s affidavits are replete with the minutia of those parties’ disagreement about those concerns.

[270] Summarizing or even describing that evidence would simply be a reiteration of the parties’ contrasting narratives of what happened, which is repeated in their legal submissions. Therefore, I have only highlighted portions of the evidence that address the content of the duty. I confirm, however, that I have reviewed and considered the entire record.

[271] The preceding comments are not intended to be critical of any party. It is unfortunate, and ultimately unhelpful, that the Court gets drawn into examining the

minute details of the parties' communication to determine if the process and content of those discussions met a duty to consult. This predicament seems inherent when the law constitutionalizes a process of negotiation, without a fixed format or outcome. Since it is impossible to force people to agree, inevitably, the discussions (which may or may not be found to constitute consultation) will get mired in the semantics of the process itself as each party, quite reasonably, wants both to advance and protect its legal position. It is with that perplexing backdrop that I examine the evidence in this case. Before I do so, I reiterate that the standard of review is reasonableness (see above paras. 28 to 31).

[272] The evidence is clear that up until about the time this proceeding was launched, the Province's interaction with the Gitanyow about any potential impacts from the TAH decision was confused and inconsistent. The Province's evidence confirms it failed on occasion to adhere to certain requirements in the Treaty regarding preparation and approval of the TAHs and AMPs. Mark Williams deposed at paras. 8 and 9 of his January 13, 2016 affidavit as follows:

> 8. In early years of implementing the [Treaty] provisions regarding the AMP, there were often challenges in completing the process for the approval of the AMP in a timely way. In some years, the AMP did not receive approval before the commencement of the hunting season. As a result, it was my understanding that the Wildlife Committee determined that to address this timing issue, the previous AMP would remain in effect until a new one was developed and approved.
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> 9. I attended a Wildlife Committee meeting held in Terrace on May 6, 2013. The 2012-2014 AMP which was in place at that time had not significantly changed the 2009 AMP. Given that the Province and the NLG were developing a comprehensive Nass Moose Recovery Plan ("NMRP"), representatives of both the Minister and the NLG recognized that it made sense to delay the development of a new AMP until such time as harvest objectives consistent with NMRP objectives could be incorporated into the new AMP. The Wildlife Committee also recommended that the status quo be maintained for the TAH.

[273] He also deposed that he believed at one time that "draft AMPs were documents received by the Wildlife Committee in confidence from the Nisga'a Lisims Government and should not be disclosed until they received Ministerial approval".

That is why in response to a request made by Glen Williams at a September 13, 2013 meeting, Mark Williams stated there had been no AMP's since 2009.

[274] Mark Williams' affidavit does not dispute that on behalf of the Province, he stated at a Governance Forum meeting on September 19, 2013 that consultation with the Gitanyow regarding AMP could only occur after the Minister had approved the AMP. Even though I have concluded the Province has no duty to consult the Gitanyow about the AMP, the suggestion that consultation about a decision could take place after that decision was made, was clearly incorrect.

[275] In his January 14, 2016 affidavit (paras. 48 and 49), Mr. Pesklevits describes other mistakes:

> 48. When I joined the Wildlife Committee, it was my understanding that the Wildlife Committee had previously decided that AMPs could be prepared on a two year basis. It was my understanding that this was to create consistency with the cycle for provincial hunting regulation changes, which occurs every two years. On this basis, the Nisga'a prepared AMPs for 2012-2014 and 2014-2016. While these AMPs were reviewed by the Wildlife Committee, I can find no record of the plans being sent to the Minister, or his delegate, for approval.
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> 49. Following the 2011 moose inventory, the TAH was reduced from 70 moose to 32. Based on my review of available records, I can find no record of the TAH of 32 moose recommended by the Wildlife Committee being provided to the Minister, or his delegate, for approval. Nevertheless, according to the allocation formula set out in Schedule A of Chapter 9 of the NFA, a TAH of 32 moose provides for a Nisga'a allocation of 25 moose. The Nisga'a harvest has been limited to bulls only.

[276] Also problematic is the fact that around 2004 or 2005, one of the Provincial representatives on the Wildlife Committee was from the BC Guide Outfitters' Association[6]. Glen Williams describes the problem with that appointment at para. 27 of his affidavit made March 22, 2016:

> So while the Gitanyow cannot get BC to consult regarding the Nisga'a total allowable harvest (at least until this litigation) or the annual management plans – despite the fact that the TAH numbers and AMPs involve moose in the Nass Wildlife Area covering 84 percent of the Gitanyow Lax'yip – BC granted a seat at the Nass Wildlife Committee to at least two non-aboriginal

[6] In 2016, a member of the Terrace Rod and Gun Club was one of the Province's representatives.

> groups to assist in making decisions about hunting and wildlife management in Gitanyow territory.

[277] In addition, Glen Williams deposed that the first time the Wildlife Committee's TAH recommendation was made available to the Gitanyow before the Minister made a decision, despite repeated requests, was in June 2016. He also deposed that in response to the *FOI* request, the Minister's decision letters approving the TAH in 2008 and 2009, had the actual TAH number redacted. The redactions were purportedly done pursuant to ss. 13 (policy advice recommendations) and 16 (disclosure harmful to intergovernmental relations or negotiations). Those redactions are without merit, and unexplained on the record. It is also clear that for a period of time, the Province was not responsive to the Gitanyow's numerous requests for information about the TAH process, Wildlife Committee membership and recommendations, and other information that ought to have been provided. Among other things, I refer to the Gitanyow's evidence about their *FOI* request (as mentioned at para. 24 of this judgment).

[278] However, starting in early 2016, the Province's position and conduct toward consultation with the Gitanyow about the TAH decision changed, as described below. Applying the reasonableness standard to this issue, I am satisfied that prior to March 2016 the Province did not meet the requisite duty to consult the Gitanyow about the TAH decision

C. Consultation about the 2016/2017 TAH

[279] On behalf of the Province, Mr. Pesklevits sent a letter to Glen Williams dated March 18, 2016 in which he proposed a "process for engagement" regarding the TAH decision for 2016/2017. Among others things, the letter stated the Province was "open to exploring opportunities for Gitanyow to participate" in what was then the upcoming moose population survey (conducted in 2017).

[280] The letter starts by addressing the Nass Moose Management Plan (MMP). It affirms the Province's intention to develop and implement the MMP "in collaboration with the Gitanyow Hereditary Chiefs, the Nisga'a Lisims Government" and others.

The MMP would "identify objectives for management and conservation of moose in the Nass, and identify recommended strategies for achieving those objectives". The Province requested a meeting in the near future "to discuss the planning process, the planning area boundary, and the scope and structure of the plan" and to "discuss how Gitanyow can be meaningfully engaged in the planning process".

[281] With regard to the TAH decision, the Province acknowledged its "willingness to engage Gitanyow regarding the results of the moose survey and the recommendation for the TAH for 2016/2017, to the extent it is relevant to that portion of the [NWA] that overlaps the Gitanyow Lax'yip, even in advance of the completion of the [MMP]". The letter described that once the Wildlife Committee's recommendations about the TAH are published, the Gitanyow would be given "an opportunity to raise issues for discussion and consideration" and that would be a "venue for the Gitanyow and others to raise issues as to how they might be affected by the TAH, while respecting the need for the Minister to make a timely decision on the TAH".

[282] Glen Williams responded by letter dated April 12, 2016. He focussed on the TAH portion of Mr. Pesklevits' letter. Among the concerns raised is that the Gitanyow were "surprised that the Crown still does not appreciate a corresponding duty to consult and if necessary, accommodate, the Gitanyow" with regard to the AMP. Over half of the letter is devoted to the Gitanyow position that they are entitled to be consulted on the AMP.

[283] With regard to the MMP, Glen Williams wrote that the Gitanyow welcomed continued participation, but "that participation does not obviate the Crown's obligation to consult with, and if necessary, accommodate the Gitanyow regarding the Minister's setting of the TAH and his decision regarding the AMP".

[284] The record contains correspondence and meetings following those two letters until October 2016. That correspondence repeats the positions and submissions of the Province and Gitanyow before me, including: the disagreement about what degree of consultation is required; the disagreement about whether the Province has

been given or needs more information about the adverse impact of the TAH decision on the Gitanyow's claims; the Gitanyow's position that it has the right to be consulted about the AMP decision, and; the Province's and Gitanyow's summary and restatement of each other's prior correspondence. Most of it is repetitive of the parties' legal submissions. I summarize only some of that correspondence in the following paragraphs.

[285] In the July 7, 2016 letter to the Minister, Glen Williams wrote that the Gitanyow were very disappointed with the "actions, or inaction, of the Province with matters that have the potential to significantly and adversely impact our Aboriginal right to hunt for moose, including the TAH and the [AMP]". He wrote that the Gitanyow were not provided a legitimate reason why the Province would not consult on the TAH and AMP and in the meantime, "our Aboriginal right to hunt moose has continued to be adversely impacted and our people have continued to be prejudiced and suffer damages as a result" of the Province's failure to engage in consultation. None of the correspondence has a more precise articulation of the Gitanyow's description of adverse impact.

[286] Following a Governance Forum meeting held in August 2016, Mr. Pesklevits wrote to Glen Williams on August 22, 2016 and among the things he wrote was that the "…TAH is not intended to regulate or place limits on Gitanyow's harvest". He also stated that "…the duration and timing of the Nisga'a harvesting effort is out of the scope of the TAH decision". He wrote the majority of the discussion at the meeting about the adverse impact of the TAH focussed not on the proposal for a TAH "but on the potential for Nisga'a hunters to focus their harvest effort on areas important to Gitanyow". He also stated that the MMP process "could offer an opportunity to discuss coordinated management objectives among Gitanyow, Nisga'a" and the Province. He also confirms that the Province extended deadlines for the Wildlife Committee to provide its recommendation to the Minister about the TAH for the specific purpose of engaging in further consultation with the Gitanyow.

[287] Glen Williams' September 2, 2016 letter to Mr. Pesklevits makes it clear he does not share the Province's view of what was agreed to at the August 2016 meeting. In part, the letter advocated for a "firm commitment and certainty in the form of a five-year agreement" between the Province and the Gitanyow. In apparent response to the Province's suggestion that they set objectives to further develop processes aimed at reconciliation, Glen Williams writes that the Gitanyow "have pushed long and hard for B.C. to acknowledge the mismanagement of the moose population by the Nass Wildlife Committee (NWC) since ratification of the [Treaty] and believe this is a critical step towards reconciliation with the Gitanyow".

[288] In his September 26, 2016 letter to Glen Williams, Mr. Pesklevits stated that "[f]or the purposes of consultation on the Proposed TAH, the Ministry assumed that [the] Gitanyow have a strong *prima facie* claim to Aboriginal rights (including title) to at least part of the Gitanyow Lax'yip, and thus to part of the area relevant to the Proposed TAH".

[289] Based on that correspondence and my review of the whole record, a number of things are clear. The Province differentiated the consultation process on the TAH decision from the process and purpose of the MMP. The latter was more comprehensive than the former. This was entirely appropriate in my view. The Province had to ensure any consultation on the TAH decision did not adversely affect the Nisga'a Nation's treaty rights, or depart from the process mandated in the Treaty. The Gitanyow's insistence that they have a right to be consulted on both the AMP and TAH coloured every aspect of their response to the Province, including unfairly dismissing the genuine and comprehensive consultation that was offered to them via the MMP.

[290] The Province cannot be faulted for the Gitanyow's choice to insist on consultation on treaty terms, which I have found unavailable to them. The duty to consult will be met even if the Aboriginal group does not avail itself of reasonable opportunities made available to them: *Taku River*, at para. 40; see also *Ahousaht*

Indian Band v. Canada (Minister of Fisheries & Oceans), 2008 FCA 212 at para. 53; *R. v. Douglas*, 2008 FCA 212 at para. 45.

[291] In my view, the Province provided fair, timely and sufficient opportunity to the Gitanyow to engage in genuine consultation about the TAH decision to the appropriate degree. Moreover, those opportunities were appropriately tailored to reflect the fact that the adverse impact the Gitanyow wanted addressed came primarily from Treaty terms themselves. However, the extent of consultation about the TAH decision could go no further than ensuring that the Gitanyow were fully informed of the considerations, timing and process leading to the decision, and were given opportunity to provide input. Given the modification I have applied to the legal test about the existence of the duty, I also specifically find that the Province was not required to accommodate the Gitanyow's concerns in making the TAH decision. Doing so may have negatively affected the Nisga'a Nation's rights, or contravened specific Treaty provisions. Accordingly, I find the Province adequately met its duty to consult the Gitanyow; I add that I would have come to the same conclusion even if the applicable standard of review was correctness.

[292] I also find that the Province provided the opportunity for even more meaningful participation, akin to deep consultation, via the MMP. That is because the MMP process includes the Nisga'a Nation. With the Nisga'a Nation's participation and consent, the Province may not have been barred from engaging in moderately high to deeper consultation. Not only does that process have the real potential to provide greater influence on moose harvest in the Gitanyow Lax'yip, it is more consistent with best practices for wildlife management.

[293] I find that the Gitanyow were adamant about deep consultation on the TAH and AMP decisions because they did want direct input and ultimately accommodation with regard to both the Nisga'a allotment and the manner in which the Nisga'a Nation exercised its harvest rights under the Treaty. As I have explained in this judgment, neither option is available to the Gitanyow.

[294] Given all of the foregoing, I conclude the Province met its duty to consult the Gitanyow from March 2016 in regard to the setting of the 2016/2017 TAH. Although I concluded the Province did not meet its duty of consultation prior to 2016, the Gitanyow did not identify what remedy is available or appropriate for that deprivation.

IX. CONCLUSION

[295] For the reasons articulated in this judgment, I conclude that the legal principles for ascertaining the existence of the Crown's duty to consult Aboriginal peoples must be modified when the land or resources subject to an asserted claim overlaps land or resources governed by a modern treaty. I add a fourth step to the existing legal test, which is to ask the following question: would recognizing a duty to consult Aboriginal peoples who have asserted a claim for title and/or rights, in relation to the contemplated Crown conduct, be inconsistent with the Crown's duties or responsibilities to the Aboriginal peoples with whom it has a treaty? If so, the Crown's duties and responsibilities flowing from the treaty must take precedence over the asserted, but not yet finalized, claims. This is the only result that is consistent with the constitutional status of a treaty. In this case, it is also a necessary outcome to fortify both the honour of the Crown in entering the Treaty, and the fundamental bargain the Nisga'a Nation struck in accepting that the Treaty exhausted all their claims to title and rights under s. 35 of the *Constitution Act, 1982*.

[296] Incorporating that modification into the jurisprudence, I conclude that the TAH decision does trigger the Province's duty to consult the Gitanyow, and recognizing that duty does not conflict with the Crown's duties or responsibilities owed to the Nisga'a Nation under the Treaty. The scope of that duty lies at neither end of the spectrum, and was met by the Province for the 2016/2017 TAH decision. However, I found the Province did not fulfill its duty to consult the Gitanyow prior to the 2016/2017 TAH decision.

[297] The AMP decision does not trigger the duty to consult. I am not satisfied that the AMP decision has the potential to adversely affect the Gitanyow's asserted rights. However, even if I am wrong about that, I find recognizing a duty to consult

the Gitanyow about the AMP decision would not only be inconsistent, it would be incompatible with the Crown's duties and responsibilities under the Treaty. As such, the Treaty takes precedence.

[298] Accordingly, the petition is dismissed.

"Sharma J."