

CANADA / JUDGMENT

Malii v. British Columbia

2024 BCSC 1432

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Supreme Court of British Columbia

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2024 BCSC 1432 Malii v. British Columbia

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Malii v. British Columbia,

2024 BCSC 1432

Date: 20240807

Docket: S036687

Registry: Vancouver

Between:

Malii also known as Glen Williams, Gwaas Hlaam also known as

George Philip Daniels, Luuxhon also known as Don Russell, Gamlaxyeltxw

also known as Wilhelm Marsden, Sindihl also known as Graham Morgan,

Watakhayetsxw also known as Deborah Good, Gwinuu also known as

Phyllis Haizimsque, Wii'litsxw also known as Gregory Rush, Haizimsque alsoknown as Verna Howard, on behalf of themselves and in their capacity as the Gitanyow
Hereditary Chiefs and on behalf of all members of the Gitanyow Nation

Plaintiffs

And

His Majesty the King in Right of the Province of British Columbia and
the Attorney General of Canada

Defendants

Corrected Judgment: The text of the judgment was corrected at paragraph 66 on August 9, 2024.

Before: The Honourable Justice Stephens

Reasons for Judgment

(Application by Tsetsaut/Skii km Lax Ha Nation

to be Added as Defendant and to Commence a Third-Party Proceeding)

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Place and Date of Hearing:

Vancouver, B.C.

June 10-13, 2024

Place and Date of Judgment:

Vancouver, B.C.

August 7, 2024

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Overview

[1] This is an application brought by the Skii km Lax Ha, also known as Darlene Simpson, also known as Chief Simpson, on behalf of herself and, in her capacity as Tsetsaut/Skii km Lax Ha Hereditary Chief, on behalf of all members of the Tsetsaut/Skii km Lax Ha Nation (the "TSKLH Nation").

- [2] The TSKLH Nation apply to be added as a defendant and to file a third-party notice naming the Province and Canada as third parties in this action.
- [3] In the action, the plaintiffs (collectively, the "Gitanyow") seek a declaration of Aboriginal rights and title to an approximately 6,200 square-kilometre area located in the mid-Nass River and Kitwanga River watershed in northwestern British Columbia (the "Gitanyow Claim Area").
- [4] By way of background to this joinder application, in the separate litigation leading to *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 1997 CanLII 302, several Gitksan and Wet'suwet'en houses brought a claim for Aboriginal title in 1984. One of the plaintiffs in *Delgamuukw* was "SKIIK'M LAX HA, also known as John Wilson, suing on his own behalf and on behalf of all the members of the House of Skiik'm Lax Ha": *Delgamuukw*, Schedule 1. The House of Skiik'm Lax Ha asserted a claim for Aboriginal title to a geographic territory in *Delgamuukw* that was located adjacent to, but did not overlap with, the Gitanyow Claim Area. *Delgamuukw* went to trial, and was appealed, and a new trial was ordered, with the result that the claim was not resolved: *Delgamuukw* at para. 184.
- [5] In the years since the Supreme Court of Canada's decision in *Delgamuukw*, the TSKLH Nation have a new hereditary chief: Chief Darlene Simpson. At some time after that, it is not clear on the evidence precisely when, the House of Skiik'm Lax Ha began to use the name Tsetsaut/Skii km Lax Ha Nation. The TSKLH Nation say that they are the same as the House of Skiik'm Lax Ha - a plaintiff in *Delgamuukw*.
- [6] Under the leadership of Chief Darlene Simpson as hereditary chief, the TSKLH Nation have significantly changed their position as to the geographic scope and location of their asserted territory from that advanced in *Delgamuukw*. On October 6, 2023, Skiik'm Lax Ha filed a notice of discontinuance in the *Delgamuukw* action.
- [7] The TSKLH Nation now assert a claim area that is substantially larger than the claim area asserted by the House of Skiik'm Lax Ha in *Delgamuukw*.
- [8] And the TSKLH Nation's claimed territory is no longer merely adjacent to the Gitanyow Claim Area (as it was in *Delgamuukw*). Now, unlike in *Delgamuukw*, the TSKLH Nation's claimed area substantially overlaps with the Gitanyow Claim Area. The TSKLH Nation's proposed pleading in this action refers to the existence (and historical practices) of an asserted historic rights-bearing group called the Laxwiiyip Tsetsaut.
- [9] It is on the basis of the TSKLH Nation's revised claim area that they apply to be joined as a defendant to this action and to commence a third-party proceeding claiming Aboriginal rights and title to an area substantially overlapping with the Gitanyow Claim Area. The TSKLH Nation have also filed a separate notice of civil claim on April 16, 2024 (Vancouver Registry No. S-242480) seeking a declaration of Aboriginal rights and title to an even broader area, which go beyond the boundaries of the Gitanyow Claim Area. However, the TSKLH Nation's proposed third-party notice in the Gitanyow's action does not seek a declaration of

Aboriginal title and rights outside of the Gitanyow Claim Area.

- [10] The plaintiffs oppose the TSKLH Nation's application, contending that Chief Simpson and the TSKLH Nation lack standing and, in the alternative, should not be permitted to be joined as a party since that would constitute an abuse of process (referring to, among other things, Chief Simpson's and the TSKLH Nation's change in position from the House of Skiik'm Lax Ha's claim in the Delgamuukw litigation). They also argue that the tests to be added as a defendant and to commence a third-party proceeding have not been met.
- [11] For the reasons that follow, the TSKLH Nation's application to be added as a defendant and for leave to file a third-party notice is granted.

Issues

- [12] The issues on this application are:
- (a) should the TSKLH Nation's application be dismissed for lack of standing?
 - (b) should the TSKLH Nation's application be dismissed because it constitutes an abuse of process?
 - (c) should the TSKLH Nation's application to be added as a defendant to this action be granted?
 - (d) should the TSKLH Nation's application to be permitted to file a third-party notice against the Province and Canada in this action be granted?
 - (e) Should the TSKLH Nation be made an intervener in this action instead of being joined as a defendant?

The Applicant's and the Parties' Positions

- [13] The plaintiffs submit that the TSKLH Nation's application should be dismissed since it is plain and obvious that Chief Simpson lacks standing to advance their proposed claims and defences, and that their application is an abuse of process. With respect to standing, they submit (among other things) that, under the relevant case law, the court must determine if the applicant can represent the whole of the asserted historic rights-bearing community--and if not, there is no standing. The plaintiffs argue that Darlene Simpson cannot do so here. They also submit that Chief Simpson and the TSKLH Nation do not meet the test to be added as a defendant or to be permitted to commence third-party proceedings. The plaintiffs further submit, in the alternative, that the TSKLH Nation could be added as an intervener but not as a defendant.
- [14] The applicant, TSKLH Nation, submits that they meet the test for standing on this application, and that their application does not constitute an abuse of process. They further submit that they meet the test to be added as a defendant and to commence third-party proceedings.

- [15] Importantly, the TSKLH Nation and the plaintiffs disagree on a matter of principle as to what the applicable test is to determine if a modern Indigenous collective (the claimant) has standing on an application to be added as a defendant based on *Campbell v. British Columbia (Forest and Range)*, 2011 BCSC 448, aff'd 2012 BCCA 274; and *Hwilitsum First Nation v. Canada (Attorney General)*, 2018 BCCA 276, leave to appeal to SCC ref'd, 38325 (28 March 2019) [Hwilitsum].
- [16] Based on *Campbell* and *Hwilitsum*, the plaintiffs contend that the court must assess if the modern applicant, the proposed representative, purports to represent the "whole" of the historic rights-bearing Indigenous community, and if it is plain and obvious that they do not or are not capable of doing so (including by looking at the proposed pleadings), then they do not have standing.
- [17] The plaintiffs contend that this is an issue that must be addressed at the outset, and not be left until later (i.e., at trial). They contend that on the proposed pleadings and evidence, Chief Simpson is not capable of representing all of the historic rights-bearing community, which is a "fatal problem" and why there is no standing here.
- [18] However, the TSKLH Nation contend that the plaintiffs' articulation of the standing test is incorrect, and they contend that the standing test does not in principle require a modern applicant to represent, or be capable of representing, an asserted historical rights-bearing group. They say that a claimant's asserted successorship to a historic group is the "bread and butter of Aboriginal rights and title litigation," involves historical evidence, and that any disagreement that the TSKLH Nation is a modern successor does not touch on standing, but instead goes to the merits of a rights and title claim and should be assessed on a proper record at trial. The TSKLH Nation contend that standing is instead satisfied if the modern collective, the representative, comes to court and asserts rights on behalf of the living members of the class they claim to represent.
- [19] The TSKLH Nation contend that the *Campbell* and *Hwilitsum* cases are distinguishable on their facts, and dealt with situations, not present on this application, where a modern rights-claiming collective was defined in terms of genealogical descent from a historic collective.
- [20] The Province takes no position on this application, but made written and oral submissions. It submits that if the TSKLH Nation's application is dismissed, it is not the current intention of the Province to obtain and adduce the evidence that might otherwise have been adduced by the TSKLH Nation in the underlying proceeding. Nor, the Province submits, would it be appropriate for the Province to do so. In oral submissions, the Province also noted, among other things, that the TSKLH Nation have recently filed its own separate notice of civil claim for Aboriginal title (which names the Province as a defendant).
- [21] Canada takes no position on this application.

Legal Context: Aboriginal Rights and Title

- [22] As a backdrop to the issue of standing, I set out the test for establishing Aboriginal title from *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44:
- [50] The claimant group bears the onus of establishing Aboriginal title. The task is to identify how pre-sovereignty rights and interests can properly find expression in modern common law terms. In asking whether Aboriginal title is established, the general requirements are: (1) "sufficient occupation" of the land claimed to establish title at the time of assertion of European sovereignty; (2) continuity of occupation where present occupation is relied on; and (3) exclusive historic occupation. In determining what constitutes sufficient occupation, one looks to the Aboriginal culture and practices, and compares them in a culturally sensitive way with what was required at common law to establish title on the basis of occupation. Occupation sufficient to ground Aboriginal title is not confined to specific sites of settlement but extends to tracts of land that were regularly used for hunting, fishing or otherwise exploiting resources and over which the group exercised effective control at the time of assertion of European sovereignty.
- [23] In addition, "Aboriginal title is held communally. In making a declaration of Aboriginal title, the court must be convinced that the claimant group is the proper rights or title holder": *The Nuchatlaht v. British Columbia*, 2023 BCSC 804 at para. 358.
- [24] In this regard, *R. v. Marshall*; *R. v. Bernard*, 2005 SCC 43 states that "[m]odern-day claimants must establish a connection with the pre-sovereignty group upon whose practices they rely to assert title or claim to a more restricted aboriginal right": para. 67; see also para. 70.
- [25] Thus, in an Aboriginal title trial, the court "determine[s] the historic rights-holding community and then determine[s] the claimant's relationship to that group": *The Nuchatlaht* at para. 360; see also para. 418.
- [26] The test to establish an Aboriginal right was set out in *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 1996 CanLII 216, and I quote aspects of the test:
46. the following test should be used to identify whether an applicant has established an aboriginal right protected by s. 35(1): in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.
55. To satisfy the integral to a distinctive culture test the aboriginal claimant must do more than demonstrate that a practice, custom or tradition was an aspect of, or took place in, the aboriginal society of which he or she is a part. The claimant must demonstrate that the practice, custom or tradition was a central and significant part of the society's distinctive culture. He or she must demonstrate, in other words, that the practice, custom or tradition was one of the things which made the culture of the society distinctive -- that it was one of the things that truly made the society what it was.

[Emphasis in original.]

Analysis

Issue 1: Should the TSKLH Nation's application be denied for lack of standing?

Test for Standing in Aboriginal Rights and Title Cases

[27] Class definition is an essential component of advancing a representative collective claim, for reasons expressed in *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 [Western Canadian Shopping Centres]:

[38] First, the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria

[Emphasis added.]

See also *Hwilitsum* at para. 28; R. 20-3(1).

[28] Further, the "need to clearly define the collective in an Aboriginal rights or title case is important given the collective nature of the Constitution-protected rights at issue": *Hwilitsum* at para. 22.

[29] The principles related to standing in Aboriginal rights and title cases have been summarized and articulated in two decisions: *Campbell* and *Hwilitsum*.

[30] In *Campbell*, the Court dismissed a petition brought by a modern Indigenous claimant for lack of standing. In that case, the Court found that the petitioners - the modern claimant - had defined themselves with reference to this historic community - the Sinixt: see paras. 3, 139, 142, 144, 158-160, 166.

[31] The petitioners in *Campbell* said that it was "their intention to determine membership of the collective primarily by ancestral connection" (para. 142) and "claim to be able themselves to recognize an adequate Sinixt ancestral connection" (para. 144). But the Court stated that "the rules will only permit a representative proceeding to be brought on behalf of a group that is capable of objective definition": para. 144.

- [32] The Court ultimately found that it was plain and obvious that the petitioners had not established standing because they had not defined the proposed collective in a way that could be determinable by objective criteria: paras. 136, 166. In particular, the Court in Campbell concluded:
- [160] The petitioners represent only one segment of the Sinixt in particular; those who have determined that their interests cannot and should not be represented by the aboriginal collectives into which the Lakes People merged in the period from the late 1800s to 1956. There is sufficient evidence on this application to establish that they are authorized to speak for those who have been active in seeking a separate voice to speak for the Sinixt, but they do not purport to speak only for those disaffected members of other recognized communities. They purport to speak for all Sinixt.
- [161] There is, in my view, an inadequate basis to say they can properly represent that broad group.
- [166] I am bound to dismiss representative proceedings where the proposed class or collective for whom the action is brought is not defined in a manner that permits its membership to be determined by objective criteria. I find that the petitioners have not so defined the collective for whom they propose to act as representatives, and for that reason I find that the petition is not properly brought as a representative proceeding and I dismiss the petition.
- [Emphasis added.]
- [33] In Campbell, Justice Willcock (then of this Court) commented with respect to two other Indigenous groups that, in contrast, did speak for persons whose identities were objectively determinable:
- [162] The petitioners ask: Who speaks for the Sinixt? The answer is that both the Colville Confederacy and the Okanagan Nation Alliance have purported to speak for the Sinixt. Those groups speak for persons whose identities are determinable by objective criteria. The source of their authority and the nature of their representation is also determinable.
- [Emphasis added.]
- [34] In Hwlitsum, the Indigenous plaintiffs sought "declarations of Aboriginal rights and title over the lower mainland of British Columbia, southern Vancouver Island, the Gulf Islands and lands and waters related to those areas": para. 2.
- [35] The Court of Appeal affirmed a decision of this Court that dismissed this putative Aboriginal rights and title claim on the ground that the Indigenous plaintiffs lacked standing and the claim was therefore bound to fail. Like the petitioners in Campbell, the plaintiffs purported to represent members defined with reference to the asserted historic rights-bearing group, being the Lamalcha Tribe of Indians: para. 4. Although the plaintiffs initially proposed to represent the "entire" Lamalcha Tribe, they later purported to represent only "some" or "one

branch of the descendants of the Lamalcha Tribe": Hwlitsum at paras. 29, 32, 34.

[36] The Court of Appeal upheld the chambers judge's conclusion that the plaintiffs lacked standing since they could not represent the historic collective so defined and the claim was therefore bound to fail: Hwlitsum at para. 34. The Court of Appeal found that the plaintiffs were not "capable of advancing a claim to the historic and communal rights of the Lamalcha": Hwlitsum at para. 32; see also para. 33.

[37] Taken together, Hwlitsum and Campbell establish several propositions applicable to a standing challenge on an Aboriginal rights and title claim:

- (a) The court may deal with a standing challenge on a preliminary basis (Hwlitsum at paras. 6, 18; Campbell at paras. 84-90, 133);
- (b) On a preliminary standing challenge, as well as on a motion to dismiss a petition or strike a claim, the standard is whether it is "plain and obvious" that the claimant lacks standing and whether the claim is bound to fail (Hwlitsum at paras. 9, 39; Campbell at paras. 136, 138);
- (c) The standing test set out in *Western Canadian Shopping Centres* (at para. 48) has been modified slightly to address the context of Indigenous representative claims (Hwlitsum at paras. 8, 18, 22; Campbell at para. 10) as follows:
 - 1. whether the collective of rights-bearers on behalf of whom they purport to act is capable of clear definition;
 - 2. whether there are issues of law or fact common to all members of the collective so defined;
 - 3. whether success on the petition means success for the whole collective so defined; and
 - 4. whether the proposed representatives adequately represents the interests of the collective.
- (d) Whether the claimant's identification is of "recent vintage" is a relevant factor in assessing whether the claimant has standing: Hwlitsum at para. 9; Campbell at para. 116; and
- (e) Finally, the fact that certain organizations may have recognized the Indigenous claimant does not mean the representative claim is not bound to fail: Hwlitsum at para. 9.

[38] The Indigenous claimants' standing in both Hwlitsum and Campbell faltered on the first criterion of the modified *Western Canadian Shopping Centres* test - that is, whether the collective of rights-bearers on behalf of whom they purport to act is capable of clear definition: see Hwlitsum at para. 39; Campbell at para. 10.

Findings Regarding Standing

Threshold for the Standing Challenge

[39] The plain and obvious standard should apply to determine if the TSKLH Nation's application should be denied for lack of standing. Hwlitsum and Campbell articulated this standard on preliminary standing challenges seeking to dismiss or strike proceedings. But, given that the

standing argument on this application similarly seeks to "drive the [applicants] from the judgment seat" (Campbell at para. 138), I find that the same standard should apply. Thus, the Court ought not to exercise its discretion to permit joinder, or a third-party proceeding, where the applicant's proposed defence or claim is bound to fail on the basis of standing, or that it is "clear" the applicant has no standing to "represent an aboriginal community that can claim s. 35 rights": Campbell at paras. 136, 138.

- [40] As in Campbell, I also approach the standing question with a focus on the applicant's proposed pleadings (the unfiled proposed response to civil claim and third-party claim), but also in the context of the evidence and submissions on the application to determine whether any deficiency in the pleadings can be easily overcome: Campbell at para. 141. Campbell signals that the court should be generous when allowing the receipt of evidence on an application of this sort, in order to do justice between the parties. I note that objections were made both by the plaintiffs and the TSKLH Nation to the admissibility of certain aspects of the other's evidence relied on during this interlocutory application; nothing in these reasons should be taken to have made any finding or ruling as to the admissibility of or weight to be given to the evidence filed on this application for the purposes of the trial of this action.

Is it Plain and Obvious that the TSKLH Nation Lack Standing?

- [41] As discussed above, both Hwlitsum and Campbell involved modern Indigenous claimants who defined their collective with reference to a historic rights-bearing group.
- [42] The plaintiffs contend that the TSKLH Nation's application should be denied for lack of standing when the principles in Hwlitsum and Campbell are applied. They specifically rely on the following passages of Hwlitsum which they contend mean that, when considering standing on a preliminary basis, the court must always be satisfied that the modern Indigenous claimant can represent the whole of the asserted historic rights-bearing collective:
- [31] Aboriginal rights and title vest in the historic Aboriginal community at the time of contact in the case of Aboriginal rights, and at sovereignty in the case of Aboriginal title, which in British Columbia has been found to be 1846: Delgamuukw at paras. 145–146; Tsilhqot'in Nation v. British Columbia, 2014 SCC 44.
- [32] The historic Aboriginal community in issue in the present case is the Lamalcha Tribe of Indians. In order to assert a claim under s. 35 of the Charter, the HFN must be capable of advancing a claim to the historic and communal rights of the Lamalcha. In my view the HFN cannot assert such rights, because they define themselves as only one branch of the descendants of the Lamalcha Tribe, i.e., those Lamalcha who are descendants of Si'nuscutun and who are not members of any other Indian band.

- [43] The plaintiffs also refer to the TSKLH Nation's proposed response to civil claim in this action (excerpts quoted below) which they contend defines the TSKLH Nation in terms of the asserted historic rights-bearing group, the Laxwiiyip Tsetsaut:
12. The TSKLH Nation's members are matrilineal descendants of the Laxwiiyip Tsetsaut, a self-governing people who exclusively occupied and effectively controlled the Disputed Territory at the time the British Crown asserted sovereignty over TSKLH Territory ("Sovereignty Assertion"). Members of the TSKLH Nation are the sole remaining Laxwiiyip Tsetsaut descendants to continue to identify with their Laxwiiyip Tsetsaut origins.
 17. The Laxwiiyip Tsetsaut organized itself into kin groups, sometimes referred to as "houses." Membership in a Laxwiiyip Tsetsaut kin group is matrilineal, and names, crests, authority, and territory are derived from the mother's line. Under Laxwiiyip Tsetsaut law, individuals raised by and adopted into a kin group are full members of the mother's line.
 29. Other descendants of the Laxwiiyip Tsetsaut left TSKLH Territory both prior to and since European Contact or Sovereignty Assertion. Some of these descendants joined, associated with, or formed other Aboriginal groups.
 30. the Gitanyow names Luuxhon, Gamlaxyeltxw, and Sindihl are descended from the Laxwiiyip Tsetsaut names Luuxhon, Gamlaxyeltxw, and Sindihl, whose holders migrated out of TSKLH Territory before Sovereignty Assertion.
 31. . . . [T]he migrations of Luuxhon, Gamlaxyeltxw, and Sindihl are recorded and described in Laxwiiyip Tsetsaut and Gitanyow oral histories and songs, and on Tsetsaut and Gitanyow crests and totem poles.
- [44] The plaintiffs contend that Chief Simpson is not capable of representing all of the asserted historic rights-bearing community, and it is therefore plain and obvious that she lacks standing. In other words, they contend that it is plain and obvious that the Court does not have before it a representative that represents the whole of the asserted historic rights-bearing community, being the Laxwiiyip Tsetsaut.
- [45] I do not accept the plaintiffs' submission regarding the test for standing in Aboriginal rights and title cases. Their proposed standing test would in effect merge the concept of standing of a modern claimant to bring an Aboriginal rights and title claim with the separate issue of the modern claimant's assertion of successorship to rights (based on historic practices) of an asserted historical collective, which is not required by the law of standing including as set out in *Campbell and Hwlitsum*.
- [46] In *Hwlitsum and Campbell*, the courts analyzed standing with reference to the modern claimant's relationship to the historic rights-bearing group, but as I read these decisions, that was because the modern claimants in those cases had specifically chosen to define their membership with reference to genealogical association with the historic group. The claimants failed to establish standing on that basis, since membership in the modern group could not be identified by stated, objective criteria: *Campbell* at paras. 150, 162, 166;

Hwlitsum at paras. 28-29, 39.

- [47] However, I do not read Hwlitsum and Campbell as laying down a general requirement that a court, on a preliminary standing challenge, must always engage in scrutiny of the validity of the modern claimant's assertion to their successorship to the rights of the historic rights-bearing collective. Instead, the standing analysis depends on how the claim is framed and advanced, and how the modern claimant chooses to define itself.
- [48] Incorporating into a preliminary standing assessment an inquiry into the merits of a modern Indigenous group's successorship to an asserted historic rights-bearing community, of the sort engaged by this Court after a trial in *The Nuchatlaht* (at paras. 407-419), would draw the Court into close scrutiny of an aspect of the validity of an Aboriginal rights or title claim at a preliminary procedural stage. This would invite the Court, when conducting a preliminary standing assessment, to engage in merits-based scrutiny on a matter of mixed fact and law that would not be suitable on a preliminary application: Campbell at para. 84, citing *Oregon Jack Creek Indian Band v. Canadian National Railway Co.*, [1989] 56 D.L.R. (4th) 404 at 412, 1989 CanLII 249 (B.C.C.A.), *aff'd* [1989] 2 S.C.R. 1069, 1989 CanLII 4.
- [49] In my view, this is not required by the holdings in Campbell and Hwlitsum.
- [50] Further, requiring successorship scrutiny of an Aboriginal rights and title claim at a preliminary procedural stage would be contrary to the commentary in *R. v. Desautel*, 2021 SCC 17 [Desautel], where the Court found that successorship can be a complex issue that should be dealt with on a "fuller factual record": para. 49. As a measure of its potential complexity, Desautel also implies that a historic group could, in theory, have more than one modern successor:
- [48] In the present case, the trial judge found as a fact that the Sinixt had occupied territory in what is now British Columbia at the time of European contact. She also found that the Lakes Tribe were a modern successor of the Sinixt -- leaving open the possibility that there may be others. I would defer to this factual finding. The migration of the Lakes Tribe from British Columbia to a different part of their traditional territory in Washington did not cause the group to lose its identity or its status as a successor to the Sinixt.
- [49] This case does not require the Court to set out criteria for successorship of Aboriginal communities. This is a complex issue that should be dealt with on a fuller factual record, with the benefit of legal argument. For example, consideration would have to be given to the possibility that a community may split over time, or, that two communities may merge into one, as well as to the relative significance of factors such as ancestry, language, culture, law, political institutions and territory in connecting a modern community to its historical predecessor. Some of the difficulties here are brought out in the academic literature (see P. L. A. H. Chartrand, "Background", in P. L. A. H. Chartrand, ed., *Who are Canada's Aboriginal Peoples? Recognition, Definition, and Jurisdiction* (2002), 27; R. K. Groves, "The Curious Instance of the Irregular Band: A Case Study of Canada's Missing Recognition Policy" (2007), 70 Sask. L.R. 153; and B. Olthuis, "The Constitution's Peoples: Approaching Community in

the Context of Section 35 of the Constitution Act, 1982" (2009), 54 McGill L.J. 1).

[Emphasis added.]

- [51] Nor does the first criterion of the modified Western Canadian Shopping Centres test expressly state, or imply, that in every standing challenge, the court must also examine and satisfy itself that the modern claimant is also capable of representing the whole of the historic rights-bearing collective that is the subject of the Aboriginal title claim. The first Western Canadian Shopping Centres criterion does not call for such an inquiry. That case further states that it "is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria": *Western Canadian Shopping Centres* at para. 38.
- [52] The TSKLH Nation submit that their "Notice of Application and proposed Response and Third Party Notice plainly state that relief is sought and rights are asserted on behalf of the Tsetsaut Skii km Lax Ha Nation" and that "the Tsetsaut Skii km Lax Ha Nation provided a definition of membership that well exceeds the threshold for satisfying the Western Canadian Shopping criteria."
- [53] Here, the applicants have defined the modern collective as all members of the TSKLH Nation, a modern group they assert has membership rules and is capable of objective definition.
- [54] Applying the four criteria in the modified Western Canadian Shopping Centres test, I find that it is not plain and obvious that Chief Simpson lacks standing, and that it is instead arguable that:
1. The collective of modern rights-bearers on behalf of whom Chief Simpson purports to act, the TSKLH Nation, is capable of clear definition and determinable by objective criteria. There is evidence that TSKLH Nation have a membership list and membership rules, including that of matrilineal descent (and adoptions);
 2. There are issues of law or fact common to all members of the collective so defined. In my view, it is arguable that the asserted Aboriginal rights and title asserted by Chief Simpson on behalf of the TSKLH Nation are common to all members of the TSKLH Nation;
 3. Success in the action would mean success for the whole collective of the TSKLH Nation so defined; and
 4. Chief Simpson adequately represents the interests of the TSKLH Nation. I do not find that the plaintiffs raised any arguments or criticisms of Chief Simpson, including those also advanced under the abuse of process ground, that are of sufficient merit to deny Chief Simpson and the TSKLH Nation standing at this preliminary stage.

- [55] Further, I do not find it plain and obvious that the TSKLH Nation's self-identification is merely of recent vintage and that they should be denied standing for this reason: Campbell at para. 116; Hwlitsum at para. 9.
- [56] I also do not accept the plaintiffs' argument that it is plain and obvious that the TSKLH Nation's proposed class is impermissibly subjective. In the TSKLH Nation's membership criteria on the evidence before me, I do not detect the sort of plain and obvious defect in objectively discernible membership criteria that existed in Hwlitsum and Campbell.
- [57] In short, I find that Hwlitsum and Campbell are distinguishable on their facts, and the same result in those cases (a lack of standing) does not follow on this application.

Conclusion on Standing

- [58] It is not plain and obvious that the TSKLH Nation include persons whose identities cannot be determinable by objective criteria, and that Chief Simpson otherwise lacks standing to advance a defence or third-party claim on behalf of a TSKLH Nation collective in this action. The plaintiffs' challenge to Chief Simpson's and TSKLH Nation's standing on this application is therefore dismissed.

Issue 2: Should the TSKLH Nation be denied joinder because their application constitutes an abuse of process?

Test for Abuse of Process on an Application for Joinder or Third-Party Proceeding

- [59] The plaintiffs also oppose this application on the basis that it, and the positions Chief Simpson and TSKLH Nation advance in this action, constitute an abuse of process.
- [60] A party alleging that a pleading or proposed pleading constitutes an abuse of process bears a heavy onus and must show that the abuse is plain and obvious, and the impugned conduct is egregious, and to not permit a claim at the pleadings stage on this basis should be done only in the clearest of cases: *Keltic (Brighthouse) Development Ltd. v. Yi Teng Investment Inc.*, 2023 BCCA 375 at paras. 41-42; *Hare v. Lit*, 2013 BCSC 33 at paras. 22, 25; *A.M. v. Dr. F*, 2021 BCSC 32 at paras. 63, 106. In my view, this standard equally applies here where the plaintiffs oppose the application by the TSKLH Nation to be added as a defendant and to commence a third-party proceeding. I find that the plaintiffs must meet the "plain and obvious" and "clearest of cases" standard in opposing joinder on the basis that it would constitute an abuse of process: Campbell at para. 136.
- [61] Further, while the abuse of process doctrine focuses on protecting the integrity of the justice system, it "should be applied only where proceedings are exceedingly unfair, vexatious, or oppressive": *Fontaine v. Canada (Attorney General)*, 2019 BCCA 178 at paras. 85, 87, leave to appeal to SCC ref'd, 38862 (27 February 2020); see also *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at paras. 35-37.

Findings Regarding Abuse of Process

- [62] It is not plain and obvious that Chief Simpson and the TSKLH Nation's application to be added as a defendant and to file a third-party notice constitutes an abuse of process.
- [63] The plaintiffs contend that there has been an abuse of process through the change of position from Delgamuukw in terms of the location of the TSKLH Nation's (formerly the House of Skiik'm Lax Ha's) current claim area, which they describe as a diametrically different claim; from Chief Simpson's position in defence of a charge of unlawful fishing; arising from certain evidence given in the Delgamuukw trial; and from Chief Simpson's conduct, including her dealings with other Gitksan groups. The plaintiffs submit that Chief Simpson and the TSKLH Nation have taken positions which are incompatible, unfair, and abusive to the court's process.
- [64] The TSKLH Nation assert that there is no abuse of process because, among other things, there has been a change in the law since Delgamuukw leading to its change in position from that case. They also rely on an August 2023 letter from the Province that says "all evidence suggests that" certain geographic areas (though not areas that overlap with the Gitanyow Claim Area) "[were] part of the Skii km Lax Ha's Awijii territory and that its omission from the Delgamuukw map was an error." The TSKLH Nation contend that this justifies their reassessment of the scope of their claimed territory from that in Delgamuukw.

Conclusion on Abuse of Process

- [65] In my view, it is not plain and obvious that the TSKLH Nation's change of position with respect to the size and geographic location of their asserted claim area constitutes an abuse of process. It is not plainly and obviously or clearly abusive for the TSKLH Nation to change their position as to the location and size of their traditional territory claim area over time, as has occurred from the Delgamuukw litigation, and I have not been persuaded that the plaintiffs have met this high burden on this application.
- [66] Nor do the plaintiffs' argument based on evidence tendered in the Delgamuukw litigation in respect of the claim of House of Skiik'm Lax Ha persuade me that the TSKLH Nation's current position is abusive. Nor do I find it plain and obvious that Chief Simpson's conduct, or the other criticisms of her and the TSKLH Nation on this application, rise to the level of being clearly abusive or egregious.
- [67] Accordingly, I find that the TSKLH Nation's application should not be dismissed on the ground that it constitutes an abuse of process.

Issue 3: Should the TSKLH Nation be added as a defendant?

- [68] Rule 6-2(7)(b) provides that the court has the discretion to add a party if that person ought to have been joined as a party, or if that person's participation is necessary to effectually adjudicate matters in the proceeding:

Adding, removing or substituting parties by order

- (7) At any stage of a proceeding, the court, on application by any person, may, subject to subrules (9) and (10),
- (a) order that a person cease to be party if that person is not, or has ceased to be, a proper or necessary party,
 - (b) order that a person be added or substituted as a party if
 - (i) that person ought to have been joined as a party, or
 - (ii) that person's participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated on,

[69] This Rule has been given a narrow interpretation:

As discussed in *Letvad* at paras. 16-18, Rule 6-2(7)(b) has been given a narrow interpretation. It is intended to remedy defects in the proceeding as it stood prior to the application to add a party. "Ought to have been joined" deals with the situation where the person sought to be added has a direct interest in the outcome of the existing action. "[N]ecessary to ensure that all matters may be effectually adjudicated" deals with a situation where the participation of the person sought to be added is required in order for the existing claim to be fully and properly adjudicated. See also: *Kitimat (District) v. Alcan Inc.*, 2006 BCCA 562 at paras. 28-32, 61 B.C.L.R. (4th) 295.

Byrd v. Cariboo (Regional District), 2016 BCCA 69 at para. 36. See also *Madadi v. Nichols*, 2021 BCCA 10 at para. 21.

[70] Rule 6-2(7)(c) provides that:

- (7) At any stage of a proceeding, the court, on application by any person, may, subject to subrules (9) and (10),
- (c) order that a person be added as a party if there may exist, between the person and any party to the proceeding, a question or issue relating to or connected with
 - (i) any relief claimed in the proceeding, or
 - (ii) the subject matter of the proceeding

that, in the opinion of the court, it would be just and convenient to determine as between the person and that party.

[71] This Rule requires "a degree of interrelationship" between the applicant and an existing party and allows joinder for "convenience" so as to "counter the narrow interpretation" of R. 6-2(7)(b): *Cowichan Tribes v. Canada (Attorney General)*, 2016 BCSC 1660 at para. 9, citing *Lawrence Construction Ltd. v. Fong*, 2001 BCSC 813 at para. 29; see also *Kitimat (District) v. Alcan Inc.*, 2006 BCCA 562 at paras. 35-38; *Madadi* at paras. 22-24.

- [72] The TSKLH Nation should be added as a defendant in this action. There is a strong reason to add them as a defendant over the plaintiffs' objections: *Kwikwetlem First Nation v. British Columbia (Attorney General)*, 2021 BCCA 311 at para. 39 [Kwikwetlem]. The TSKLH Nation assert an Aboriginal title claim to significant portions of land in the Gitanyow Claim Area. In my view, it is just and appropriate to permit them to be added as a defendant to defend against the plaintiffs' claim to Aboriginal title over the overlapping areas.
- [73] There are also very strong reasons demonstrating necessity for adding the TSKLH Nation as a defendant (*Kwikwetlem* at para. 39), and the TSKLH Nation have a direct and precise interest in the outcome of the proceeding given their significantly overlapping Aboriginal title claim. Both the plaintiffs and the TSKLH Nation are seeking declarations of Aboriginal rights and title to the same territory.
- [74] Further, the TSKLH Nation raise an issue that is not frivolous and it would further the interests of justice and convenience in the circumstances to add the TSKLH Nation as a defendant.
- [75] The trial of this action is scheduled to commence on March 3, 2025: *Malii v. British Columbia*, 2024 BCSC 1062 at para. 24.
- [76] The TSKLH Nation submit that, if joined, they do not intend to delay the start of the trial of this action (and at the time of the hearing of this application, the trial had been scheduled to commence on October 1, 2024).
- [77] I am cognizant of the impact that adding the TSKLH Nation as a defendant may have on the conduct of this action and its potential complexity: see *Kwikwetlem* at paras. 27, 29. However, in my view, those considerations are outweighed by the strong necessity and the interests of justice in having both the TSKLH Nation's and the plaintiffs' claim to Aboriginal rights and title over the same geographic area determined in the same action: *Delgamuukw* at para. 185.
- [78] I find that the interests of proportionality, access to justice, and reconciliation militate toward adding the TSKLH Nation as a defendant: *Kwikwetlem* at para. 36.
- [79] The plaintiffs argue that the TSKLH Nation have engaged in delay, and that this weighs against allowing joinder. I am concerned by the passage of time since Chief Simpson became aware of the Gitanyow's action in May 2016. By letter dated September 18, 2017, the TSKLH Nation sought consent from the parties to be added as a defendant and third party, and on September 20, 2017, the plaintiffs advised they would not consent. The TSKLH Nation then prioritized their ultimately unsuccessful application to disqualify counsel for the plaintiffs, including an unsuccessful appeal (*Malii v. British Columbia (Attorney General)*, 2019 BCSC 2060, *aff'd* 2021 BCCA 140), before setting down this joinder application for hearing.

[80] However, I do not find that the passage of time should result in the consequence of denying the TSKLH Nation's application for this reason.

[81] The comments in Tsilhqot'in that were made in the pleadings context are apposite here: "What is at stake is nothing less than justice for the Aboriginal group and its descendants, and the reconciliation between the group and broader society": para. 23. Denying the TSKLH Nation relief to be added as a defendant due to the passage of time would be disproportionate, and would not further the interests of access to justice and reconciliation. Nor does the relatively small size of the current TSKLH Nation membership (approximately 45) militate against the denial of their status as a defendant.

[82] For all of these reasons, the TSKLH Nation's application to be added as a defendant is granted.

Issue 4: Should the TSKLH Nation be permitted to file a third-party notice in this action?

[83] Third-party proceedings are governed by R. 3-5. Rule 3-5(1) provides:

Making a third party claim

- (1) A party against whom relief is sought in an action may, if that party is not a plaintiff in the action, pursue a third party claim against any person if the party alleges that
 - (a) the party is entitled to contribution or indemnity from the person in relation to any relief that is being sought against the party in the action,
 - (b) the party is entitled to relief against the person and that relief relates to or is connected with the subject matter of the action, or
 - (c) a question or issue between the party and the person
 - (i) is substantially the same as a question or issue that relates to or is connected with
 - (A) relief claimed in the action, or
 - (B) the subject matter of the action, and
 - (ii) should properly be determined in the action.

[84] I find that the TSKLH Nation should be permitted to file a third-party notice. Their claim is neither frivolous nor bound to fail: *Canfor Pulp Limited Partnership v. Siemens Building Technologies Ltd.*, 2016 BCSC 2089 at paras. 32-36, 47-50 [Canfor Pulp]; *NRI Solutions Ltd. v. Chohan*, 2024 BCCA 146 at para. 26, citing *Tyson Creek Hydro Corporation v. Kerr Wood Leidal Associates Limited*, 2014 BCCA 17 at paras. 16-17. The claims advanced in the relief sought in the proposed third-party notice are substantially connected to the questions raised, the relief sought, and the subject matter, in the fourth amended notice of civil claim, and should properly be determined in the action: Supreme Court Civil Rules, R. 3-5(1)(c).

- [85] Further, not permitting the third-party proceeding would likely result in an undesirable and inefficient multiplicity of proceedings, and risk contradictory findings: *Canfor Pulp* at para. 47.
- [86] Greater injustice and inconvenience would arise from allowing the matter to be pursued in a separate action versus granting leave to commence a third-party proceeding: *Kwikwetlem* at paras. 148-149, citing *The Owners, Strata Plan LMS 1751 v. Scott Management Ltd.*, 2010 BCCA 192 at para. 90.
- [87] In my view, the balance of prejudice weighs in favour of allowing the TSKLH Nation to file the proposed third-party notice in this action.
- [88] Nor do I accept the plaintiffs' submissions that the TSKLH Nation's interests can be adequately advanced through participating as an intervener instead of a defendant or third party.
- [89] In short, the TSKLH Nation's application to file a third-party notice is granted.

Conclusion and Order

- [90] In summary, the relief sought in paras. 1 and 2 of the notice of application, seeking orders that the TSKLH Nation be added as a defendant and be permitted to file a third-party notice naming British Columbia and Canada as third parties, is granted.
- [91] Costs of this application shall be in the cause.

"Stephens J."

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