

CANADA / JUDGMENT

Malii v. British Columbia

2024 BCSC 85

COURT

Supreme Court of British Columbia

DECIDED

17 January 2024

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2024 BCSC 85 Malii v. British Columbia

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Malii v. British Columbia,

2024 BCSC 85

Date: 20240117

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 Robert Good, Watakhayetsxw also known as Agatha Bright, Gwinuu also known as Phyllis Haizimsque, Wii'litsxw also known as Gregory Rush, Haizimsque also known as Ken Russell, 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 the citation, headers, cover page and paragraph 95 on January 24, 2024.

Before: The Honourable Justice Stephens

Reasons for Judgment

(application by the Nisga'a Nation to be added as a defendant)

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Place and Date of Hearing:

Vancouver, B.C.

September 27, 2023

Written Submissions of the Nisga'a Nation, as represented by the Nisga'a Lisims Government:

October 6 and October 19, 2023

Written Submissions of the Plaintiff:

October 16, 2023

Place and Date of Judgment:

Vancouver, B.C.

January 17, 2024

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OVERVIEW

[1] In this 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 "Claim Area"). Their action is currently scheduled for an 84-day trial in October 2024.

[2] The Nisga'a Nation, as represented by the Nisga'a Lisims Government (the "Nisga'a") have entered into the Nisga'a Final Agreement with the defendants, Canada and British Columbia (the "Nisga'a Treaty"). The Nisga'a Treaty, among other things, grants the Nisga'a certain rights over, as well as fee simple title to, geographic areas that overlap, in part, with the geographic area of the Gitanyow's claim.

- [3] Because of the overlap between the Nisga'a's treaty lands, the Claim Area, and provisions of the Nisga'a Treaty, the Nisga'a apply to be added as a defendant to the Gitanyow's action. The Nisga'a also contend that they have relevant evidence to provide at the upcoming trial regarding their historical occupation of their traditional territory. If made a defendant, the Nisga'a would be entitled to file a response to civil claim and participate fully in both the pre-trial procedure and the trial of this action on all issues, including closing argument.
- [4] The Nisga'a support their position to be added as a defendant on three pillars. First, they argue that they have a right to be added as a defendant because they hold statutory and treaty entitlements to appear as a party. Second, they contend that the Nisga'a ought to be added as a party under Rules 6-2(7)(b)(i), (b)(ii), and (c) of the Supreme Court Civil Rules [Rules], based on established case law tests. Third, they contend that counsel for the Gitanyow represented to them in 2018 that they had acquiesced to the Nisga'a's participation in the action and would not oppose their application to be added as a defendant, and therefore the Gitanyow should not be permitted to resile from that position now.
- [5] The Gitanyow oppose the Nisga'a's participation as a defendant, contending, among other things, that adding the Nisga'a as a defendant is unnecessary.
- [6] In response to the Nisga'a's application, the Gitanyow have narrowed their claim, removing relief previously sought that would have entitled them to ratify, or refuse to ratify, previously granted rights and interests, including those of other Aboriginal nations (such as the Nisga'a), that conflicts with their Claim Area.
- [7] The Gitanyow contend that they have intentionally re-framed their action so that Nisga'a rights are not engaged. The Gitanyow contend that the Nisga'a's treaty rights are not engaged at this stage in the proceeding as now framed. They say that if the Gitanyow are successful in obtaining a declaration of Aboriginal title, the Nisga'a Treaty will carry on. They say that they are not asking the Court to make a determination about any adverse effects or impacts on the Nisga'a Treaty.
- [8] As a practical matter, the Gitanyow also contend that adding the Nisga'a as a defendant would "expand the length, complexity, and cost" of the trial of their action and thwart the Gitanyow's access to justice by delaying their ability to bring their Aboriginal rights and title case to resolution.
- [9] The Gitanyow wish to avoid a lengthy trial of the sort experienced in other Aboriginal rights and title cases. For example, the Gitanyow points to the trial in *Delgamuukw v. British Columbia*, 79 D.L.R. (4th) 185, 1991 CanLII 2372 (B.C.S.C.), which spanned over 300 days: *The Nuchatlaht v. British Columbia*, 2023 BCSC 804 at para. 6. They have also pointed to the trial of *Cowichan Tribes v. Canada (Attorney General)*, 2016 BCSC 1660 [Cowichan], where the Tsawwassen First Nation (the "TFN") was added as a defendant, and which heard 458 days of evidence until the spring of 2023: *The Nuchatlaht* at para. 6. I do not take the Gitanyow to mean any disrespect to the Court or to any of the parties involved in other litigation concerning Aboriginal rights and title, but they submit that some of these trials have taken a

very long time, and they wish to avoid that from happening in their trial.

- [10] In these Reasons, I find that the Nisga'a should not be added as a defendant to this action, and their application shall be dismissed. Having regard to the principles expressed in *Kwikwetlem First Nation v. British Columbia (Attorney General)*, 2021 BCCA 311 [Kwikwetlem], it is not necessary, just, or convenient for the Nisga'a to be added as a defendant to this action, and I decline to do so. In reaching this decision, I have not only placed weight, as I must, on the Gitanyow's interest in access to justice, but also on the interest in resolving such claims in a timely manner.
- [11] However, dismissing the Nisga'a's application is not quite the end of the matter, since both federal and provincial legislation give the Nisga'a - specifically the Nisga'a Lisims Government - a statutory right to participate as a party in any judicial proceeding where an issue regarding "the interpretation or validity of the Nisga'a Final Agreement" or "the validity or applicability of any settlement legislation or any Nisga'a law" is raised: Nisga'a Final Agreement Act, S.B.C. 1999, c. 2, c. 8(1) [BC Nisga'a Final Agreement Act]; Nisga'a Final Agreement Act, S.C. 2000, c. 7, s. 20(1) [Nisga'a Final Agreement Act]. In a proceeding where those issues are raised, these two implementing statutes require that the Nisga'a be given at least 14 days' notice before the day of argument and may participate as a party: BC Nisga'a Final Agreement Act, s. 8(2)-(3); Nisga'a Final Agreement Act, s. 20(2)-(3).
- [12] Based on the current version of the pleadings, I see no issue being raised by the Gitanyow as to the validity of the Nisga'a Treaty, or to the validity or applicability of settlement legislation or Nisga'a law. Nor do the Gitanyow directly raise any issue as to the interpretation of the Nisga'a Treaty in their most recent fourth further amended notice of civil claim ("Fourth FANOCC"). However, both Canada's and British Columbia's current responses to civil claim could potentially raise an issue as to the interpretation of the Nisga'a Treaty during the argument phase of the trial that would, in turn, statutorily entitle the Nisga'a to be heard as a party on the discrete issues they raise. That said, further amendments to the pleadings may yet be made before the commencement of the trial of this action, and the issues for the trial may still be in flux.
- [13] Accordingly, I dismiss the Nisga'a's application to be added as a defendant to this action at this time. However, I will nevertheless direct that a hearing take place no less than 60 days before the trial of this action to determine whether the statutory notice is required to be sent to the Nisga'a on the issues as pleaded and the case as framed at that time, and to consider and determine the scope, if any, of the Nisga'a's right to participate as a party at the closing argument of the trial of this action.

FACTUAL BACKGROUND

The Gitanyow's Action

- [14] The Gitanyow's Aboriginal rights and title action was first commenced in December 2003 and later reactivated in 2016. The Claim Area in the action is called the "Gitanyow Lax'yip," which has been defined to encompass a territory of approximately 6,200 square kilometres of the mid-Nass River and Kitwanga River watershed in northwestern British Columbia.
- [15] The Gitanyow's claim has been amended several times. From the outset, the Gitanyow's claim sought a declaration of Aboriginal rights and title and related relief. Up until the third further amended notice of civil claim, filed May 19, 2023, the declaration sought was phrased as a "declaration recognizing the Plaintiffs' existing aboriginal title and rights in and to the Gitanyow Lax'yip which are existing aboriginal rights within the meaning of section 35 of the Constitution Act, 1982."
- [16] The Gitanyow provided an unfiled copy of their Fourth FANOC at this application hearing. In subsequent written submissions, the Gitanyow advised that both defendants have consented to the filing of the Fourth FANOC. I will therefore proceed on the basis that the Fourth FANOC is relevant for the purposes of deciding the Nisga'a's application.
- [17] In the Fourth FANOC, the Gitanyow somewhat reframe their declaration of Aboriginal rights and title sought, although the declaratory relief remains with reference to "the entirety of the Gitanyow Lax'yip."
- [18] The Gitanyow have now also made substantial deletions to their claim in the Fourth FANOC. Notably, their previous claim for a declaration to ratify conditionally or otherwise refuse to ratify fee simple titles, tenures, or any other rights or interests in relation to the Gitanyow Lax'yip has been deleted from the Fourth FANOC. This deleted relief previously read:
4. A declaration that the Plaintiffs' Aboriginal title and rights include the right to ratify conditionally or otherwise refuse to ratify fee simple titles, Tenures or any rights or interests created or purported to be created directly or indirectly, at any time by either of the Defendants in relation to the Gitanyow Lax'yip or the resources thereof, including but not limited to those granted or purported to be granted to other aboriginal nations or portions of other aboriginal nations without the Plaintiffs' consent.
- [19] The Gitanyow have also removed the declaratory relief sought for trespass; wrongful interference with their Aboriginal rights and title; nuisance; and breach of fiduciary duty: November 10, 2023 Fourth FANOC at paras. 7-10.
- [20] The Gitanyow have also removed the interlocutory and permanent injunctive relief sought, which previously read:
12. Interlocutory and permanent injunctive relief to prevent further or new interference with the Plaintiffs' aboriginal title and rights in and to the Gitanyow Lax'yip, including but not limited to:

- a. An interlocutory and permanent injunction prohibiting the appropriation by the Defendants of any part of the Gitanyow Lax'yip or the granting to third parties of any rights or interests in relation thereto, through grants, licenses, leases, authorizations, approvals and permits or in any other manner whatsoever which may infringe on the Plaintiffs' aboriginal title or rights without the Plaintiffs' consent; and
- b. An interlocutory and permanent injunction prohibiting the Defendants from issuing or renewing any grants, licenses, leases, authorizations, approvals and permits authorizing the use of any resources within the Gitanyow Lax'yip by the Defendants, their agents or by third parties which may infringe on the Plaintiffs' aboriginal title or rights without the Plaintiffs' consent.

The Nisga'a Treaty and Implementing Legislation

[21] The Nisga'a's application relies significantly (though not exclusively) on the Nisga'a Treaty.

[22] The Nisga'a Treaty was described in *Gamlaxyeltxw v. British Columbia (Minister of Forests, Lands & Natural Resource Operations)*, 2020 BCCA 215 at para. 19:

The Nisga'a Treaty came into effect on May 11, 2000. It was acknowledged by the Nisga'a and the Crown to be a treaty within the meaning of sections 25 and 35 of the Constitution Act, 1982. Under the Treaty, certain lands were designated as Nisga'a Lands, owned by the Nisga'a Nation in fee simple. A large area of just over 16,000 km² was designated as the Nass Wildlife Area. The Treaty describes the rights of the Nisga'a' people in the Nass Wildlife Area in this way:

1. Nisga'a citizens have the right to harvest wildlife throughout the Nass Wildlife Area, in accordance with this Agreement, subject to:
 - a. measures that are necessary for conservation; and
 - b. legislation enacted for the purposes of public health or public safety.
2. The entitlement set out in paragraph 1 is a right to harvest in a manner that:
 - a. is consistent with:
 - i. the communal nature of the Nisga'a harvest for domestic purposes, and
 - ii. the traditional seasons of the Nisga'a harvest; and
 - b. does not interfere with other authorized uses of Crown land.

[23] The evidence indicates that there is a relatively modest geographic overlap between the Claim Area and the Nisga'a Treaty lands where the Nisga'a hold fee simple title (the "Nisga'a Lands"), and a more considerable overlap with the "Nass Wildlife Area" and "Nass Area" under the Nisga'a Treaty where the Nisga'a have harvesting and other rights.

[24] The Nisga'a Treaty also contains, among other things, terms which contemplate what would happen in the event another Indigenous group, such as the Gitanyow, establishes s. 35 rights that conflict with the Nisga'a Treaty rights:

OTHER ABORIGINAL PEOPLE

33. Nothing in this Agreement affects, recognizes, or provides any rights under section 35 of the Constitution Act, 1982 for any aboriginal people other than the Nisga'a Nation.
 34. If a superior court of a province, the Federal Court of Canada, or the Supreme Court of Canada finally determines that any aboriginal people, other than the Nisga'a Nation, has rights under section 35 of the Constitution Act, 1982 that are adversely affected by a provision of this Agreement:
 - a. the provision will operate and have effect to the extent that it does not adversely affect those rights; and
 - b. if the provision cannot operate and have effect in a way that it does not adversely affect those rights, the Parties will make best efforts to amend this Agreement to remedy or replace the provision.
 35. If Canada or British Columbia enters into a treaty or a land claims agreement, within the meaning of sections 25 and 35 of the Constitution Act, 1982, with another aboriginal people, and that treaty or land claims agreement adversely affects Nisga'a section 35 rights as set out in this Agreement:
 - a. Canada or British Columbia, or both, as the case may be, will provide the Nisga'a Nation with additional or replacement rights or other appropriate remedies;
 - b. at the request of the Nisga'a Nation, the Parties will negotiate and attempt to reach agreement on the provision of those additional or replacement rights or other appropriate remedies; and
 - c. if the Parties are unable to reach agreement on the provision of the additional or replacement rights or other appropriate remedies, the provision of those additional or replacement rights or remedies will be determined in accordance with Stage Three of the Dispute Resolution Chapter.
- [25] Justice Hunter described that the effect of these provisions in Gamlaxyeltxw "is to ensure that the Nisga'a Treaty does not affect the s. 35 rights of other Indigenous groups" and added (at para. 97):

If an Indigenous group does establish s. 35 rights, either by final judicial determination or by negotiation with the Crown, and those rights are adversely affected by the provisions of the Nisga'a Treaty, the other rights will prevail, and appropriate measures will be negotiated to address the diminished Nisga'a rights. These provisions provide significant protection for Indigenous groups such as the Gitanyow that have not yet established the nature and scope of their s. 35 rights in a way that could permit enforcement.

[Emphasis added.]

[26] Sections 41 and 42 of Chapter 19 (Dispute Resolution) of the Nisga'a Treaty also deal with the Nisga'a's right to be a party in judicial and administrative proceedings where certain enumerated issues are raised by the parties to such proceedings:

41. If, in any judicial or administrative proceeding, an issue arises in respect of:

- a. the interpretation or validity of this Agreement; or
- b. the validity, or applicability of:
 - i. any settlement legislation, or
 - ii. any Nisga'a law

the issue will not be decided until the party raising the issue has properly served notice on the Attorney General of British Columbia, the Attorney General of Canada, and Nisga'a Lisims Government.

42. In any judicial or administrative proceeding to which paragraph 41 applies, the Attorney General of British Columbia, the Attorney General of Canada, and Nisga'a Lisims Government may appear and participate in the proceedings as parties with the same rights as any other party.

ANALYSIS

Issue 1: Does *Cowichan Tribes v. Canada* (Attorney General), 2016 BCSC 1660, bind the Court so as to require the Nisga'a to be made a defendant in this action?

[27] The Nisga'a contend that I am bound by stare decisis to add them as a defendant because of *Cowichan*, a previous decision of this Court. In that case, this Court allowed the TFN's application to join as a defendant in the *Cowichan Tribes'* action, which sought declarations relating to Aboriginal title of lands in what is now the City of Richmond.

[28] The TFN sought to be added as a defendant in *Cowichan* by relying on the overlap of its claim between its treaty lands with the *Cowichan Tribes'* title claim area. The TFN also relied on a provision of the TFN's treaty (that is substantively the same as s. 34 of the Nisga'a Treaty) which provides:

48. If a superior court of a province, the Federal Court of Canada or the Supreme Court of Canada finally determines that any aboriginal people, other than Tsawwassen First Nation, have rights under section 35 of the Constitution Act, 1982 that are adversely affected by a provision of this Agreement:
- a. the provision will operate and have effect to the extent that it does not adversely affect those rights; and
 - b. if the provision cannot operate and have effect in a way that it does not adversely affect those rights, the Parties will make best efforts to amend this Agreement to remedy or replace the provision.

[29] Ultimately, this Court added the TFN as a defendant pursuant to Rules 6-2(7)(b)(ii) and 6-2(7)(c)(i): Cowichan at paras. 69, 76.

[30] In Cowichan, this Court stated at para. 57:

As previously mentioned, I find that that proposed interpretation of the TFA, cl. 48, itself puts TFN in direct engagement with Cowichan's claims. I do not at this stage make any pronouncement on the meaning of TFA, cl. 48. However, I agree with TFN that one (as yet unproven) interpretation that cl. 48 pre-emptively cedes TFN's treaty rights to adverse future judicially determined rights of other aboriginal collectives in fact provides grounds for allowing TFN's joinder.

The Nisga'a rely on this paragraph of Cowichan and contend that this passage has a direct application to this case.

- [31] Cowichan did not deal with the statutory/treaty entitlement to participate in proceedings that was argued before me by the Nisga'a, of which I will address separately below.
- [32] The Nisga'a assert that the Gitanyow's claim will erode their treaty rights. The Nisga'a submit that Cowichan is binding on this Court under the principles of horizontal stare decisis and that the Nisga'a Lisims Government ought to be added as a party. In supplemental written submissions, they argue that:

The Cowichan case is directly on point as the Gitanyow's alleged claim overlaps with the Nisga'a Lands, the Nass Wildlife Area and the Nass Area and clause 34 of the Nisga'a Treaty is identical to clause 48 of the TFA. If anything, the direct interest of the Nisga'a Nation is even compelling as the overlap area includes lands in which the Nisga'a Nation has fee simple ownership (ie. the orange shaded area).

- [33] However, despite some similarities with Cowichan, I find that I am not bound by stare decisis to add the Nisga'a as a defendant to the Gitanyow's action. Adding a party is a discretionary decision: Kwikwetlem at para. 39, citing *Alexis v. Duncan*, 2015 BCCA 135 at paras. 15, 17. I decline to do so on the facts of this case.

- [34] There are several differences between this case and Cowichan.

[35] First, when Cowichan was decided in 2016, the decision was informed by the state of Aboriginal rights and title jurisprudence as it existed at that time. Specifically, this Court in Cowichan observed "the importance of justice among competing aboriginal rights" at para. 72:

The court has stressed in many judgments, including Delgamuukw and Marshall/Bernard, the importance of justice among competing aboriginal rights. I take this principle to be generally relevant even where the conflicting interest arises between a litigating nation and a treating nation.

[36] Second, and relatedly, in Cowichan, the Court further characterized this area of Aboriginal law - s. 35(1) Aboriginal rights and title claims - as it existed at that point in time as being "still in its infancy": para. 73. This characterization, coupled with "the importance of justice among competing aboriginal rights," militated towards adding the TFN as a defendant in that case: paras. 72-73, 76.

[37] However, seven years after Cowichan, Aboriginal rights litigation has evolved and is less so in its infancy. With the benefit of experience, the procedural law with respect to s. 35(1) litigation has been recalibrated, leading to the further development of the legal principles applicable to such joinder applications.

[38] That development happened in Kwikwetlem-- which represents the third difference between this case and Cowichan. In that case, the Court of Appeal considered "the context of modern Aboriginal rights litigation": para. 24. In particular, the Court observed that experience has shown in Aboriginal rights litigation that the "complexity of these claims has been matched by procedural complexities" noting the length of some s. 35(1) trials (at para. 27):

It is by now well-recognized that s. 35(1) trials--which typically require considerable historical evidence--may extend into the hundreds of court dates. The trials in Delgamuukw and Tsilhqot'in, for instance, each lasted over 300 days. The two phases of Ahousaht Indian Band and Nation v. Canada (Attorney General), dealing with the establishment of Aboriginal rights to fish and the issues of infringement and justification, took 120 and 150 days respectively: 2009 BCSC 1494 and 2018 BCSC 633.

[39] Third, the Court of Appeal in Kwikwetlem observed that the length of a s. 35(1) trial can impact access to justice: "This is self-evidently a challenge for ensuring access to justice for Indigenous litigants and for serving the public interest in having Aboriginal rights claims determined on their merits": para. 28.

[40] In making such an observation, the Court of Appeal also reviewed several other decisions, including Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam), 2020 SCC 4 [Innu], which "emphasized the desirability of facilitating Indigenous litigants' access to justice": Kwikwetlem at para. 34.

[41] As I read *Kwikwetlem*, the Court of Appeal has invited trial courts to find solutions to the complexity of s. 35(1) Aboriginal litigation going forward, and to seek to avoid potential attendant impediments to access to justice in s. 35(1) trials. The Court also directs courts to implement the objectives of "proportionality, access to justice and reconciliation" in such litigation (at para. 36):

In my view, courts cannot ignore the complexity inherent in modern Aboriginal rights litigation and should not foreclose solutions that respect the rules of practice and fairness to all parties. Put simply, courts can, and must, approach pleadings in s. 35(1) claims flexibly, with due regard to proportionality, access to justice and reconciliation.

[42] With these considerations in mind, the Court of Appeal in *Kwikwetlem* ultimately upheld the chambers judge's decision to not add the Attorney General of Canada as a defendant. In doing so, the Court endorsed the chambers judge's reasoning, including that (para. 39):

"[a]dding a defendant over the plaintiff's objections requires 'very strong reasons demonstrating necessity'; and

"the proposed defendant must have a 'direct and precise interest, not merely a general interest, in the outcome of the proceeding.'"

The Court of Appeal further agreed with the chambers judge who, among other things, was "simply not persuaded that the validity of Canada's grants was meaningful for the purpose of R. 6-2(7)(b) in this case, given the restricted nature of the KFN's [plaintiff's] claims": para. 94.

[43] I find that the principles of stare decisis set out in *Re Hansard Spruce Mills*, [1954] 4 D.L.R. 590, 1954 CanLII 253 (B.C.S.C.), do not bind this Court to the result in *Cowichan* so as to require me to add the Nisga'a as a defendant to this action: *R. v. Sullivan*, 2022 SCC 19 at paras. 75-78 [Sullivan]. Trial courts should only depart from binding decisions issued by a court of coordinate jurisdiction if (1) the rationale of an earlier decision has been undermined by subsequent appellate decisions; (2) the earlier decision was reached per incuriam ("through carelessness" or "by inadvertence"); or (3) the earlier decision was not fully considered, e.g. taken in exigent circumstances: *Sullivan* at para. 75. I find *Cowichan* to be distinguishable from the case at hand, and that principles considered in that earlier decision have been altered by subsequent jurisprudence including *Kwikwetlem*.

[44] The plaintiffs in this case, the Gitanyow, have expressly removed from their claim relief which would have given them the power to ratify, or not ratify, conflicting rights holders, including those of the Nisga'a, a circumstance which did not arise in *Cowichan*. Nor did *Cowichan* address a circumstance where an Indigenous plaintiff expressly removed from its rights and title claim injunctive relief in respect of potentially conflicting rights or interests. Finally, the overlap between the Claim Area and the Nisga'a Lands in which they hold fee simple title is relatively modest.

- [45] I also find that Kwikwetlem has overtaken Cowichan and changed the legal landscape concerning the factors which must be considered on an application to add a party in s. 35(1) litigation. Kwikwetlem has added to the underlying considerations a court must consider when deciding whether to add a defendant in a s. 35(1) Aboriginal rights and title case. Accordingly, when considering the exercise of my discretion in this case, I respectfully find that I am not bound by the result in Cowichan, but rather I am bound by the principles set out in Kwikwetlem and Innu, both of which were decided after Cowichan.
- [46] On an application of this sort, Kwikwetlem requires a court to place weight on "proportionality, access to justice and reconciliation" considerations, as well as the plaintiff's choice as to how it chooses to frame its case on the pleadings: para. 36. Kwikwetlem stands for the proposition that "very strong reasons demonstrating necessity" are required to add a defendant over the plaintiff's objections; and that the proposed defendant must have a "direct and precise interest, not merely a general interest, in the outcome of the proceeding": para. 39.
- [47] With those principles in mind, I now turn to the other grounds raised by the Nisga'a on this application. I deal first with their arguments under R. 6-2(7).

Issue 2: Should the Nisga'a be added as a defendant under the R. 6-2(7) common law test?

- [48] The Nisga'a argue that they should be added as a defendant under Rules 6-2(7)(b)(i) and (ii) and 6-2(7)(c).
- [49] For the following reasons, I find that the Nisga'a should not be added as a defendant under these Rules.

Rule 6-2(7)(b)

- [50] 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,

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

[36] 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, *aff'g* 2020 BCSC 765 [*Madadi BCCA*].

[52] As an initial matter, the Nisga'a argue that they ought to be added as a defendant, since they have relevant evidence for the trial with respect to the Gitanyow's Claim Area. They contend that the Nisga'a has been in the Nass Area since time immemorial, and there is no one better placed to complete the factual record in this case. They contend that it is "necessary for the Nisga'a Nation to meaningfully participate in the litigation by offering their own evidence and oral histories so that the issue of Aboriginal title over the overlap areas can be effectively adjudicated on," and that "NLG's participation in the proceeding will ensure the best evidence can be lead about these lands at the time of Crown sovereignty."

[53] However, the fact that an applicant has relevant evidence is not sufficient to fulfill R. 6-2(7)(b) (ii), since the applicant could simply serve as a witness: *Cowichan* at para. 11, citing *Lawrence Construction Ltd. v. Fong*, 2001 BCSC 813 at para. 27 [*Lawrence Construction*]. I am not satisfied that either current defendant, given their resources, is unable to lead evidence from the Nisga'a's witnesses if, and to the extent, they have relevant evidence for this trial.

[54] The Nisga'a also point to the geographic overlap between the Nisga'a Treaty lands and the Claim Area, contending that, under s. 34 of the Nisga'a Treaty, any proven s. 35(1) rights would supersede their treaty rights. The Nisga'a argue that the Nisga'a Treaty also provides that if a court finally determines that any Aboriginal people, other than the Nisga'a Nation, has rights under s. 35(1) of the Constitution Act, 1982, R.S.C. 1985, Appendix II, No. 44, Schedule B, that are adversely affected by a provision of the Nisga'a Treaty, s. 34 is engaged and will operate and have effect to the extent that it does not adversely affect those rights, and that Nisga'a rights will be revisited if eroded.

[55] The Nisga'a contend that "overlapping areas between a treaty nation and a litigation nation in addition to s. 34 of the Nisga'a Treaty is a 'direct interest' that is sufficient for joinder under Rule 6-2(7)(ii) of the Supreme Court Civil Rules." They submit that the Gitanyow's claim conflicts with existing Nisga'a laws in the Nass Wildlife Area and the Nass Area.

[56] In light of s. 34 of the Nisga'a Treaty, the Nisga'a contend that it is just and convenient to add them as a party because they have a direct interest in the outcome of this proceeding and their participation is necessary to ensure that all matters in the proceeding may be effectively adjudicated on. In their written submissions, the Nisga'a contend:

In short, the Nisga'a Nation agreed that if declarations of the kind now sought by the Plaintiffs are made establishing their Aboriginal rights, the Nisga'a Treaty will be "read down" to the extent it adversely affects those rights. This was a compromise made by the Nisga'a Nation in its Treaty. But part of this compromise was the Nisga'a Nation's right to be a full party to proceedings that may bring about that result under Chapter 19 of the Nisga'a Treaty.

[57] In response, the Gitanyow contend, among other things, that they do not put in issue or seek from the Court a "final determination" that their rights and title are adversely affected by any of the Nisga'a Treaty's provisions. Instead, they contend that s. 34 is not at issue in this case, particularly in light of the recent amendments to the Fourth FANOC. The Gitanyow contend that it would go against their wishes to add the Nisga'a as a party when they have specifically chosen to limit their claim to reduce the complexity of the litigation and avoid the need to add additional defendants.

[58] The Gitanyow contend that the claim, as now framed, advances a s. 35(1) Aboriginal rights and title claim. The Gitanyow argue that, if successful, determining how their s. 35(1) rights should be reconciled with the rights held by third parties, such as those of the Nisga'a, should be a matter first dealt with through negotiations before proceeding to further litigation.

[59] On a review of the pleadings now framed, I am not satisfied that the Nisga'a have a direct interest in the questions to be decided, or that their participation is necessary to properly adjudicate the Gitanyow's claim: *Kwikwetlem* at para. 94, citing *Byrd* at para. 36. In their Fourth FANOC, the Gitanyow have removed certain relief previously sought, including relief granting them a right to ratify, or refuse to ratify, fee simple titles, tenures, or any rights or interests created by either Canada or British Columbia in relation to the Claim Area, such as those granted to other Aboriginal nations without the Gitanyow's consent.

[60] I acknowledge that the Claim Area overlaps with the Nisga'a Treaty lands. However, there must be "very strong reasons" demonstrating that it is necessary to add a defendant over the plaintiff's objections; and the proposed defendant must not only have a "general interest" but a "direct and precise interest" in the outcome of the proceeding: *Kwikwetlem* at para. 39. *Kwikwetlem's* endorsement of the caution that there should be "very strong reasons demonstrating necessity" signals that this Court should not take a broad view of what constitutes a direct interest in this context. In my view, there is an absence of very strong reasons demonstrating necessity in this case, and the Nisga'a have a general interest - not a direct and precise interest - in the outcome of this proceeding.

- [61] Reliance on s. 34 in this case creates only a general interest. The modest geographic overlap between the Claim Area and the Nisga'a Lands on which they hold fee simple title, and the larger area of overlap with the Nass Wildlife Area and Nass Area, constitutes a general but not a direct and precise interest within the meaning of Kwikwetlem.
- [62] I find that para. 57 of Cowichan (as it may relate to s. 34 of the Nisga'a Treaty) is not binding on me in this regard and does not require me to grant Nisga'a's application.
- [63] Even if the Nisga'a's reliance on s. 34 did constitute a direct and precise interest, I would nevertheless exercise my discretion to decline to add them as a defendant under Rules 6-2(7)(b)(i) and (ii) and 6-2(7)(c), since to do so would not meet the objectives of justice and convenience in this case: *Madadi v. British Columbia*, 2020 BCSC 765 at para. 24, *aff'd* 2021 BCCA 10. Such a decision would also not achieve the objectives of "proportionality, access to justice and reconciliation" in the Gitanyow's Aboriginal rights and title litigation: Kwikwetlem at para. 36.
- [64] I have also considered this Court's ruling in *Thomas and Saik'uz First Nation v. Rio Tinto Alcan Inc.*, 2022 BCSC 15 [Thomas], relied on by the Nisga'a. In that case, Justice Kent addressed the situation where there are overlapping claims by other Indigenous groups (at para. 276):

Nevertheless, the simple fact of the matter is that the sites in respect of which the plaintiffs seek a "finding" of title are subject to overlapping claims by other First Nations who have not been made parties to this litigation and whose evidence has not been heard. No witnesses were called as representatives of the neighbouring title claimants, whether to substantiate their claim or to waive it in favour of the plaintiffs. There is thus no full evidentiary basis to properly determine exclusivity between overlapping claimants and it is possible that a "finding of title" in favour of the plaintiffs would irrevocably and unfairly disentitle another Indigenous group that may have a stronger claim.

See also Thomas at para. 661.

- [65] Here, however, the Nisga'a do not have an "overlapping claim." Rather, they have the Nisga'a Treaty whose subject lands overlap, in part, with the Claim Area. Further, I have found that both of the defendants have the capacity and resources to lead the Nisga'a's evidence at trial if, and to the extent, such evidence may be relevant to the issue of the Gitanyow's s. 35(1) claim. Accordingly, I am not persuaded by Thomas to add the Nisga'a as a defendant to this action.
- [66] Any necessity considerations arising from the geographic overlap between the Claim Area and the Nisga'a Treaty areas, and the indirect effect that proof of the Gitanyow's Aboriginal rights and title may have on the Nisga'a Treaty rights, are outweighed by: (a) the countervailing strong interest of the Gitanyow's access to justice in the resolution of their claim; and (b) the Gitanyow's choice of how to frame their claim.

Rule 6-2(7)(c)

[67] 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.

[68] 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 at para. 9, citing Lawrence Construction at para. 29; see also Kitimat (District) v. Alcan Inc., 2006 BCCA 562 at paras. 35-38; and Madadi BCCA at paras. 22-24.

[69] The exercise of discretion to add a party under R. 6-2(7)(c) requires both the fulfilment of the condition of a "question or issue" between a party and the applicant, as well as the presiding judge's own determination of justness and convenience in the circumstances: Cowichan at para. 9.

[70] Again, based on the Gitanyow's Fourth FANOC, I do not find that there is a question or issue arising in respect of "any relief claimed in the proceeding" as between the Gitanyow and the Nisga'a. In this regard, I find that the Nisga'a lack a direct interest in this proceeding for the reasons I have stated. Having considered the principles in Kwikwetlem, I am also not satisfied that it would be just and convenient to add the Nisga'a as a defendant in the circumstances. I consider, among other things, the risk of delay to the resolution of the Gitanyow's claim were the Nisga'a added as a defendant to this action.

[71] Finally, I also disagree with the Nisga'a's contention that an application filed by another Indigenous group to be added as a defendant, which has not been set down for a hearing, supports the Nisga'a's application to be added as a defendant. Nor do I find that the Nisga'a's reliance on its contention that the Gitanyow endorse actions which demonstrate a direct conflict between the Nisga'a and the Gitanyow justifies adding the Nisga'a as a defendant.

Issue 3: Do the Nisga'a have a statutory or treaty right to be added as a defendant to this action at this time?

- [72] The Nisga'a also argue that they have a statutory and treaty right, not in the Court's discretion, to be added as a defendant to this action under the Nisga'a Treaty and implementing federal and provincial legislation. Specifically, the Nisga'a contend that the declarations sought raise issues "in respect of the interpretation or validity of various Nisga'a Treaty provisions, and the validity or applicability of Nisga'a laws."
- [73] The Nisga'a rely on s. 41 of the Nisga'a Treaty for its participatory procedural right, and this provision has been given the force of law: Nisga'a Final Agreement Act, s. 4(1); BC Nisga'a Final Agreement Act, s. 3(1). However, s. 20 of the Nisga'a Final Agreement Act and s. 8 of the BC Nisga'a Final Agreement Act also speak directly and in specific terms to the Nisga'a's participatory rights in other proceedings; and I prefer to focus on these party-entitling provisions which are expressly set out in the implementing legislation itself (instead of s. 41 of the Nisga'a Treaty). In interpreting these provisions, I am cognizant that they arise from a modern treaty, and I should interpret them in a generous manner: *First Nation of Nacho Nyak Dun v. Yukon*, 2017 SCC 58 at para. 37; see also *R. v. Marshall*, [1999] 3 S.C.R. 456 at para. 52, 1999 CanLII 665.

The Nisga'a's Statutory Party-Confering Rights

- [74] Specifically, s. 20 of the federal Nisga'a Final Agreement Act provides:

Notice of issues arising

20 (1) If, in any judicial or administrative proceeding, an issue arises in respect of

- (a) the interpretation or validity of the Nisga'a Final Agreement, or
- (b) the validity or applicability of any settlement legislation or any Nisga'a law,

the issue shall not be decided until the party raising the issue has properly served notice on the Attorney General of Canada, the Attorney General of British Columbia and the Nisga'a Lisims Government.

Content of notice

- (2) The notice required under subsection (1) must
 - (a) describe the judicial or administrative proceeding in which the issue arises;
 - (b) state whether the issue arises in respect of the matters referred to in paragraph (1)(a) or (b) or both;
 - (c) state the day on which the issue is to be argued;
 - (d) give particulars necessary to show the point to be argued; and
 - (e) be served at least fourteen days before the day of argument, unless the court or tribunal authorizes a shorter period.

Participation in proceedings

- (3) In any judicial or administrative proceeding to which subsection (1) applies, the Attorney General of Canada, the Attorney General of British Columbia and the Nisga'a Lisims Government may appear and participate in the proceeding as parties with the same rights as any other party.

Saving

- (4) For greater certainty, subsections (2) and (3) do not require that an oral hearing be held where one is not otherwise required.

[Emphasis added.]

[75] Similarly, s. 8 of the BC Nisga'a Final Agreement Act provides:

Judicial or administrative proceedings

8 (1) If, in any judicial or administrative proceeding, an issue arises in respect of

- (a) the interpretation or validity of the Nisga'a Final Agreement, or
- (b) the validity or applicability of any settlement legislation or any Nisga'a law

the issue must not be decided until the party to the proceeding raising the issue has properly served notice on the Attorney General of British Columbia, the Attorney General of Canada and the Nisga'a Lisims Government.

- (2) The notice required under subsection (1) must
- (a) describe the judicial or administrative proceeding in which the issue arises,
 - (b) state whether the issue arises in respect of the matters referred to in subsection (1) (a) or (b) or both,
 - (c) state the day on which the issue is to be argued,
 - (d) give particulars necessary to show the point to be argued, and
 - (e) be served at least 14 days before the day of argument unless the court or tribunal authorizes a shorter notice.
- (3) In any judicial or administrative proceeding to which subsection (1) applies, the Attorney General of British Columbia, the Attorney General of Canada and the Nisga'a Lisims Government may appear and participate in the proceeding as parties with the same rights as any other party to the proceeding.
- (4) The Judicial Review Procedure Act applies to an application for judicial review under the following provisions of the Nisga'a Final Agreement as if the decision under review were made pursuant to a statutory power of decision as defined in that Act:

- (a) paragraph 17 of the Nisga'a Government Chapter;
- (b) paragraph 26 of the Eligibility and Enrolment Chapter.

[Emphasis added.]

- [76] I further approach the interpretation of s. 20 and s. 8 (the "Party-Confering Provisions") from the premise that: "Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects": Interpretation Act, R.S.B.C. 1996, c. 238, s. 8. I make five findings in this regard.
- [77] First, the Party-Confering Provisions provide the Nisga'a with the right to participate as a party in litigation on certain issues but not to participate at large. Specifically, the Nisga'a may only participate in proceedings where the following discrete issues may arise: (a) the "interpretation or validity of the Nisga'a Final Agreement," or (b) the "validity or applicability of any settlement legislation or any Nisga'a law." The right to participate as a party must therefore be construed in this context, and with this purpose in mind.
- [78] Second, the Party-Confering Provisions allow for relatively short notice to the Nisga'a (and the defendants): at least 14 days' notice before the "issue" is to be argued (or shorter notice if permitted by the court). They also require that notice be tailored specifically to the issue or point of "interpretation," "validity," or "applicability" which triggers the statutory entitlement to participate: Nisga'a Final Agreement Act, s. 20(2); BC Nisga'a Final Agreement Act, s. 8(2).
- [79] Third, the Nisga'a only become a party to the proceeding after they have been properly served with the statutory notice: Nisga'a Final Agreement Act, s. 20(3); BC Nisga'a Final Agreement Act, s. 8(3).
- [80] Thus, the Party-Confering Provisions do not have the statutory effect of deeming the Nisga'a to be a defendant to an action from the outset, on the basis of the pleadings, but instead gives the Nisga'a the right to be a party for the specific purpose of participating in the argument relating to the specific issues of "interpretation," "validity," or "applicability" that other parties may raise in the proceeding. In other words, the Nisga'a do not have a general statutory right to participate in proceedings more broadly. They instead have a discrete right to participate in proceedings where specific issues are raised.
- [81] Fourth, it follows that the Party-Confering Provisions do not confer a right on the Nisga'a to be a defendant in an action and participate in the same fashion as other defendants, with full rights of discovery, document production, and the calling of evidence. Rather, they confer a statutory right on the Nisga'a to be heard on issues which the parties may raise at the argument phase of such hearings. In my view, the specific provision that, if given notice, the Nisga'a may "participate in the proceeding as parties with the same rights as any other party to the proceeding" must be interpreted in this context: BC Nisga'a Final Agreement Act, s. 8(3); see also Nisga'a Final Agreement Act, s. 20(3).

- [82] Finally, the scope of the Nisga'a participation after any statutory notice is given is subject to the Court's discretion. It is for the Court to determine precisely how, and to what extent, the Nisga'a may "participate in the proceeding" as a party. I do not read the Party-Conferring Provisions as necessarily curtailing the Court's power to manage a trial efficiently, effectively, fairly and justly.
- [83] In my view, a court may appropriately make inquiries of the parties and conduct its case management function to determine whether statutory notice is required to be provided to the Nisga'a; the timing of issuance of notice; and what participatory rights should be provided to the Nisga'a once notice has been served.

Are the Nisga'a's Statutory Party-Conferring Rights Engaged at this Time?

- [84] The Gitanyow contend that s. 41 of the Nisga'a Treaty (and the Party-Conferring Provisions) is not engaged by their claim. They argue that the current Fourth FANOC does not engage the Nisga'a Treaty or seek a final determination that any of the Gitanyow's s. 35(1) rights conflicts with rights under the Nisga'a Treaty. They contend that until the Gitanyow asks a court to make such a declaration, neither the interpretation of the Nisga'a Treaty nor the applicability of Nisga'a laws is at issue.
- [85] I agree with the Gitanyow that the Party-Conferring Provisions are not engaged at this time, but I find that they may be so in the future as the trial approaches. I will therefore direct a hearing to consider this matter further closer to the trial.
- [86] In the Gitanyow's Fourth FANOC, I do not see the Gitanyow directly raising any issues regarding the interpretation or validity of the Nisga'a Treaty. Nor do I see the Gitanyow directly raising an issue regarding the validity or applicability of any Nisga'a laws in their claim. The Gitanyow's Fourth FANOC seeks a declaration that they hold Aboriginal rights and title to the Gitanyow Lax'yip. This invites the Court to determine whether the Gitanyow has rights or title to the Gitanyow Lax'yip but does not directly ask to make any determinations regarding the Nisga'a Treaty or Nisga'a law. For these reasons, I do not regard the Gitanyow to be directly raising any issue which engages the Party-Conferring Provisions at this time.
- [87] However, whether the defendants' pleadings raise an argument about the "interpretation of the Nisga'a Final Agreement" (the Nisga'a Treaty) provisions is another matter. The defendants Canada and British Columbia took no position on this application, and made no substantive submissions at this hearing. But, it appears possible that the interpretation of the Nisga'a Treaty may become an issue at trial based on certain averments in both Canada's and British Columbia's responses to civil claim which plead reliance on the Nisga'a Treaty. The defendant, British Columbia, in its response to amended notice of civil claim, filed August 9, 2016, pleads reliance on the Nisga'a Final Agreement: Part 1 at paras. 24-27; see also the Gitanyow's reply filed December 20, 2016 at paras. 16-17, which pleads reliance on some sections of the Nisga'a Final Agreement. Canada's amended response to the second further amended notice of civil claim, filed October 18, 2022, also pleads reliance on the

Nisga'a Final Agreement: (Part 1 at para. 4 and Division 2 at paras 3--4). These brief references to the Nisga'a Treaty currently in the defendants' responses to civil claims (and in one of the plaintiff's filed reply pleadings) appear to raise only discrete (if any) potential issues of the interpretation of certain sections of the Nisga'a Treaty.

- [88] However, the most recent Fourth FANOCOC has been amended four times, and the parties may well seek to make further amendments to their pleadings as the trial approaches. For these reasons, I find that it would be premature to make a finding, at this stage, on whether s. 8 and s. 20 are engaged based solely on the current averments referring to the Nisga'a Treaty in the defendants' responses to civil claim.

Issue 4: Should the Nisga'a be added as a defendant because the Gitanyow had not opposed such an application in 2018?

- [89] On August 30, 2018, counsel for the Gitanyow wrote to the defendants and then-counsel for the Nisga'a, advising that, "If they [the Nisga'a] do seek to be added as a party, I have instructions to not oppose such an application." No such application was brought by the Nisga'a until May 2023.
- [90] The Nisga'a did not provide the Court with any case law supporting their position that the Gitanyow should now be effectively estopped or otherwise prevented from opposing the Nisga'a's application to be added as a defendant in their 2023 application that was filed over four years later.
- [91] I am not persuaded that the Gitanyow's position about the Nisga'a's potential party status in 2018 should have any significant bearing on whether I should now exercise my discretion to add the Nisga'a as a defendant to this action. It is not a basis to add the Nisga'a as a defendant at this time.

CONCLUSION

- [92] In summary, I decline to add the Nisga'a as a defendant to this action under the Rules, nor add them at this time as a party pursuant to s. 20 of the Nisga'a Final Agreement Act or s. 8 of the BC Nisga'a Final Agreement Act (or s. 41 of the Nisga'a Treaty). However, I will direct that a judicial management conference shall take place no less than 60 days before the trial to determine if notice is required to be given to the Nisga'a under the Party-Conferring Provisions and, if so, what participatory rights if any will be provided to the Nisga'a during the trial of this action.

ORDERS

- [93] For these reasons, I make the following orders:

1. Paragraphs 1-3 of the May 31, 2023 notice of application of the Nisga'a Nation, as represented by the Nisga'a Lisims Government, to be added as a defendant to this action and for related relief, is dismissed;
 2. This Court orders and directs that, no less than 60 days before the trial of this action, or such further date as may be ordered by this Court, the parties shall appear at a judicial management conference to address the topic of the issuance of any statutory notice to the Nisga'a under s. 20 of the Nisga'a Final Agreement Act and s. 8 of the BC Nisga'a Final Agreement Act; the timing of any such notice; and for direction from the Court as to the Nisga'a's participatory rights at the trial of this action as a statutory party; and
 3. The parties shall give the Nisga'a Nation, as represented by the Nisga'a Lisims Government, notice of, and the Nisga'a Nation shall be entitled to appear at, the judicial management conference ordered above.
- [94] This Court has remarked on the complexity of issues raised in Aboriginal rights and title cases regarding the interrelationship between Aboriginal rights and title claims and other rights-holders: *The Council of the Haida Nation v. British Columbia*, 2017 BCSC 1665 at paras. 8, 52. This Court has also grappled with the consideration of what findings may fairly be made in such cases in light of who is a party to the action, and what evidence has been adduced at trial: *Thomas* at para. 661. Nothing in these Reasons expresses any view on the nature and scope of findings of fact and law which may ultimately be made by the Court at the trial of this action, having regard to the parties to the proceeding and what evidence is ultimately adduced at trial.
- [95] Both the plaintiffs and the Nisga'a sought costs of this application. Given the novel nature of some of the issues arising on this application, the Nisga'a and all of the parties shall bear their own costs of this application.

"Stephens J."

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Prepared on 28 October 2026 · Esheria