

CANADA / JUDGMENT

Malii v. British Columbia

2024 BCCA 406

COURT

British Columbia Court of Appeal

DECIDED

5 December 2024

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2024 BCCA 406 Malii v. British Columbia

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Malii v. British Columbia,

2024 BCCA 406

Date: 20241205

Docket: CA50083

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 also

known 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 ("Gitanyow Nation")

Appellants

(Plaintiffs)

And

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, and on behalf of all members of the Tsetsaut/Skii km
Lax Ha Nation ("TSKLH Nation")

Respondent

(Applicant)

And

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

Respondents

(Defendants)

Before:

The Honourable Justice Griffin

The Honourable Mr. Justice Butler

The Honourable Justice Riley

On appeal from: An order of the Supreme Court of British Columbia, dated
August 7, 2024 (Malii v. British Columbia, 2024 BCSC 1432,
Vancouver Docket S036687).

Appeal of Tsetsaut/Skii km Lax Ha Joinder Order

Counsel for the Appellants:

P.R.A. Grant, K.C.

D. Schulze

M. Décarie-Daigneault

Counsel for the Respondent, 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, and on behalf

of all members of the Tsetsaut/Skii km

Lax Ha Nation ("TSKLH Nation"):

M.C. Power

R.S. Beaton

M. Mackenzie

Counsel for the Respondent, His Majesty

the King in Right of the

Province of British Columbia:

K.B. Bergner

M.E. Casey

Counsel for the Respondent,

Attorney General of Canada:

A.M.L. Harvey

J.L. Ingram

Place and Date of Hearing:

Vancouver, British Columbia

October 30-31, 2024

Place and Date of Judgment:

Vancouver, British Columbia

December 5, 2024

Written Reasons by:

The Honourable Justice Griffin

Concurred in by:

The Honourable Mr. Justice Butler

The Honourable Justice Riley

Summary:

The appellants on behalf of the Gitanyow Nation claim Aboriginal title and rights over a certain territory, and have advanced its claims against the federal and provincial Crown. The first stage of the trial is set to begin in March 2025. Chief Darlene Simpson sought and obtained an order adding her as a defendant on behalf of herself and Tsetsaut/Skii km Lax Ha Nation ("TSKLH"), and permitting her to file a third party claim against the Crown, which advances TSKLH's claim

for Aboriginal title and rights over the same territory as the Gitanyow Nation. The Gitanyow Nation says the case management judge erred in granting standing to Chief Simpson, and allowing the TSKLH to be added as a defendant and to advance a third party claim.

Held: Appeal allowed in part.

The judge's order permitting the TSKLH to advance a third party claim is set aside. The judge did not err in concluding that Chief Simpson had standing and in adding the TSKLH as a defendant to the action. However, the judge overlooked relevant factors and erred in permitting the TSKLH to advance its own third party claim of Aboriginal title and rights within the action. The judge did not consider that the Gitanyow Nation will suffer unfair delay and expense if the TSKLH's claim is tagged onto its action. The judge also did not consider the fact that permitting the third party claim will address only part of the larger area over which the TSKLH claims Aboriginal title, and would not avoid the possibility of duplication and inconsistent fact-finding in its separate action seeking broader declarations of Aboriginal title. Allowing the TSKLH to defend against the Gitanyow Nation's action, and not permitting it to advance its own third party claim, will strike a more appropriate balance between the competing interests.

Reasons for Judgment of the Honourable Justice Griffin:

Introduction

- [1] The present appeal raises the question of what is the best way for courts to approach overlapping claims of Aboriginal title over the same territory, in circumstances where one Indigenous collective's claim to Aboriginal title and rights has been advanced more diligently against the Crown, and is approaching trial, and a second Indigenous collective seeks to join the action belatedly both as a defendant and to advance its own third party claim of Aboriginal title and rights within the same territory.
- [2] This situation creates a dilemma for the trial judge assigned to case manage the action and conduct the trial. Here, the case management judge allowed the application of the Tsetsaut/Skii km Lax Ha Nation ("TSKLH") to be joined as a defendant and to advance its own third party claim against the provincial and federal Crown for declarations of Aboriginal title and rights.
- [3] The appellants are the plaintiffs in this proceeding, and represent an Indigenous collective described as the Gitanyow Nation. The Gitanyow Nation seeks a declaration of Aboriginal rights in and title to an approximately 6200-square kilometre territory located in the mid-Nass River and Kitwanga River watershed in northwestern British Columbia ("Gitanyow Claim Area"). This territory is known as the Gitanyow Lax'yip.

- [4] The Gitanyow Nation says that the case management judge erred in granting standing to the respondent Skii km Lax Ha, also known as Darlene Simpson; in adding Chief Simpson, on behalf of the TSKLH, as a defendant to the action; and in allowing her application to file a third party claim to advance an Aboriginal title and rights claim against the Province and Canada on behalf of the TSKLH.
- [5] The Province and Canada take no position on this appeal, and they took no position on the application below.
- [6] For the reasons that follow, I am of the view that the judge did not err in granting Chief Simpson standing or in adding her as a defendant on behalf of the TSKLH. However, I am of the view that the judge erred in permitting Chief Simpson on behalf of the TSKLH to file a third party claim against the Province and Canada.

Background

- [7] The Gitanyow Nation seeks declarations of Aboriginal title and rights to the Gitanyow Claim Area. The Gitanyow Nation estimates that it has between 2,000 to 2,500 members.
- [8] The Gitanyow Nation says it has existing Aboriginal title to the Gitanyow Lax'yip, which is governed by Gitanyow Ayookxw (law)--a "part of a body of Indigenous law governing the establishment, recognition, and transfer of territorial claims, and the resolution of territorial disputes between the Gitanyow and neighbouring peoples": Fourth Further Amended Notice of Civil Claim ("Fourth Amended Notice of Civil Claim") at para. 7.
- [9] The Gitanyow Nation says it is organized by a clan and house (Wilp) system, which is the social and organizational structure by which the Gitanyow Nation exclusively occupies, owns, possesses, and exercises authority over the Gitanyow Lax'yip.
- [10] In 1984, neighbouring First Nations, namely several other Gitxsan and Wet'suwet'en houses, asserted Aboriginal title to territories that were in proximity to, but not overlapping, the Gitanyow Claim Area. This litigation proceeded through the system to the Supreme Court of Canada, culminating in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 1997 CanLII 302 [Delgamuukw]. The Gitanyow Nation chose not to participate in *Delgamuukw* despite a large number of Gitxsan and Wet'suwet'en houses participating.
- [11] During the course of *Delgamuukw*, the claims evolved to claims of Aboriginal title and self-government. The plaintiffs were Gitxsan and Wet'suwet'en hereditary chiefs, claiming personally and on behalf of their houses. For the purposes of the claim, the area was divided into 133 individual territories, claimed by the respective 71 Houses: *Delgamuukw* at para. 7.
- [12] One of the plaintiff hereditary chiefs in *Delgamuukw* was Skiik'm Lax Ha (also then known as John Wilson); he sued on his own behalf and on behalf of all members of the House of Skiik'm Lax Ha for a claim of Aboriginal title that was adjacent to, but not overlapping, the geographic territory neighbouring the Gitanyow Claim Area.

- [13] In 1997, following a trial and an appeal to this Court, the Supreme Court of Canada in *Delgamuukw* ordered a new trial. The Court held that Aboriginal title encompasses the right to exclusive use and occupation of the land and that to establish a claim to Aboriginal title, the group asserting the claim must establish that it sufficiently, continuously, and exclusively occupied the lands in question at the time at which the Crown asserted sovereignty over the land subject to the title: *Delgamuukw* at para. 144. Subsequent to that decision, however, the *Delgamuukw* claim was not resolved and no new trial has occurred.
- [14] In December 2003, the Gitanyow Nation filed the underlying action, seeking declarations of Aboriginal title and Aboriginal rights to the Gitanyow Claim Area. The Province and Canada are named as defendants.
- [15] Canada, in its response to the notice of civil claim, takes issue with the Gitanyow Nation having exclusive occupation, effective control, and continuity of the use of the entirety of the Gitanyow Claim Area. It also pleads that other First Nations and Indigenous groups assert claims of Aboriginal title or rights to all or portions of the Gitanyow Claim Area.
- [16] The Province also pleads in its response to the notice of civil claim, among other things, that the Gitanyow Nation did not sufficiently, exclusively, and continuously occupy all of the Gitanyow Claim Area at the time of the assertion of sovereignty in a way that meets the test for Aboriginal title. It pleads that there are competing claims by other Indigenous groups over the same territory; and that the Gitanyow Nation's claims to Aboriginal title should not be adjudicated without giving those groups "the opportunity to be named as parties". One of these groups with competing claims is the TSKLH. Another is the Nisga'a Nation, which I will address below.
- [17] After the initial filing of the action, the Gitanyow Nation's claim was reinvigorated in April 2016. More recently, the Gitanyow Nation filed the Fourth Amended Notice of Civil Claim on November 10, 2023. The Gitanyow Nation has also delivered several expert reports to the Province and Canada. As I understand it, the Gitanyow Nation has negotiated various procedural steps with the Crown defendants in order to move the case toward trial, as well as reaching an agreement to accommodate expert witnesses.
- [18] Meanwhile, in September 2005, John Wilson, who carried the name of Skiik'm Lax Ha, died. Darlene Simpson says that prior to his passing, Chief Wilson selected her to take the name of Skiik'm Lax Ha as the hereditary chief, and in December 2006, she then took on this name and role.
- [19] At some point subsequently, Chief Simpson began to refer to the collective, previously known as the House of Skiik'm Lax Ha, as Tsetsaut/Skii km Lax Ha Nation. Although Chief Simpson has not identified this in her pleadings, at the application below, she made an admission before the case management judge that the TSKLH is the same as the House of Skiik'm Lax Ha, as identified by John Wilson in *Delgamuukw*. It is not a different collective, but it uses a different name: see *Reasons* (2014 BCSC 1432) at para. 5.

- [20] I pause to note that because Chief Simpson admits this to be the same collective, it strikes me as preferable that this be stated in the TSKLH's pleadings rather than just stated in submissions at the hearing. This will make it clear to all parties and all judges who hear matters involving the TSKLH. However, I will leave that issue to the trial court to manage.
- [21] Chief Simpson asserts that the TSKLH have Aboriginal title over a large scope of territory (the "TSKLH Claim Area"). The TSKLH Claim Area is significantly larger than what was claimed as its territory by Chief Wilson in Delgamuukw. The TSKLH Claim Area now overlaps substantially with the Gitanyow Claim Area, and it also overlaps with other neighbouring First Nations' claims, including other Gitxsan and Tahltan claims.
- [22] In response to the Gitanyow Nation's claim, Chief Simpson (on behalf of the TSKLH) disputes that the Gitanyow Nation has Aboriginal title and rights to the Gitanyow Claim Area, asserting instead that the TSKLH holds Aboriginal title and rights to that area because its members' ancestors exclusively occupied the disputed territory at the time of assertion of sovereignty.
- [23] In September 2017, the TSKLH sought the Gitanyow Nation's consent to be added as a defendant and to file a third party notice. The Gitanyow Nation refused. Later, in May 2018, Chief Simpson on behalf of the TSKLH filed an application for joinder as a defendant and to bring a third party notice. Chief Simpson then put that application on hold while she pursued an application to have the Gitanyow Nation's counsel removed due to an alleged conflict of interest arising from his representation of the plaintiffs in Delgamuukw. That application was unsuccessful before the Law Society, the Supreme Court, and on appeal to this Court: see *Skii km Lax Ha v. Malii*, 2021 BCCA 140.
- [24] In July 2022, Chief Simpson on behalf of the TSKLH filed a new application for joinder as a defendant and to bring a third party claim in the Gitanyow Nation's action. This application was adjourned until ultimately it was heard from June 10-13, 2024 before the case management judge.
- [25] On April 26, 2024, prior to the hearing of the joinder application, Chief Simpson on behalf of the TSKLH filed a separate notice of civil claim against the provincial and federal governments, seeking a declaration of Aboriginal title and rights to a broad area that goes well beyond the boundaries of the Gitanyow Claim Area (the "TSKLH Title Action"; Docket No. S242480).
- [26] The Gitanyow Nation hopes to litigate various issues in phases, starting with the issue of whether it has Aboriginal title. The trial was set to commence in October 2024, but an application by the Province for an adjournment was granted and the trial is now set to commence on March 3, 2025: *Malii v. British Columbia*, 2024 BCSC 1062.

Nisga'a Nation

- [27] The Province pleads that the Nisga'a Nation, with whom it has a negotiated treaty, has certain treaty rights overlapping part of the Gitanyow Claim Area. As a result of the treaty, the Nisga'a Nation has some fee simple ownership of lands within the Gitanyow Claim Area.
- [28] The Nisga'a Nation applied to be added as a defendant, arguing that it had rights to participate in litigation concerning the territory, based on its treaty and a statute arising from the treaty. The same case management judge dismissed the application (2024 BCSC 85 - "Nisga'a SC"), a decision which was upheld by this Court on appeal (2024 BCCA 313 - "Nisga'a CA") .
- [29] A key factor in the decision to dismiss the Nisga'a Nation's application, and distinguishing its position from that of the TSKLH, is that the Gitanyow Nation amended its claim to make it clear that it was not seeking any relief challenging the Nisga'a Nation's treaty rights. The previously drafted claim sought a declaration giving it the right to ratify or refuse to ratify any rights or interests granted by the Crown to other First Nations. This relief was withdrawn, and so the trial judge in the action will not be asked to resolve any conflict between the Gitanyow Nation's claimed rights and the treaty rights of the Nisga'a Nation.
- [30] In this regard, the analysis in the Nisga'a Nation joinder application was analogous to that in *Kwikwetlem First Nation v. British Columbia (Attorney General)*, 2021 BCCA 311 [Kwikwetlem]. The plaintiff in that case sought a declaration of Aboriginal title over certain lands, title to which was held in fee simple by provincial public bodies, but had originally been transferred by grants from the federal Crown. The Province was the sole defendant, and applied to have Canada joined as a defendant. The case management judge dismissed the application, and that result was upheld on appeal. The key factor was that the plaintiff had limited its claim and was not seeking to challenge the validity of the original federal Crown grants nor was it seeking any relief in respect of them.
- [31] I should note that in the Nisga'a Nation joinder application below, it was argued that it was necessary for the Nisga'a Nation to be added as a party because it had relevant evidence to give about whether the Gitanyow Nation could establish sufficient, continuous, and exclusive use of the Gitanyow Claim Area. The case management judge was of the view that any relevant evidence from the Nisga'a Nation could be called by the Crown defendants, without the necessity of adding the Nisga'a Nation as a party. Both the Nisga'a Nation and the Crown challenged this finding on appeal, but this Court did not interfere with it. This Court noted that the Crown had taken no position before the judge and so the judge could not be faulted for this conclusion: Nisga'a CA at para. 98. Further, this Court held that it is part of the case management judge's exercise of responsibilities to consider and hear from the parties as to the appropriate way for the Nisga'a Nation's evidence to be led and if necessary, to revisit that issue: at para. 102.

Parties' Positions

- [32] The Gitanyow Nation opposed the TSKLH's application to be joined as a defendant and to advance a third party claim. The Gitanyow Nation argued that Chief Simpson lacked standing, the application was an abuse of process because it was inconsistent with positions taken in *Delgamuukw*, and the TSKLH did not meet the tests for joinder or to file a third party claim. The Gitanyow Nation further suggested that the TSKLH could be made an intervenor with rights to call evidence that might challenge the Gitanyow Nation's claims, but it should not be given full party status as this would significantly disrupt the Gitanyow Nation's presentation of its own case and would likely delay the trial. On appeal, the Gitanyow Nation takes the same positions.
- [33] The TSKLH submitted below and on appeal that Chief Simpson has standing to represent the TSKLH collective. It says that it has a membership list; that there are good reasons for its change in position about the scope of its territory; and it is necessary that it be added as a defendant and that its overlapping claim to Aboriginal title and rights be determined together with the Gitanyow Nation's claims. It also says that the judge's order was discretionary and the Gitanyow Nation has not established a basis for appellate interference.
- [34] The Province and Canada took no position on the application or on appeal. However, the Province submits there should be no presumption that it will call evidence from the TSKLH if the decision to add Chief Simpson as a party is overturned on appeal. There are several reasons for this, all broadly having to do with the goals of reconciliation and the special relationship between the Crown and First Nations: it cannot be assumed that the Crown is in a typical adversarial relationship in the way it answers an Indigenous collective's claim; or that the Crown will have knowledge of or be entrusted with the evidence of other Indigenous collectives and their witnesses; or that the Crown will be the best placed to make decisions as to how that evidence should be adduced.

Case Management Judge's Reasons (2024 BCSC 1432)

- [35] The case management judge addressed each of the arguments on standing, abuse of process, joinder, and the right to file a third party notice.
- [36] First, the judge recognized that the context of the applications had to be considered in light of the test for establishing Aboriginal title and rights: Reasons at paras. 22-26.
- [37] Aboriginal title requires establishing: (1) "sufficient occupation" of the claimed land at the time of assertion of European sovereignty; (2) continuity of occupation where present occupation is relied on; and (3) exclusive historic occupation: *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 at para. 50 [Tsilhqot'in]. The judge noted that an Indigenous group claiming Aboriginal title must also demonstrate that it is the proper rights holder, by showing its relationship with the pre-sovereignty group said to hold that title: Reasons at paras. 23-25, citing *The Nuchatlaht v. British Columbia*, 2023 BCSC 804 at paras. 358, 360, 418 [Nuchatlaht]; *R. v. Marshall*; *R. v. Bernard*, 2005 SCC 43 at paras. 67, 70 [Marshall/Bernard].

- [38] Aboriginal rights require showing that an activity is an element of a practice, custom, or tradition integral to the distinctive culture of the group claiming the right; showing that it was one of the things that made that society distinctive, and made it "what it was": *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at paras. 46, 55, 1996 CanLII 216.
- [39] The judge identified that the question of standing in Aboriginal title and rights claims has evolved to recognize this context, citing the decisions in *Campbell v. British Columbia (Forest and Range)*, 2011 BCSC 448, aff'd 2012 BCCA 274 and *Hwlitsum First Nation v. Canada (Attorney General)*, 2018 BCCA 276, leave to appeal to SCC ref'd, 38325 (28 March 2019) [Hwlitsum]. The judge summarized the approach in these cases as follows:
- [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.
- [40] The judge found that much of the argument on standing addressed whether Chief Simpson and the TSKLH were in fact, as they claim, the sole successors of the Laxwiiyip Tsetsaut and capable of advancing a claim to Aboriginal title as broadly as framed. However, determining this issue would draw the judge into the merits of one aspect of an Aboriginal title or rights claim, which would be inappropriate at a preliminary procedural stage and would fail to recognize the complexity of establishing successorship of Indigenous communities: *Reasons* at paras. 48, 50.

- [41] The judge found that it was not plain and obvious that Chief Simpson lacked standing, and it appeared that the Indigenous collective, on behalf of whom she purports to act, was capable of clear definition and objective criteria. The judge found that Chief Simpson had standing to represent the interests of the TSKLH (again, accepting that it is the same collective as previously identified in *Delgamuukw* as the House of Skiik'm Lax Ha; see Reasons at para. 5).
- [42] The Gitanyow Nation argued that it was an abuse of process for Chief Simpson and the TSKLH to assert Aboriginal title to a larger territory than was claimed by her collective in *Delgamuukw*. Chief Simpson relied on evidence to support her change in position, including evidence from the Province that certain areas were erroneously excluded from the *Delgamuukw* map. The TSKLH also relied on evolution in Aboriginal law as the reason for changing its position. The judge found that it was not plain and obvious that the change in position amounted to an abuse of process.
- [43] On the issue of joinder, the judge turned to Rule 6-2(7)(b) and (c), which gives the court discretion to add a party to litigation where it is necessary to ensure that all matters in the proceeding may be effectually adjudicated on, or where there exists between the person and any party to the proceeding, a question or issue relating to the relief claimed or subject matter of the proceeding.
- [44] The judge found that because the TSKLH asserts an Aboriginal title claim to significant portions of land in the Gitanyow Claim Area and has a direct and precise interest in the outcome of the proceeding due to that overlap, it was just, appropriate, and necessary to add it as a defendant to defend against the Gitanyow Nation's claim to Aboriginal title: at paras. 72-73, 77.
- [45] The judge noted that there had been some delay on the part of the TSKLH, and that adding it as a party would have an impact on the conduct and complexity of the action. The judge also noted that the TSKLH stated that it did not intend to delay the trial of the action. The judge held that the concerns of delay and the increased complexity of the action were "outweighed by the strong necessity and the interests of justice in having both the TSKLH's and the plaintiffs' claims to Aboriginal title and rights over the same geographic area determined in the same action": at para. 77, citing *Delgamuukw* at para. 185. Denying the TSKLH's application to be added as a defendant would be a disproportionate response to the delay and contrary to the goals of reconciliation: at para. 81.
- [46] Lastly, the judge considered the TSKLH's application to commence a third party claim against the Province and Canada in the action. The judge found that the test pursuant to Rule 3-5(1) was met, in that the relief sought was substantially connected to the questions raised and relief sought in the Fourth Amended Notice of Civil Claim and should properly be determined in the action. In his view, not permitting the third party claim would likely result in a multiplicity of proceedings and risk contradictory findings. The judge stated that greater injustice and inconvenience would arise from allowing the matter to be pursued in a

separate action than in allowing a third party claim; and the balance of prejudice favoured the applicant: at paras. 85-87.

[47] The judge rejected the Gitanyow Nation's submissions that the TSKLH's interests could be adequately advanced as an intervenor, rather than as a defendant or third party.

Issues

[48] Broadly, the Gitanyow Nation submits that the judge made errors in his approach to all issues on the application, namely in:

- a) finding that Chief Simpson had standing to act on behalf of the TSKLH;
- b) not finding that the TSKLH's claim was an abuse of process;
- c) adding the TSKLH as a defendant; and,
- d) allowing the TSKLH to advance a third party claim.

[49] Before I address the substance of the issues I will first touch on the standard of review.

Standard of Review

[50] A discretionary decision of a case management judge in a complex case is entitled to a heightened degree of deference: *Kwikwetlem* at para. 22, citing *West Moberly First Nations v. McLeod Lake Indian Band*, 2014 BCCA 283 [West Moberly] at para. 19; *Haida Nation v. British Columbia (Attorney General)*, 2018 BCCA 462 [Haida] at paras. 20-21, 23. The rationale for this high level of deference is that the case management judge has an "advantageous perspective" on the litigation and the court's ability "to adjust to evolving circumstances and even to re-visit directions when necessary": *West Moberly* at para. 19; *Haida* at para. 21, citing *Robak Industries Ltd. v. Gardner*, 2006 BCCA 395 at para. 13.

[51] More specifically, the decision to add a party to a proceeding or to allow a third party claim is discretionary and entitled to deference on appeal: *0848052 B.C. Ltd. v. 0782484 B.C. Ltd.*, 2023 BCCA 95 at para. 16. This Court may only interfere where it concludes the judge erred by self-misdirection, erred in law or principle, failed to give weight, or sufficient weight, to relevant considerations, or if the result is so plainly wrong on the facts as to result in an injustice: *Madadi v. Nichols*, 2021 BCCA 10 at para. 41.

Analysis

Standing

- [52] As I will address below, I am of the view that the judge erred in allowing Chief Simpson to bring a third party claim on behalf of the TSKLH. I therefore do not find it necessary to address whether Chief Simpson has standing to represent the TSKLH to advance an independent claim to Aboriginal title and rights over a broad territory. I will only address whether Chief Simpson has standing to act on behalf of the TSKLH in defending the Gitanyow Nation's action to Aboriginal title and rights.
- [53] I do not accept the Gitanyow Nation's argument that Chief Simpson does not have standing to represent the TSKLH in defending the action, for several reasons:
- a) The Gitanyow Nation says that the judge erred in relying on the "plain and obvious" test from *Hwlitsum and Campbell*, in holding that it was not plain and obvious that Chief Simpson did not have standing. However, this Court has accepted this test in Aboriginal title and rights cases, taking into context the unique issues in those cases; the Gitanyow Nation has not sought a five-judge division to reconsider the test; and, the Gitanyow Nation relied on this test before the case management judge. In my view, the judge correctly and helpfully synthesized the key principles arising from these authorities at para. 37 of the Reasons.
 - b) The TSKLH has conceded that the collective Chief Simpson represents is one and the same Indigenous collective as the House of Skiik'm Lax Ha, which was previously recognized in *Delgamuukw* litigation. As mentioned, I would prefer that Chief Simpson's pleadings made this clear; however, this Court can rely on this assertion as binding on the TSKLH. The Gitanyow Nation does not dispute that such a collective as the House of Skiik'm Lax Ha exists; rather, it disputes that the TSKLH is the successor in interests that it now asserts or that it has Aboriginal title and rights over the expanded territory.
 - c) In my view, the standing to at least defend against the Aboriginal title claim was effectively conceded when the Gitanyow Nation said it would not oppose Chief Simpson becoming an intervenor for that purpose.
- [54] Similar to its position on the application below, on appeal, the Gitanyow Nation still takes strong issue with Chief Simpson's allegations as to the historic successorship, lineage, cultural practices and laws of the collective she claims to represent. I agree with the case management judge that the issue of standing is different than determining whether an Indigenous collective has proven that it is a successor to title, rights, or practices of a historic rights-bearing group. The latter issue is frequently a complex question requiring evidence and determinations at trial, as seen in *Nuchatlaht* at paras. 407-419 and *R. v. Desautel*, 2021 SCC 17 at paras. 48-49.
- [55] I see no basis for interfering with the judge's decision on standing.

Abuse of Process

- [56] The Gitanyow Nation's abuse of process argument is based primarily on the change of position of Chief Simpson, and the collective she represents, as to the boundaries of its asserted territory and its Indigenous ancestry. For example, Chief Simpson now claims an area that substantially overlaps with and exceeds the Gitanyow Claim Area; it is not confined to the smaller territorial boundaries that were claimed in Delgamuukw. Further, Chief Simpson claims the Indigenous collective she represents has a different name, ancestry and Indigenous governance than was the position of the House of Skiik'm Lax Ha in Delgamuukw. While this inconsistency with the position taken in Delgamuukw is its focus, the Gitanyow Nation also points to other inconsistencies in the positions taken by Chief Simpson over time, including in her defence of a claim of unlawful fishing and in her dealings with Gitxsan groups.
- [57] The Delgamuukw case was ordered re-tried, and no re-trial has taken place. On October 6, 2023, Chief Simpson filed a notice of discontinuance in that case.
- [58] The judge had some evidence from Chief Simpson as to the reason for the change in position regarding the boundaries of her claim.
- [59] As this Court held in *Illingworth v. Evergreen Medicinal Supply Inc.*, 2019 BCCA 471 at paras. 67-69, affirmed in *Keltic (Brighthouse) Development Ltd. v. Yi Teng Investment Inc.*, 2023 BCCA 375 at para. 15, inconsistent positions taken without full knowledge of the facts, or without giving rise to an injustice, do not necessarily amount to an abuse of process. A determination as to whether an inconsistency in a party's pleadings amounts to an abuse of process warranting judicial intervention to strike an action involves the exercise of judicial discretion, and attracts deference.
- [60] The judge held that a party seeking to strike a pleading on the grounds of abuse of process due to inconsistent positions must show that the abuse is plain and obvious. The Gitanyow Nation did not meet this burden. I do not accept the Gitanyow Nation's argument that a lower burden should apply. The plain and obvious standard recognizes that the question is being addressed at an early stage, may be challenged by the evidence on these issues at trial, and therefore an applicant seeking to prevent the party from advancing its pleaded case must meet a high standard. Of course, this does not preclude the trial judge from drawing conclusions at trial that are adverse to the TSKLH, due in part to its changing positions.
- [61] I see no basis for interfering with the judge's exercise of discretion to decline to find the pleadings to be an abuse of process.

Joinder as a Defendant

- [62] Rule 6-2(7) of the Supreme Court Civil Rules provides that a party may, on application, be added to existing litigation. The specific sections relied upon at the application below were R. 6-2(7)(b) and (c):

6-2 (7) At any stage of a proceeding, the court, on application by any person, may, subject to subrules (9) and (10),

- (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, and
- (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.

[Emphasis added.]

[63] The legal principles that apply to joinder are not in dispute on this appeal, and have been stated in numerous cases, including *Kwikwetlem* at paras. 64, 114, 121. In summary:

- a) Rule 6-2(7)(b) is typically given a narrow interpretation. Rule 6-2(7)(b)(i) is intended to remedy defects in the proceeding, where a party that has a direct interest in the outcome ought to be added. Rule 6-2(7)(b)(ii) deals with the situation where the person's participation is required in order that the existing claim may be fully and properly adjudicated. Joinder must be just and convenient.
- b) Rule 6-2(7)(c) involves two stages. First, a court must determine if any question or issue related to the claimed relief or subject matter of the proceeding might exist between the existing party and the party bringing the joinder application. Second, the court must ask whether it is just and convenient to add the person. This involves an exercise of discretion and should be assessed with flexibility, but typically the factors considered include the extent of and reasons for delay in bringing the application, the degree of prejudice caused by the delay, the extent of the connection, and the prejudice to the existing parties by the increased complexity of the action.

[64] The judge found that the TSKLH:

[73] 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.

[Emphasis added.]

- [65] It is clear that, in allowing the joinder application, the central concern of the case management judge was the potential that a finding of Aboriginal title or Aboriginal rights in favour of the Gitanyow Nation could be legally and factually incompatible with the TSKLH's claim of Aboriginal title over the same area. This led to his view that: as the TSKLH had a direct interest in the proceeding, it was necessary to have both parties involved so all the matters may be effectually adjudicated (R. 6-2(7)(b)); there was a question between the TSKLH and the Gitanyow Nation in relation to the relief claimed and the subject matter of the proceeding (R. 6-2(7)(c)); and it was both just and convenient that the TSKLH be added as a defendant.
- [66] While the argument is framed in different ways, the essence of the Gitanyow Nation's challenge to the judge's finding on joinder is that he erred in giving too much weight to the fact that the Gitanyow Nation and the TSKLH have competing claims of Aboriginal title over the same territory, and in giving no or insufficient weight to the delay in bringing the joinder application and the increased complexity of the litigation created by adding the TSKLH as a defendant, which will lead to additional delay and costs incurred by the Gitanyow Nation before its claims are finally determined. The Gitanyow Nation says it cannot be just and convenient to add the TSKLH as a defendant given these latter factors.
- [67] In my view, while he did not engage in a lengthy analysis of the factors of delay and complexity in his reasons regarding joinder, the judge mentioned these factors and had a good understanding of them because of his role as the case management judge. He clearly did take these factors into account but felt they were outweighed by the need to allow the TSKLH the ability to defend the Gitanyow Nation's claims of Aboriginal title and rights so the TSKLH would not be irreparably harmed in advancing its own claims.
- [68] There is good reason to be concerned that a finding that the Gitanyow Nation has Aboriginal title or rights over the Gitanyow Claim Area may be incompatible with the TSKLH's claim to Aboriginal title over the same area. The full legal implications of a declaration of Aboriginal title on other property rights and on competing claims to Aboriginal title and rights is not yet known. However, at least one possible interpretation of the law is that a declaration of Aboriginal title (or possibly even Aboriginal rights) by one Indigenous group over a particular territory necessarily excludes any other Indigenous group from holding Aboriginal title over the same area. The authorities indicate that:
- a) Aboriginal title "encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes" (Delgamuukw at para. 117).
 - b) Aboriginal title is "an exclusive right to the use and occupation of land, i.e., to the exclusion of both non-aboriginals and members of other aboriginal nations" (Delgamuukw at para. 185).

- c) The right to control the land conferred by Aboriginal title means that governments and others seeking to use the land must obtain the consent of the Aboriginal title holders (Tsilhqot'in at para. 76).
- d) Exclusive occupation means the intention and capacity to retain exclusive control, and is not inconsistent with occasional acts of trespass or the presence of other Aboriginal groups by consent (Marshall/Bernard at paras. 54, 57).
- e) "The common law right to title is commensurate with exclusionary rights of control. That is what it means and has always meant. If the ancient aboriginal practices do not indicate that type of control, then title is not the appropriate right. To confer title in the absence of evidence of sufficiently regular and exclusive pre-sovereignty occupation, would transform the ancient right into a new and different right. It would also obliterate the distinction that this Court has consistently made between lesser aboriginal rights like the right to fish and the highest aboriginal right, the right to title to the land" (Marshall/Bernard at para. 77).

[Emphasis added.]

- [69] The finding that one group has Aboriginal rights in, or Aboriginal title to, a specific territory may be sufficient to rebut the necessary exclusivity required for another group to prove it had Aboriginal title in that territory: *Ahousaht Indian Band v. Canada (Attorney General)*, 2007 BCSC 1162 at para. 87.
- [70] The Gitanyow Nation says it is willing to take the risk that if the TSKLH is not made a party, the trial judge may decline to make a declaration of Aboriginal title in the Gitanyow Nation's favour out of concern that other affected parties such as the TSKLH have not been heard.
- [71] Respectfully, however, the Gitanyow Nation fails to acknowledge the risk to the TSKLH, if the Gitanyow Nation's claim to Aboriginal title and rights was to go to trial and succeed in the TSKLH's absence.
- [72] If the TSKLH is not able to defend against the Gitanyow Nation's claim to Aboriginal title and rights, there is a real risk of serious and potentially irreparable prejudice to its overlapping claims of Aboriginal title and rights.
- [73] There is currently no clear precedent that answers how a court's declaration of Aboriginal title for one Indigenous collective might affect a subsequent lawsuit by a different Indigenous collective claiming Aboriginal title over the same territory. Would the second group be precluded from proving it had exclusive occupation over that area? Would the findings from the first trial bind the Crown as against the second Indigenous collective? Would the second Indigenous collective need to, or be able to, establish that the first Indigenous collective consented to it sharing title or exercising Aboriginal rights with the territory? Would the first Indigenous collective who succeeds in establishing Aboriginal title or rights have to defend successive litigation brought by other groups claiming Aboriginal title, potentially never achieving any finality?

- [74] It was because of the current law's requirement for exclusivity of Aboriginal title that the judge concluded that there was a "strong necessity" to add the TSKLH as a defendant and the "interests of justice" weighed in its favour: Reasons at para. 77. This was a sound and practical decision in the circumstances, due to these overlapping claims.
- [75] Indeed, the Gitanyow Nation admitted that some procedural concessions were appropriate to avoid prejudice to the TSKLH, when agreeing that the TSKLH could be an intervenor with the ability to challenge the Gitanyow Nation's evidence. It repeats this position on appeal, maintaining that TSKLH should not be permitted to be a defendant, only an intervenor.
- [76] In suggesting that the TSKLH could be an intervenor, the Gitanyow Nation points to this passage from *Delgamuukw*, stated after the Court concluded that a new trial should be ordered:
- [185] I conclude with two observations. The first is that many aboriginal nations with territorial claims that overlap with those of the appellants did not intervene in this appeal, and do not appear to have done so at trial. This is unfortunate, because determinations of aboriginal title for the Gitksan and Wet'suwet'en will undoubtedly affect their claims as well. This is particularly so because aboriginal title encompasses an exclusive right to the use and occupation of land, i.e., to the exclusion of both non-aboriginals and members of other aboriginal nations. It may, therefore, be advisable if those aboriginal nations intervened in any new litigation.
- [Emphasis added.]
- [77] The issue of what is the best procedural status to give to an Indigenous collective seeking to challenge another collective's claim of Aboriginal title and rights--intervenor or defendant--was not considered in the above passage from *Delgamuukw*. Rather, the Court was indicating its views that one Indigenous collective's claim to Aboriginal title could affect the overlapping claims of another Indigenous collective, and so it is advisable for a court determining any claim to hear from affected collectives.
- [78] Intervenor status was granted to a neighbouring First Nation in *West Moberly*, where the intervenor said a First Nations plaintiff advancing a claim to territory under treaty could affect its own claim to Aboriginal title and rights over the same territory, or its negotiations with governments for treaty or other rights. However, I note that in that case the applicants sought intervenor status on the basis they had a direct interest in the proceeding, because the outcome would have directly and adversely affected its legal rights or interests. The applicants for intervenor status in *West Moberly* did not seek to be added as a defendant. Another affected First Nation did seek to be added as a defendant in the action, the *Kaska Dena Council*, and it was added: *Willson et al. v. British Columbia & Canada (Attorney General of)*, 2006 BCSC 228. The common issue between those parties was the location of a treaty boundary.

- [79] The Gitanyow Nation has not said how permitting the TSKLH status as a defendant, to defend against Gitanyow Nation's claim to Aboriginal title and rights, will be significantly different from allowing the TSKLH to intervene with the right to call or challenge evidence. Presumably some differences are that an intervenor's procedural rights will have to be determined by the case management judge on a procedure-by-procedure basis and can be contested by the Gitanyow Nation, such as a right to pre-trial discovery; whereas a defendant automatically has procedural rights, including discovery rights.
- [80] The TSKLH was not seeking to intervene. Without more precise argument from the Gitanyow Nation as to the practical benefits and disadvantages that flow from the two types of status, I cannot say that the judge erred in concluding that the TSKLH should be permitted to participate as a defendant, rather than limited to participate solely as an intervenor. As a defendant, the TSKLH will be required to file a response to civil claim so that other parties and the court will have notice of its position. The TSKLH will be bound by its own pleadings. I am of the view that having TSKLH set out its position in a pleading is a benefit to the parties and the court. Further, there will be no question that as a defendant, the TSKLH will be bound by the result at trial.
- [81] In my view, the Gitanyow Nation has not shown that the judge erred in his application of the test, his weighing of relevant factors, and the exercise of discretion to add the TSKLH as a defendant.

Third Party Claim

- [82] The Gitanyow Nation also challenges the judge's ruling that permitted the TSKLH to bring a third party claim.
- [83] Rule 3-5 provides that a defendant may bring a third party claim in an action in certain circumstances:
- (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
 - (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] If a third party claim is filed within 42 days after the notice of civil claim to which it pertains, no leave is required: R. 3-5(4)(b). However, another party can apply to set aside a third party notice: R. 3-5(8).
- [85] More than 42 days after the notice of civil claim is filed, a party needs leave to file a third party claim: R. 3-5(4).
- [86] A third party claim may be struck if it fails to disclose a cause of action, applying the same test as other challenges to pleadings, namely, whether it is plain and obvious it cannot succeed: *WorleyParsons Canada Ltd. v. David Nairn and Associates*, 2013 BCCA 513 at para. 17; R. 3-5(8); R. 9-5(1)(a).
- [87] There are well established principles regarding an application to bring a third party claim within an existing proceeding. Those principles are not seriously in dispute on this appeal. If there is delay, a party seeking leave will need to explain the reason for the delay and address the potential prejudice to the plaintiff. The court will also consider the prospect of a multiplicity of proceedings if leave is not granted. Overall, the question will be determined by weighing the balance of convenience as between the parties, or, to put it another way, who will be most prejudiced by either allowing or disallowing the third party claim. This includes considering whether the third party claim will lead to extra delay, cost and complexity: *Tyson Creek Hydro Corporation v. Kerr Wood Leidal Associates Limited*, 2014 BCCA 17 at paras. 39-43.
- [88] The judge's analysis of the basis for allowing the TSKLH to bring a third party claim is set out in his Reasons at paras. 84-87. In summary, he found that:
- a) the claim was neither frivolous nor bound to fail;
 - b) the claims advanced and relief sought were substantially connected to the questions raised, the relief sought, and the subject matter of the Fourth Amended Notice of Civil Claim, and should properly be determined in the action;
 - c) not permitting the third party claim would likely result in an undesirable and inefficient multiplicity of proceedings and risk contradictory findings;
 - d) greater injustice and inconvenience would arise from allowing the matter to be pursued in a separate action, than from permitting it to be brought by a third party claim; and,
 - e) therefore, the balance of prejudice weighed in favour of allowing the TSKLH to file the third party claim.
- [89] The Gitanyow Nation is critical of the judge for not amplifying his analysis of the above conclusions. However, his reasons must be read as a whole.
- [90] The judge considered delay and increased complexity when considering the TSKLH application to be added as a defendant. He took at face value the TSKLH's submissions that it "[does] not intend to delay the start of this action", which was then set to commence in a few

months on October 1, 2024: Reasons at para. 76. Respectfully, without some clear commitments from the TSKLH to forgo pre-trial procedural discovery rights, and commitments as to how Chief Simpson would fulfill her own discovery obligations and be ready for trial, including being able to serve any necessary expert evidence-- commitments that were not forthcoming--the TSKLH's stated intention was entitled to very little, if any, weight in the decision to permit it to advance a third party claim.

- [91] The judge's optimistic approach to accepting the TSKLH's "intention" not to delay, without more, can only be explained by his concern that the more important factor was the serious prejudice to the TSKLH if it was not able to defend the Gitanyow Nation's claims to Aboriginal title and rights, given that the TSKLH asserts Aboriginal title and rights to some of the same territory. This is what became the deciding factor in permitting TSKLH to be added as a defendant.
- [92] It is one thing to ensure that Chief Simpson and the TSKLH were not irreparably prejudiced in its own Aboriginal title and rights claim. But once that prejudice was addressed by allowing the TSKLH to defend the Gitanyow Nation's claims, the judge failed to recognize that it is quite another thing to grant Chief Simpson leave to advance the TSKLH's claims to Aboriginal title and rights within the same action.
- [93] The judge did not consider the additional delay and complexity that would result if TSKLH were permitted to advance its third party claim. He overlooked how this would add significantly to the prejudice to the Gitanyow Nation, by increasing the complexity, length, and cost of the litigation in orders of magnitude greater than simply adding the TSKLH as a defendant.
- [94] On appeal, the Gitanyow Nation sought leave to adduce new evidence to show that, since the TSKLH was added as a defendant and permitted to file a third party claim, the TSKLH's position on discovery and procedures for trial has dramatically increased the complexity of the action and its readiness for trial. The TSKLH opposes the new evidence, but says in the event it is admitted, it would like to introduce its own evidence in response. In my view, it is not necessary to receive evidence on this point. It is obvious that adding the TSKLH as both a defendant to the action and allowing it to bring a third party claim will bog down the litigation.
- [95] Claims of Aboriginal title and rights are some of the most difficult and complex to litigate.
- [96] In *Delgamuukw*, after first noting that other First Nations should intervene when there are competing Aboriginal title claims, the Court stated: "...this litigation has been both long and expensive, not only in economic but in human terms as well": at para. 186.
- [97] In the years since *Delgamuukw*, it remains extraordinarily time-consuming, complex, and expensive for First Nations to prove through litigation the historic uses and exclusive occupation of territory, as well as modern-day successorship, that form the basis of Aboriginal title claims. Not only is the preparation for trial difficult and costly, often leading

to delay, the actual hearing takes an exceptional number of days in court--often hundreds of days. When the trial hearing is complete, the matter is not over. The trial judge must then sort through the large amount of evidence and decide countless contested factual and legal issues, and explain all of this in comprehensive reasons. Once the judgment is written (the content of which can approach a PhD thesis), the judgments are often appealed, and skilled advocates on both sides of the case comb through the large record and lengthy reasons for judgment to identify numerous arguments about errors made.

- [98] As observed in *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2021 BCCA 155, when there are too many issues in a single proceeding, it becomes unwieldy and risks an unsatisfactory outcome for all participants, including the courts: at paras. 158-159.
- [99] In *Kwikwetlem*, this Court emphasized that because Aboriginal title and rights claims are incredibly complex to litigate, the courts should strive to approach procedural issues with due regard to proportionality, access to justice, and reconciliation: at para. 36. The judge recognized this in his decision refusing the Nisga'a Nation's joinder application: *Nisga'a SC* at paras. 38-46.
- [100] I come back to the judge's analysis of delay and complexity in the present judgment under appeal. In my view, the judge erred in overlooking the additional serious prejudice to the Gitanyow Nation, in terms of the overall delay, complexity and cost to it in advancing its own claims in the litigation, that would result from allowing the TSKLH not just to defend the action, but also to bring a third party claim against the Province and Canada.
- [101] If the Aboriginal title and rights claims of one Indigenous collective can take hundreds of days of hearing at trial, and years to work through the appellate process, it is obvious that joining it with another Indigenous collective's Aboriginal title and rights claims may take considerably longer. Hearing multiple overlapping Aboriginal title claims in one trial could impair the goal of access to justice for these types of cases. When the fact that the TSKLH has taken so long to bring its application is added to this context, the balance of convenience tilts significantly in favour of the Gitanyow Nation's position opposing the third party claim. Simply put, it is not in the interests of justice to allow the TSKLH to belatedly tag its own complex claims to the Gitanyow Nation's existing action, thereby adding delay, cost and complexity to the determination of the Gitanyow Nation's claims.
- [102] Further, while the judge was correct in wishing to limit duplication and inconsistent findings by judges in multiple actions, he overlooked the problem that allowing the TSKLH to bring a third party claim does not avoid that risk and potentially increases it.
- [103] There is much repetition and overlap as between the pleadings in the TSKLH Title Action and its third party claim in the present action.
- [104] In the third party claim brought on behalf of the TSKLH against the Province and Canada, Chief Simpson seeks declarations of Aboriginal title and rights overlapping a large part of the same territory as claimed by the Gitanyow Nation, described in the TSKLH's pleading as

"Disputed Territory". This claim for relief is pleaded as being within a larger area of territory over which TSKLH claims it has Aboriginal title and rights. This is the larger territory, the TSKLH Claim Area, also asserted by Chief Simpson in the separate TSKLH Title Action. The existence of the larger TSKLH Claim Area thus forms the factual foundation for the third party claim seeking declarations of Aboriginal title and rights over the Gitanyow Claim Area.

- [105] The TSKLH pleads that its members are the sole remaining descendants and successors of a self-governing people known as the Laxwiiyip Tsetsaut, who "continue collectively to identify with their Laxwiiyip Tsetsaut origins", and who had exclusive, continuous use and occupation of territory mapped and defined by it as TSKLH territory at the time of the Crown assertion of sovereignty. It pleads that the TSKLH holds particular traditions and laws. These allegations are mirrored in both the TSKLH Title Action and in the third party claim in the present action.
- [106] Based on the position taken on the standing challenge, it is obvious that these allegations are strongly contested by the Gitanyow Nation.
- [107] In her affidavit, Chief Simpson asserts that there are approximately 55 members of the TSKLH. This is a relatively small group asserting Aboriginal title over a large territory that is home to thousands of Indigenous people and affects other, larger Indigenous collectives. The claim in the TSKLH Title Action may well be opposed by other First Nations whose own Aboriginal title and rights claims overlap with the TSKLH's. Those other Indigenous collectives may want to participate in the TSKLH Title Action to defend against the TSKLH's claims of historic successorship, Aboriginal title and rights.
- [108] In my view, had the judge considered the duplicative nature of the TSKLH Title Action and the proposed TSKLH third party claim, he would have concluded that it is far better that all of the TSKLH's claims of Aboriginal title and rights be heard together in a separate action, in order to avoid the risk of duplication and inconsistent findings, rather than to allow a territorial carve-out to be determined first by way of third party claim in the Gitanyow Nation's action.
- [109] Importantly, the judge also failed to acknowledge the practical burdens on the trial judge if the TSKLH's own third party claim was added to the existing action. The trial judge would be faced with the task of having to determine the issues of historic successorship, exclusive occupation, effective control, and integral connection to culture of two Indigenous collectives advancing claims to Aboriginal title and rights within the same action. Respectfully, this not only risks denying access to justice to the Gitanyow Nation, it is difficult for one judge to take on effectively in one trial, no matter how capable the judge.
- [110] The increased complexity of determining two different Indigenous collectives' claims to Aboriginal title and rights would also make any appeal proceeding difficult and extraordinarily complex.

- [111] In conclusion, out of an understandable concern to protect the TSKLH's position that it has Aboriginal title that overlaps with the Gitanyow Claim Area, the judge failed to appreciate the distinction between defending the Gitanyow Nation's claims and advancing the TSKLH's own third party claims, and this had a material impact on the exercise of his discretion. Appreciating this distinction leads to a different approach to factors of delay and complexity.
- [112] In my view, the most practical way to balance the prejudice to the Gitanyow Nation and the TSKLH is to permit the TSKLH to be added as a defendant only, and not to permit it to advance a third party claim. This will allow the TSKLH to challenge the Gitanyow Nation's claims and is sufficient to protect the TSKLH's interests in claiming Aboriginal title and rights over the same territory. The action will remain the Gitanyow Nation's action, and ultimately the trial judge will only need to determine whether the Gitanyow Nation's claims are proven. The judge will quite likely not need to determine all the many issues related to the TSKLH's successorship, cultural connection, Indigenous laws and practices, and other matters relevant to establishing its own Aboriginal title and rights claims to the territory. Some of those matters will likely arise, and may require some findings, but their relevance will only be in defence of the Gitanyow Nation's claims.
- [113] I would therefore set aside the judge's order allowing Chief Simpson on behalf of TSKLH to bring a third party claim in the within proceeding.

Disposition

- [114] I would dismiss the application to adduce fresh evidence. I would allow the appeal, and vary the judge's order by setting aside the order permitting a third party claim.

"The Honourable Justice Griffin"

I AGREE:

"The Honourable Mr. Justice Butler"

I AGREE:

"The Honourable Justice Riley"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/ca/24/04/2024BCCA0406.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/malii-v-british-columbia-2024>

Prepared on 29 October 2026 · Esheria