IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Chief Mountain v. Canada (Attorney General),* 2012 BCSC 1152

Date: 20120801
Docket: L000808
Registry: Vancouver

Between:

Sga'Nisim Sim'Augit (Chief Mountain), also known as James Robinson, suing on his own behalf and on behalf of all the members of the House of Sga'Nisim, Nisibilada, also known as Mercy Thomas, and Wilp-Lth Git Gingolx ("The Association of Git Gingolx Tribe Members") suing on its own behalf and on behalf of all its members

Plaintiffs

And

**The Attorney General of Canada,
Her Majesty The Queen in Right of British Columbia,
The Attorney General of British Columbia, and the Nisga'a Nation**

Defendants

Before: The Honourable Madam Justice Lynn Smith

Reasons for Judgment on Costs

Counsel for Plaintiffs:	P.E. Jaffe
Counsel for Defendant Nisga'a Nation:	J.R. Aldridge, Q.C. and M.W. Bartley
Counsel for Defendant Attorney General of Canada:	J.H. Russell
Counsel for Defendant Attorney General of British Columbia :	M.L. Foster
Place and Date of Hearing:	Vancouver, B.C. May 10-11, 2012
Place and Date of Judgment:	Vancouver, B.C. August 1, 2012

INTRODUCTION

[1] The plaintiffs were unsuccessful in their challenge to the constitutional validity of the Nisga'a Treaty (*Chief Mountain v. Attorney General (Canada)*, 2011 BCSC 1394).

[2] Of the three defendants, two (the governments of Canada and British Columbia) do not seek costs against the plaintiffs. The third defendant, the Nisga'a Nation, does seek costs.

[3] As a general rule, a successful party is entitled to its costs. Rule 14-1(9) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, states: "Subject to subrule (12), costs of a proceeding must be awarded to the successful party unless the court otherwise orders." However, courts have a residual discretion to depart from the general rule in exceptional cases, including when the litigation serves the public interest.

[4] The main issue on this application is whether the plaintiffs have shown that this is an exceptional case in accordance with the factors established in the jurisprudence regarding public interest costs.

[5] Three of the relevant factors are whether the plaintiffs have a personal, proprietary or pecuniary interest in the outcome of the litigation, whether the defendants have a superior capacity to bear the costs of the litigation, and whether the plaintiffs have conducted the litigation in a manner that is abusive, frivolous or vexatious. Accordingly, I will begin by reviewing the evidence relating to those factors.

BACKGROUND

[6] This action was launched over twelve years ago, on March 22, 2000. The trial was held in October 2010 and continued in early 2011. Reasons for Judgment were delivered on October 19, 2011. I am advised that an appeal is set for hearing in the fall of 2012.

[7] Over the 10 years that it took for the case to come to trial, the plaintiffs' actions were the subject of rebuke by several judges of this Court and of the Court of Appeal for British Columbia due to the plaintiffs' failure to pursue the action in an expeditious and efficient way and to comply with the Rules of Court or with Court Orders.

[8] The Reasons for Judgment from trial attach an appendix summarizing many of the steps in these proceedings. The parties were invited, for the purposes of the costs hearing, to supplement or correct that document. I attach to these Reasons an amended version provided by Mr. Aldridge, counsel for the Nisga'a Nation: "Appendix A: Amended Background and Procedural History" (that I have slightly edited). The plaintiffs did not object to its accuracy.

[9] This action is the second in which the constitutionality of the Nisga'a Final Agreement (signed on behalf of the Nisga'a Nation and Her Majesty in right of British Columbia on April 27, 1999 and on behalf of Her Majesty in right of Canada on May 4, 1999 and laid before the House of Commons on October 19, 1999) ("Treaty") has been challenged. The first was *Campbell v. AG BC/AG Cda & Nisga'a Nation*, 2000 BCSC 1123. The unsuccessful plaintiffs in that case launched an appeal, but abandoned it.

[10] In an Intervenors' factum filed in the *Campbell* appeal the plaintiffs in this case supported the *Campbell* appellants' arguments, which were very similar to the arguments later advanced by the plaintiffs at the trial in these proceedings.

[11] There are two individual plaintiffs in this case: Sga'Nisim Sim'Augit (Chief Mountain), also known as James Robinson, suing on his own behalf and on behalf of all the members of the House of Sga'Nisim; and Nisibilada, also known as Mercy Thomas. As well, Wilp-Lth Git Gingolx ("The Association of Git Gingolx Tribe Members") is a plaintiff, suing on its own behalf and on behalf of all its members. No evidence was provided regarding that Association.

[12] The plaintiffs in this action originally included two other individuals, Frank Barton and Marlon Watts. They were removed from the proceedings in 2004 through an order dismissing their claim for want of prosecution, after multiple procedural mis-steps.

[13] The three parties to the Treaty are Canada, British Columbia and the Nisga'a Nation. The plaintiffs named only Canada and British Columbia as defendants to their action challenging the Treaty's constitutionality. The defendant Nisga'a Tribal Council (now the Nisga'a Nation) was added as a defendant on December 4, 1998, upon its own application, without opposition by the plaintiffs.

[14] The original pleadings were different from those upon which the trial proceeded in 2010. In their original pleadings, the plaintiffs alleged that the Nisga'a Tribal Council lacked authority to negotiate a treaty affecting the territory of the various hereditary chiefs, and that aboriginal self-government had not been extinguished but, instead, continued to be exercised by the chiefs of the Wilps (Houses). The original pleadings alleged that the Nisga'a Tribal Council had traded land and resources, including those of the plaintiffs, in return for the Treaty's self-government provisions.

[15] Similarly, in their Intervenors' factum in *Campbell* the plaintiffs submitted that the Chief Mountain Group's territory was largely negotiated away in the Treaty process, that the whole Treaty must fall and be re-negotiated by the true traditional entities and in accordance with Canadian constitutional precepts, and that the Settlement Legislation should be set aside as unconstitutional.

[16] In 2001, portions of the plaintiffs' Statement of Claim were struck because of internal inconsistencies between the pleaded claims: *Sga'Nisim Sim'Augit v. HMTQ* (25 September 2001), Vancouver L000808 (B.C.S.C.). Mr. Justice Wong noted at para. 8 of his decision:

> When the plaintiffs' claim was initially filed the defendants recognized the major inconsistency between the two parts of the Statement of Claim. In the first part of the claim the plaintiffs allege the existence of certain inherent aboriginal rights of self-government. In the second part of the claim, as

> reflected in their prayer for relief, the plaintiffs allege that there is no room in the Canadian Constitution for inherent aboriginal right of self-government.

[17] By the time of trial, the pleadings had been amended to include only the claims based upon the Treaty's alleged inconsistency with principles of federalism and with s. 35 of the *Constitution Act*, *1982*, being Schedule B to the *Canada Act, 1982* (U.K.), c. 11 [*Constitution Act 1982*]. The original claims regarding the negotiation of the Treaty and alleged infringements of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act 1982*, had been removed.

[18] The claims advanced at trial were, as described in the Reasons for Judgment, based upon alleged inconsistencies between the Treaty and constitutional principles of federalism, including the division of powers between federal and provincial governments, the appointment of judges, the imposition of taxes, and the requirement for Royal Assent, as well as s. 35 of the *Constitution Act*, *1982*. The plaintiffs also referred to *Charter* values. The defendants all strenuously objected to such reference if it amounted to a means of re-inserting *Charter* claims previously made but no longer in the pleadings.

[19] The plaintiffs did not provide any evidence at trial as to their role in the Nisga'a community or in the Wilp-Lth Git Gingolx, or as to the role of the Wilps.

[20] Some evidence was led at the costs hearing regarding the circumstances of the two individual plaintiffs and the background of the claim.

[21] In an affidavit sworn in 2000, in connection with the plaintiffs' application for an injunction restraining the federal and provincial governments and officials from taking steps to bring the Treaty settlement statutes into effect, Mr. Robinson deposed that as Sim'Augit (Chief) of the Wilps Sga'Nisim he had authority to bring the action on behalf of all members of the Wilps. He deposed that since time immemorial the basic governance unit of the Nisga'a people has been the Wilp, and that each Wilp has a defined territory from which members are entitled to harvest the natural resources. He explained that there are about 60 Wilps, each with a territory. He stated that the Wilp is the foundation of the cultural identity of all Nisga'a people.

[22] According to Mr. Robinson, the head of the Wilp is the Sigidimnak (Matriarch) and the leader of the Wilp is the Sim'Augit (Chief). He deposed that the Sga'Nisim Sim'Augit is a powerful name in Nisga'a history, and that Chief Mountain was the most powerful of all the Nisga'a chiefs for a long period of time. Mr. Robinson has held the position since 1993. He deposed that his sister Rose Doolan is the Matriarch of the Wilp and that together, they are responsible for the protection of the Wilp's territory and for the continued health and existence of the Wilp.

[23] Mr. Robinson deposed that he believed that the Wilp Sga'Nisim Sim'Augit did not consent to the alienation of its aboriginal title to its territory, all of which was surrendered under the Treaty because it fell outside the "Cranky Eagle" area which was to form Nisga'a lands. He believed that the Nisga'a Tribal Council had no right to negotiate or sign the Nisga'a Final Agreement for the Kincolith Band, to which he belongs. He stated that he had no choice but to fight to preserve his culture, and that if the Nisga'a Final Agreement became law, "Chief Mountain, Sga'Nisim Sim'Augit, is dead along with all the other titles, ceremonies, rights, and traditions that give meaning to my life as an aboriginal Canadian."

[24] On March 27, 2012, for the purpose of the costs hearing, Mr. Robinson swore another affidavit. In it, he deposes that he has no personal, proprietary or pecuniary interest in the outcome of these proceedings, and that "not for one second did I ever consider my own financial interests throughout the entirety of this litigation". He states that he is 59 years of age, and works part time as an on-call longshoreman with the Port of Prince Rupert. He has five adult children, three of whom he continues to support. His income has varied from about $40,000 to $112,000, depending on the hours of work he receives. He further deposes that no one has agreed to indemnify him for any costs award against him, stating that he is personally fully exposed to any costs judgment against him.

[25] In an affidavit prepared in 2000, Ms. Thomas described the Clan structure into which the Wilps are grouped, and the importance of Wilps to cultural identity. She deposed that she is a matriarch of the Wilp of Nee'is'lis'e'yan of the Laxgibuu

(Wolf) Clan. She explained that all of the territory pertaining to her Wilp was to be surrendered under the Treaty, and the land of every Wilp was to be rolled into the Cranky Eagle lands which were to be administered by the Nisga'a Lisims Government. She stated, "[i]f this happens the culture which is the most important thing in our lives will suddenly be taken away from us and we will be wiped out as an aboriginal people." She asserted that the Kincolith Band had never assented to a surrender of their reserve lands. She described the ratification process and stated that the vote could not possibly stand for the proposition that the Wilp Nee'is'lis'e'yan consented to the alienation of aboriginal rights in their territory. She said that the grant of enormous powers to the Nisga'a Lisims Government would seriously prejudice her democratic and equality rights, and that if the Treaty came into effect it would destroy the foundation of the culture of her Wilp, be the death of the distinct culture that is the centre of her life, and would be catastrophic for her.

[26] Ms. Thomas swore a subsequent affidavit in 2004. In it, she deposed that she had authority to speak for her Wilp. She stated:

> I was led into this case by Frank Barton. Over four years ago, he convinced me that our only way to recover the lands that relate to my ancestral clan, or "wilp", was to make our claim under Section 35 of the Constitution, and under related constitutional provisions. Frank not only explained the legal strategy to me, but he also introduced John Weston, now our General Counsel, who brought together the other lawyers who have represented us since we began our action.

[27] She further stated:

> I desperately want my wilp and fellow Nisga'a people to regain ancestral lands that were unlawfully and unfairly surrendered in the course of negotiating the Treaty. As I have outlined in the affidavit I made in this action dated April 2, 2000, I believe the deal made by the Nisga'a Tribal Council, the predecessor of the Nisga'a Lisims Government, violated our constitutional rights, wrongfully alienated our lands, and benefited Nisga'a leaders who were acting out of step the Nisga'a "Ayuuk" laws and traditions.

[28] Ms. Thomas further referred in this affidavit to "our attempt to reclaim lands unfairly surrendered under the Nisga'a Treaty", and in the penultimate paragraph deposed:

> I am most concerned about the passing of time with respect to my land claim. I believe that, the longer unauthorized parties trespass on the lands that belong to my Wilp, and to the other Wilps whose lands were wrongfully surrendered in the passing of the Settlement Legislation, the harder it will be to roll back the circumstances such that the rightful parties may enjoy the use of our respective lands.

[29] For the purposes of the costs hearing, Ms. Thomas provided an affidavit sworn March 26, 2012. In it, she deposes that she has no personal, proprietary or pecuniary interest in the outcome of these proceedings, and that she has a firm belief "that the model of the Nisga'a Government as established under the NFA [Nisga'a Final Agreement] is unconstitutional and damaging to the Nisga'a people and to all other Canadians." She states that she is 77 years of age and that her personal financial circumstances are challenging, attaching a "Financial Summary" confirming that description. She swears that she has no agreement with anyone that will indemnify her wholly or in part for a costs award that may be made against her, and that she is personally fully exposed to an order that she pay costs.

[30] In the balance of her affidavit she sets out reasons why, in her view, there were irregularities and improprieties in the Treaty negotiation and ratification process that made it illegitimate. Ms. Thomas states that she has observed many problems in the Nisga'a government including a lack of accountability, a lack of transparency, nepotism and financial waste. She deposes that the Nisga'a Government is very powerful, rendering many people afraid to speak out, and that she, her family and friends have paid a price for her involvement in this litigation. She states that "[i]f the Nisga'a people could freely express themselves without consequences, they would not wish to see a costs award against me...because...many and perhaps most of them support my efforts in this case but are afraid to speak out."

[31] In his affidavit of March 27, 2012, Mr. Robinson expresses agreement with Ms. Thomas's criticisms of the Treaty process and of the Nisga'a Lisims Government. He also agrees that people are afraid to speak out and states that he, along with his family and friends, have paid a price for coming forward. He agrees that the Nisga'a people would not support a costs award against himself or Ms.

Thomas "for doing something that so many in our community believe is the right thing to do."

[32] In addition to this evidence about the two individual plaintiffs, there is evidence regarding the role of the Canadian Constitutional Foundation ("CCF"), a non-profit organization that has supported the plaintiffs' litigation throughout. The defendant Nisga'a Nation provided some evidence about the CCF organization, taken from its website.

[33] From the Statement of Operations in its Annual Report it appears that CCF's revenues in 2010 were $1,058,160 and expenses $1,184,934. In a speech on May 1, 2011, Chris Schafer, the CCF Executive Director, is reported to have stated with reference to these proceedings:

> We started this case formally in 2002, CCF involvement, but prior to that and just recently the BC Supreme Court with our plaintiff Chief Mountain, or James Robinson as he's also known, wrapped up our trial in March 2011 and we currently await the Court's decision.
>
> ...
>
> In effect then, to sum up, the CCF has asked the Court whether Canada is in fact a group of 10 provinces and 3 territories and, what will likely become in the future as hinted at the beginning of the presentation, hundreds of sovereign Indian Bands, all with authority parallel to that of the feds and provinces. Or, do we have two orders of government, federal and provincial, and Indian Bands whose authority is more akin to that of municipalities. We await the Court's answer.

[34] One of the founders of the CCF in 2002 was John Weston, who was solicitor of record for the plaintiffs in these proceedings from their commencement in 2000 until 2006 or 2007. In October 2007, John Carpay, then the Executive Director of the CCF, became solicitor of record. Along with Jeffrey Rustand, in-house counsel for the CCF, Mr. Carpay represented the plaintiffs until Mr. Jaffe became their solicitor of record on May 8, 2009.

[35] The CCF announced the decision to appeal the trial judgment in this case on November 10, 2011, describing the plaintiffs as its "clients".

THE PLAINTIFFS' POSITION

[36] The plaintiffs assert a number of reasons why they should not be required to pay the costs of the Nisga'a Nation.

[37] First, they rely upon what they say is an exception for public interest litigants. The plaintiffs submit that they are public interest litigants because this Court found that they were entitled to public interest standing. They rely upon cases such as *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71 [*Okanagan Indian Band*]; and *Odhavji Estate v. Woodhouse*, 2003 SCC 69, where the Supreme Court of Canada has recognized that courts may exercise their discretion on costs to avoid harsh results that might flow from adherence to the traditional principles (*Okanagan Indian Band* at para. 27). They also rely upon a work by three academic writers, Chris Tollefson, Darlene Gilliland and Jerry DeMarco, "Towards a Cost Jurisprudence in Public Interest Litigation", (2004) 83:2 *Can. Bar Rev.* 473. In that article the authors describe the trend towards the development of a coherent costs jurisprudence in public interest litigation, asserting that the dominant trend is towards excusing unsuccessful public interest litigants from costs liability. (Professor Tollefson provided an updated survey of public interest costs jurisprudence in "Costs in Public Interest Litigation Revisited" (2011), 39 Advocates Q. 197, where he proposed at 197 that "it is now plausible to talk about this area of the law as a distinct and coherent jurisprudence in its own right".)

[38] The plaintiffs submit that the jurisprudence has recognized strong policy reasons for protecting *bona fide* public interest litigants from costs awards that would have a chilling effect on their access to justice. They point to the unusual circumstances of this case, including that the federal and provincial governments declined to take a reference case to the courts about the validity of the Treaty; that Ch. 2, Para. 20 of the Treaty prevented the governments and Nisga'a Nation from challenging the Treaty; and that the appeal in the *Campbell* case did not proceed after the plaintiffs in that case moved from being Members of the Official Opposition to forming the Government of British Columbia.

[39] Second, the plaintiffs submit that the "event" in this litigation remains to be determined because an appeal is set for hearing, and therefore the matter of costs can be left for the Court of Appeal. In the alternative, they submit that there was divided success.

[40] Third, the plaintiffs submit that the Nisga'a Nation should not be entitled to costs since it was a "voluntary" defendant that was only in the proceedings because it applied of its own volition to be joined to them.

[41] Finally, the plaintiffs rely upon the fact that they offered to consent to a dismissal of their claim in order to fast-track the case to the Court of Appeal.

THE DEFENDANT NISGA'A NATION'S POSITION

[42] The Nisga'a Nation emphasizes that there is no rule that public interest litigants are immune from costs and that the burden is on the plaintiffs to show that the Nisga'a Nation should be denied its costs. It relies on *Guide Outfitters Assoc. v. British Columbia (Information and Privacy Commissioner)*, 2005 BCCA 368 [*Guide Outfitters*], in which the Court referred with approval at para. 8 to *Sierra Club of Western Canada v. British Columbia (Chief Forester)* (1994), 94 B.C.L.R. (2d) 331 (S.C.) at paras. 49-50, for the proposition that it would not be wise "to establish a principle that any person bringing a proceeding out of a *bona fide* concern to vindicate his or her perception of the public interest should be insulated from an award of costs in all cases." The Nisga'a Nation disagrees that immunity from costs is a "dominant trend" in public interest litigation.

[43] The Nisga'a Nation also refers to the costs decision in *Campbell v. Attorney General (British Columbia)*, 2001 BCSC 1400 [*Campbell (Costs)*]. In that case, Mr. Justice Williamson found that the unsuccessful plaintiffs should pay costs, in part because they were not a "public interest group".

[44] In response to the plaintiffs' position, the Nisga'a Nation says that the "event" has been determined, and costs at trial are a matter that the trial judge must determine. It disagrees that success was divided.

[45] As to the suggestion that it is a voluntary defendant, the Nisga'a Nation submits that it had no choice but to apply to be added to the litigation, which threatened its very existence.

[46] Finally, the Nisga'a Nation's position is that the plaintiffs' offer was not an offer to settle within the Rules, and that the approach proposed was not one which the defendants could reasonably have accepted.

ANALYSIS

[47] I will begin with the plaintiffs' arguments related to matters other than public interest litigation.

(1) Divided success, or "event" yet to be determined

[48] I agree with the Nisga'a Nation that success was not divided; the plaintiffs failed on almost all of their arguments at trial. Further, normally costs of the proceedings at trial are addressed by the trial judge even though an appeal is pending.

(2) Voluntary defendant

[49] The plaintiffs say that the Nisga'a Nation is a voluntary defendant, comparable to a statutory third party such as the Insurance Corporation of British Columbia (which, even if successful, is not always entitled to costs: *Bewza v. Kershaw,* 2007 BCSC 775; *Dyk v. Protec Automotive Repairs Ltd.*, 41 C.P.C. (4th) 317).

[50] I am not persuaded by that submission. The Nisga'a Nation was joined to the litigation when it applied to be added to the proceedings under Rule 15(5) of the former *Rules of Court*, 1990, B.C. Reg. 221/90 as a necessary party. The plaintiffs did not oppose that application. The Nisga'a Nation was a party to the Treaty and therefore a necessary party to the litigation challenging the Treaty's validity; it should have been joined to the action in the first instance. Its position is not comparable to that of a statutory third party.

(3) Offer to expedite proceedings

[51] On June 25, 2009, a few months before the trial, counsel for the plaintiffs wrote (without prejudice) to all defendants as follows:

> *Re: Chief Mountain litigation (SCBC No. L000808, Vanc. Reg.)*
>
> I am writing this letter with a view to reaching an agreement by which the parties may achieve a just, speedy and inexpensive determination of this matter on the merits.
>
> In my telephone conversations with Mr. Russell, I understood his view of the case (and please correct me if I have misunderstood) to be this:
>
> a) The plaintiffs are essentially seeking to reargue the *Campbell* case, and
>
> b) That, by reason of judicial deference/comity, any other judge of the B .C. Supreme will be obliged to follow Williamson J. in *Campbell* on the same issues.
>
> Accordingly, it seems that, to have an adjudication of the issues on the merits, the matter must come before the Court of Appeal.
>
> For that to happen, either:
>
> i) the parties get to the Court of Appeal by taking up considerable court time and expending considerable resources re-litigating the issues raised in *Campbell*, then appealing in the normal course, or
>
> ii) the parties can reach agreement as to the trial court's disposition of a summary trial, and facilitate a quick and inexpensive means by which the issues would come before the Court of Appeal.
>
> If we reach an agreement, the judgment of the trial court would reflect that that the claims are being dismissed, without costs, on the basis of the court's judicial deference/comity to the judgment of Williamson J. in *Campbell*.
>
> A term of the order would be that such judgment is without prejudice to the plaintiffs in arguing the substantive issues on appeal, such issues being:
>
> a) It is in error to hold that the *Constitution Act, 1867* did not exhaustively and exclusively distribute all legislative power in Canada between the federal Parliament and the provincial Legislatures;
>
> b) It is in error to hold that a right to self-government, akin to legislative power to make laws, survived the assertion of sovereignty by the British Crown, and is now recognized and enshrined as an aboriginal right, a treaty right, or both an aboriginal and treaty right under Section 35 of the *Constitution Act, 1982*;
>
> c) It is in error to hold that a right of social self-regulation, as has been recognized by some courts, equates to a power to legislate;
>
> d) It is in error to hold that the federal Government and Government of British Columbia can confer, by Treaty or otherwise, sovereign legislative authority on the Nisga'a Government;

> e) It is in error to hold that the provisions of the NFA which deny the right of non-Nisga'a citizens who reside within the boundaries of Nisga'a Lands territory to vote in elections for or to hold office in the Nisga'a Government do not violate Section 3 of the *Canadian Charter of Rights and Freedoms*; and
>
> f) It is in error to hold that the law making authority conferred upon the Nisga'a Government under the NFA does not violate Sections 55 and 90 of the *Constitution Act, 1867*, which require the assent of the Governor General, or, in the case of provincial legislation, the Lieutenant Governor in Council, for all new laws passed in Canada.
>
> I understood from Mr. Russell that the defendants seek another CMC sometime fairly soon and that Mr. Russell was in the process of ascertaining available dates from counsel and the court.
>
> Subject to alternative suggestions as to achieving a just, speedy and inexpensive determination on the merits, I propose that this idea be addressed at the next CMC.

[52] On July 16, 2009, Mr. Russell for Canada replied, stating that he was doing so on behalf of counsel for all defendants. With respect to the proposal that the matter be resolved by a consent dismissal order on certain terms, Mr. Russell stated:

> Thank you for your without prejudice letter of June 25, 2009. You seem to be proposing that the *Charter* s 3 claim be reintroduced to this lawsuit. The Defendants cannot agree to this. Nor do we think that the trial can be avoided. The Plaintiffs must present their case, so that an appropriate record and Trial Judge's reasons are obtained. The parties can seek a just, speedy and inexpensive resolution of the trial by reaching agreement on documents and limiting evidence and argument to the issues raised in the pleadings.

[53] The reference to "the *Charter* s 3 claim" is to the plaintiffs' claim regarding infringement of democratic rights, which had been struck from the statement of claim, by consent, in 2008.

[54] The plaintiffs' proposal did not constitute a formal offer to settle under the *Supreme Court Civil Rules*. Further, the plaintiffs' definition of the issues for an appeal, the questionable concept of an appeal from a consent order, and the fact that the case would proceed to appeal without a record from trial, were legitimate grounds for concern such that the defendants understandably declined to follow the course that the plaintiffs proposed.

(4) Public interest litigation

[55] I turn to the plaintiffs' assertion that the Court should exercise its discretion to immunize them from a costs order on the basis that they are public interest litigants.

[56] The overarching issue is whether the normal costs rule should apply, such that the successful defendant Nisga'a Nation is entitled to its costs from the plaintiffs, or whether this is an exceptional case warranting the exercise of discretion in the plaintiffs' favour. The plaintiffs have the burden of showing that the case is exceptional.

[57] The principles applicable to public interest litigants and costs have been developed in different contexts, but the relevant factors are similar throughout. The contexts include: (1) applications by public interest litigants for special costs (*Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2011 BCCA 425; *Victoria (City) v. Adams*, 2009 BCCA 563 [*Adams*]); (2) applications by public interest litigants for interim costs (*Okanagan Indian Band*; *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2 [*Little Sisters]*); and (3) applications (as in this case) for costs against unsuccessful public interest litigants (*Sierra Club*; *Guide Outfitters*; *Campbell (Costs)*; *Allman v. Northwest Territories (Commissioner)*, [1983] N.W.T.R. 231 (N.W.T.S.C.), *The Consumers' Association of Canada v. Coca-Cola Bottling Company*, 2006 BCSC 1233 [*Coca-Cola]*; *Friesen v. Hammell*, 2002 BCSC 1103; *Friends of the Calgary General Hospital Society v. Calgary (City of)*, 2001 ABCA 162) or by unsuccessful public interest litigants (*B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315).

[58] In *Campbell (Costs),* the Nisga'a Nation sought costs against the unsuccessful plaintiffs, who were then members of the Official Opposition in the Legislative Assembly of British Columbia. The plaintiffs argued that they were public interest litigants, and that the Court should depart from the normal rule concerning costs and order that each party bear its own costs. Justice Williamson considered that the Nisga'a Nation could not be regarded as the equivalent of the Crown. He

further held that the plaintiffs did not fit within the definition of "public interest litigants" (at paras. 13-14):

> The plaintiffs brought their action, they stated, in their capacity as members of Her Majesty's Loyal Opposition. While it may be true that they have no personal, proprietary or pecuniary interest in the outcome of the proceeding, they might have obtained a political benefit. They are not an organization which has as its object the taking of litigious initiatives to effect public policy. The principal forum in which they operate is that of the legislative assembly. Within that forum, they have a highly visible platform, ready access to the media, and legislative immunities which give them rights to raise issues and to challenge government initiatives in a manner denied other groups in society.
>
> However, when in their capacity as members of the opposition they decide to act outside of the legislative process and resort to the courts, they become private citizens subject to the usual rules of court.

[59] In *Guide Outfitters*, the litigation addressed whether the Province should release to an environmental group (Raincoast) information about the specific locations of sport hunters' grizzly bear kills. Guide Outfitters intervened and was partially successful in a judicial review application but unsuccessful on appeal. It asked the Court of Appeal to depart from the normal rule that costs follow the event and order that the parties bear their own costs throughout. Guide Outfitters argued that it undertook litigation in the public interest in good faith to obtain an interpretation of the law for the protection of non-economic public concerns. The Court of Appeal referred to *MacDonald v. University of British Columbia*, 2004 BCSC 412 where Mr. Justice Bauman, as he then was, had adopted certain factors articulated by the Ontario Law Reform Commission with respect to the exercise of discretion in awarding costs in public interest litigation. The Court of Appeal in *Guide Outfitters* stated at para. 9:

> Although I consider these factors as useful ones to guide the Court in the exercise of its discretion as to costs, the overarching question is still whether the normal rule is unsuitable on the facts of this case. As Smith J. (as he then was) said in [*Sierra Club*] at paras. 49-50, aff'd (1995), 7 B.C.L.R. (3d) 375, 60 B.C.A.C. 230:
>
> > I do not think it would be wise to establish a principle that any person bringing a proceeding out of a bona fide concern to vindicate his or her perception of the public interest should be insulated from an award of costs in all cases. Such a motive will always be a relevant and important factor, but it should not

> be considered to the exclusion of all other relevant and important factors. The Court must retain the flexibility to do justice in each case.
>
> In my view, the authorities cited do not set out any rule which must guide the exercise of my discretion. Rather, they set out examples of the relevant factors to be taken into account and illustrate that the factors ... will be given more or less weight depending on their relationship to other pertinent considerations. In the result, whether to depart from the ordinary rule that costs follow the event is a matter within my discretion. The exercise of that discretion must be informed by proper principles, but it is nonetheless a decision to be made with regard to the particular facts before me.

[60] In *Adams*, a successful public interest litigant applied for special costs in a *Charter* case against the defendant municipality. The Court of Appeal provided a general framework for the analysis of cases in which a party seeks an exception from the general rule that costs follow the event on a party-party basis. The Court stated at para. 180:

> The general rule with respect to costs is that they follow the event and are assessed on a party and party basis unless the court otherwise orders: Rules 57(9) and 57(1) of the *Rules of Court*. Courts retain the discretion to depart from the general rule where the circumstances justify a different approach: [*Okanagan Indian Band*] at para. 22. It is a broad discretion, and this Court will only interfere "if there is misdirection or the decision is so clearly wrong as to amount to an injustice": *Agar v. Morgan*, 2005 BCCA 579 at para. 26.

[61] The Court in *Adams* noted at para. 186 that in *Guide Outfitters* at para. 8 Justice Hall had "emphasized that these factors do not constitute a test fettering what is inherently an exercise of principled discretion" and that in all cases the "overarching question is ... whether the normal rule is unsuitable on the facts of this case". Thus, the applicability of a factor is to be determined by its relevance to the facts of the particular case, not by the nature of the derogation from the normal costs rule (*Adams* at para. 187).

[62] The Court in Adams said that there is a spectrum of cases in which exceptions from the normal costs rule can be considered, describing it this way at paras. 190-91:

> While similar, or even identical, factors may apply to various forms of departure from the normal rule, that is not to suggest that all forms of departure are of equal magnitude. The justification necessary to grant an exceptional cost award is, in part, related to the magnitude of derogation from the usual cost structure of the award being considered. An award of interim costs requires one party to incur liability for the other's costs before the case has been heard and irrespective of the outcome. These are truly exceptional orders. Likewise, as this Court observed in *Barclay* [*Barclay (Guardian ad litem of) v. British Columbia (Attorney General)*, 2006 BCCA 434] at para. 37, an award of costs to an unsuccessful party represents a more significant departure than an order that each side bear their own costs. In terms of this spectrum, an award of special costs to a successful public interest litigant involves only the level of costs. As a result, such an award, albeit financially very significant, would be less of a departure from the normal rule than orders awarding interim costs or costs to an unsuccessful party.
>
> Nor should we be taken to suggest that a successful public interest litigant will automatically be entitled to special costs. On the contrary, just as the discretion to award interim costs or costs to an unsuccessful public interest litigant is limited to cases involving matters of public importance that are highly exceptional, special costs (even for successful public interest litigants) must be the exception rather than the norm: see *Finney* [*Finney v. Barreau du Québec*, 2004 SCC 36 at para. 48. Each case must be considered on its merits, and access to justice considerations must be balanced against other important factors: see [*Little Sisters*] at para. 35.

[63] The Court of Appeal referred to four factors, which I take to have general application in all cases where a party seeks exemption on public interest grounds from the normal rule that costs follow the event on a party-party basis. These factors are described in para. 188 of *Adams*:

> Having said that, the following may be identified as the most relevant factors to determining whether special costs should be awarded to a successful public interest litigant:
>
> (a) The case involves matters of public importance that transcend the immediate interests of the named parties, and which have not been previously resolved;
>
> (b) The successful party [the party seeking an exception] has no personal, proprietary or pecuniary interest in the outcome of the litigation that would justify the proceeding economically;
>
> (c) As between the parties, the unsuccessful party [the party opposing the exception] has a superior capacity to bear the costs of the proceeding; and
>
> (d) The successful party [the party seeking the exception] has not conducted the litigation in an abusive, vexatious or frivolous manner.

[64] The overarching principle is that in some exceptional cases the public interest in resolving a legal issue of broad importance, which would otherwise not be resolved, justifies a departure from the normal rule about costs (para. 189). Each case must be considered on its merits, and access to justice considerations must be balanced against other important factors (para. 191).

[65] The factors focus on the nature of the litigation, the interests of the party seeking an exception and the conduct of that party, as well as on the comparative resources of the two parties. They are said to be the "most relevant" factors, and it is apparent that other factors may also enter into decision-making about public interest costs.

[66] One such factor may be the nature and identity of the opposing party. Notably, almost all of the cases granting public interest litigants some exception from the normal costs rules have involved a Crown entity (either the federal government or a provincial government). However, there are also some in which municipalities or private parties have been involved, and the jurisprudence suggests that there may be special considerations in such cases, at least with respect to private parties.

[67] In *Okanagan Indian Band*, Lebel J. emphasized that the involvement of a private litigant in public interest cases can militate against departing from the normal rules concerning costs (at para. 41):

> In the context of public interest litigation judges must be particularly sensitive to the position of private litigants who may, in some ways, be caught in the crossfire of disputes which, essentially, involve the relationship between the claimants and certain public authorities, or the effect of laws of general application. Within these parameters, it is a matter of the trial court's discretion to determine whether the case is such that the interests of justice would be best served by making the order.

[68] Thus, he explained that Courts should consider whether or not a government is involved in the litigation (at para. 39):

> One factor to be borne in mind by the court in making this determination it that in a public law case costs will not always be awarded to the successful party if, for example, that party is a government and the opposing party is an individual *Charter* claimant of limited means.

[69] A “government” may include a municipality, as in *Adams*. There, the Court of Appeal found “no merit” to the City of Victoria’s argument that it was an error of law to award public interest litigation special costs because the City was not a Crown entity (para. 170). The Court stated at para. 174:

> Nor is there any policy reason why municipalities should be immune from an award of public interest litigation special costs. Municipalities are subject to the *Charter*, as is evident from this case, because they perform "quintessentially governmental function[s]": see *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844 at para. 51. There is no good reason to distinguish municipalities from other government entitles governed by the *Charter* in considering whether, in a particular case, public interest litigation special costs are appropriate.

[70] See also *Palmer v. City of Port Moody*, 2006 BCSC 1137, where Justice Wilson ordered that the defendant City bear its own costs because the plaintiffs, in unsuccessfully challenging a Municipal rezoning bylaw, were acting in the public interest.

[71] A different outcome resulted in *Hastings Park Conservancy v. City of Vancouver*, 2007 BCSC 147 [*Hastings Park*] (upheld on appeal without reference to the costs issue, 2008 BCCA 117, application for leave to appeal to the Supreme Court of Canada dismissed with costs, [2008] 8 W.W.R. 636). In that case, Justice Dorgan held, applying the *Guide Outfitters* case, that the unsuccessful public interest litigant had not provided compelling reasons to depart from the presumptive rule that costs follow the event. She noted, among other matters, as follows (at para. 10):

> 3. While the City has the capacity to bear the costs of this application, its financial resources are entirely dependant on taxpayers. A costs award merely shifts the burden from one group of concerned citizens to all citizens of Vancouver.

[72] The case for an exemption from the ordinary costs rules is more difficult to make when it is a private party seeking its costs from a public interest litigant. In *Sierra Club*, Smith J. (as he then was) considered whether earlier cases established a general principle of departing from the normal costs rules in public interest cases. He concluded that they did not, noting instead the importance of the fact that in all cases, the public interest proceedings were brought against the Crown (at para 24):

> I do not think any principle of general application can be discerned from those cases. In my view, each turned on an exercise of judicial discretion in the particular circumstances. The novelty of the point involved was one, but not the only, relevant circumstance. It appears a more cogent factor was that the successful party was the Crown and the unsuccessful one was a private citizen in each case. None of them deal with a situation where the successful party is a private citizen and the unsuccessful party is a public interest litigant.
>
> [Emphasis added.]

[73] In the end, Smith J. concluded that the appropriate exercise of discretion, taking into account the relevant factors, was to adhere to the normal rule and order costs in favour of MacMillan Bloedel.

[74] Similarly, in *Western Canada Wilderness Committee v. Cattermole Timber*, 2004 BCSC 723, the Court refused an unsuccessful public interest litigant's application that the parties bear their own costs. In doing so, Shabbits J. emphasized the fact that Cattermole Timber was a "private citizen" (at para. 18):

> Cattermole Timber is a private citizen. It was involved in these proceedings only because the petitions made it necessary for it to defend its private interests. Western Canada Wilderness Committee's application that Cattermole Timber bear its own costs amounts to a submission that Cattermole Timber be required to fund Western Canada Wilderness Committee's litigation. Western Canada Wilderness Committee seeks to have a private citizen fund the cost of unsuccessful litigation of its choosing.

[75] Relying on this case and *Sierra Club*, Justice Russell, in *Coca-Cola*, observed at para. 23 that "[t]here is some authority in this jurisdiction for an award of costs in the usual fashion when a public interest litigant has involved a private party rather than a government entity".

[76] In summary, the jurisprudence suggests that the nature of the party on the other side of the litigation from the public interest litigant may have some relevance to the question of public interest costs. Senior levels of government are at one end of a spectrum, and private parties at the other end. The Court of Appeal in *Adams* makes clear that municipalities, at least with respect to an application for special costs (which, the Court noted, constitutes a lesser exception than does, for example, an advance costs order) are like other levels of government.

[77] So far as I am aware, this is the first instance of a First Nations government seeking costs against a public interest litigant. Mr. Aldridge for the Nisga'a Nation submitted that, while the Nisga'a Lisims Government is a government, it differs from the other levels of government in terms of the magnitude of its resources. I will return to that question later, when addressing the third *Adams* factor. However, for present purposes, I conclude that the Nisga'a Nation should not be viewed as a private party, but rather as a form of government.

[78] The question, then, is whether this is an exceptional case in which I should exercise discretion to exempt the plaintiffs from the rule that would normally make them responsible for the costs of the defendant Nisga'a Nation (and the costs of the other defendants, if they had chosen to seek costs).

[79] Before proceeding to address the *Adams* factors as they apply to this case, I will first address the plaintiffs' submission that because they were granted public interest standing, they are therefore public interest litigants for the purposes of an exemption from costs.

[80] At trial, the Province challenged the plaintiffs' standing, although it had not pleaded that matter, nor brought an application before trial to strike the plaintiffs' claim on that basis. Neither Canada nor the Nisga'a Nation challenged the plaintiffs' standing. I held at paras. 174-201 that it was unnecessary to determine whether the Province should have pleaded the matter because, in any event, the plaintiffs, who are Nisga'a citizens, were entitled to public interest standing under the criteria established in *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236.

[81] I also concluded that the plaintiffs did not have private interest standing because, although they are Nisga'a citizens whose rights could have been affected by the Treaty, they did not argue the case that way at trial. They did not claim that the Treaty or anything flowing from it specifically affected them, and they did not claim or lead evidence to establish personal exceptional prejudice caused by the Treaty or any direct personal interest in the outcome of the litigation.

[82] In recognizing that the plaintiffs had public interest standing, I found that they raised a serious issue, that is, whether the Treaty is inconsistent with longstanding principles of Canadian federalism. I found that as Nisga'a citizens they have a genuine and serious interest in the matter. Finally, I found that they met the third criterion for public interest standing in that there was no other reasonable and effective way for the question of the constitutional validity of the self-government provisions of the Treaty to be brought before the Court. Among other reasons, this is because the parties to the Treaty have agreed not to challenge the validity of its provisions or to support such a challenge.

[83] I found that granting public interest standing to the plaintiffs was consistent with the policy rationale for public interest standing emphasized by Mr. Justice Cory in *Canadian Council of Churches*: "... to ensure that legislation is not immunized from challenge" (at 256).

[84] It is evident that the criteria for recognizing public interest standing share some common features with the *Adams* criteria for allowing exemption from the normal costs rule. However, by and large, the questions of standing and liability for costs are different, and the exercise of discretion is governed by different considerations. Notably, the question of public interest standing does not encompass consideration of the second, third and fourth factors specified in *Adams*.

[85] I conclude that recognition that a party meets the criteria for public interest standing does not lead necessarily to the conclusion that the party should be exempt from costs.

[86] I turn, then, to the application of the *Adams* factors.

(a) Does the case involve matters of public importance that transcend the immediate interests of the named parties, and which have not been previously resolved?

[87] In *Okanagan Indian Band*, Lebel J. explained that the discretion as to public interest costs is meant to "ensure that ordinary citizens have access to the justice

system when they seek to resolve matters of consequence to the community as a whole" (at para. 27).

[88] The governments, aboriginal peoples and the Canadian public all have an interest in knowing whether the Treaty is constitutionally valid. There is no doubt that the constitutionality of the Treaty raises matters of public importance transcending the interests of the plaintiffs and of the Nisga'a Nation (since many of the arguments would have a bearing on the validity of other modern treaties). Counsel for the Nisga'a Nation rightly concedes that the proceeding involves issues with importance extending beyond the immediate interests of the parties involved.

[89] It is also necessary to consider whether the issues have been previously resolved. In *Hastings Park*, Justice Dorgan refused an application for the parties to bear their own costs, in part because the proceeding did not "have the potential to further develop the law" (at para. 10). Similarly, in *Ahousaht Indian Band and Nation*, the Court refused an order for special costs to a public interest litigant because "this case did not break novel ground in establishing legal principles", and was highly fact driven (at para. 35).

[90] Although *Campbell* decided a number of issues relevant to the constitutional validity of the Treaty, these proceedings raised other issues that are novel and that are capable of developing the law. In addition, these proceedings were the only viable way of working towards obtaining appellate authority on the constitutional validity of the Treaty.

(b) Do the plaintiffs have no personal, proprietary or pecuniary interest in the outcome of the litigation that would justify the proceeding economically?

[91] The Nisga'a Nation says that the plaintiffs originally pleaded the case in a manner that emphasized a violation of their own rights, and claimed exceptional personal prejudice. It says that the plaintiffs have always been motivated by their asserted personal interest in land. Its position is that the plaintiffs fail to meet this criterion.

[92] Where a litigant pursues a matter primarily in order to secure his or her own interests, he or she may not be considered a public interest litigant even though the issues are of interest to a broad class of persons: see for example *McDonald* at para. 16; *Campbell v. British Columbia (Minister of Forests and Range)*, 2011 BCSC 1046 at para. 20; *Little Sisters* at para. 60; and *Ahousaht Indian Band and Nation* at para. 38.

[93] Where a plaintiff's personal interest is the same as that of any other citizen, and the litigant acts for the benefit of the community as a whole, the litigant will stay within the ambit of public interest litigants. In *PHS Community Services Society v. Canada (Attorney General)*, 2008 BCSC 1453 (aff'd 2010 BCCA 15; 2011 SCC 44), Pitfield J. stated at para. 25:

> It is facile to say that PHS or the individual plaintiffs have a personal interest in this litigation. PHS is a non-profit society that operates the facility under contract with a provincial health authority. It does so for the benefit of the community as a whole and not, on the evidence, for its own benefit or financial gain. The individual plaintiffs have the same interest in the ongoing operation of the facility as any citizen has in respect of any other healthcare facility, namely their personal health and welfare. This action benefits all who suffer from the illness of addiction. The interests that PHS and the individual plaintiffs have in the outcome of the litigation are not such as to remove them from the ambit of public interest litigants.

[94] The plaintiffs in this case do have some personal interest in the outcome of the proceedings. As a hereditary Chief and Matriarch, they are concerned that the Treaty has changed their traditional role in the community and deprived them of their traditional territory. Nevertheless, they raise issues of considerable public importance.

[95] The evidence (including the history of these proceedings) leads me to these conclusions.

[96] First, the individual plaintiffs are involved in the litigation because of their belief that the Treaty process was illegitimate and harmful. Their motivation to bring the litigation was, in part, to unwind the Treaty and retain their aboriginal claims to territories pertaining to their Wilps. Those claims were as individuals and on behalf

of the Wilps with respect to which they hold hereditary positions. The plaintiffs were unsuccessful in an attempt to intervene in the *Campbell* litigation and in an attempt to enjoin governments from taking steps to implement the Treaty. However, they proceeded with this litigation in an attempt to obtain a ruling that the Treaty was constitutionally invalid, contrary to the ruling in *Campbell*.

[97] Second, the plaintiffs are not wholly devoid of personal or proprietary interest in the outcome of this litigation, in that they are the hereditary leaders of Wilps whose territory was surrendered as part of the Treaty. At the same time, I accept that they were acting according to their view as to what is best for their Wilps and for the Nisga'a people. I note that their attachment to the land comprising their Wilps' territories was framed in cultural, not monetary or proprietary terms.

[98] It is not inconceivable, given the size of the territories, that success in the litigation would have been sufficient to justify it economically for the plaintiffs and the Wilps they represent. I note that in *Ahousaht Indian Band and Nation*, the successful plaintiffs' claim for special costs was denied by the Court of Appeal in part because their success could allow them to use the aboriginal right to fish commercially for economic gain. However, without evidence as to the value of the territories and the costs of this litigation, it is impossible to know whether or not it could have been justified economically.

[99] Finally, it is appropriate to note that the CCF, which has supported the litigation throughout, does not appear to have any personal, proprietary or pecuniary interest in the outcome of these proceedings.

(c) As between the parties, does the Nisga'a Nation have a superior capacity to bear the costs of the proceeding?

[100] The Nisga'a Nation's position is that there is nothing objectionable about the CCF funding this litigation. However, they argue that if the plaintiffs failed to obtain an indemnity agreement from the CCF regarding costs or if the CCF failed to budget for an order of costs against the plaintiffs, those are decisions they were entitled to make, but are required to live with.

[101] There was no application to cross-examine the plaintiffs on their affidavits, and I accept their evidence that they have not entered into any agreement that will indemnify them as to costs. At the same time, I note that there is no evidence from the CCF that it has determined to withdraw from this litigation or that it will refuse to assist the plaintiffs in meeting a costs judgment.

[102] Accordingly, I reach no conclusion as to the likelihood that the plaintiffs will be left on their own to pay a costs award.

[103] The individual plaintiffs are both of modest means and would find it very difficult, if not impossible, to pay a costs award. The CCF is not a large organization, but it would find payment of a costs award more feasible than would the plaintiffs. In almost all of the cases in which exceptions to the normal costs rule have been made in favour of public interest litigants, the party on the other side is a federal or provincial government, which will almost inevitably be in a better position to bear costs than will any public interest litigant. In this case, the party seeking costs is the Nisga'a Nation. Mr. Aldridge for the Nisga'a Nation submits that while the Nisga'a Lisims Government is a government, its resources are not comparable to those of the provincial or federal government. Although no evidence was led, I believe that I can take judicial notice of that fact, and I do so. At the same time, it was not disputed that the Nisga's Nation's ability to bear costs exceeds the ability of the individual plaintiffs or the CCF to do so.

[104] In summary, in comparison with the Nisga'a Nation, the plaintiffs are less able to bear responsibility for costs. In comparison with the Nisga'a Nation, the CCF is also less able to bear responsibility for costs. Nevertheless, the Nisga'a Nation's resources are not similar to those of a senior level of government.

(d) Has the party seeking an exception conducted the litigation in an abusive, vexatious or frivolous manner?

[105] The Nisga'a Nation emphasizes this factor. It points to the great length of time it took the plaintiffs to bring this matter to trial, the number of changes to the pleadings, the issues that led several judges along the way to express frustration

with the plaintiffs' conduct of the matter and to reprimand them or stay proceedings, and the plaintiffs' attempts at trial to re-instate *Charter* claims that they had earlier agreed to withdraw.

[106] The plaintiffs' position is that if any errors were made by counsel, those errors should not be visited on them in the form of a costs order; that the delay did not in fact prejudice the defendants; and that their conduct of the litigation was not abusive, frivolous or vexatious. They dispute the factual accuracy of some of the Nisga'a Nation's assertions.

[107] I have reviewed the record, and must conclude that, whatever the plaintiffs' intentions, the effect of their conduct of the litigation was to create inordinate delay, expense and frustration for the defendants. It is apparent that a contributing factor to the disorderliness of the proceedings may have been some dissonance between the plaintiffs' and the CCF's objectives in the litigation.

[108] Examples of problematic conduct on the part of the plaintiffs include: refusing to comply with a Court order to provide particulars; refusing to comply with the *Rules of Court* regarding the removal of plaintiffs from the proceedings; attempting to litigate *Charter* issues with respect to which the plaintiffs did not apparently have standing; and persistently seeking remedies (injunctions against the Crown to prevent it from proceeding with legislation) that are unknown to Canadian law.

[109] Although costs in any event of the cause were awarded to the defendants with respect to two specific applications, by and large costs have been left as costs in the cause. The plaintiffs say that I should not revisit those cost rulings by holding the plaintiffs' behaviour against them. However, in considering the question of costs under the *Adams* framework, I must take into account the entire course of the litigation. In doing so, I note that the record is not uniform, and in some respects the litigation was responsibly conducted. Further, for a time, the plaintiffs were self-represented.

[110] The plaintiffs bear the burden of showing that they deserve exceptional treatment with respect to costs because they have performed a public service in bringing forward a matter requiring judicial determination. Important policy considerations about access to justice underlie the principles developed by the courts regarding public interest costs. Those policies are served when responsible public interest litigants are afforded relief from the usual costs rules. However, those policy considerations are not served if public interest litigants who abuse the courts' processes are permitted to take shelter under the same umbrella.

[111] In my opinion, the plaintiffs in this case have not always conducted the litigation in the way that a responsible litigant would, and the record shows examples of conduct that can fairly be described as abusive or vexatious.

(e) The overarching question: is a departure from the normal rule about costs justified by the public interest in resolving a legal issue of broad importance, which would otherwise not be resolved?

[112] Access to justice interests speak in favour of declining to award costs against the plaintiffs. They, with the assistance of the CCF, are attempting to resolve questions about the constitutional validity of a modern Treaty, a matter of great importance.

[113] Although the plaintiffs arguably have some personal, proprietary interest in the matter, they also believe that they are representing a number of people in their community. Further, it is not clear that it would make economic sense for them to bring this litigation. I think that they may fairly be viewed as public interest litigants. The CCF, if it was the party, could equally be viewed as a public interest litigant.

[114] The party seeking costs, the Nisga'a Nation, is a form of government comparable, in this particular context, to a municipality. It is not comparable to a private party.

[115] The individual plaintiffs and the CCF have less capacity to deal with costs than does the Nisga'a Nation, although the resources of the Nisga'a Nation are not comparable to those of a provincial or federal government.

[116] A further important consideration is that the plaintiffs have not concluded this litigation in an effective or responsible manner, to the point that some of their conduct can fairly be described as vexatious or abusive.

CONCLUSION

[117] While there should be some recognition of the public service the plaintiffs have rendered in bringing litigation in order to resolve some issues of broad importance, the plaintiffs should not be wholly exempt from responsibility for costs in the particular circumstances of this case. I note all of the factors referred to above, and that the federal and provincial governments are not seeking to recover their costs from the plaintiffs. I conclude that the Nisga'a Nation will have two-thirds of its costs on a party-party basis from the plaintiffs, including the costs of this application. This will be in addition to costs for those applications where costs were ordered in any event of the cause.

"Lynn Smith J."

AMENDED APPENDIX A
BACKGROUND AND PROCEDURAL HISTORY

Barton et al. v. Nisga'a Tribal Council et al.
1998

- In 1997, Nisga'a individuals James Robinson (one of the plaintiffs in these proceedings) and Frank Barton (one of the original plaintiffs in these proceedings) petitioned the B.C. Supreme Court to set aside the Nisga'a ratification of the Nisga'a Agreement in Principle (Action No. 24853, Kamloops Registry). They asserted that the affairs of the Nisga'a Tribal Council were being conducted in a manner oppressive to the petitioners, that the General Executive Board of the Nisga'a Council had exceeded its mandate by negotiating the Agreement, and that the Nisga'a Tribal Council was acting *ultra vires* its bylaws. They also asserted that insufficient notice and time had been allowed for the members of the Tribal Council to consider and understand the Agreement before ratification. Mercy Thomas (one of the plaintiffs in these proceedings) and Marlon Watts (another of the original plaintiffs in these proceedings) – also Nisga'a individuals – swore affidavits in support of that petition. The petition was dismissed on July 31, 1998, by Mr. Justice Hunter.

- The petitioners filed a notice of appeal from the dismissal of their petition and applied to the Court of Appeal for an interim injunction to halt the process of ratifying the Treaty. Their application was dismissed on October 1, 1998, by Mr. Justice Goldie. They subsequently withdrew their appeal.

Campbell et al. v. A.G. B.C. et al.
1998

- On October 19, 1998, Gordon Campbell, Geoffrey Plant and Michael de Jong filed an action in the B.C. Supreme Court (Action No. A982738, Vancouver Registry). They claimed that:

  a) the Treaty violates the Constitution of Canada because parts of it purport to bestow upon the governing body of the Nisga'a Nation legislative jurisdiction inconsistent with the exhaustive division of powers granted to Parliament and the Legislative Assemblies of the Provinces by ss. 91 and 92 of the *Constitution Act, 1867*.

  b) the legislative powers set out in the Treaty interfere with the requirement for royal assent.

  c) by granting legislative power to citizens of the Nisga'a Nation, non-Nisga'a Canadian citizens who reside in or have other interests in the territory subject to Nisga'a government are denied rights guaranteed to them by s. 3 of the *Charter*.

- At trial, the *Campbell* plaintiffs did not seek an order setting aside the entire Treaty. They sought an order that the settlement legislation passed by Parliament and the Legislative Assembly of British Columbia that gives effect to the Nisga'a Final Agreement, and which gives it its status as a treaty, is inconsistent with the Constitution of Canada and therefore of no force and effect, to the extent that it allows the Nisga'a Government to make laws that prevail over federal and provincial laws, or limit the right to vote or to be candidates for Nisga'a Government to Nisga'a citizens.

Sga'nism Sim'augit (Chief Mountain) et al. v.
AG Canada, AG British Columbia and Nisga'a Nation
("Chief Mountain Action")
2000

- On March 22, 2000, Sga'nisim Sim'augit (Chief Mountain), also known as James Robinson; Nsibilada*,* also known as Mercy Thomas; Luubyte Jijok, also known as Frank Barton; Imas-One, also known as Marlon Watts; and Wilp Ith Git Gingolx ("The Association of Git Gingolx Tribe Members") filed the current action in the B.C. Supreme Court [Action No. L000808, Vancouver Registry] seeking:

  > a) declarations that the federal and provincial settlement statutes giving effect to the Nisga'a Final Agreement were inconsistent with various parts of the Constitution of Canada, including the Canadian Charter of Rights and Freedoms, and
  >
  > b) injunctions restraining the federal and provincial executive branches and various federal and provincial officials from taking steps to bring the federal and provincial settlement statutes into effect.

- The plaintiffs did not name the Nisga'a Tribal Council as a defendant in the action.

- The plaintiffs applied for interim injunctive relief restraining the two levels of government from bringing the settlement statutes into effect. On April 5, 2000, the Nisga'a Tribal Council's application to be added as a defendant was granted without opposition by the plaintiffs. On April 5, 2000, the interim injunction application was dismissed by Mr. Justice Williamson for two reasons: to allow the injunction would be inconsistent with his decision to delay the hearing of the *Campbell* matter until Parliament's deliberative function had been completed; and given the extraordinary nature of the injunctions sought, they should only be issued (if at all) with the fullest argument [*Chief Mountain et al. v. HMTQ in Right of Canada et al.*, Action No. L000808, Vancouver Registry. Oral Reasons pronounced in Chambers].

- The plaintiffs sought leave to appeal from the order made by Mr. Justice Williamson and sought the same interim injunctions from the Court of Appeal

for British Columbia. On April 10, 2000, their application was dismissed [2000 BCCA 260].

- The plaintiffs then applied to the B.C. Supreme Court for interlocutory injunctions that were otherwise the same as the interim injunctions. On April 20, 2000, their application for interlocutory injunctions was dismissed by Mr. Justice Williamson [2000 BCSC 659].

- The plaintiffs then applied to intervene in the *Campbell* action. On May 9, 2000, their application to intervene was dismissed by Mr. Justice Williamson [*Campbell et al. v. A.G. of B.C. et al.*, Action No. A982738, Vancouver Registry. Oral Reasons pronounced in Chambers].

- By consent order dated August 3, 2000 the Nisga'a Nation was substituted as a defendant in the action for the defendant the Nisga'a Tribal Council.

Campbell et al. v. A.G. B.C. et al.
2000

- The *Nisga'a Final Agreement Act*, S.B.C 1999, c. 2, the *Nisga'a Final Agreement Act*, S.C. 2000, c. 7, and the Treaty took effect on May 11, 2000. The trial of the *Campbell* action took place between May 15 and May 29, 2000.

- On July 24, 2000, Mr. Justice Williamson dismissed the *Campbell* claim, holding that neither the NFA nor the federal or provincial settlement legislation was inconsistent with the Constitution of Canada [2000 BCSC 1123, 79 B.C.L.R. (3d) 122].

Chief Mountain Action
2001

- The Nisga'a Nation and the Attorney General of Canada brought applications (on May 7, 2001, and September 18, 2001, respectively) to strike out large parts of the plaintiffs' statement of claim (primarily assertions about traditional systems of Nisga'a governance and the plaintiffs' roles in those systems) on the basis that such assertions were either inconsistent with the balance of the plaintiffs' case, irrelevant to the plaintiffs' case (based on earlier representations made by plaintiffs' counsel) or an abuse of the Court's process (based on positions adopted in the earlier Kamloops petition).

- On September 25, 2001, Mr. Justice Wong ordered the impugned provisions of the statement of claim to be struck out on the basis that they constituted an abuse of the process of the Court. He also stayed the proceedings generally [*Sga'nisim Sim'augit, et al. v. HMTQ, et al.*, Action No. L000808, Vancouver Registry. Oral Reasons pronounced in Chambers].

Campbell et al. v. A.G. B.C. et al.
2001

- The plaintiffs appealed the decision of Mr. Justice Williamson to the Court of Appeal for British Columbia. They filed a factum but abandoned their appeal on November 9, 2001.

Chief Mountain Action
2002

- The plaintiffs filed an appeal from the September 25, 2001, order of Mr. Justice Wong in the Court of Appeal. On March 13, 2002, Mr. Justice Braidwood held that the plaintiffs had proceeded incorrectly, and were required to seek leave of the Court before filing an appeal.

- The plaintiffs then applied to the Court of Appeal for leave to appeal from the order of Mr. Justice Wong. On June 7, 2002, Mr. Justice Donald denied the plaintiffs' application for leave to appeal.

- On December 13, 2002, in accordance with the order of Mr. Justice Wong, the plaintiffs filed a statement of claim from which the paragraphs that had been found to be an abuse of the Court's process were struck.

2003

- On June 16, 2003, the plaintiffs delivered a notice of motion in which they sought:

  a) leave to further amend the statement of claim by deleting still more of its provisions;

  b) an order that the plaintiffs Barton and Watts cease to be plaintiffs; and

  c) a declaration that the stay of proceedings had already been lifted; or

  d) in the alternative, an order lifting the stay.

- On July 11, 2003, the plaintiffs delivered a further notice of motion in which they sought only an order lifting the stay of proceedings and leave to further amend the statement of claim.

- The defendants did not oppose the July 11, 2003 ,motion, and on July 16, 2003, Madam Justice Bennett lifted the stay of proceedings and permitted the further deletions from the statement of claim.

- On October 16, 2003, the plaintiffs Robinson, Thomas and Wilp-lth Git Gingolx delivered a notice of motion for an order that the federal and provincial defendants pay their past and future legal fees, expenses and

disbursements for the case. This motion does not appear to have gone to hearing.

- On November 25, 2003, Chief Justice Brenner convened a pre-trial conference in the case. At the pre-trial conference, counsel for the plaintiffs orally applied for an order removing himself as solicitor of record for the plaintiffs Barton and Watts. The defendants indicated that if the plaintiffs ceased to be jointly represented, the proceedings should be stayed, and that the defendants would seek such an order. Chief Justice Brenner required counsel for the plaintiffs to prepare a motion for his application.

- On November 26, 2003, counsel for the plaintiffs delivered a motion in which the plaintiffs Robinson, Thomas and Wilp-lth Git Gingolx applied for an order removing the plaintiffs' counsel as the solicitor of record for the plaintiffs Barton and Watts, relying on a provision of the Professional Conduct Handbook.

- On November 28, 2003, the defendants Nisga'a Nation and Canada each delivered a motion in which they applied for an order staying the proceedings until the plaintiffs were jointly represented.

- On December 1, 2003, Chief Justice Brenner adjourned the hearing of the plaintiffs' November 26, 2003, motion on the bases, *inter alia*, that the motion was not properly framed, and that there was no reliable evidence that the other two plaintiffs had received the notice of the motion.

2004

- On January 12, 2004, counsel for the plaintiffs delivered a further motion in which counsel, in his own name and as agent for the plaintiff Watts, applied for an order that the plaintiff Watts cease to be a party under Rule 15(5) of the *Rules of Court*.

- On January 14, 2004, Chief Justice Brenner:

  a) dismissed the plaintiffs' applications for an order that the plaintiffs Barton and Watts be removed as parties under Rule 15(5),

  b) granted the application made by counsel for the plaintiffs that he be removed as solicitor of record for the plaintiffs Barton and Watts, and

  c) granted the defendants' application for an order staying the proceedings until the irregularity of the plaintiffs' lack of joint representation was resolved.

- On June 7, 2004, counsel for the plaintiffs Robinson, Thomas and Wilp-lth Git Gingolx delivered a motion in which those plaintiffs applied for an order:

a) that the plaintiffs Barton and Watts were not necessary or proper parties under Rule 15(5), or

b) in the alternative, that the plaintiffs Barton and Watts cease to be plaintiffs under Rule 5(6), and

c) that the stay of proceedings be lifted immediately, or

d) in the alternative, that the stay of proceedings be lifted in part, in order to permit the plaintiffs Robinson, Thomas and Wilp-lth Git Gingolx to proceed with their motion for Crown funding.

- On September 10, 2004, Chief Justice Brenner:

  a) dismissed the plaintiffs' application under Rule 15(5),

  b) dismissed the plaintiffs' application under Rule 5(6),

  c) declined to lift the stay of proceedings, and

  d) ordered that costs go to the defendants in any event of the cause.

- On October 7, 2004, counsel for the plaintiffs Robinson, Thomas and Wilp-lth Git Gingolx delivered a motion in which those plaintiffs applied for an order dismissing the action of the plaintiffs Barton and Watts for want of prosecution under Rule 2 of the *Rules of Court*.

- On December 9, 2004, counsel for the plaintiffs Robinson, Thomas and Wilp-lth Git Gingolx delivered a further motion in which those plaintiffs applied for an order:

  a) that the actions of the plaintiffs Barton and Watts be dismissed under Rule 19(24) on the basis of delay, and for consequential amendments to the statement of claim; or

  b) in the alternative, that the actions of the plaintiffs Barton and Watts be dismissed under Rule 2(7) for want of prosecution, and for consequential amendments to the statement of claim; and

  c) the stay of proceedings be lifted.

- The defendants did not oppose the dismissal of the actions of the plaintiffs Barton and Watts for want of prosecution and, if that order was granted, did not oppose the consequential amendments to the statement of claim and the lifting of the stay of proceedings.

2005

- On January 19, 2005, Chief Justice Brenner dismissed the actions of the plaintiffs Barton and Watts for want of prosecution under Rule 15(5) and lifted the stay of proceedings.

- In May 2005 Mr. Justice Pitfield was appointed as Case Management Judge.

- On June 16 and 29, 2005, Mr. Justice Pitfield held case management conferences. The parties provided him with a general overview of the case, and set dates for the hearing of:

  a) the defendants' application for an order that the plaintiffs deliver demanded particulars, and

  b) the defendants' application to strike the *Charter*-related portions of the statement of claim.

- On September 16, 2005, the defendants' motion for particulars was heard by Mr. Justice Cullen. Mr. Justice Cullen ordered that the plaintiffs deliver to the defendants, by September 19, 2005, the specific particulars of the individual plaintiffs':

  a) enrolment as participants in accordance with the Nisga'a Final Agreement, and

  b) participation in Nisga'a Government elections.

- Mr. Justice Cullen declined to order the delivery of other particulars that the defendants had demanded, relating to the members of the classes that two of the plaintiffs purported to represent.

- At a case management conference on September 30, 2005, Mr. Justice Pitfield:

  a) gave the plaintiffs until October 14, 2005, to deliver to the defendants the specific particulars that Mr. Justice Cullen had ordered the plaintiffs to provide by September 19, 2005, and

  b) indicated that if the plaintiffs did not deliver the ordered particulars to the defendants by October 14, 2005, the defendants would be at liberty to apply to strike the action out in its entirety.

- On October 31, 2005, Mr. Justice Pitfield heard the motion of the defendant Nisga'a Nation for an order that the action be dismissed, based on the plaintiffs' failure to provide the ordered particulars. Mr. Justice Pitfield dismissed the action in its entirety [2005 BCSC 1928].

- On November 28, 2005, the plaintiffs filed a Notice of Appeal from the decision of Mr. Justice Pitfield dismissing the action. However, the Notice of Appeal was not served on the defendants within the time required by section 14 of the *Court of Appeal Act*, R.S.B.C. 1996, c.77.

2006

- On February 3, 2006, the plaintiffs filed a notice of motion seeking an extension of time to serve the Notice of Appeal on the defendants.

- The motion was heard by Mr. Justice Donald on March 7 and 8, 2006 and dismissed with written reasons on March 29, 2006 [2006 BCCA 155].

- On April 4, 2006, the plaintiffs filed a notice of application to vary the order of Mr. Justice Donald.

- The application was heard by Madam Justice Southin, Madam Justice Prowse, and Mr. Justice Lowry on September 18, 2006. The Court allowed the application and granted the extension of time to serve the Notice of Appeal. Oral reasons for judgment were given from the Bench [2006 BCCA 413].

2007

- The appeal from Mr. Justice Pitfield's order was heard on June 14, 2007. The Court allowed the appeal on October 9, 2007. [2007 BCCA 483].

- The plaintiffs delivered their reply to the defendants' demand for particulars on October 22, 2007.

- On November 21, 2007, the Defendant Nisga'a Nation delivered a notice of motion to strike certain paragraphs from the statement of claim.

2008

- Case management resumed before Mr. Justice Pitfield on June 3, 2008.

- On June 20, 2008, the plaintiffs delivered a notice of motion for leave to amend the statement of claim.

- Hearing of the motions commenced before Mr. Justice Pitfield on July 28, 2008, and continued on December 19, 2008.

- By consent, Mr. Justice Pitfield ordered that the statement of claim be amended. The amendments included the deletion of the paragraphs that the Nisga'a Nation had sought to strike, in particular those setting out the plaintiffs' *Charter* claims.

2009

- The fifth amended statement of claim was filed on April 21, 2009. The defendants subsequently filed amended statements of defence.

- On August 19, 2009, the plaintiffs filed a notice of motion seeking summary judgment. A response was filed by the defendants on August 31, 2009.

- At a case management conference on November 3, 2009, Mr. Justice Pitfield made an order in respect of filing a new summary trial motion as well as the

delivery by each party of an index setting forth with particularity "all statutes, regulations, Orders in Council, debates and other documents of every nature and kind whatsoever" on which they purported to rely in respect of the summary trial motion.

- On December 4, 2009, the plaintiffs delivered a notice of motion applying for a declaration that the "combination" of the settlement legislation and the Treaty, or alternatively the provisions of that "combination" specified in the statement of claim, were contrary to the Constitution of Canada, and therefore of no force or effect by virtue of Section 52 of the *Constitution Act, 1982.* In addition to the declarations, the plaintiffs sought an order for costs.

2010

- At a case management conference on January 19, 2010, Mr. Justice Pitfield made an order setting the hearing of the plaintiffs' application for summary trial for five days commencing September 27, 2010, and ordering that any application to exclude documents from the evidence be delivered to all other parties by no later than April 30, 2010, with any application to be heard by May 31, 2010. He further ordered dates for the exchange of written arguments for the summary trial.

- Following a case management conference on April 26, 2010, Madam Justice Smith ordered that:

  > a) the parties would exchange notice in writing specifying which documents identified on their lists of documents were tendered as authorities and which were tendered as evidence; and
  >
  > b) the hearing of the plaintiffs' summary trial application be adjourned to October 4, 2010.

- On July 8, 2010, the plaintiffs delivered a notice of application that they were seeking an order adding a subparagraph (f) to paragraph 19 of the fifth amended statement of claim. The defendants responded, opposing the order. The subparagraph read:

  > f) Legislative jurisdiction (Chapter 11) denying democratic rights to persons residing within the Nisga'a Lands but who are not determined by the Nisga'a Government to be Nisga'a citizens, in breach of section 3 of the *Canadian Charter of Rights and Freedoms*.

- The application was returnable on August 13, 2010. However, on August 11, 2010 the parties were notified that Madam Justice Smith would not be available due to illness, and the parties were canvassed as to whether they preferred to proceed before another judge on August 13, or before Madam Justice Smith on a later date. The plaintiffs preferred to adjourn in order to appear in front of Madam Justice Smith, while the defendants preferred to proceed on August 13.

- At Chief Justice Bauman's request, the parties appeared before him on August 12, 2010. Following submissions by counsel he ordered the matter to proceed as scheduled on August 13, 2010 before another judge.

- The matter was set to be heard by Madam Justice Adair. However, at the commencement of the hearing counsel for the plaintiffs advised the Court that he did not intend to proceed with his application.

- By consent, on August 13, 2010, Madam Justice Adair made an order dismissing the plaintiffs' July 8, 2010, application.

- On September 14, 2010, the defendants delivered a response to the December 4, 2009, notice of motion. The defendants indicated that they opposed the granting of the relief set out in the notice of motion.

- On September 15, 2010, a trial management conference was held with Madam Justice Smith.

- The hearing of the plaintiffs' application commenced on October 4, 2010, and continued on October 4-8, 12-13, 2010, January 11-14 and March 1-2, 2011.