IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Chief Mountain v. British Columbia (Attorney General),* 2011 BCSC 1394

Date: 20111019
Docket: L000808
Registry: Vancouver

Between:

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

Plaintiffs

And

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

Defendants

Before: The Honourable Madam Justice Lynn Smith

Reasons for Judgment

Counsel for Plaintiffs:	P.E. Jaffe and J. Rustand
Counsel for The Attorney General of Canada	J. Russell and M. Hopkins
Counsel for Her Majesty in Right of British Columbia:	J.L. Owen
Counsel for the Nisga'a Nation	J. Aldridge, Q.C. and M. Bartley
Place and Date of Hearing:	Vancouver, B.C. October 4-8, 12-13, 2010, January 11-14, and March 1-2, 2011
Place and Date of Judgment:	Vancouver, B.C. October 19, 2011

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INTRODUCTION

[1] The Nisga'a Nation made a treaty with the Crown on April 27, 1999. The plaintiffs are members of the Nisga'a Nation who challenge the constitutionality of that Treaty. Their major complaint is that the Treaty provides for Nisga'a law-making and self-government in a manner inconsistent with the Canadian Constitution. The defendants, supporting the Treaty's constitutionality, are the three parties to the Treaty: the Nisga'a Nation, Her Majesty the Queen in Right of Canada and Her Majesty the Queen in Right of British Columbia.

[2] The Nisga'a Final Agreement [*NFA*] is a sophisticated modern treaty. It is the product of decades of work by the Nisga'a Nation and the federal and provincial governments. The goal of the Treaty was to provide the legal basis for a lasting and productive relationship between the Nisga'a and non-Aboriginal Canadians. Through the Treaty, the Nisga'a and the federal and provincial Crowns took an important step – together – towards reconciliation.

[3] In *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, the Supreme Court of Canada emphasized the importance of modern treaty-making. For example, Mr. Justice Binnie wrote at para. 10 and 54:

> [10] ... The reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship is the grand purpose of s. 35 of the *Constitution Act, 1982*. The modern treaties, including those at issue here, attempt to further the objective of reconciliation not only by addressing grievances over the land claims but by creating the legal basis to foster a positive long-term relationship between Aboriginal and non-Aboriginal communities. Thoughtful administration of the treaty will help manage, even if it fails to eliminate, some of the misunderstandings and grievances that have characterized the past. Still, as the facts of this case show, the treaty will not accomplish its purpose if it is interpreted by territorial officials in an ungenerous manner or as if it were an everyday commercial contract. The treaty is as much about building relationships as it is about the settlement of ancient grievances. The future is more important than the past. A canoeist who hopes to make progress faces forwards, not backwards.
>
> ...
>
> [54] ... The difference between the LSCFN Treaty and Treaty No. 8 is not simply that the former is a "modern comprehensive treaty" and the latter is more than a century old. Today's modern treaty will become tomorrow's historic treaty. The distinction lies in the relative precision and sophistication

> of the modern document. Where adequately resourced and professionally represented parties have sought to order their own affairs, and have given shape to the duty to consult by incorporating consultation procedures into a treaty, their efforts should be encouraged and, subject to such constitutional limitations as the honour of the Crown, the Court should strive to respect their handiwork: *Quebec (Attorney General) v. Moses*, 2010 SCC 17, [2010] 1 S.C.R. 557.
>
> [Emphasis added]

[4] For the reasons that I summarize in this Introduction, and set out in full below, I conclude that the plaintiffs' challenge to the constitutionality of the Treaty fails.

[5] In challenging the Treaty, the plaintiffs rely on many of the same grounds that other plaintiffs asserted in a previous challenge to the Treaty. In that previous challenge (*Campbell v. British Columbia (Attorney General)*, 2000 BCSC 1123, 79 B.C.L.R. (3d) 122) [*Campbell*], the plaintiffs were the Leader of Her Majesty's Loyal Opposition, Gordon Campbell, and two Members of the British Columbia Legislative Assembly, Michael de Jong and Geoffrey Plant. The defendants to that challenge were, as in these proceedings, the three parties to the Treaty.

[6] In *Campbell*, Mr. Justice Williamson held that the Nisga'a Treaty is consistent with the constitutional division of powers in Canada created by ss. 91 and 92 of the *Constitution Act, 1867*, (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 [*Constitution Act, 1867*]. He further held that the requirements for Royal Assent under s. 55 of the *Constitution Act, 1867*, were met in the passage of the legislation by the two levels of government: *Nisga'a Final Agreement Act*, S.B.C. 1999, c. 2, Royal Assent April 26, 1999 [*NFA Act B.C.*]; *Nisga'a Final Agreement Act*, S.C. 2000, c. 7, Royal Assent April 13, 2000 [*NFA Act Canada*] [together, the "Settlement Legislation"].

[7] Mr. Justice Williamson reasoned that the Treaty is consistent with the constitutional division of powers because the division of powers between federal and provincial governments is not exhaustive. Referring to the Preamble to the *Constitution Act*, *1867,* he held that the Aboriginal right to self-government was not extinguished by the Crown's assertion of sovereignty. He held that s. 35 of the

Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Constitution Act, 1982*], constitutionally guarantees the limited form of self-government that remained with the Nisga'a after the assertion of sovereignty. In his view, the self-government right, as a now-entrenched treaty right, can be infringed by Parliament or by the provincial Legislative Assembly only if the infringement meets the justification test set out in the authorities and if such infringement is consistent with the honour of the Crown.

[8] The Court in *Campbell* also dismissed a challenge on a ground that is not asserted in this litigation, relating to an alleged infringement of s. 3 (electoral rights) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* [*Charter*].

[9] The plaintiffs appealed the decision in *Campbell*, but abandoned their appeal after an election which resulted in their party forming the government of the Province and Mr. Campbell becoming Premier.

[10] In these proceedings, the issues are largely the same as those that were before Mr. Justice Williamson. As a general rule, members of this Court do not depart from decisions of other members of this Court. I conclude that I should follow *Campbell*, and will do so with respect to the issues that it decided.

[11] The defendants raise some issues that were not before the Court in *Campbell*. They all rely, in the alternative and to varying degrees, on arguments supporting the constitutionality of the Treaty that differ from the arguments made in *Campbell*. Most notably, they argue that the self-government powers in the Treaty were or could have been validly delegated to the Nisga'a Nation by the federal government and the provincial government. I find that argument to be persuasive and conclude that delegation provides an alternative basis for the constitutional validity of the Treaty.

[12] The plaintiffs, too, raise some issues before this Court that were not before the Court in *Campbell*. They claim that the Treaty is inconsistent with the provisions

of the *Constitution Act, 1867* that confer legislative jurisdiction to impose taxes (ss. 53, 54 and 90) and inconsistent with s. 96 of the *Constitution Act, 1867* regarding the appointment of judges to superior courts. They claim that the Treaty is inconsistent with the reservation and disallowance powers provided in ss. 55, 56, 57, 90, 91 and 92 of the *Constitution Act, 1867*. I do not find merit in the first claim, regarding taxation, and I find that the claim based on s. 96 is not justiciable. Finally, I find that the claim based on reservation and disallowance powers was, in essence, decided in *Campbell*.

[13] The Attorney General of British Columbia disputes the plaintiffs' standing to bring this action and the justiciability of the plaintiffs' claims. I conclude that the plaintiffs should be granted public interest standing. I further conclude that a sufficient record is before the Court and that the plaintiffs raise justiciable issues, with the exception of their challenge based on s. 96 of the *Constitution Act, 1867*, which I find not to be a justiciable claim.

[14] At the hearing of this matter, which proceeded by way of summary trial, the defendants objected to the scope of the plaintiffs' claim based on their pleadings and submissions. Largely, that dispute related to the nature of the relief the plaintiffs sought, and whether their submissions were consistent with their pleadings and with certain limitations to their claim described by their counsel at the hearing. Because the plaintiffs' claim fails, it is unnecessary to address or resolve the dispute in these Reasons.

[15] In these Reasons, I will refer to "the Treaty" and to "the *NFA*" interchangeably.

THE TREATY

[16] Negotiation of the Treaty began in 1976, initially between the Nisga'a Tribal Council and Her Majesty the Queen in Right of Canada. In 1989, Her Majesty the Queen in Right of British Columbia joined the negotiations. The Nisga'a Nation and the Crowns Federal and Provincial signed the *NFA* on April 27, 1999. Neither the Federal nor the Provincial Crown has sought an opinion as to the Treaty's constitutionality by way of constitutional Reference.

[17] The Treaty is a detailed and comprehensive agreement, addressing issues of land, natural resources, government, the administration of justice, taxation, environmental protection, finance, culture and heritage.

[18] The Nisga'a Nation approved the Treaty in an assembly and then by a referendum, in which 73% of those who voted were in favour of the Treaty. Each level of government passed legislation (the *NFA Act Canada* and the *NFA Act B.C.*) that was given Royal Assent. The Treaty came into effect on May 11, 2000.

[19] The Preamble to the *NFA* acknowledges some of the long history that lies behind the conclusion of the Treaty. The Preamble states that the Nisga'a Nation has lived in the Nass Area since time immemorial and had never previously entered into a treaty with Canada or British Columbia. It refers to the Nisga'a Petition to His Majesty's Privy Council dated May 21, 1913, and to the early land claims litigation that led to the decision in *Calder v. Attorney General of British Columbia*, [1973] S.C.R. 313.

[20] The Preamble also acknowledges the ongoing importance to the Nisga'a Nation of the hereditary chiefs and matriarchs (Simgigat and Sigidimhaanak) continuing to tell their oral histories (Adaawak) relating to their family hunting, fishing, and gathering territories (Ango'oskw) in accordance with Nisga'a traditional laws and practices (Ayuuk).

[21] Referring to Canadian courts' statements that reconciliation between the prior presence of Aboriginal peoples and the assertion of sovereignty by the Crown is best achieved through negotiation and agreement, rather than through litigation or conflict, the Preamble states that the parties intend the *NFA* to result in reconciliation and a new relationship among them. The relationship is to be based on a new approach to mutual recognition and sharing, achieved through agreement on rights rather than extinguishment of rights. The parties intend the Agreement to provide certainty with respect to Nisga'a ownership and use of lands and resources, and the relationship of federal, provincial and Nisga'a laws within the Nass Area. They

intend the *NFA* to set out the Aboriginal and treaty rights of Nisga'a under s. 35 of the *Constitution Act, 1982*.

[22] On May 11, 2000, the assets referred to in the Treaty vested in the Nisga'a Nation. Those assets include close to 2,000 square kilometres of land in the Nass Area, which vested in the Nisga'a Nation in fee simple, as well as fisheries, wildlife entitlements and a capital sum. In turn, the *NFA* is said to constitute the full and final settlement in respect of the Nisga'a Nation's Aboriginal rights, including Aboriginal title, in Canada.

[23] The *NFA* is said to be "a treaty and a land claims agreement within the meaning of ss. 25 and 35 of the *Constitution Act, 1982*" (Chapter 2, para. 1). It is said to be exhaustive of Nisga'a s. 35 rights (Chapter 2, para. 23):

> 23. This Agreement exhaustively sets out Nisga'a section 35 rights, the geographic extent of those rights, and the limitations to those rights, to which the Parties have agreed, and those rights are:
>
> a. The aboriginal rights, including aboriginal title, as modified by this Agreement, in Canada of the Nisga'a Nation and its people in and to Nisga'a Lands and other lands and resources in Canada;
>
> b. The jurisdictions, authorities, and rights of Nisga'a Government; and
>
> c. The other Nisga'a section 35 rights.

[24] The Nisga'a Nation through the *NFA* releases Canada, British Columbia and all other persons from claims arising from past or future infringements of or effects on Aboriginal rights including Aboriginal title (Chapter 2, para. 27).

[25] The *NFA* states that it "does not alter the Constitution of Canada", and that the *Canadian Charter of Rights and Freedoms* "applies to Nisga'a Government in respect of all matters within its authority, bearing in mind the free and democratic nature of Nisga'a Government as set out in this Agreement" (Chapter 2, para. 8-9).

[26] The Nisga'a Nation has established a Constitution. Under it, the Nisga'a Lisims Government succeeds the Nisga'a Tribal Council. The Nisga'a Village Governments succeed the Band Councils under the *Indian Act*, R.S.C. 1985, c. I-5.

[27] The *Indian Act* ceases to apply to the Nisga'a, except for the purpose of determining "Indian" status, and Nisga'a Lands are not "lands reserved for the Indians" under the *Constitution Act, 1867* or "reserves" under the *Indian Act* (Chapter 2, para. 10).

[28] The self-government provisions of the Treaty, which are the focus of the plaintiffs' attack, are found throughout the Treaty but particularly in Chapter 11. That Chapter begins with the statement:

> 1. The Nisga'a Nation has the right to self-government, and the authority to make laws, as set out in this Agreement.

[29] The *NFA* employs various means of harmonizing the Nisga'a right to self-government and authority to make laws with the fact that the Nisga'a Nation exists within British Columbia and within Canada.

[30] Federal and provincial laws apply to all of the Nisga'a governmental institutions and to Nisga'a lands and citizens, but in the event of an inconsistency between the *NFA* and the provisions of any federal or provincial law, the *NFA* prevails to the extent of the inconsistency or conflict: Chapter 2, para. 13.

[31] In a number of specific areas, Nisga'a laws made in accordance with the *NFA* are said to prevail. For example, Chapter 11, para. 44(a) provides that the Nisga'a Lisims Government may make laws in respect of the use and management of Nisga'a Lands, and para. 45 states:

> 45. In the event of an inconsistency or conflict between a Nisga'a law under paragraph 44 and a federal or provincial law, the Nisga'a law prevails to the extent of the inconsistency or conflict.

[32] Similar statements are made in the context of, for example: the administration, management and operation of Nisga'a government (Chapter 11, para. 34-36); Nisga'a citizenship (Chapter 11, para. 39-40); and culture and language (Chapter 11, para. 41-43).

[33] In some other instances, limits are imposed. For example, the parties agree to the following in Chapter 11, para. 89-93 with respect to child and family services:

> 89. Nisga'a Lisims government may make laws in respect of child and family services on Nisga'a Lands, provided that those laws include standards comparable to provincial standards intended to ensure the safety and well-being of children and families.
>
> ...
>
> 91. In the event of an inconsistency or conflict between a Nisga'a law under paragraph 89 and a federal or provincial law, the Nisga'a law prevails to the extent of the inconsistency or conflict.
>
> ...
>
> 93. Laws of general application in respect of reporting of child abuse apply on Nisga'a Lands.

[34] On the other hand, in still other areas, where there is a conflict between a Nisga'a law and a federal or provincial law of general application, the federal or provincial law prevails to the extent of the conflict. Examples are: public order, peace and safety on Nisga'a Lands (Chapter 11, para. 59-62); traffic and transportation (Chapter 11, para. 72-74); the solemnization of marriage (Chapter 11, para. 75-77); and intoxicants (Chapter 11, para. 110-111).

[35] As another example of the attempts to harmonize Nisga'a self-government and law-making powers with existing provincial and federal laws, the *NFA* allows for the Nisga'a to establish a police force, so long as it is approved by the Lieutenant Governor in Council and its enabling laws conform to or are compatible with provincial laws. The Minister responsible for policing in British Columbia can intervene in policing matters on Nisga'a lands if necessary (Chapter 12, para. 1-22). Similarly, if a Nisga'a court is established to administer Nisga'a laws, it must provide for judicial standards, supervision and appeal procedures. It must also be approved by the Lieutenant Governor in Council before it becomes active (Chapter 12, para. 30-51). An accused liable to a sentence of imprisonment under Nisga'a law would have the option of electing to be tried in the British Columbia Provincial Court (Chapter 12, para. 43).

[36] The Treaty has now been in effect for more than eleven years. No evidence was led regarding the actual experience of the three parties in its implementation.

PLEADINGS

[37] The plaintiffs say that the *NFA* and the Settlement Legislation (which they define together as "the Combination") are inconsistent with the Constitution of Canada. They allege the following "Particulars of Inconsistency with the Constitution of Canada":

> 19. The Combination is contrary to the Constitution of Canada by being inconsistent with the distribution and exercise of legislative jurisdiction as provided in the Constitution of Canada, in that Nisga'a Government is created with, or recognized as possessing:
>
> a. Legislative jurisdiction that is not delegated by Parliament or the Legislature of British Columbia or their delegates, contrary to the exhaustive and exclusive distribution of legislative jurisdiction provided in Part VI of the *Constitution Act, 1867*;
>
> b. Further or in the alternative to subparagraph (a) above, legislative jurisdiction which, as a right within the meaning of s. 35 of the *Constitution Act, 1982*, cannot be freely withdrawn or amended by Parliament or the Legislature of British Columbia, or both, as the case may be;
>
> c. Legislative jurisdiction to make laws for the appointment of judges, contrary to s. 96 of the *Constitution Act, 1867*;
>
> d. Legislative jurisdiction to make laws without requiring Royal Assent and excluding the exercise of the powers of reservation and disallowance, as provided in sections 55, 56, 57, 90, 91 and 92 of the *Constitution Act*, *1867*;
>
> e. Legislative jurisdiction to impose taxes contrary to sections 53, 54 and 90 of the *Constitution Act, 1867*.

[38] The plaintiffs seek a declaration that:

> ... the Combination, alternatively the provisions of the Combination specified in this Statement of Claim, are contrary to the Constitution of Canada, and are therefore of no force or effect by virtue of the provisions of Section 52 of the *Constitution Act, 1982*.

[39] Mr. Jaffe for the plaintiffs stated, at the outset of the hearing and in his written submissions, that the plaintiffs challenge only the provisions of the Treaty that relate

to self-government. He submits that other provisions of the *NFA* could remain in effect even if any or all of the self-government provisions are struck down.

[40] Nevertheless, when asked to provide a list of the provisions that should be declared unconstitutional, plaintiffs' counsel included the Settlement Legislation on the list, as well as some provisions of the Treaty not specified in the statement of claim. The defendants took exception to this; counsel for each of the defendants argued that the plaintiffs should not be permitted to resile from their position that they were challenging only the self-government provisions, and not the entire Treaty. The defendants submit that to declare the enabling legislation unconstitutional would be to strike down the entire Treaty.

[41] This dispute essentially relates to the relief sought by the plaintiffs. Because I conclude that the plaintiffs' challenge fails both as stated in their pleadings and as framed in their counsel's submissions, the plaintiffs are not entitled to relief. It is unnecessary for me to comment further about the extent to which the plaintiffs' submissions departed from their pleadings.

PROCEDURAL HISTORY

[42] Attached as Appendix A is a chronology setting out the procedural history of this case, as well as that of two related prior proceedings. It shows a long and somewhat tortured history in which some of the current plaintiffs tried to prevent the Treaty from coming into force, and unsuccessfully applied to intervene in the *Campbell* case. It is attached because it has relevance to whether the plaintiffs should be granted discretionary standing.

CHARTER VALUES

[43] The plaintiffs referred to *Charter* values, arguing that, because of inconsistency with *Charter* values, the *NFA* must be of no force and effect insofar as it "seeks to ... deny democratic rights to persons based on racial, ethnic or ancestral differences". However, no allegations of infringement of s. 3 or s. 15 of the *Charter* are before the Court, the plaintiffs having withdrawn their pleadings to that effect.

Charter values (for example, freedom of expression, equality, and democracy) may be taken into account as an aid to interpretation in this case, as in any other. However, the invocation of *Charter* values in argument does not obviate the need to plead an infringement of the *Charter* as a basis for relief.

[44] Because no allegations of infringements of *Charter* democratic or equality rights were before the Court, I will not address those issues in these Reasons.

EVIDENTIARY ISSUES

[45] Before I turn to the remaining substantive issues, I will address briefly some evidentiary issues that arose.

Factum in the Campbell Case

[46] As I have already described, the plaintiffs in *Campbell* were Gordon Campbell, then Leader of the Opposition, and Michael de Jong and Geoffrey Plant, also Opposition Members of the provincial Legislative Assembly. After Mr. Justice Williamson handed down his decision in *Campbell* on July 24, 2000, they filed an appeal. The day before the provincial election of May 15, 2001, their counsel filed a factum in that appeal. After the election, the plaintiffs in the *Campbell* case became members of Her Majesty's Government rather than Her Majesty's Loyal Opposition, and Mr. Campbell, as leader of the successful party, became Premier of the Province. The plaintiffs then abandoned their appeal.

[47] The plaintiffs in this case seek to rely upon the factum filed in the aborted *Campbell* appeal. As I understand Mr. Jaffe's position, it is because the factum shows what the *Campbell* plaintiffs' views were before they became subject to the provision of the Treaty that he characterizes as a "trap", namely para. 20 of Chapter 2, that "no party will challenge, or support a challenge to, the validity of any provision of this agreement".

[48] As well, there seems to be some suggestion that the factum constitutes a form of admission by the current Government of British Columbia.

[49] The defendants all take the position that the factum is irrelevant and inadmissible.

[50] I agree with the defendants. The factum puts forward a set of arguments formulated by other parties in a different proceeding. It appears that in some instances the plaintiffs in this proceeding have made very similar arguments to those in the *Campbell* plaintiffs' factum. In my view, those arguments must stand and fall on their merits, and it is of no import that counsel for other parties have previously asserted them. Accordingly, I decline to consider the factum filed in the *Campbell* appeal as evidence in this case.

Report of the Chief Electoral Officer on the Provincial Referendum

[51] In 2002, the Government of British Columbia conducted the Treaty Negotiations Referendum. The vote by provincial electors was conducted by mail, between April 2 and May 15, 2002. The referendum question was:

> Whereas the Government of British Columbia is committed to negotiating workable, affordable treaty settlements that will provide certainty, finality and equality;
>
> Do you agree that the Provincial Government should adopt the following principles to guide its participation in treaty negotiations?
>
> 1. Private property should not be expropriated for treaty settlements.
> 2. The terms and conditions of leases and licences should be respected; fair compensation for unavoidable disruption of commercial interests should be ensured.
> 3. Hunting, fishing and recreational opportunities on Crown land should be ensured for all British Columbians.
> 4. Parks and protected areas should be maintained for the use and benefit of all British Columbians.
> 5. Province-wide standards of resource management and environmental protection should continue to apply.
> 6. Aboriginal self-government should have the characteristics of local government, with powers delegated from Canada and British Columbia.
> 7. Treaties should include mechanisms for harmonizing land use planning between Aboriginal governments and neighbouring local governments.
> 8. The existing tax exemptions for Aboriginal people should be phased out.

[52] The plaintiffs suggest that the *Report of the Chief Electoral Officer on the Treaty Negotiations Referendum*, Sept. 9, 2002, Elections BC, on the outcome of the referendum vote forms part of the legislative history and should be considered.

[53] All other parties oppose the reception of this evidence.

[54] The Treaty Negotiations Referendum post-dates the signing of the Treaty, the ratification process and the passage of the Settlement Legislation. It also post-dates the decision of Mr. Justice Williamson in the *Campbell* case. It can hardly be seen to form part of the legislative history.

[55] I do not see any basis for the relevance of the *Report of the Chief Electoral Officer on the Treaty Negotiations Referendum*, and I decline to consider it as evidence.

Report of the Royal Commission on Aboriginal Peoples

[56] The parties agreed to a consent order that certain extracts from the *Report of the Royal Commission on Aboriginal Peoples*, Parliamentary Research Branch, Library of Parliament, PRB 99-24E [*RCAP Report*], could be referred to in submissions by any party as authority or as evidence of legislative fact, subject to the right of other parties to argue as to their admissibility, utility, relevance and weight.

[57] Counsel for both the Nisga'a Nation and the Attorney General of Canada referred to extracts from the *RCAP Report* in their submissions.

[58] Counsel for the Nisga'a, Mr. Aldridge, takes the position that the *RCAP Report* formed a backdrop to the negotiation and conclusion of the Treaty. He submits that, as part of the legislative history, it is relevant evidence of what was in the parties' minds at the time they made the Treaty. In addition, he submits that the *RCAP Report* provides a source of scholarly writing that a court can refer to in its Reasons. He notes that Madam Justice Bertha Wilson and Mr. Justice René Dussault were members of the Commission, and that the *RCAP Report* has been

referred to in a number of Supreme Court of Canada decisions, such as in the minority reasons in *Mitchell v. Canada*, 2001 SCC 33, at para. 129; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at para. 17, and in *Delgamuukw v. British Columbia,* [1997] 3 S.C.R. 1010 at para. 85.

[59] On the other hand, Mr. Jaffe for the plaintiffs argues that the defendants have been attempting to rely on the *RCAP Report* as evidence of facts. He refers to *Buffalo v. Canada*, 2001 FCT 1249, where Mr. Justice Teitelbaum characterized the *RCAP Report* as a political work, embodying recommendations to the government. He stated as much at para. 18:

> ... the report of the Royal Commission on Aboriginal Peoples is a "political" work in the sense that its purpose is to recommend to the Government of Canada how it should govern its policies in the Government's relationship with the aboriginal peoples of Canada. I am satisfied that I do not require the report of RCAP to help me legally determine the issues before me.

[60] The *RCAP Report* sets out the views of experts who were commissioned by Parliament to investigate the evolution of the relationship among Aboriginal peoples, the Canadian Government, and Canadian society as a whole. They were asked to propose specific solutions to the problems that have plagued those relationships and that confront Aboriginal peoples.

[61] I have considered what was said in the *RCAP Report* as scholarly work, of assistance in analyzing the submissions on the law, but not as evidence of adjudicative facts.

Jurisprudence from the United States Supreme Court (The Marshall Decisions)

[62] In his Reasons in *Campbell*, Mr. Justice Williamson referred to three decisions of Chief Justice Marshall of the United States Supreme Court in 1823-1832: *Johnson v. McIntosh*, 21 U.S. (8 Wheat) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); and *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 8 L. Ed. 483 (1982) (together, the *Marshall* decisions). Mr. Aldridge for the Nisga'a Nation also referred to those decisions in his submissions before me.

[63] Mr. Jaffe took objection.

[64] The *Marshall* decisions, from a different jurisdiction, are not binding, but can be referred to in legal submissions as possibly persuasive authority. I accept them on that basis.

Views of Politicians and Others

[65] Finally, counsel on both sides from time to time referred to the speeches and writings of politicians as shedding light on the intention behind, and the effect of, the Treaty in the context of the Canadian Constitution, particularly s. 35 of the *Constitution Act, 1982*. For example, counsel for the plaintiffs quoted from the memoirs and speeches of the former Prime Minister, the Right Honourable Pierre Trudeau, and from speeches made by former Provincial Attorney General Alex MacDonald.

[66] Scholarly writing may be considered in order to assist in the analysis of legal principles, and the statements of Cabinet Ministers may be considered in order to ascertain legislative intent. However, I do not see the political speeches or writings in question as falling into either of those categories. Accordingly, I have disregarded them.

THE COMITY PRINCIPLE

Positions of the Parties

[67] As I have noted, the central question in this summary trial, whether the self-government provisions of the Treaty are consistent with the Constitution of Canada, was addressed in 2000 in the *Campbell* case. The plaintiffs urge that I am not bound to follow, and should not follow, that case. The defendants all argue that I should follow *Campbell*, at least with regard to its conclusion if not all of its reasoning.

[68] The Nisga'a Nation's position is that the plaintiffs' claims in subparagraphs 19(a) and (b) of their fifth amended statement of claim, and in that part of subparagraph 19(d) that deals with Royal Assent, were expressly dealt with in the

Campbell case and, for that reason alone, should be dismissed. Mr. Aldridge for the Nisga'a Nation further submits that the determination of the other issues raised in the plaintiffs' pleadings, at least in part, follows logically from what was decided in *Campbell*. He supports the reasoning in *Campbell* and the premise that the Aboriginal right to self-government was not extinguished by the Crown's assertion of sovereignty. He supports as well the alternative basis asserted for constitutional validity, based on delegation.

[69] Mr. Russell for the Attorney General of Canada similarly argues that because of the decision in *Campbell,* this Court should dismiss the plaintiffs' claims that the right of self-government created in the Treaty is inconsistent with the distribution of legislative powers in the *Constitution Act, 1867*, and with the Royal Assent provisions of the Constitution. However, Mr. Russell indicates less than full support for the reasoning in the *Campbell* decision, despite strong support for its outcome. Canada emphasizes its argument that the Treaty powers were validly delegated by the Canadian and British Columbia governments.

[70] The Attorney General of British Columbia similarly takes the position that this Court should follow *Campbell* in its conclusions but not necessarily in its reasoning. Ms. Owen for the Province also submits that the plaintiffs lack standing and a justiciable claim, in part because of the existence of the *Campbell* decision. I will deal with those issues later in these Reasons.

[71] Counsel for the plaintiffs argues that, because the defendants did not plead the principle of judicial comity, this Court should not consider the defendants' submissions that *Campbell* should be followed. Whether or not the principle of comity is a matter that must be pleaded, which I tend to doubt, I find that the absence of a pleading does not preclude the defendants from arguing that this Court should follow *Campbell*. There was no suggestion that the plaintiffs were taken by surprise by this argument, nor could such a suggestion credibly be made.

[72] Also, Mr. Jaffe for the plaintiffs argues that the issues in this case are different than they were in *Campbell*, that the rule in *Re Hansard Spruce Mills Ltd.*, [1954] 4

D.L.R. 590 (B.C.S.C.), should not be applied strictly in constitutional cases, and that in constitutional or public law cases, the approach to relitigation of issues is different than it is in cases that simply involve the private law rights of individuals.

[73] He further submits that there is an exception to the requirement for judicial comity when, in the opinion of a subsequent court, the earlier judgment is patently or palpably wrong.

Articulation of the Comity Principle

[74] Judges of this Court generally do not depart from decisions of their fellow judges. This practice promotes certainty and consistency in the law. It is not, however, an invariable requirement. It is a practice rather than a rule because certainty and consistency are not the only desirable characteristics in the law – it should also be open to change. The principle is sometimes described as the principle of comity, or "horizontal *stare decisis*", to distinguish it from the rule of "vertical" *stare decisis* which requires judges to follow binding precedents from higher courts.

[75] In her article "Precedent Unbound? Contemporary Approaches to Precedent in Canada", *Manitoba Law Journal*, (2006-2008), 32 Man. L.J. 135-162, Debra Parkes states that the dominant approach in Canada is that articulated in *Hansard Spruce Mills*. She characterizes it as "nonbinding comity", that is, respect for opinions of the same court, with freedom to depart for good reason (at p. 160).

[76] In British Columbia, *Hansard Spruce Mills* is the classic expression of the principle of comity. Mr. Justice Wilson (as he then was) wrote that, as a general rule, he would follow decisions of his fellow judges. The exceptions to that rule would be limited (at para. 4-5):

> Therefore, to epitomize what I have already written in the *Cairney* case, I say this: I will only go against a judgment of another Judge of this Court if:
>
> (a) Subsequent decisions have affected the validity of the impugned judgment;

> (b) it is demonstrated that some binding authority in case law, or some relevant statute was not considered;
>
> (c) the judgment was unconsidered, a *nisi prius* judgment given in circumstances familiar to all trial Judges, where the exigencies of the trial require an immediate decision without opportunity to fully consult authority.
>
> If none of these situations exist I think a trial Judge should follow the decisions of his brother Judges.

[77] Mr. Justice Wilson had previously stated the principle this way in *Cairney v. Queen Charlotte Airlines Ltd. (No. 2)* (1954), 12 W.W.R.(N.S.) 459 (B.C.S.C.), at 460:

> No suggestion has been made to me that the authorities bearing on the question were not considered by Fisher, J. There is no subsequent judgment by any member of this court or by any higher court which would suggest that Fisher J. reached a wrong conclusion. <u>There is no suggestion that this judgment is palpably wrong in that it displays a patent error as to law or as to the facts upon which his statement of law is based.</u> [Emphasis added]

[78] The notable difference between the two cases is the suggestion in *Cairney* that, in addition to the three circumstances mentioned in *Hansard Spruce Mills*, a decision of the same court need not be followed if it is "palpably wrong in that it displays a patent error as to law or as to the facts upon which [the] statement of law is based".

[79] In the Supreme Court of Canada decision on the appeal from *Cairney,* Chief Justice Kerwin stated that Wilson J. should not have considered himself bound in that case because the prior decision was that of a single judge: "It cannot be said that one decision of a single judge is a clear judicial interpretation and certainly there is no course of judicial decision" (*Cairney v. MacQueen*, [1956] S.C.R. 555 at 559).

[80] In S. Kerwin, "*Stare Decisis* in the B.C. Supreme Court: Revisiting *Hansard Spruce Mills*" (2004) 62 *The Advocate* 541, the author argues that "palpably wrong" decisions need not be followed, and that Wilson J. could not have intended that his decision in *Hansard Spruce Mills* would be used to "shield manifestly wrong decisions or act as an obstacle to innovation in the law" (at 555). The author refers to the practice in other jurisdictions, stating at 553:

> In *Cairney*, Mr. Justice Wilson stated that he would be free to go against a previous B.C. Supreme Court decision if that decision was "palpably wrong". He did not repeat this statement in his epitome of the law in *Hansard Spruce Mills* and, perhaps for that reason, this criterion has been rarely applied in subsequent B.C. Supreme Court cases. The "palpably wrong" criterion, however, accurately states the rule of horizontal *stare decisis* as it is applied in England, the United States and Australia. The leading case in England is the Court of Appeal decision in *Police Authority for Huddersfield v. Watson*, in which Lord Goddard stated:
>
> > I think the modern practice, and the modern view of the subject, is that a judge of first instance, unless he is convinced the judgment is wrong, would follow it as a matter of judicial comity.
>
> In *Mackay v. Commissioners of Inland Revenue*, the court stated: "[I]f one concludes that a particular decision is wrong, it could be said to be a disservice to reinforce it by following it, or to put the parties to the delay and expense of taking the point to the Court of Appeal." ...
>
> [Emphasis added]

[81] In *Musqueam First Nation v. British Columbia*, 2010 BCSC 1259, Mr. Justice Nathan Smith considered the comity principle, and observed at para. 28 that possibly Mr. Justice Wilson did not include the reference to "patently wrong" in the *Hansard Spruce Mills* list of exceptional circumstances because a "palpable" error will often be the result of one or more of the other factors listed in *Hansard Spruce Mills*. I agree with that observation.

[82] Mr. Justice Smart, in *R. v. Sipes*, 2009 BCSC 285, referred to the sound policy reasons behind the comity principle: consistency and certainty. He commented (at para. 10):

> The approach advocated in *Re Hansard Spruce Mills* is not a rule of law; rather, it is a wise and prudent prescription for the exercise of judicial discretion. It will almost always be in the interests of justice for a judge to follow the decision of another judge of the same court on a question of law. Consistency, certainty, and judicial comity are all sound reasons why this is so. It is for the Court of Appeal to decide whether a judge of this Court has erred, not another judge of the Court. [Emphasis added]

[83] There has been some suggestion that the comity principle applies differently in constitutional cases.

[84] In that regard, Mr. Jaffe cites *Withler v. Attorney General of Canada*, 2002 BCSC 820. In *Withler*, the Chambers judge declined to strike portions of the statement of defence on the ground of *res judicata* or abuse of process. The Chambers judge proceeded instead to hear a constitutional challenge to the validity of legislation even though in an earlier case in Federal Court (in which the plaintiff had not sought declaratory relief) the court had held that the relevant legislative provisions were unconstitutional and awarded damages to the plaintiff. Although *Withler* went on appeal regarding its decision on the merits (*Withler v. Canada (Attorney General)*, 2008 BCCA 539, 2011 SCC 12) the ruling on the application to strike was not appealed and there was no comment on this aspect of the case in either the British Columbia Court of Appeal or the Supreme Court of Canada.

[85] In *Nanaimo Community Bingo Assn. v. British Columbia (Attorney General)*, 2000 BCCA 166, the Court stated at para. 7 (per Southin J.A.):

> ... I am mindful that that leaves the reasons for judgment as they are. But appeals are not from reasons for judgment, they are from judgments. The value of the reasons on the second ground will be for the judge hearing the class action. I think it fair to say that in constitutional cases, whatever may be said about other cases, the judgment of Mr. Justice Wilson, in *Hansard Spruce Mills Limited* (1954), W.W.R. N.S. Vol. 13, is not as compelling as it would otherwise be. This whole question will be open for the judge hearing the case, as cases are always open for a trial judge when he or she is confronted by reasons of one of his or her colleagues that may or may not appeal to the second judge. [Emphasis added]

[86] And in *R. v. Silbernagel*, 2000 BCCA 251 at para. 4, Southin J.A. wrote:

> In my view *Hansard Spruce Mills* sets down a rule of practice, a series of rules for trial judges in the application of the doctrine of stare decisis. It is not, however, a statute and it is not the law of the Medes and Persians. When a question of constitutionality arises, a trial judge, whether a Justice of the Peace or anything else, must address his or her own mind to the question and come to a conclusion in the absence of authority binding from above. There was no authority binding from above on the Justice of the Peace who dealt with Mr. Silbernagel. [Emphasis added]

[87] However, in *United States v. Shull*, 2004 BCSC 908, Goepel J. noted (at para. 28-29) that Madam Justice Southin's comments in *Silbernagel* were *obiter dicta*, given that the court refused leave to appeal in that case.

[88] Casting further doubt on the effect of Madam Justice Southin's comments in *Nanaimo Community Bingo* and *Silbernagel* are the views expressed in other appellate cases to the effect that it is not for the Court of Appeal to interfere with the manner in which Supreme Court judges apply the comity principle. In *John Carten Personal Law Corporation v. British Columbia* (1997), 153 D.L.R. (4th) 460 (B.C.C.A.), Lambert J.A. specifically declined to consider the question of whether the trial judge had been correct in his application of *Hansard Spruce Mills*, stating (at para. 7):

> ... I do not think that the Supreme Court judges, who developed the *Hansard Spruce Mills Ltd*. rules and who are familiar with their application, need to have any issues connected with the application of those rules resolved by this Court.

[89] This position was recently confirmed in *Ludwig v. Bos*, 2010 BCCA 203, which cited *John Carten* as authority for the principle that the Court of Appeal will not address an alleged error in the application of the rule in *Hansard Spruce Mills*.

Contextual Factors

[90] In my view, as a general rule, previous decisions of this court should be followed in constitutional cases as much as in any other type of case. However, in deciding whether a previous decision on the same point of law should be followed, it is necessary to consider the context of both the previous decision and the current decision. It is in those contexts that the specific factors identified in *Hansard Spruce Mills* and *Cairney* should be addressed: whether the previous decision has been overtaken by more recent developments in the law; whether it was made without the benefit of full argument or without reference to some binding authority or statute; and whether it is palpably wrong.

[91] An additional factor in a constitutional case is the far-reaching impact of constitutional decisions. As our understanding of constitutional principles evolves and society changes, we may well need to revisit previous decisions and redevelop the jurisprudence relating to particular areas.

[92] That said, the starting point is that it is highly desirable to maintain consistency among decisions of the same court.

[93] I turn to the contextual factors relating to the case before me and to the *Campbell* case.

[94] First, with respect to the place of the *Campbell* case in the jurisprudence, I note that it has neither been followed nor distinguished in subsequent cases with respect to the issues that arise in the case before me. Thus, although *Campbell* stands as good law, it does not form part of a "stream" of authority leading to a settled state of the law. Echoing the comment of Chief Justice Kerwin, in his decision on the appeal from *Cairney*, there is not yet a "course of judicial decision" on the issues addressed in *Campbell.*

[95] The unsuccessful plaintiffs in *Campbell* launched an appeal but did not pursue it. Mr. Jaffe for the plaintiffs in this case makes much of the fact that the plaintiffs in *Campbell* abandoned their appeal only after their party was elected to form the government in the Province and Mr. Campbell became Premier. He submits that the *Campbell* plaintiffs' abandonment of their appeal may be explained by para. 20 of Chapter 2 of the *NFA*, which states: "No Party will challenge, or support a challenge to, the validity of any provision of this Agreement." Mr. Jaffe adopts the terminology used by former British Columbia Attorney General Alex MacDonald, and calls this the "trap" provision, having the effect of "muzzling" Messrs. Campbell, de Jong and Plant from further challenging the Treaty.

[96] However, the reason for the *Campbell* plaintiffs' abandonment of their appeal seems immaterial to the application of the principle of comity in this case. The only relevant fact is that the *Campbell* decision has neither been overruled nor approved by the Court of Appeal. Nor has it been the subject of much commentary in subsequent cases (likely because of the unique issues it addressed).

[97] Second, it is relevant that the issues here arise not only in the context of traditional (division of powers) constitutional principles but also in the newer, and

still-emerging, area of constitutionally-entrenched Aboriginal rights. This may affect the way in which the balance should be struck between achieving consistency and allowing for change in the law.

[98] Third, the *Campbell* case not only addresses many of the same legal issues as those that are before me, but arose out of precisely the same facts. (This aspect of the case is very unusual, and led the Attorney General of British Columbia to take the position that the plaintiffs' claim is *res judicata* or amounts to a collateral attack constituting an abuse of process. I will deal with those arguments later.) The plaintiffs challenge the same Treaty, involving the same defendants, and on preponderantly the same grounds, as in *Campbell*. Those circumstances give much force to the argument for following *Campbell* unless there are clear and cogent reasons not to do so.

[99] Fourth, another part of the context is the lengthy process that led to the successful negotiation of the Treaty, and the desirability of concluding treaties with Aboriginal peoples – reflected in the pronouncements of the Supreme Court of Canada encouraging settlement and reconciliation rather than litigation. The need for certainty and consistency in judicial decision-making may be particularly strong when it comes to decisions about the constitutional validity of treaty agreements.

Application of the Comity Principle

[100] Having addressed the contextual factors, which I view as, on the whole, supporting the conclusion that I should follow *Campbell*, I turn to the question of whether any of the recognized exceptions to the comity principle apply in this case.

[101] The *Campbell* case was fully argued before Mr. Justice Williamson, who took time and issued a written decision. It does not appear that some binding authority or statute was not brought to his attention, nor does it appear that subsequent decisions have affected the validity of his ruling.

[102] The plaintiffs submit that a number of the propositions in the reasoning in *Campbell* are incorrect, including those regarding:

- the exclusive and exhaustive nature of legislative powers set out in ss. 91 and 92 of the *Constitution Act, 1867*, unaltered by the *Constitution Act, 1982*;

- the intention of the framers of the *Constitution Act, 1982*, as to whether treaties would be the vehicle for defining rights;

- whether the expression "Aboriginal and treaty rights" in s. 35 of the *Constitution Act, 1982*, encompasses the self-government model embodied in the Treaty; and

- the effect of the rules of statutory construction on the interpretation of s. 35 of the *Constitution Act, 1982*.

[103] Having reviewed the plaintiffs' submissions, and those of the defendants in response, it is not "clear to the mind or plain to see", as "palpable" may be defined, that the *Campbell* decision was in error. In my view, if there are errors in *Campbell*, it will be for the Court of Appeal to detect them and correct the law.

[104] I conclude that this is not a case for departing from a previous decision of this Court, and I will follow the *Campbell* case with respect to the matters decided there.

WHAT THE *CAMPBELL* CASE DECIDED

[105] *Campbell* decided that the Treaty does not violate the division of powers or Royal Assent provisions of the *Constitution Act, 1867*.

[106] The plaintiffs' central contention in *Campbell* was that the Treaty violated the Constitution because "parts of it purport to bestow upon the governing body of the Nisga'a Nation legislative jurisdiction inconsistent with the exhaustive division of powers" in ss. 91 and 92 of the *Constitution Act, 1867*: *Campbell* at para. 12. The two secondary grounds of the challenge were that the legislative powers set out in the Treaty interfered with the concept of Royal Assent, and that the Treaty would have the effect of disenfranchising non-Nisga'a Canadian citizens with interests in

the Nisga'a territory, as they would not be able to vote or to be members of the Nisga'a government: also at para. 12.

[107] Mr. Justice Williamson's Reasons explore the provisions of the Treaty in detail, and highlight in particular the distinction between the areas in which Nisga'a law would prevail, and those in which federal and provincial laws would prevail. He points to the fact that the areas in which Nisga'a law would prevail tend to deal with particularly Nisga'a matters, and would still be subject to comparable provincial standards: at para. 46.

[108] Mr. Justice Williamson concluded that not all legislative power was distributed between the federal and provincial heads of power under ss. 91 and 92. In particular, the right to Aboriginal self-government that he found pre-existed Confederation had survived the Crown's assertion of sovereignty and the *Constitution Act*, 1867. He referred to the *Marshall* decisions. In his view, the powers distributed between ss. 91 and 92 consisted of all of – but no more than – the powers that had belonged to the colonies prior to confederation. He held that the legislative power granted to the Nisga'a Nation did not create a new order of government.

[109] Mr. Justice Williamson was of the view that the Crown is able unilaterally to abridge treaty rights, provided the limitation on the rights is justified. He believed that this power, retained by the Crown, answers the concern that Parliament has permanently abdicated its right to interfere with decisions of the Nisga'a government: at para. 128. He also relied on *Delgamuukw* for the proposition that Aboriginal title itself partly originates from pre-existing systems of Aboriginal law, and that the right to determine the appropriate use of land under such title is inextricably bound up with that title: at para. 134-137.

[110] The Court in *Campbell* concluded that s. 35 constitutionally guarantees the "limited form of self-government" codified in the Treaty: at para. 181.

[111] The plaintiffs in this case argue that the Treaty is inconsistent with the constitutional division of powers on substantially the same basis as did the plaintiffs in *Campbell*. I will follow *Campbell* in its conclusions, rejecting that argument.

[112] The *Campbell* plaintiffs submitted that all laws are proclaimed in force in Canada only by assent of the Queen's representative and that to entrench a legislative body absent Royal Assent, as the plaintiffs maintained the *NFA* does, would be unconstitutional. They did not succeed in that argument, for reasons which I will describe below.

[113] The plaintiffs argue the Royal Assent point before me more broadly than did the plaintiffs in *Campbell.* The plaintiffs in this case add a reference to the powers of reservation and disallowance. They plead that the *NFA* and the Settlement Legislation are inconsistent with the Constitution of Canada insofar as they grant the Nisga'a Lisims Government legislative jurisdiction to make laws without requiring Royal Assent and excluding the exercise of the powers of reservation and disallowance. They refer to ss. 55, 56, 57, 90, 91 and 92 of the *Constitution Act, 1867*.

[114] Sections 55-57 and 90 provide:

> 55. Where a Bill passed by the Houses of the Parliament is presented to the Governor General for the Queen's Assent, he shall declare, according to his Discretion, but subject to the Provisions of this Act and to Her Majesty's Instructions, either that he assents thereto in the Queen's Name, or that he withholds the Queen's Assent, or that he reserves the Bill for the Signification of the Queen's Pleasure.
>
> 56. Where the Governor General assents to a Bill in the Queen's Name, he shall by the first convenient Opportunity send an authentic Copy of the Act to One of Her Majesty's Principal Secretaries of State, and if the Queen in Council within Two Years after Receipt thereof by the Secretary of State thinks fit to disallow the Act, such Disallowance (with a Certificate of the Secretary of State of the Day on which the Act was received by him) being signified by the Governor General, by Speech or Message to each of the Houses of the Parliament or by Proclamation, shall annul the Act from and after the Day of such Signification.
>
> 57. A Bill reserved for the Signification of the Queen's Pleasure shall not have any Force unless and until, within Two Years from the Day on which it was presented to the Governor General for the Queen's Assent, the Governor General signifies, by Speech or Message to each of the Houses of the

> Parliament or by Proclamation, that it has received the Assent of the Queen in Council.
>
> ...
>
> 90. The following Provisions of this Act respecting the Parliament of Canada, namely, – the Provisions relating to Appropriation and Tax Bills, the Recommendation of Money Votes, the Assent to Bills, the Disallowance of Acts, and the Signification of Pleasure on Bills reserved, – shall extend and apply to the Legislatures of the several Provinces as if those Provisions were here re-enacted and made applicable in Terms to the respective Provinces and the Legislatures thereof, with the Substitution of the Lieutenant Governor of the Province for the Governor General, of the Governor General for the Queen and for a Secretary of State, of One Year for Two Years, and of the Province for Canada.

[115] In their written submissions the plaintiffs also refer to s. 9 of the *Constitution Act, 1867*, which states:

> 9. The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen.

[116] Mr. Jaffe refers to *O'Donohue v. Canada* [2003] O.J. No. 2746 at para. 20-23, where Rouleau J. stated:

> The preamble to the Constitution Act, 1867, (U.K.) 30 and 31 Victoria, c. 3, as amended, provides as follows:
>
> > Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom ...
>
> This portion of the preamble confirms not only that Canada is a constitutional monarchy, but also that Canada is united under the Crown of the United Kingdom of Great Britain. A constitutional monarchy, where the monarch is shared with the United Kingdom and other Commonwealth countries, is, in my view, at the root of our constitutional structure.
>
> [Emphasis added]

[117] The plaintiffs submit that although the monarchy, as the root of our constitutional structure, cannot be bypassed, the *NFA* purports to do so.

[118] As I have said, I will follow *Campbell* regarding the matters it decides. In *Campbell*, Mr. Justice Williamson heard arguments similar to those that the plaintiffs make here. He described those arguments, and stated his conclusions about them,

at para. 144-50. Distinguishing *In re The Initiative and Referendum Act*, [1919] A.C. 935 (J.C.P.C.), he stated at para. 149-50:

> The specific, limited powers granted to the Nisga'a Nation in the Treaty are distinguishable from what was attempted by the Manitoba legislature in 1916. By that statute, the Legislative Assembly abrogated totally its legislative powers and purported to grant to the majority of eligible voters among the population the authority to enact legislation granted to the legislature in Section 92 of the *British North America Act* as it then was known. The limited powers granted to the Nisga'a Nation cannot be described as "a profound constitutional upheaval". As I have found above, the powers granted to the Nisga'a Nation in the Treaty are limited and are within those contemplated by Section 35 of the *Constitution Act, 1982*.
>
> Finally, s. 55 of the *Constitution Act, 1982*, speaks of legislation passed by Parliament and, by later reference, legislation passed by the provinces. It does not on its wording apply to other law-making bodies.

[119] Mr. Jaffe said little about the reservation and disallowance power in his written or oral submissions, explaining that the issue is subsumed in his arguments relating to Royal Assent. Counsel for the defendants Attorney General of Canada and Nisga'a Nation submitted that, in any event, the power of reservation and disallowance has fallen into disuse.

[120] The power of reservation and disallowance referred to in s. 55 of the *Constitution Act, 1867,* is (in effect) the other side of the coin, or the corollary, of the requirement for Royal Assent. A power to assent implies the existence of a power to refrain from assenting. Since the *Campbell* case addressed whether the *NFA* is consistent with the Royal Assent requirement in s. 55 of the *Constitution Act, 1867*, it also implicitly addressed whether the *NFA* is consistent with its corollary.

[121] I find that the plaintiffs' claim based on an alleged infringement of the reservation and disallowance power is subsumed in their claim regarding the Royal Assent requirement, and that it, too, was decided in *Campbell*. I will again follow *Campbell* in its conclusion on this point.

[122] The final point decided in *Campbell* was not raised in the case before me, but I briefly describe it for the sake of completeness. Mr. Justice Williamson held that s. 25 of the *Charter* is a complete answer to the contention that the Treaty deprived

non-Nisga'a of their voting rights. He noted that s. 25 is meant to be a "shield", protecting treaty rights, and that it is not unusual for Canadians to be unable to vote or participate in the formation of local laws to which they are subject: at para. 160.

COLLATERAL ATTACK, JUSTICIABILITY AND STANDING

[123] One of the defendants, the Province of British Columbia, takes the position that this Court should not proceed to determine the plaintiffs' case on the merits because, for several reasons, it is unsuitable for adjudication. The reasons alleged by the Province are interrelated: that the plaintiffs do not have standing as of right (private interest standing) and should not be granted public interest standing; that the plaintiffs have put forward little or no factual matrix and raise merely hypothetical issues; that the plaintiffs' claims are not justiciable because they are not "ripe"; and that the plaintiffs' claims amount to a form of collateral attack on the *Campbell* decision. The Province points to the overarching principle of restraint – that courts should not decide matters that are unnecessary for them to decide, where there is no practical dispute between the parties.

[124] The other two defendants, Canada and the Nisga'a Nation, disagree with the Province and are content that the Court proceed; indeed, they urge the Court to decide this case on its merits in order that, if the parties so wish, they can obtain the rulings from higher courts that were foreclosed when the *Campbell* plaintiffs abandoned their appeal.

Positions of the Parties

(1) Attorney General of British Columbia

[125] The Province's position is that the plaintiffs have neither private nor public interest standing and that the plaintiffs in effect seek to bring a reference regarding the constitutionality of the Settlement Legislation and the Nisga'a Treaty.

[126] Ms. Owen argues that the plaintiffs seek no practical relief and do not identify any Nisga'a laws, constitutional or otherwise, that they claim affect them. The plaintiffs have identified nothing, in her submission, that differentiates their interest in

the constitutionality of the *NFA* from the interests of all other British Columbians. For this reason, the Province says, the plaintiffs lack private interest standing.

[127] The Province says, with respect to public interest standing, that the lack of a factual foundation and the hypothetical nature of the proposed questions cast doubt upon whether the plaintiffs raise serious issues of constitutional validity.

[128] The Province further submits that there are clearly other reasonable and effective ways to bring the question of constitutional validity of Nisga'a laws before the court.

[129] Citing *Henry v. Canada (A.G.),* 2010 BCSC 610, Ms. Owen argues that "courts should not decide hypothetical issues". There must be a proper factual foundation before legislation or treaties are measured against the Constitution, and the relief sought must not be merely hypothetical: *Danson v. Ontario (A.G.)*, [1990] 2 S.C.R. 1086; *Canadian Bar Assn. v. British Columbia*, 2008 BCCA 92, 76 B.C.L.R. (4th) 48; and *Kaska Dena v. British Columbia (A.G.)*, 2008 BCSC 455. The Province urges that it is not in the interest of the treaty process to allow public interest standing to challenge treaties where no specific adverse effect of the treaty is identified.

[130] The Province argues that concerns regarding the paramountcy of Nisga'a laws over federal or provincial laws in the event of inconsistency or conflict cannot be addressed in the abstract; rather, paramountcy issues should be addressed in the context of a specific exercise of the impugned legislative power.

[131] Ms. Owen further argues that this action amounts to a collateral attack on *Campbell*, and is impermissible as an abuse of process. However, the Province does not seek dismissal on that basis; rather, it argues that this factor should be considered in the context of the exercise of this Court's discretion to grant the plaintiffs standing.

(2) Plaintiffs

[132] The plaintiffs submit that the Court should take a generous and liberal approach to standing, as prescribed in *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, and reiterated in *Cassells v. University of Victoria,* 2010 BCSC 1213 at para. 69.

[133] The plaintiffs submit that there is a serious issue to be tried. In their submission, the issue is so serious that the B.C. government sought public ratification of its position by putting it to a public referendum in 2002.

[134] The plaintiffs further submit that although normally the federal or provincial government would be able to instigate a constitutional Reference regarding the Treaty's validity, in this case, the governments (and the Nisga'a Nation) agreed to be bound by the Treaty. The plaintiffs submit that, accordingly, the only avenue by which the constitutionality of the self-government provisions of the *NFA* can be put before the court is through private actions brought by persons such as the plaintiffs.

[135] On the question of ripeness, the plaintiffs submit that, as in *Henry*, the issue is not hypothetical because the legislation has been passed and it affects the rights of the plaintiffs.

[136] As to the argument that this case amounts to a collateral attack, the plaintiffs disagree. They also point out that the Province did not plead abuse of process or collateral attack.

(3) Nisga'a Nation

[137] The defendant Nisga'a Nation disagrees with the Province's position regarding standing, justiciability or ripeness, or collateral attack. Instead, it takes the position that this Court should proceed to determine the plaintiffs' claim on the merits.

(4) Attorney General of Canada

[138] Canada's position, similarly, is that this Court should proceed to determine the plaintiffs' claim rather than dismiss it for want of standing, lack of justiciability or ripeness, or abuse of process. On the other hand, Mr. Russell for Canada submits that, insofar as the plaintiffs are attempting to argue that the rights in the Treaty are not constitutionally protected as Aboriginal rights, that question is of a different kind and should not be decided without a greater factual matrix.

[139] In oral argument, Mr. Russell submitted that the courts have recognized that in certain circumstances it is appropriate for the constitutionality of legislation to be addressed in an action that merely seeks a declaration of unconstitutionality, citing *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138.

[140] Mr. Russell submits that it is important for the citizens of Canada to know whether or not a statute is constitutionally valid, and in this particular case whether or not the treaty right of self-government is constitutionally valid. He submits that this issue is of substantial practical significance for the B.C. treaty process and "justiciable" in the sense that the court *should* answer the question. He refers to *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3, where the Court proceeded to render its decision in a matter that was moot. Referring at para. 20 to the concern for conserving scarce judicial resources, the majority *per* Iacobucci and Arbour JJ. observed that an expenditure of judicial resources is warranted in cases that raise important issues but are evasive of review. The majority also noted the social cost of continued uncertainty in the law (at para. 21).

[141] Mr. Russell submits that the constitutionality of legislation is such an important part of a provincial superior court's jurisdiction that it cannot be excluded by federal statutes, citing *A.G. Canada v. Law Society of B.C.*, [1982] 2 S.C.R. 307 at 326-27.

[142] Canada also relies on *Dumont v. Canada* (1988), 52 D.L.R. (4th) 25 (Man. C.A.) and *Dumont v. Canada (Attorney General)*, [1990] 1 S.C.R. 279. In *Dumont*, the plaintiffs sought a declaration that federal and provincial legislation enacted

between 1871 and 1886 to implement a land distribution policy was *ultra vires*. The plaintiffs wished to use the declaration in negotiations for a land claims agreement for the descendants of Métis persons entitled to land and other rights under ss. 31 and 32 of the *Manitoba Act*, S.C. 1870, c. 3. The majority in the Court of Appeal held that the issue the plaintiffs raised was not justiciable since it related to spent legislation that did not affect anyone's rights at that time. The Supreme Court of Canada disagreed, and held that the claim should not have been struck, stating at 280:

> The Court is of the view also that the subject matter of the dispute, inasmuch as it involves the constitutionality of legislation ancillary to the *Manitoba Act, 1870* is justiciable in the courts and that declaratory relief may be granted in the discretion of the court in aid of extra-judicial claims in an appropriate case.

[143] In response to the suggestion that there is an insufficient factual matrix before the Court, Canada's position is that the *NFA* and the Settlement Legislation are before the Court and that adjudicative facts are unnecessary in light of the nature of the plaintiffs' challenge. The challenge is not based upon an alleged infringement of the *Charter* rights or the Aboriginal rights of anyone, but instead upon the constitutional *vires* of the legislation, in Canada's view. Mr. Russell argues that the case can and should be determined based upon the law and the legislative facts (in particular, the *NFA* itself) that are before this Court.

Analysis

[144] I observe at the outset some salient features of this case.

[145] First, the plaintiffs' claim is not under the *Charter*. The plaintiffs do not allege an infringement of their *Charter* rights or an infringement of anyone else's *Charter* rights. They do not point to any specific law or action undertaken pursuant to the *NFA* or argue that a specific law or action permitted by the *NFA* has adversely affected them or anyone else. Instead, the plaintiffs urge the Court to declare that certain aspects of the *NFA*, as enabled by the Settlement Legislation, are unconstitutional because they are inconsistent with the division of powers created

under ss. 91 and s. 92 of the *Constitution Act, 1867*. This factor is particularly significant in considering whether there is a factual matrix and whether the plaintiffs' claim is justiciable.

[146] Second, it does not appear that other challenges to the Treaty, or to actions taken or laws passed pursuant to the Treaty, are making their way through the courts. As well, neither the provincial nor the federal government has sought a Reference regarding the constitutionality of the *NFA* and there is no evidence that either intends to do so. In fact, both governments agreed, when they entered into the Treaty, that they would not challenge or support a challenge to any of its provisions in court.

[147] Third, it appears that in the *Campbell* case no party raised a question as to the standing of the plaintiffs to argue the constitutional issues, or their justiciability, even though the *Campbell* plaintiffs had no direct connection to the Nisga'a Nation or to the Treaty.

(1) Collateral attack

[148] I will begin with the Province's argument that this claim amounts to a collateral attack on the *Campbell* case and constitutes an abuse of process. The argument was made as part of the Province's submission that the plaintiffs do not qualify for standing because there is no serious issue to be tried. However, I think that it should be considered on its own: if the plaintiffs' claim constitutes an abuse of process, that raises different considerations than does the question whether the plaintiffs have identified a serious issue to be tried.

[149] The Province relies on *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, [2003] 3 S.C.R. 77 for its submission that the plaintiffs' action amounts to a collateral attack on *Campbell* or an abuse of process.

[150] In *Toronto v. C.U.P.E.* the issue was summarized by Arbour J. in this way, at para. 1: "Can a person convicted of sexual assault, and dismissed from his

employment as a result, be reinstated by a labour arbitrator who concludes, on the evidence before him, that the sexual assault did not take place?"

[151] The Court found that the arbitrator could not revisit the criminal conviction. This was not because of issue estoppel, since the requirement of mutuality of parties was not met. Nor did the rule against collateral attack precisely apply. The rule against collateral attack provides, according to Binnie J. in *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460 at para. 20: "that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it." In *Toronto v. C.U.P.E.* the union did not seek to overturn the criminal conviction itself, but instead to attack the factual basis of the decision in a different context.

[152] However, under the inherent discretion that courts possess to prevent an abuse of their own process, a court may prevent an attempt to relitigate a claim that the court has already determined: *Toronto v. C.U.P.E.* at para. 37. The majority *per* Arbour J. observed at para. 51-52 that the focus must be on the integrity of the adjudicative process, taking into account factors such as that relitigation will not necessarily lead to a more accurate result, and that inconsistency will undermine the credibility of the judicial process. At the same time, relitigation may enhance the integrity of the judicial system where, for example, a proceeding is tainted by fraud or dishonesty. At para. 53, the majority commented:

> The discretionary factors that apply to prevent the doctrine of issue estoppel from operating in an unjust or unfair way are equally available to prevent the doctrine of abuse of process from achieving a similar undesirable result. There are many circumstances in which the bar against relitigation, ... would create unfairness. If, for instance, the stakes in the original proceeding were too minor to generate a full and robust response, while the subsequent stakes were considerable, fairness would dictate that the administration of justice would be better served by permitting the second proceeding to go forward than by insisting that finality should prevail. An inadequate incentive to defend, the discovery of new evidence in appropriate circumstances, or a tainted original process may all overcome the interest in maintaining the finality of the original decision. [Emphasis added]

[153] Thus, when exercising discretion to prevent abuse of process through relitigation, courts must consider the impact of relitigation not only on the parties but also on the administration of justice.

[154] No defendant pleaded that the plaintiffs' claim constitutes an abuse of process, and during the many years that this litigation took to come to court, the Province did not raise the issue or apply to strike the plaintiffs' claim on this ground.

[155] Further, the policy reasons underlying the comity principle are similar to those underlying the court's discretion to prevent abuse of process, and the abuse of process argument is a close cousin of the argument that I should follow *Campbell*. Specifically, the factors Arbour J. identified in *Toronto v. C.U.P.E.* that indicate when relitigation may enhance the integrity of the judicial process closely resemble the exceptions to the comity principle that Wilson J. articulated in *Hansard Spruce Mills.* I have already determined that I will follow *Campbell* as to the matters it decides, taking into account those policy considerations.

[156] Finally, I note that the plaintiffs raise some issues that were not decided in the *Campbell* litigation. For those reasons, and because I think that the administration of justice is better served by allowing this case to go forward, I decline to give effect to the Province's submissions that the plaintiffs' claim constitutes an abuse of process.

(2) Justiciability

[157] The Province pleaded that there is an insufficient factual foundation to permit a decision on the plaintiffs' claim and that the questions the plaintiffs pose are not ripe for determination. Ms. Owen submits that it would be open to the court to dismiss the claim for those reasons either on their own, or as showing why the plaintiffs fail to raise a serious issue and should be denied public interest standing.

[158] I will consider this question in two parts. At this juncture I will address the justiciability of the plaintiffs' main claim, that the Treaty's self-government provisions are unconstitutional for being inconsistent with the division of legislative powers.

Later, I will address as a separate matter the justiciability of the plaintiffs' claim that the Treaty's provision for the establishment of a Nisga'a court is inconsistent with s. 96 of the *Constitution Act, 1867*.

[159] Distinct from the question of who can bring a challenge to legislation or government action is the question of the suitability of the challenge (including its timing or ripeness) and whether it is grounded in a sufficient factual matrix.

[160] In *Kaska Dena,* the Kaska Dena Council sought a declaration that certain references to Aboriginal rights in an agreement it had made with the Province were to "existing Aboriginal rights" within the meaning of s. 25 of the *Charter* and s. 35 of the *Constitution Act, 1982*. There was no specific factual situation, other than the execution of the agreement, giving rise to the petition -- no suggestion of a breach of the agreement or that the right or interest of any party was in jeopardy.

[161] The Chambers judge dealt with the matter, but the Court of Appeal said it was an error to do so. Madam Justice Newbury for the Court referred (at para. 12) to *Operation Dismantle Inc. v. Canada*, [1985] 1 S.C.R. 441 where Dickson J. stated for the majority (at para. 33) that "...the preventative function of the declaratory judgment must be based on more than mere hypothetical consequences; there must be a cognizable threat to a legal interest before the courts will entertain the use of its process as a preventive measure." Stating that a "real" issue may arise where there is an actual or threatened infringement of a right, including a contractual right, the Court referred to the decision of Mr. Justice Lysyk in *Cheslatta Carrier Nation v. British Columbia* [1999] B.C.J. No. 2639, aff'd 2000 BCCA 539 (leave to appeal refused, [2000] S.C.C.A. No. 625). Newbury J.A. then stated at para. 14-16:

> ...The parties' disagreement as to whether the aboriginal rights of the Kaska Dena referred to in the LOU are constitutionally protected seems only an intellectual disagreement that might arise between any two persons reading the agreement. The petitioner's only "claim" is that its position is the correct one.
>
> In these circumstances, it is my view that the Chambers judge erred in embarking on the task of construing or interpreting the LOU.

> In addition, the absence of any factual context provided by the pleadings in a case in which a constitutional question is raised, militates against the exercise of the Court's discretion (see this court's decision in *Cheslatta, supra*, at para. 12) in favour of expressing its opinion concerning the questions posed by the Council. The Supreme Court of Canada has noted on many occasions that factual context is particularly important in constitutional cases and in cases concerning aboriginal rights: see *R. v. Gladstone* [1996] 2 S.C.R. 723, at paras. 56 and 65. As stated by the Court in *MacKay v. Manitoba* [1989] 2 S.C.R. 357 in another context, "the presentation of facts is not ... a mere technicality; rather, it is essential to a proper consideration of *Charter* issues. A respondent cannot, by simply consenting to dispense with factual background, require or expect a court to deal with an issue such as this in a factual void. *Charter* decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel." (At 361-2.) The same must be true of decisions relating to aboriginal rights protected by the *Constitution Act, 1982*. (See also *Katlodééche First Nation v. Canada*, [2003] N.W.T.J. No. 85, [2004] 8 W.W.R. 233 (N.W.T. S.C.), at paras. 29-31.) [Emphasis added]

[162] The principles set forth there are clear: factual context is particularly important in constitutional cases and in cases concerning Aboriginal rights; and cases should not be decided on the basis of hypothetical facts.

[163] As I have already noted, the Province argues that most of the issues raised by the plaintiffs have already been decided, and that none of the issues they raise is situated in a foundation of concrete facts, such as a law passed or a specific administrative decision taken by the Nisga'a Lisims Government. For those reasons, the Province says the Court should not exercise its discretion to grant the plaintiffs standing and entertain their claim, which they say is largely hypothetical.

[164] It is true that the preponderance of the issues raised by the plaintiffs were decided in *Campbell*. However, as the other defendants suggest, the remaining issues and the need to test the validity of this Treaty in a higher court, may warrant going ahead to decide the case on its merits.

[165] The plaintiffs do not base their claim on any action taken by the Nisga'a Lisims Government or any Nisga'a institutions. What they dispute is the constitutional underpinnings of the Treaty – the very possibility that it might empower the Nisga'a Lisims Government or another Nisga'a institution to make laws or take action that would otherwise be within the exclusive jurisdiction of either the federal or

provincial government. The plaintiffs' challenge is to the creation or recognition of jurisdiction, not to any exercise of jurisdiction.

[166] Viewed in that way, the challenge is not hypothetical. This is not a challenge to a treaty that might be made; it is a challenge to the comprehensive Treaty that has been in effect for eleven years, ratified by the two levels of government through the Settlement Legislation, creating or acknowledging jurisdiction for the Nisga'a Nation to govern itself and make laws.

[167] In my opinion, the plaintiffs' claim is distinguishable from that made in *Kaska Dena* because it is a constitutional challenge to a Treaty and its enabling legislation. *Kaska Dena*, on the other hand, concerned a request for judicial interpretation of particular provisions of an agreement, in a factual vacuum.

[168] In *Thorson* at 145, Mr. Justice Laskin (as he then was) referred to *Dyson v. The Attorney General*, [1911] 1 K.B. 410. He noted that courts are able to prevent a proliferation of declaratory actions, and then commented on justiciability as follows:

> A more telling consideration for me, but on the other side of the issue, is whether a question of constitutionality should be immunized from judicial review by denying standing to anyone to challenge the impugned statute. That, in my view, is the consequence of the judgments below in the present case. The substantive issue raised by the plaintiff's action is a justiciable one; and, *prima facie*, it would be strange and, indeed, alarming, if there was no way in which a question of alleged excess of legislative power, a matter traditionally within the scope of the judicial process, could be made the subject of adjudication. [Emphasis added]

[169] The question in *Thorson* that was held to be justiciable was whether the *Official Languages Act*, 1968-69 (Can.), c. 54 (and the provision of money to implement it) was unconstitutional. Having said (at 151) that the question of the constitutionality of legislation has in this country always been a justiciable question, Laskin J. further stated (at 163) that "[i]t is not the alleged waste of public funds alone that will support standing but rather the right of the citizenry to constitutional behaviour by Parliament where the issue in such behaviour is justiciable as a legal question."

[170] The obligation of courts to decide constitutional issues was stated forcefully in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 at para. 136:

> Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the Constitution. But the courts also have a role: to determine, objectively and impartially, whether Parliament's choice falls within the limiting framework of the Constitution.

[171] I am persuaded by Canada's position that the nature of this challenge is such that it is not essential for specific Nisga'a Government enactments or actions to be placed before the court.

[172] While the plaintiffs do not allege that any particular Nisga'a Nation laws infringe constitutional principles, they say that the Treaty itself does. The factual foundation of the claim is in the *NFA* and Settlement Legislation. I find that to be a sufficient factual foundation and that the claim is justiciable, with the exception of the claim based on s. 96 of the *Constitution Act, 1867*. I will address that matter later.

(3) Standing

Failure to plead want of standing

[173] The Province did not plead that the plaintiffs lacked standing, nor did it bring an application to strike the plaintiffs' claim before trial on that basis. The Province questioned the plaintiffs' standing for the first time, as I understand it, in the Province's written submissions. Nevertheless, Ms. Owen submits, the question of standing should be addressed by the Court, even if it has not been pleaded. She cites *Sierra Club of Canada v. Comox Valley (Regional District)*, 2010 BCCA 343, where Mr. Justice Chiasson wrote at para. 27: "... generally where a litigant does not have a direct interest in the dispute, before the matter is considered the court should address whether the litigant has standing to participate in the litigation". He added that parties cannot consent to standing, although their consent or non-opposition is relevant.

[174] Because I have concluded that, in any event, the plaintiffs should be granted public interest standing, it is unnecessary for me to decide whether the Province should have pleaded want of standing or raised the question earlier than it did.

Principles governing standing

[175] There are two categories of standing: private interest and public interest.

[176] A fundamental principle of our legal system is that a person who has a direct personal interest in the question to be litigated is legally entitled to invoke the jurisdiction of the court. That person will have standing as of right (private interest standing) on that question. Standing as of right has been said to require "personal exceptional prejudice" or, if a person is charged with a criminal offence, that a third party's rights are infringed unconstitutionally by the law under which the charge is laid: *604598 Saskatchewan Ltd. (c.o.b. Great Canadian Superbar) v. Saskatchewan (Liquor and Gaming Licensing Commission)* (1998), 157 D.L.R. (4th) 82 (Sask. C.A.) at para. 28.

[177] Public interest standing arises from the courts' recognition that, particularly in constitutional challenges, it may be in the public interest to permit persons to pursue litigation even though they do not qualify for private interest standing. The central purpose of public interest standing is to prevent the immunization of legislation or public acts from any challenge.

[178] Prior to the advent of the *Charter*, the Supreme Court of Canada had developed principles under which individual citizens could challenge legislation.

[179] As I have noted, in *Thorson*, Mr. Thorson, suing as a taxpayer in a class action, was allowed to proceed with a claim for a declaration that the *Official Languages Act* was unconstitutional. Mr. Justice Laskin wrote at 161:

> In my opinion, standing of a federal taxpayer seeking to challenge the constitutionality of federal legislation is a matter particularly appropriate for the exercise of judicial discretion, relating as it does to the effectiveness of process. Central to that discretion is the justiciability of the issue sought to be raised, a point that could be said to be involved (although the case was not

> decided on that basis) in *Anderson v. Commonwealth* [(1932), 47 C.L.R. 50], where the High Court of Australia denied standing to a member of the public to challenge the validity of an agreement between the Commonwealth and one of the States. Relevant as well is the nature of the legislation whose validity is challenged, according to whether it involves prohibitions or restrictions on any class or classes of persons who would thus be particularly affected by its terms beyond any effect upon the public at large. If it is legislation of that kind, the Court may decide, as it did in the *Smith* case, that a member of the public, and perhaps even one like *Smith*, is too remotely affected to be accorded standing. On the other hand, where all members of the public are affected alike, as in the present case, and there is a justiciable issue respecting the validity of legislation, the Court must be able to say that as between allowing a taxpayers' action and denying any standing at all when the Attorney General refuses to act, it may choose to hear the case on the merits. [Emphasis added]

[180] In *Canadian Council of Churches,* an umbrella organization of churches alleged that amendments to federal legislation infringed the *Charter* rights of refugees. The Court denied standing to the Canadian Council of Churches because there were other reasonable methods of bringing the matter before the Court. For example, individual claimants for refugee status, some of whom had already challenged the legislation, could have brought the challenge.

[181] Concerns about conservation of scarce judicial resources were prominent in the reasoning of the Court in that case. After canvassing the positions of other common law jurisdictions on the question of standing, and characterizing the positions elsewhere as more restrictive than Canada's, Mr. Justice Cory summarized the pre-*Charter* and post-*Charter* position in Canada as follows (at para. 28-32):

> Courts in Canada like those in other common law jurisdictions traditionally dealt with individuals. For example, courts determine whether an individual is guilty of a crime; they determine rights as between individuals; they determine the rights of individuals in their relationships with the state in all its various manifestations. One great advantage of operating in the traditional mode is that the courts can reach their decisions based on facts that have been clearly established. It was by acting in this manner that the courts established the rule of law and provided a peaceful means of resolving disputes. Operating primarily, if not almost exclusively, in the traditional manner courts in most regions operate to capacity. Courts play an important role in our society. If they are to continue to do so care must be taken to ensure that judicial resources are not overextended. This is a factor that will always have to be placed in the balance when consideration is given to extending standing.

> On the other hand there can be no doubt that the complexity of society has spawned ever more complex issues for resolution by the courts. [...]
>
> The state has been required to intervene in an ever more extensive manner in the affairs of its citizens. The increase of state activism has led to the growth of the concept of public rights. The validity of government intervention must be reviewed by courts. Even before the passage of the *Charter* this Court had considered and weighed the merits of broadening access to the courts against the need to conserve scarce judicial resources. It expanded the rules of standing in a trilogy of cases; *Thorson v. Attorney General of Canada*, *supra*, *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265, and *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575. [...]
>
> ...
>
> The rule of law is thus recognized as a corner stone of our democratic form of government. It is the rule of law which guarantees the rights of citizens to protection against arbitrary and unconstitutional government action. This same right is affirmed in s. 52(1) which states:
>
> > 52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.
>
> Parliament and the legislatures are thus required to act within the bounds of the constitution and in accordance with the *Charter*. Courts are the final arbiters as to when that duty has been breached. As a result, courts will undoubtedly seek to ensure that their discretion is exercised so that standing is granted in those situations where it is necessary to ensure that legislation conforms to the Constitution and the *Charter*.
>
> [Emphasis added]

[182] Asking itself whether the current test for public interest standing should be expanded, the Court answered (at para. 35-36):

> The increasing recognition of the importance of public rights in our society confirms the need to extend the right to standing from the private law tradition which limited party status to those who possessed a private interest. In addition some extension of standing beyond the traditional parties accords with the provisions of the *Constitution Act, 1982*. However, I would stress that the recognition of the need to grant public interest standing in some circumstances does not amount to a blanket approval to grant standing to all who wish to litigate an issue. It is essential that a balance be struck between ensuring access to the courts and preserving judicial resources. It would be disastrous if the courts were allowed to become hopelessly overburdened as a result of the unnecessary proliferation of marginal or redundant suits brought by a well-meaning organizations pursuing their own particular cases certain in the knowledge that their cause is all important. It would be detrimental, if not devastating, to our system of justice and unfair to private litigants.

> The whole purpose of granting status is to prevent the immunization of legislation or public acts from any challenge. The granting of public interest standing is not required when, on a balance of probabilities, it can be shown that the measure will be subject to attack by a private litigant. The principles for granting public standing set forth by this Court need not and should not be expanded. The decision whether to grant status is a discretionary one with all that that designation implies. Thus undeserving applications may be refused. Nonetheless, when exercising the discretion the applicable principles should be interpreted in a liberal and generous manner.
>
> [Emphasis added]

[183] The Court set out (at para. 37) the three criteria to be applied in exercising discretion to grant public interest standing, as follows: (1) is there a serious issue raised as to the invalidity of legislation in question? (2) has it been established that the plaintiff is directly affected by the legislation, or if not, does the plaintiff have a genuine interest in its validity? (3) is there another reasonable and effective way to bring the issue before the court?

[184] In its recent decision in *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, 2010 BCCA 439, leave to appeal to the Supreme Court of Canada allowed, [2010] S.C.C.A. No. 457, the Court of Appeal for British Columbia considered an attempted challenge to *Criminal Code* provisions regarding soliciting. The challenge was brought by an individual and an organization. The trial judge had concluded that both plaintiffs lacked private interest standing and that they did not qualify for public interest standing. The Court of Appeal majority agreed with respect to private interest standing, stating at para. 29:

> I would not accede to these several submissions. The law on private interest standing is, in my view, well stated by the judge. Ms. Kiselbach must be able to establish a direct, personal interest in the impugned provisions: *Finlay v. Canada,* at 622. In words approved in *Finlay* from the High Court of Australia decision in *Australian Conservation Foundation Incorporated v. Commonwealth* (1980), 146 C.L.R. 493, 28 A.L.R. 257, Ms. Kiselbach must establish that she "is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest" or to "suffer some disadvantage, other than a sense of grievance or debt for costs". [Emphasis added]

[185] The Court of Appeal found that public interest standing should have been granted. Madam Justice Saunders for the majority referred to the appellants' submissions regarding the vulnerability of persons who work in the sex trade, and said at para. 62 that the reasons of the Chambers judge "do not fully reflect the systemic and comprehensive nature of the challenge advanced". She concluded on this point, at para. 64-66:

> During the hearing of the appeal, concern was expressed that the case would amount to the work of a Commission of Inquiry. I do not agree. It seems to me inconsistent to say "do not worry – this challenge may be brought by an individual", and also to say that hearing the case advanced, which all agree raises justiciable issues, is beyond the role of the courts. Justice Laskin's cautious statement in *Thorson* that "The question of the constitutionality of legislation has in this country always been a justiciable question" articulates an important principle, one which requires provision of a venue to permit that question to be heard.
>
> ...
>
> In this case I respectfully conclude the judge failed to give sufficient weight to the breadth of the constitutional challenge and the comprehensive and systemic nature of the plaintiffs' theory. The balance struck by the jurisprudence is between judicial economy and openness to court review of seriously challenged legislation. In my respectful view, the third criterion, considering the claim in total, is met and the balance tips toward access to court review of the impugned legislation.
>
> [Emphasis added]

[186] In Peter Hogg, *Constitutional Law of Canada*, looseleaf, 5th ed. (Toronto: Thomson Reuters Canada Limited, 2007) ["*Hogg*"], the author criticizes the idea that the test for public interest standing should be less liberal where the challenge is on federalism grounds rather than on *Charter* grounds (at pp. 59-11):

> Although it has been argued that private persons ought not to be permitted to challenge a statute on federalism grounds [an argument made by Weiler in *In the Last Resort* (1974), ch. 6; criticized in Swinton, *The Supreme Court and Canadian Federalism* (1990), ch. 2.], the argument has never been considered by the courts. On the contrary, it has always been assumed that a private person does have standing to challenge on federalism grounds a law that purportedly applies to him. This assumption, although never articulated and defended, accords with a basic notion of constitutionalism that insists that governments must stay within the limits of their legal powers. When a private person challenges a law on federalism grounds, no matter how selfish the motive of the challenger, the private person is enforcing a

> regime of constitutionalism that requires governments to obey the Constitution. [Emphasis added]

[187] Professor Hogg refers to *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 at 313, which states that standing and jurisdiction to challenge the validity of a law pursuant to which one is being prosecuted is the same whether that challenge is based on division of powers grounds or on the *Charter*.

Application of the principles governing standing

[188] For a party to have private interest standing, there must be a live controversy directly affecting that party's interests. The individual plaintiffs are Nisga'a citizens. As Nisga'a citizens, their rights could have been affected by the Treaty. However, they have not pleaded the case in that way. They do not claim that the Treaty, or laws or actions made possible by the Treaty, have specifically affected them. They do not claim, and have not led evidence to establish, personal exceptional prejudice caused by the Treaty or a direct personal interest in the outcome of this litigation.

[189] I find that the plaintiffs have not established private interest standing.

[190] Turning to public interest standing, the first question is whether there is a serious issue to be tried.

[191] From a broad and perhaps simplistic perspective, it would seem that for the parties to the Treaty few issues could be more serious than the Treaty's constitutional validity. However, although this Court in *Campbell* addressed the question of the constitutional validity of the *NFA*, that case did not proceed on appeal. Decisions of higher courts on this important issue would assist the parties, and others, in governing their affairs.

[192] The point of this inquiry about the seriousness of the issue to be tried, however, is not simply to assess the importance of the issues to the parties or the public. Whether or not it is of great importance, an issue that has already been decided, that is not situated in a sufficient factual foundation, or that is merely hypothetical, may be an issue that should not be decided or for which public interest

standing should not be granted. The overarching principle of restraint – that courts should only decide constitutional issues when it is necessary for them to do so – must never be overlooked.

[193] Nevertheless, for the reasons I have given, I think that the question of whether the Treaty is inconsistent with long-standing principles of Canadian federalism is justiciable, is not merely hypothetical and does not constitute an abuse of process.

[194] I find that the plaintiffs raise a serious issue and meet the first criterion for public interest standing.

[195] The second question is whether the plaintiffs, as Nisga'a citizens, have a genuine and serious interest in the matter. That much was conceded by the Province. The plaintiffs have taken a long-standing interest in the constitutionality of the Treaty, as is evidenced by the history set out in Appendix A. I find that the plaintiffs have a genuine and serious interest.

[196] The third question is whether there is another reasonable and effective way for the question of the constitutional validity of the self-government provisions of the *NFA* to be brought before the Court.

[197] This case is different from cases like *Canadian Council of Churches* and *Downtown Eastside Sex Workers*, where individuals' *Charter* rights underpinned the challenge. The challenge here is not based on the alleged infringement of anyone's rights, but on alleged deviation from principles of federalism.

[198] Because the underlying dispute is whether a treaty can provide for a First Nation to make laws and to govern itself in the manner set out in the *NFA*, the primary way in which that question could come to court would be through one of the parties to a treaty taking objection. However, the parties to this Treaty have agreed not to challenge the validity of its provisions or to support such a challenge. There was no evidence of any similar challenge to self-government provisions in another treaty coming forward in the courts at the behest of other parties. I take judicial

notice that few other treaties have been made in recent years, despite lengthy negotiations, strenuous efforts and great expense.

[199] I think that the position taken by the Province would come very close to immunizing the Treaty and its enabling legislation from any review. As was stated in *Thorson* and in *Canadian Council of Churches*, the central purpose of public interest standing is to prevent such immunity.

[200] Finally, I note that real concern about the scarcity of judicial resources might have led the Province to raise this question at a much earlier stage (for example, to plead that the plaintiffs did not have standing, and to bring on an application to strike before trial). As the other three parties to this litigation suggested, each in their own way, these proceedings have had a lengthy history and it seems desirable for all concerned to receive a judicial decision on the merits of the plaintiffs' challenge so that, if the parties wish, they can go to a higher court.

[201] I find that it is appropriate to exercise my discretion to grant the plaintiffs public interest standing.

[202] Having dealt with the preliminary issues, I will now discuss the merits of the plaintiffs' claim.

THE DELEGATION ARGUMENTS

[203] As I have already explained, in *Campbell* Mr. Justice Williamson concluded that the division of powers in the *Constitution Act, 1867* was not exhaustive and that the source of the self-government rights in the Treaty lay in the pre-existing self-government rights of Aboriginal peoples. He did not address the possibility of delegation from either level of government as a source of the rights, nor did he address whether, if the rights in the Treaty were delegated, the delegation was properly effected.

[204] The Settlement Legislation does not explicitly state that powers are delegated to the Nisga'a Nation by either the federal or provincial Crown. Nevertheless, the

two Crowns argue that delegation provides an alternative basis for the conclusion that the *NFA* is constitutional. The provincial Crown puts it this way: "It is not necessary for the court to determine whether the right to self-government reflected in the Nisga'a Treaty is based on an existing Aboriginal right or a combination of an existing right and delegated rights because, in any event, the law-making powers in the Nisga'a Treaty, including the taxation power, were properly delegated by both the federal and provincial governments to the extent they needed to be."

[205] Relevant to the delegation arguments, Mr. Justice Williamson held in *Campbell* (at para. 181) that: (1) s. 35 constitutionally guarantees the limited form of self-government which remained with the Nisga'a after the assertion of sovereignty by the Crown; (2) the *NFA* and the settlement legislation give that limited right definition and content; and (3) the federal or provincial government can infringe the now-entrenched treaty rights in the *NFA* if the infringement is justified and consistent with the honour of the Crown.

[206] The above propositions are relevant because one of the plaintiffs' central arguments is that the self-government powers in the Treaty could not have been delegated: they say that delegation must be retractable, but the self-government provisions in the Treaty are not.

Positions of the Parties

(1) Plaintiffs

[207] The plaintiffs say that the transfer of legislative powers to the Nisga'a Government constitutes derogation and not delegation.

[208] Mr. Jaffe urges that delegation must be clear, specific and retractable. He argues that the "litmus test" for valid delegation is whether the transfer of power can be retracted or withdrawn. He refers to *Attorney General of Nova Scotia v. Attorney General of Canada (Nova Scotia Inter-delegation Reference)*, [1951] S.C.R. 31, and to *R. v. Furtney*, [1991] 3 S.C.R. 89, where Stevenson J. stated at p. 104:

> The prohibition is against delegation to a legislature. There is no prohibition against delegating to any other body. The power of Parliament to delegate its legislative powers has been unquestioned, at least since the *Reference as to the Validity of the Regulations in Relation to Chemicals*, [1943] S.C.R. 1. The delegate is, of course, always subordinate in that the delegation can be circumscribed and withdrawn.

[209] The plaintiffs say that the federal and provincial governments cannot retract or withdraw any delegation they have made to the Nisga'a, and that the delegation is therefore invalid. They point to the fact that almost any amendment to the *NFA* requires the consent of all parties (by virtue of Chapter 2, para. 36). They point to the many instances in which the Treaty provides that "in the event of an inconsistency or conflict between a Nisga'a law under paragraph.... and a federal or provincial law, the Nisga'a law prevails to the extent of the inconsistency or conflict" (for example, Chapter 11, para. 49), and to contrasting provisions in other parts of the Treaty that provide for a federal or provincial law to prevail (for example, Chapter 11, para. 52). They further argue that it would be inconsistent with the honour of the Crown to enter into the Treaty and then infringe it, referring to *Beckman v. Little Salmon/Carmacks* at para. 71 and 108.

[210] The plaintiffs acknowledge that the Treaty provides in Chapter 2, para. 8, that the *NFA* "does not alter the Constitution of Canada," including the distribution of powers between Canada and British Columbia, the identity of the Nisga'a Nation as an Aboriginal people of Canada, and ss. 25 and 35 of the *Constitution Act, 1982*. However, Mr. Jaffe argues, that provision is merely declaratory and essentially meaningless.

[211] Mr. Jaffe refers to Chapter 2, para. 23 of the Treaty, which states:

> 23. <u>This Agreement exhaustively sets out Nisga'a section 35 rights, the geographic extent of those rights, and the limitations to those rights, to which the Parties have agreed</u>, and those rights are:
>
> a. the aboriginal rights, including aboriginal title, as modified by this Agreement, in Canada of the Nisga'a Nation and its people in and to Nisga'a Lands and other lands and resources in Canada;
>
> b. the jurisdictions, authorities, and rights of Nisga'a Government; and
>
> c. the other Nisga'a section 35 rights. [Emphasis added]

[212] He suggests that because of the wording, “This Agreement exhaustively sets out ... section 35 rights ... and the limitations to those rights ...”, justifiable infringements of the treaty are precluded. Nowhere, he says, does the Treaty make reference to *R. v. Sparrow*, [1990] 1 S.C.R. 1075, or to justifiable infringements.

[213] Mr. Jaffe further submits, relying on *Saumur v. Quebec*, [1953] 2 S.C.R. 299 *per* Rand J. at 332-3, that the delegation of jurisdiction is not sufficiently precise because the provincial and federal acts do not specify what powers those two heads of government each delegated to the Nisga’a.

[214] Finally, he argues that the Nisga’a government constitutes a “legislature” falling within the general prohibition against delegation reflected in the *Furtney* case.

(2) Attorney General of Canada

[215] Canada’s policy on Aboriginal self-government was articulated in a 1995 statement, “Aboriginal Self-Government: the Government of Canada’s Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government”. That policy states, on p. 3:

> The Government of Canada recognizes the inherent right of self-government as an existing Aboriginal right under section 35 of the *Constitution Act, 1982*. It recognizes, as well, that the inherent right may find expression in treaties, and in the context of the Crown’s relationship with treaty First Nations. Recognition of the inherent right is based on the view that the Aboriginal peoples of Canada have the right to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identifies, traditions, languages and institutions, and with respect to their special relationship to their land and their resources. [Emphasis added]

[216] Mr. Russell confirms that to be Canada’s continuing position.

[217] Counsel for Canada argues that there are only two ways to view the right of self-government: either it is an Aboriginal right, that may be codified in a treaty, or it is a delegated right that has been given constitutional protection as a treaty right. Canada takes the position that the source of the treaty rights in the *NFA* could have been either pre-existing rights inherent in the Nisga’a people, or delegation. Thus, Canada says that it is a sufficient answer to the plaintiffs’ claim that all of the treaty

rights of self-government could – whether or not they actually do – come from law-making powers delegated by the two orders of government.

[218] Mr. Russell, citing *Furtney*, argues that the Canadian constitution only limits the power to delegate legislative jurisdiction in two ways: (1) the level of government that has jurisdiction under the Constitution must maintain the ultimate capacity to exercise that jurisdiction (such that an attempt to give away or abdicate that power will prove futile); and (2) Parliament may not delegate legislative jurisdiction to a provincial Legislature, or *vice versa*.

[219] Canada says that, aside from those two limits, the authority to delegate is virtually unlimited; a delegate may be granted "an authority as plenary and as ample" as that of the delegating authority: *Hodge v. The Queen*, (1883), 9 App. Cas. 117 at 132 (J.C.P.C.). Mr. Russell submits that the fact that the law-making powers in ss. 91 and 92 were themselves delegated in 1867 by the Imperial Parliament shows how broad delegation can be.

[220] The Attorney General of Canada submits that s. 35 preserves the right of Canada and British Columbia unilaterally to infringe the Treaty in cases where such an infringement is justified and consistent with the honour of the Crown, citing *R. v. Badger*, [1996] 1 S.C.R. 771 and *Sparrow*. Mr. Russell for Canada adds that it is unlikely that either government will in fact attempt to limit or withdraw Nisga'a law-making powers since the Treaty is meant to achieve reconciliation and to be permanent.

[221] Thus, Canada argues, any delegation of law-making power to the Nisga'a government that may have been required to implement the treaty right of self-government does not derogate from federal or provincial legislative authority or represent a transfer of legislative jurisdiction. It does not derogate because federal and provincial powers to infringe treaty rights are not precluded, so long as they are justified and consistent with the honour of the Crown.

[222] Canada says that the amendment and prevailing law provisions of the Treaty do not prevent the enactment of infringing federal or provincial legislation. It says that neither Parliament nor the British Columbia Legislature has the power to commit future legislatures never to infringe the Treaty. For these reasons, the provisions of the Treaty do not prevent Canada or the Province from circumscribing or withdrawing any legislative authority that may have been delegated. The constitutional protection provided by s. 35 cannot and does not represent an invalid fettering of federal and provincial powers, nor does it otherwise render the delegation invalid. Canada argues, "The requirement that the delegating authority maintain the capacity to circumscribe or withdraw the delegated jurisdiction is satisfied as long as the capacity exists; the fact that it is not likely to be exercised or might be difficult to achieve does not transform delegation into abdication."

[223] In Canada's view, no functional subordination is required for valid delegation, and legislative jurisdiction may be validly delegated to another law-making body by the level of government to which it was assigned in the Constitution. Mr. Russell refers to *In re George Edwin Gray* (1918), 57 S.C.R. 150.

[224] Further, Canada says, *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 stands for the proposition that Parliament may, where it clearly indicates the intention to do so, provide for laws made by another body to prevail. It refers to *Waddell v. Canada (Governor in Council)* (1983), 49 B.C.L.R. 305 (S.C.), where it was held that Parliament may validly delegate the power to alter or amend statutory provisions, including provisions of the delegating statute itself.

[225] With respect to the plaintiffs' argument that delegation requires specificity, Mr. Russell refers to *British Columbia (Milk Board) v. Grisnich*, [1995] 2 S.C.R. 895, which (in a different context) indicates the contrary.

[226] Canada argues that there are many examples of delegated law making power in plenary and sometimes vaguely worded form that are part of the initial construction of this country and part of its constitutional framework. An example,

Mr. Russell says, is the creation of the Province of Alberta. Parliament had the power to grant delegated law making powers in creating Alberta, but had no constitutional power whatsoever to withdraw it, freely or otherwise, and this was considered constitutionally valid.

(3) Attorney General of British Columbia

[227] As do the other defendants, the Attorney General of British Columbia argues that it is unnecessary for the Court to determine the source of the right to self-government in the Nisga'a Treaty because the law-making powers in the Treaty were properly delegated by the two levels of government. Counsel for British Columbia argues, "With respect to the suggestion that the delegation of authority effected by the Nisga'a Treaty and the Settlement Legislation is an abdication of federal and provincial legislative authority, the possibility of legislation that justifiably infringes treaty rights under s. 35 of the *Constitution Act, 1982* is a complete answer."

(4) Nisga'a Nation

[228] Mr. Aldridge for the Nisga'a Nation submits that the right to self-government derives from the fact that the Nisga'a were governing themselves at the time of contact. The Nisga'a position is that the Aboriginal right to self-government inheres in them as a people, or as a nation, and is the basis for the Treaty without the need for delegation. However, the Nisga'a say that the basis for the Treaty could equally be delegation from the federal and provincial Crowns.

[229] Mr. Aldridge in his oral submissions suggested that a special moment arrived when the Nisga'a, wishing to negotiate their way into Canada, went to the table with the two Crowns. There and then, he said, the possessors of federal jurisdiction, provincial jurisdiction, and Nisga'a jurisdiction or lawmaking authority were all present. They achieved reconciliation, and made a treaty.

[230] Mr. Aldridge submits that it is unnecessary to specify the source of each of the treaty rights encompassed in the *NFA*: whether the source was an inherent self-government right or, on the other hand, delegation.

[231] He further submits that if the source of the treaty rights in the *NFA* is delegation, it is unnecessary to specify the level of government (federal or provincial) that delegated the power. He argues that negotiation of the *NFA* would have been impossible if it had been necessary to obtain, in the case of each treaty power, the agreement of the two Crowns as to which Crown was delegating that power. What matters, he says, is that by definition one or the other of the Crowns had the power under the Canadian constitution.

[232] Counsel for the Nisga'a argues that, insofar as the plaintiffs' submissions turn on the fact that the treaty powers are protected under s. 35 of the *Constitution Act, 1982*, the submissions create an ironic paradox. It is paradoxical because it amounts to a claim that the *NFA*, which creates constitutionally protected treaty rights, is unconstitutional because treaty rights are constitutionally protected. It is ironic because, if the plaintiffs are correct, the result would be a serious disincentive to treaty-making.

[233] Counsel for the Nisga'a submits that when the Treaty was concluded, *Badger* and *Sparrow* had been decided, and the Supreme Court of Canada had stated that s. 35 rights are not absolute; the parties knew the nature of the constitutional protection afforded by s. 35 when they entered into the Treaty.

[234] Mr. Aldridge submits that the precise justificatory standard to be applied in the event of an attempted infringement of a modern land claims agreement such as the *NFA* has yet to be defined. Acknowledging that the justificatory standard will be based on the principles set out by the Supreme Court of Canada in *Sparrow* and *Badger*, he submits that there is no need for the Court to speculate in this case as to what that standard might prove to be.

Analysis

[235] I accept the three defendants' submission that it is unnecessary for the purposes of this case to determine whether the self-government powers in the Treaty stem from an inherent Aboriginal right to self-government or from delegation.

[236] I have explained why, based on comity, I will follow *Campbell*. Following *Campbell*, I accept that the self-government powers in the *NFA* are protected by s. 35 of the *Constitution Act, 1982*. They are protected by s. 35 as treaty rights whether their source was delegation or an inherent Aboriginal right to self-government. As with other Aboriginal and treaty rights, they are not absolute; the federal and British Columbia governments would be able, in some circumstances, to infringe them. While it is unnecessary to define those circumstances in this case, it is possible that the *Sparrow* standard would be applied, permitting infringement where it is justified and consistent with the honour of the Crown.

[237] Thus, if the self-government powers in the Treaty were delegated to the Nisga'a by the federal and British Columbia governments, those governments, in some circumstances, would be able to retract those powers because of the non-absolute nature of the Aboriginal and treaty rights under the Canadian Constitution.

[238] Accordingly, the plaintiffs fail in their argument that, because the powers are not retractable, the powers could not have been delegated.

[239] I turn to the plaintiffs' argument that there is no valid delegation because the Treaty is not explicit and specific as to which government is delegating which power.

[240] The Treaty does not explicitly state that any powers in it have been delegated. However, it does seemingly provide for the possibility that that is what occurred or may occur, stating in Chapter 2, para. 11-12:

> 11. If an authority of British Columbia referred to in this Agreement is delegated from Canada and:
>
> a. the delegation of that authority is revoked; or

> b. if a superior court of a province, the Federal Court of Canada, or the Supreme Court of Canada finally determines that the delegation of that authority is invalid
>
> the reference to British Columbia will be deemed to be a reference to Canada.
>
> 12. If an authority of Canada referred to in this Agreement is delegated from British Columbia and:
>
> a. the delegation of that authority is revoked; or
>
> b. if a superior court of a province, the Federal Court of Canada, or the Supreme Court of Canada finally determines that the delegation of that authority is invalid
>
> the reference to Canada will be deemed to be a reference to British Columbia.

[241] In the *Nova Scotia Inter-delegation Reference*, the Supreme Court held that neither the Parliament of Canada nor the Legislature of any province can delegate to the other level of government any of the legislative authority conferred upon them by the *Constitution Act, 1867*. The case did not concern joint delegation or delegation to bodies other than Parliament or provincial Legislatures, but the plaintiffs rely on the general principles it articulates. Chief Justice Rinfret stated at pp. 34-35:

> The constitution of Canada does not belong either to Parliament, or to the Legislatures; it belongs to the country and it is there that the citizens of the country will find the protection of the rights to which they are entitled. It is part of that protection that Parliament can legislate only on the subject-matters referred to it by section 91 and that each Province can legislate exclusively on the subject matters referred to it by section 92. The country is entitled to insist that legislation adopted under section 91 should be passed exclusively by the Parliament of Canada in the same way as the people of each Province are entitled to insist that legislation concerning the matters enumerated in section 92 should come exclusively from their respective Legislatures. In each case the Members elected to Parliament or to the Legislatures are the only ones entrusted with the power and the duty to legislate concerning the subjects exclusively distributed by the constitutional Act to each of them.
>
> No power of delegation is expressed either in section 91 or in section 92, nor, indeed, is there to be found the power of accepting delegation from one body to the other; and I have no doubt that if it had been the intention to give such powers it would have been expressed in clear and unequivocal language.
>
> ...
>
> Delegations such as were dealt with in *re Gray* (1918), 42 D.L.R. 1, 57 S.C.R. 150, and in *The Chemical Reference*, [1943], 1 D.L.R. 248, S.C.R. 1, 79 Can. C.C. 1, were delegations to a body subordinate to Parliament and were of a

> character different from the delegation meant by the Bill now submitted to the Court.
>
> [Emphasis added]

[242] The specific question raised by this case is whether, when there is joint delegation from Parliament and a Legislature to another body, the delegators must spell out which power is delegated from which level of government. Counsel did not bring authorities directly on point to my attention. However, counsel did refer to authorities that might have some bearing, at least by way of analogy.

[243] Mr. Jaffe cited the decision of Mr. Justice Rand in *Saumur*. The case involved a challenge to a City of Québec bylaw that required prior permission from the Chief of Police in order to distribute any book, pamphlet, circular or tract. It was argued that the bylaw exceeded the powers of the province.

[244] Mr. Justice Rand, in a concurring decision, stated at p. 333:

> Conceding, as in the Alberta Reference, that aspects of the activities of religion and free speech may be affected by provincial legislation, such legislation, as in all other fields, must be sufficiently definite and precise to indicate its subject matter. In our political organization, as in federal structures generally, that is the condition of legislation by any authority within it: the courts must be able from its language and its relevant circumstances, to attribute an enactment to a matter *in relation to which* the legislature acting has been empowered to make laws. That principle inheres in the nature of federalism; otherwise, authority, in broad and general terms, could be conferred which would end the division of powers. Where the language is sufficiently specific and can fairly be interpreted as applying only to matter within the enacting jurisdiction, that attribution will be made; and where the requisite elements are present, there is the rule of severability. <u>But to authorize action which may be related indifferently to a variety of incompatible matters by means of the device of a discretionary license cannot be brought within either of these mechanisms; and the Court is powerless, under general language that overlaps exclusive jurisdictions, to delineate and preserve valid power in a segregated form. If the purpose is street regulation, taxation, registration or other local object, the language must, with sufficient precision, define the matter and mode of administration; and by no expedient which ignores that requirement can constitutional limitations be circumvented.</u>
>
> [Underlined emphasis added; Italic emphasis in original]

[245] It is notable that *Saumur* turned on the division of powers between the federal and provincial governments, and did not address the requirements for valid delegation.

[246] In *Grisnich,* the dispute related to a Milk Board, constituted under the B.C. *Milk Industry Act*, R.S.B.C. 1979, c. 258. The Milk Board had certain powers under that legislation and, in addition, was enabled to accept and exercise delegated authority pursuant to the *Agricultural Products Marketing Act*, R.S.C., 1985, c. A-6. In the Court of Appeal for British Columbia, an order issued by the Milk Board was invalidated on the ground that the Board had not specified on the face of the order from which of its two constitutional sources of subordinate legislative power it purported to draw its authority. The Supreme Court of Canada overturned the Court of Appeal decision.

[247] Mr. Justice Iacobucci for the majority stated the issue as follows in para. 2: "[M]ust administrative bodies with powers derived from multiple sources specify on the face of the decision they make exactly from which source and provision the authority to make that decision arose?" The majority said that the question could be answered without resort to the principles of inter-delegation and federalism.

[248] The majority concluded that the only requirement is to possess jurisdiction; the source of jurisdiction does not have to be specified on the face of every order (para. 8). Mr. Justice Iacobucci adverted to relevant policy considerations at para. 9:

> I would also add that Southin J.A.'s requirement of administrative specification is not only without a jurisprudential foundation, but it is also undesirable in terms of sound public policy. As administrative boards, tribunals and bodies continue to play a larger role in the regulation of the modern state, imposing an administrative specification requirement would considerably augment the transaction costs of government. The respondents' position would thus lead us to somewhat impractical and expensive consequences. Moreover, such a choice is largely a matter for the legislature. Although administrative accountability is an important principle, it is not the only factor to consider.

[249] In concurring reasons, Justices LaForest, L'Heureux-Dubé and Gonthier emphasized that the sole question before the Court was the need for the

administrative delegate to specify the source of its statutory authority: there was no challenge to the constitutional validity of the scheme.

[250] The plaintiffs rely on an authority (*Saumur*) that arose in the context of a pre-*Charter* attempt to protect basic civil liberties. The requirement for certainty arose from the fact that if the provincial government did not have the power to pass the legislation at issue, the legislation was *ultra vires* and inoperative. Canada relies on an authority (*Grisnich*) that arose in a different context, that of an administrative tribunal that failed to specify which powers it was relying upon when it made its order.

[251] Neither of these authorities provides a definitive answer. However, I think that resort to logic and first principles leads to a conclusion.

[252] If, as the plaintiffs themselves argue, the powers divided between federal and provincial governments in the *Constitution Act, 1867* are exhaustive of all possible powers, then it follows that, logically, all of the powers in the Treaty could have been delegated by one or the other, or both, of the Crowns that were at the table when the Treaty was negotiated.

[253] It may be observed that there is only one Crown in the sense that only one person at any time is the Queen (or King) of Canada. Her Majesty the Queen is the Head of State in Canada. She is represented federally and provincially by a Governor General and Lieutenant Governors.

[254] At the same time, the Crown is divisible. The Crown in Right of Canada is a separate legal entity from the Crown in Right of the United Kingdom. The Crown in right of each province is a separate legal entity from the Crown in Right of Canada (see *Hogg* at p. 10-1).

[255] Nevertheless, that something singular can be divided, or can have different manifestations, does not negate its original unitary nature. Two halves, when put back together, still make a whole. The Queen is the singular Head of State. The Nisga’a sought to make a treaty and met with the Queen’s federal and provincial

manifestations in order to do so. After more than a century of efforts to achieve reconciliation with the non-Aboriginal inhabitants of Canada, the Nisga'a concluded a Treaty with the Queen.

[256] The plaintiffs argue that there could be no valid delegation unless the two Crowns resolved which of them delegated which powers in the Treaty. Resolving that question would likely have required extraordinarily prolonged negotiations, possibly to the point of futility.

[257] In the absence of authority requiring specificity when there is joint delegation, I conclude that, if delegation was necessary for the Treaty to empower the Nisga'a to govern themselves and make laws, there was valid delegation here. The Crowns federal and provincial together entered into a treaty with a people. It was not necessary for the two Crowns to specify, if there was delegation, its specific source.

[258] I turn, finally, to the inter-delegation issue. The law on inter-delegation (*The Nova Scotia Inter-delegation Reference*) prohibits delegation from one legislature to another. Mr. Jaffe for the plaintiffs submits that the Nisga'a Lisims government is a "legislature" for the purposes of this rule. However, the Supreme Court of Canada in the *Nova Scotia Inter-delegation Reference* was referring to the water-tight compartments of federal and provincial jurisdiction under the *Constitution Act, 1867*, not to delegation to other bodies. *Furtney* makes clear that (a) either level of government can delegate to any other body; and (b) because the delegation can be circumscribed or withdrawn, the delegate is always in that sense subordinate. I think that the principles articulated in the *Nova Scotia Inter-delegation Reference* do not apply to the making of the Treaty in this case.

TAXATION

[259] The plaintiffs raise two issues that were not raised in *Campbell*. The first relates to the taxation powers in the Treaty.

[260] The *NFA* gives the Nisga'a Lisims Government powers to "make laws in respect of direct taxation of Nisga'a citizens on Nisga'a Lands in order to raise

revenue for Nisga'a Nation or Nisga'a Village purposes" (Chapter 16, para. 1). It provides, however, that those powers "will not limit the powers of Canada or British Columbia to impose or levy tax or make laws in respect of taxation" (Chapter 16, para. 2). It further provides that Canada and British Columbia may negotiate with the Nisga'a Nation and attempt to reach agreement on "the extent, if any, to which Canada or British Columbia will provide to the Nisga'a Lisims Government or a Nisga'a Village Government direct taxation authority over persons other than Nisga'a citizens on Nisga'a lands, and "the co-ordination of Nisga'a Lisims Government or Nisga'a Village Government taxation, of any person, with existing federal or provincial tax systems" (Chapter 16, para. 3).

[261] Counsel advised the Court that the taxation provisions have yet to be used by the Nisga'a Lisims Government to make laws in respect of direct taxation.

[262] The plaintiffs plead that the taxation powers in Chapter 16, para. 1 are inconsistent with ss. 53, 54 and 90 of the *Constitution Act, 1867*. The defendants all disagree.

[263] The *Campbell* case did not deal with these issues, and I will address them.

[264] The plaintiffs in their written submissions also argue that the *NFA* Chapter 16, para. 21-23 attempts to fetter the taxation powers of the federal and provincial governments. Chapter 16, para. 21-23, provides:

> 21 On the effective date, the Parties will enter into a Taxation Agreement. The Taxation Agreement does not form part of this Agreement.
>
> 22 The Taxation Agreement is not intended to be a treaty or land claims agreement, and is not intended to recognize or affirm aboriginal or treaty rights within the meaning of sections 25 and 35 of the *Constitution Act, 1982*.
>
> 23 Canada and British Columbia will recommend to Parliament and the Legislature, respectively, that the provisions of the Taxation Agreement be given effect under federal and provincial law.

[265] Mr. Aldridge for the Nisga'a Nation advised that the parties did enter into a Taxation Agreement on the effective date, relating to the susceptibility of Nisga'a Nations citizens to taxation by federal and provincial governments.

[266] The plaintiffs did not raise an issue about Chapter 16, para. 21-23 in their pleadings. Accordingly, I will not address this submission.

Positions of the Parties

(1) Plaintiffs

[267] The plaintiffs argue that the *Constitution Act, 1867* codifies the exclusive jurisdiction of the federal and provincial governments in the area of taxation. Section 91(3) provides as an exclusive federal head of power, "The raising of Money by any Mode or System of Taxation". Section 92(2) provides as an exclusive provincial head of power, "Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes".

[268] Mr. Jaffe for the plaintiffs argues that, by giving the Nisga'a Lisims Government powers to impose direct taxation, the *NFA* derogates from the taxation powers of the federal and provincial governments, the only orders of government with the constitutional authority to legislate in this area. For the federal and provincial governments validly to delegate taxation authority to the Nisga'a, they would have to be able to revoke those powers. However, he argues that cannot be the case because the *NFA* provides that the federal and provincial governments cannot change any of its terms without Nisga'a consent.

[269] The plaintiffs also rely on s. 53 of the *Constitution Act, 1867*, which requires that "Bills ... for imposing any Tax ... shall originate in the House of Commons" and s. 90, which states that the same principle applies to provincial taxation legislation.

[270] Counsel for the plaintiffs relies on *Confédération des syndicats nationaux v. Canada (A.G.)*, 2008 SCC 68 and *Re Eurig Estates*, [1998] 2 S.C.R. 565, at para. 34.

[271] Mr. Jaffe for the plaintiffs says that the taxation power conferred in the *NFA* is different from the delegated taxation power enjoyed by municipal governments. He argues that the way a tax is administered can be delegated to a subordinate agency, but the creation of the tax must arise through a Bill. He argues that any scheme that

shifts s. 91 taxation power away from the House of Commons contradicts s. 53 of the *Constitution Act, 1867*.

(2) Attorney General of Canada

[272] Canada's position is that under ss. 53, 54 and 90 of the *Constitution Act, 1867*, Parliament and the provincial legislatures can confer the right to tax on other governmental bodies if they do so expressly and unambiguously. Canada says that the provision of the Treaty that confers the right to make laws in respect of taxation is consistent with the constitutional requirements for the imposition of taxes, because the *NFA Act Canada* originated as a Bill in the House of Commons and the Treaty, as enabled by the Settlement Legislation, unambiguously delegates the right to tax to Nisga'a Government.

[273] Mr. Russell refers to *Ontario English Catholic Teachers' Assn. v. Ontario (A.G.)*, 2001 SCC 15. Mr. Russell also notes that the direct taxation provisions of the *NFA* apply only to Nisga'a citizens.

(3) Attorney General of British Columbia

[274] British Columbia says that the law-making powers in the Treaty, including the taxation power, were properly delegated by the federal and provincial governments. Ms. Owen submits that the Supreme Court of Canada recently affirmed that Parliament or a legislature may delegate its taxation power if the legislation provides expressly and unambiguously for the delegation: *Ontario English Catholic Teachers Assn.*, affirmed in *Confédération* (at para. 93). She argues that the plaintiffs identify no authority supporting their position that the federal and provincial governments have invalidly delegated their taxing authority.

(4) Nisga'a Nation

[275] Mr. Aldridge submits that because the as-yet unused taxation provisions only apply to Nisga'a citizens on Nisga'a lands, taxation without representation is not an issue.

[276] The Nisga'a Nation says that the Treaty creates a modern agreement about an inherent right of the Nisga'a Nation to raise revenues from its citizens for the community's purposes. Accordingly, Mr. Aldridge submits, the relevant sections of the *Constitution Act, 1867* do not apply. Alternatively, he argues, the Treaty represents a clearly expressed delegation of authority that was validly enacted as part of the Settlement Legislation in accordance with the *Constitution Act, 1867*. It does not constitute a derogation of taxation powers, because nothing in the Treaty purports to exclude or limit federal or provincial taxation authority in any way. In fact, Mr. Aldridge submits, the *NFA* specifically provides that the taxation powers granted will not limit the powers of Canada or British Columbia to impose or levy tax or make laws in respect of taxation (Chapter 16, para. 2). Mr. Aldrige argues that there are many examples in Canadian law of taxation being imposed by governmental bodies without a Bill originating on the floor of the House of Commons. He cites the *Yukon First Nations Self-Government Act*, S.C. 1994, c. 35, as one.

Analysis

[277] The plaintiffs' arguments with respect to the Treaty provisions for taxation are twofold: (1) the powers have not been properly delegated because they are not retractable; and (2) the provisions are inconsistent with what is required under s. 53 of the *Constitution Act, 1867*.

[278] In the general discussion about delegation in the preceding part of these Reasons I have already dealt with the first argument, that the powers are not retractable and therefore could not have been delegated. For the same reasons set out there, that argument does not succeed here.

[279] I turn to the second argument, based on ss. 53 and 90 of the *Constitution Act, 1867*. The ancient, but fundamental, principle of our democratic system is that there should be no taxation without representation: *Confédération* at para. 82. This principle means that a tax can be imposed only by a legislature or its clearly authorized delegate.

[280] Further, although Parliament or a legislature may delegate taxing authority, it must do so clearly and unambiguously: *Confédération* at para. 88. In *Confédération*, the Court concluded at para. 92:

> In short, in this case concerning employment insurance, only Parliament may impose a tax *ab initio*. According to this Court's decisions, taxing authority must be delegated expressly and unambiguously. Once this requirement is met, the delegate may exercise the power to establish the details and mechanisms of taxation.

[281] Earlier, in *Ontario English Catholic Teachers' Assn.*, the Supreme Court of Canada had stated that where the legislature expressly and clearly authorizes the imposition of a tax by a delegated body, then the requirement of "no taxation without representation" is met. Mr. Justice Iacobucci, for the Court, wrote at para. 74:

> The delegation of the imposition of a tax is constitutional if express and unambiguous language is used in making the delegation. The animating principle is that only the legislature can impose a new tax *ab initio*. But if the legislature expressly and clearly authorizes the imposition of a tax by a delegated body or individual, then the requirements of the principle of "no taxation without representation" will be met. In such a situation, the delegated authority is not being used to impose a completely new tax, but only to impose a tax that has been approved by the legislature. The democratic principle is thereby preserved in two ways. First, the legislation expressly delegating the imposition of a tax must be approved by the legislature. Second, the government enacting the delegating legislation remains ultimately accountable to the electorate at the next general election.

[282] The Court explained that the delegation was valid because the delegate was only imposing a tax that had been approved by the legislature, and was not imposing a completely new tax. At para. 78, the Court added:

> These principles explain how Parliament and the provincial legislatures are able to delegate taxing authority to municipalities, school boards and Aboriginal band councils. *Westbank First Nation*, *supra*, provides but one example of the constitutional delegation of such a taxing power, at para. 36:
>
> > The impugned charges are imposed under the authority of the legislature and levied by a public body. The by-laws are imposed pursuant to the power conferred by s. 83 of the *Indian Act*. The taxes are levied by the Band Council, under its conferred authority, and are approved by the Minister of Indian Affairs and Northern Development.

[283] In *Confédération*, the Court concluded that certain of the impugned provisions were unconstitutional, stating at para. 93:

> The relevant provisions of the *Employment Insurance Act* must therefore be examined to determine whether, as in *Ontario English Catholic Teachers' Assn.*, they are consistent with the principles laid down in this Court's decisions. The provisions in question, ss. 66.1 and 66.3, do not state that Parliament is delegating taxing authority to the Governor General in Council. The nature of the levy remains ambiguous. It is unclear whether Parliament still considered that it was exercising the authority to impose a regulatory charge in enacting those provisions. At the time Parliament delegated the power to collect employment insurance premiums to the Commission and the Governor General in Council, the legislation contained no statement either that its purpose was to collect a tax or that Parliament's taxing authority was being delegated to the Governor General in Council. The delegation concerned a charge that was no longer a levy for specific purposes but had become a levy for general purposes with the meaning of *Westbank*, but it was not specified in the Act that Parliament intended to delegate its taxing authority as such. Parliament would have had to state that it was delegating that authority to the Governor General in Council. Owing to the ambiguous nature of the levy, whether Parliament intended to delegate its taxing authority remained uncertain. [Emphasis added]

[284] Does the *NFA* delegate direct taxation power clearly and unambiguously?

[285] The Treaty does not use the term "delegate". However, it does state that the "Nisga'a Lisims Government may make laws in respect of direct taxation of Nisga'a citizens on Nisga'a Lands in order to raise revenue for Nisga'a Nation or Nisga'a Village purposes" (Chapter 16, para. 1). At the same time, it provides that that powers of Canada and British Columbia regarding taxation remain unaffected (Chapter 16, para. 3.)

[286] I note that the wording of the legislation in *Ontario Catholic Teachers' Assn.* was: "The Minister of Finance may make regulations... prescribing the tax rates for school purposes... ." (*Education Act*, R.S.O. 1990, c. E.2, s. 257.12(1)(b), as amended by the *Education Quality Improvement Act*, S.O. 1997, c. 31). Although the words "delegate" or "delegation" were not used, the provision was held to have conferred taxing power.

[287] In my view, the *NFA* and the Settlement Legislation have expressly and unambiguously delegated to the Nisga'a Lisims Government direct taxation authority over Nisga'a citizens on Nisga'a Lands in order to raise revenue for Nisga'a Nation or Nisga'a Village purposes. It remains an open question, of course, whether specific laws passed by the Nisga'a Lisims Government will fall within the scope of the delegated authority.

[288] I conclude that the plaintiffs' second argument, based upon ss. 53 and 90 of the *Constitution Act, 1867*, fails.

SECTION 96 COURTS

[289] The second issue raised by the plaintiffs that was not decided in *Campbell* is whether the *NFA* purports to establish courts that have jurisdiction only exercisable by a superior court, in contravention of s. 96 of the *Constitution Act, 1867.*

[290] Section 96 provides:

> 96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

[291] The plaintiffs plead that para. 23, 33, and 37 of Chapter 12 of the Treaty are inconsistent with s. 96. In their submissions they also referred to para. 36, 38, 43, and 49 of Chapter 12. These provisions state:

> 23. Nisga'a Lisims Government may appoint one or more persons to provide community correction services in respect of persons charged with, or convicted of, offences under Nisga'a laws.
>
> 33. If Nisga'a Lisims Government decides to establish a Nisga'a Court, Nisga'a Lisims Government will make laws to:
>
> a. ensure that the Nisga'a Court and its judges comply with generally recognized principles in respect of judicial fairness, independence, and impartiality;
>
> b. provide for means of supervision of judges of the Nisga'a Court by the Judicial Council of British Columbia or other similar means; and
>
> c. provide procedures for appeals from decisions of the Nisga'a Court.

34. The Nisga'a Court may exercise its functions when the Lieutenant Governor in Council has approved the Nisga'a Court's structure, procedures, and method of selection of judges of the Nisga'a Court.

35. An amendment to the Nisga'a Court's structure, procedures, or method of selection of judges of the Nisga'a Court will take effect when approved by the Lieutenant Governor in Council.

36. The Lieutenant Governor in Council will approve the Nisga'a Court's structure, procedures, and the method of selection of the judges of the Nisga'a Court or any amendment to the structure, procedures, or method of selection of judges of the Nisga'a Court, if Nisga'a Lisims Government has made laws in accordance with paragraph 33.

37. Nisga'a Lisims Government will appoint the judges of the Nisga'a Court.

38. The Nisga'a Court may exercise the powers and perform all the duties conferred or imposed on it by or under Nisga'a laws, in respect of:

a. the review of administrative decisions of Nisga'a Public Institutions;

b. the adjudication of prosecutions under Nisga'a laws; and

c. the adjudication of disputes arising under Nisga'a laws between Nisga'a citizens on Nisga'a Lands that would be within the jurisdiction of the Provincial Court of British Columbia if the disputes arose under provincial law.

39. The Nisga'a Court may adjudicate in respect of a dispute not referred to in paragraph 38 if the parties to that dispute, before commencing the proceeding in the Nisga'a Court, agree:

a. to accept the Nisga'a Court's authority to decide the dispute and to grant the remedies as between the parties sought in the proceeding; and

b. that any order of the Nisga'a Court will be final and binding, except for an appeal under paragraph 48.

40. In addition to the matters set out in paragraphs 38 and 39, the Nisga'a Court may exercise jurisdiction that may be assigned to the Nisga'a Court by federal or provincial law.

41. The Nisga'a Court:

a. may impose penalties and other remedies under the laws of Nisga'a Government, British Columbia, or Canada in accordance with generally accepted principles of sentencing;

b. in disputes under subparagraph 38(c), may make any order that could be made by the Provincial Court of British Columbia if the disputes arose under provincial law;

c. in disputes under paragraph 39, may grant the remedies sought by the parties;

d. may apply traditional Nisga'a methods and values, such as using Nisga'a elders to assist in adjudicating and sentencing, and emphasizing restitution; and

e. may issue process, such as summons, subpoenas, and warrants.

42. Any process issued by the Nisga'a Court has the same force and effect as process issued by the Provincial Court of British Columbia.

43. In proceedings in which an accused person may receive a sentence of imprisonment under Nisga'a law, the accused person may elect to be tried in the Provincial Court of British Columbia.

44. The Nisga'a Court may not impose on a person who is not a Nisga'a citizen a sanction or penalty different in nature from those generally imposed by provincial or superior courts in Canada, without the person's consent.

45. An appeal from a final decision of the Nisga'a Court in respect of prosecutions under Nisga'a laws may be taken to the Supreme Court of British Columbia on the same basis as summary conviction appeals under the *Criminal Code of Canada*.

46. An appeal from a final decision of the Nisga'a Court in respect of a review of an administrative decision under subparagraph 38(a) may be taken to the Supreme Court of British Columbia on an error of law or jurisdiction.

47. An appeal from a decision of the Nisga'a Court in respect of a matter under subparagraph 38(c) may be taken to the Supreme Court of British Columbia on the same basis as a similar decision could be appealed from the Provincial Court of British Columbia.

48. An appeal from a final decision of the Nisga'a Court in respect of a matter under paragraph 39 may be taken to the Supreme Court of British Columbia on an error of law or jurisdiction.

49. An order of the Nisga'a Court may be registered in the Supreme Court of British Columbia and, once registered, will be enforceable as an order of the Supreme Court of British Columbia.

50. The Lieutenant Governor in Council, upon recommendation of Nisga'a Lisims Government and with the concurrence of the persons or bodies required under provincial law, may appoint a judge of the Nisga'a Court as a provincial court judge, justice of the peace, or referee.

51. Nisga'a Lisims Government is responsible for the prosecution of all matters arising from Nisga'a laws, including appeals, and may carry out this responsibility by:

a. appointing or retaining individuals to conduct prosecutions and appeals, in a manner consistent with the principle of prosecutorial independence and consistent with the overall authority and role of the Attorney General in the administration of justice in British Columbia;

b. entering into agreements with Canada or British Columbia in respect of the conduct of prosecutions and appeals; or

c. both (a) and (b)

52. The Parties will review this Chapter no later than 10 years after the effective date, and may amend this Chapter if all Parties agree.

[Emphasis added to the provisions the plaintiffs have specified]

[292] The plaintiffs also point to *NFA* Chapter 11, s. 59:

> Nisga'a Lisims Government may make laws in respect of the regulation, control, or prohibition of any actions, activities, or undertakings on Nisga'a Lands, or on submerged lands within Nisga'a Lands, other than actions, activities, or undertakings on submerged lands that are authorized by the Crown, that constitute, or may constitute, a nuisance, a trespass, a danger to public health, or a threat to public order, peace, or safety.

[293] A Nisga'a court has not yet been created, and the plaintiffs do not point to any particular Nisga'a laws over which such a court would have jurisdiction.

Positions of the Parties

(1) Plaintiffs

[294] The plaintiffs submit that the provisions of the *NFA* that allow for a Nisga'a court are inconsistent with the requirement in s. 96 of the *Constitution Act, 1867,* that the Governor General appoint the judges of the superior, district, and county Courts in the provinces.

[295] Mr. Jaffe relies on *McEvoy v. Attorney General for New Brunswick et al.,* [1983] 1 S.C.R. 704, for the proposition that neither the federal nor provincial government can give away the Governor General's power to appoint judges under s. 96 by granting superior court powers to another court. He notes that the Nisga'a Lisims government is responsible for appointing the judges of the Nisga'a Court (*NFA,* Chap. 12, para. 37). He submits that under para. 38 of Chapter 12 of the *NFA*, jurisdiction of Nisga'a courts over "prosecution under Nisga'a laws" could include matters that constitute indictable offences under the *Criminal Code*, R.S.C. 1985, c. 46, because the term "Nisga'a laws" used in para. 38(b) of Chapter 12 is undefined and open ended. However, he submits, only superior courts have jurisdiction over these matters. In the result, he takes the position that the *NFA* purports to transfer the appointment of judges who deal with superior court matters from the Governor General to the Nisga'a Lisims government.

[296] Mr. Jaffe submits that the *NFA* "purports to create a blank cheque of jurisdiction", citing as an example jurisdiction over the review of administrative

decisions of Nisga'a Public Institutions in Chapter 12 para. 38(a). He also points to Chapter 12, para. 33, which he says obliges the Lieutenant Governor to approve Nisga'a laws that, for example, "provide procedures for appeals from decision of the Nisga'a Court." He submits, however, that matters such as supervising inferior courts and rules of procedure fall within superior court jurisdiction. He relies on *MacMillan Bloedel Ltd. v. Simpson,* [1995] 4 S.C.R. 725 at para. 15 and 37 for the proposition that any change that compromises the jurisdiction of superior courts is impermissible without constitutional amendment.

[297] The plaintiffs' position is that Chapter 12, para. 43, which provides that an accused may elect to be tried in the Provincial Court of British Columbia if the accused may receive a sentence of imprisonment under Nisga'a law, is an attempt to legislate with respect to criminal procedure, a matter within exclusive federal power under s. 91(27). I have already dealt with the plaintiffs' arguments regarding the inconsistency of the *NFA* with the Constitution's distribution of powers between federal and provincial governments. However, it appears that the plaintiffs also see Chapter 12, para. 43 as lending support to their position that s. 96 is contravened, since para. 43 makes clear that the Treaty contemplates Nisga'a laws that may result in sentences of imprisonment.

(2) Attorney General of Canada

[298] Mr. Russell for Canada submits that the *NFA* does not purport to confer the jurisdiction of a superior court on the Nisga'a court. In his submission, there is accordingly no infringement of the constitutional requirement in s. 96.

[299] Mr. Russell argues that there is no attempt to oust superior court jurisdiction; rather, the Treaty specifically affirms it.

(3) Attorney General of British Columbia

[300] Ms. Owen for British Columbia submits that the provisions of the *NFA* that allow for the creation of a Nisga'a court and for the appointment of judges to that

court do not violate s. 96 of the *Constitution Act, 1867*. The province agrees with and adopts the submissions of the Nisga'a Nation and Canada on this issue.

(4) Nisga'a Nation

[301] Mr. Aldridge for the Nisga'a Nation urges that the drafters of the *NFA* were scrupulous to define the Nisga'a court in a way that is consistent with s. 96. He points out that all decisions of a Nisga'a court would be appealable to the Supreme Court of British Columbia (Chapter 12, para. 45-48). Moreover, any Nisga'a law establishing a Nisga'a court would have to ensure that the Nisga'a court and its judges comply with generally recognized principles of judicial fairness, independence, and impartiality; provide for a means of supervision of judges by the Judicial Council of British Columbia; and provide procedures for appeals from decisions (Chapter 12, para. 33).

Analysis

[302] In addition to their arguments set out above, the defendants raised overarching questions about whether this issue is justiciable.

[303] The effect of the jurisprudence regarding s. 96 of the *Constitution Act, 1867* is described in *Hogg* at pp. 7-38:

> ... the courts have added a gloss to s. 96 and the associated constitutional provisions. What they have said is this: if a province invests a tribunal with a jurisdiction of a kind that ought properly to belong to a superior, district or county court, then that tribunal, whatever its official name, is for constitutional purposes a superior, district or county court and must satisfy the requirements of s. 96 and the associated provisions of the *Constitution Act, 1867*. This means that such a tribunal will be invalidly constituted, unless its members (1) are appointed by the federal government in conformity with s. 96, (2) are drawn from the bar of the province in conformity with ss. 97 and 98, and (3) receive salaries that are fixed and provided by the federal Parliament in conformity with s. 100.
>
> So far the law is clear, and the policy underlying it is comprehensible. But the difficulty lies in the definition of those functions that ought properly to belong to a superior, district or county court. The courts have attempted to fashion a judicially enforceable rule which would separate "s. 96 functions" from other adjudicatory functions. The uncertainty of the law, with its risk of nullification, could be a serious deterrent to the conferral of new adjudicatory functions on inferior courts or administrative tribunals, and a consequent impediment to much new regulatory or social policy. For the most part, the courts have

> exercised restraint in reviewing the provincial statutes which create new adjudicatory jurisdictions, so that the difficulty has not been as serious as it could have been. However, in the late twentieth century there was a regrettable resurgence of s. 96 litigation: six challenges to the powers of inferior courts or tribunals based on s. 96 succeeded in the Supreme Court of Canada, and these decisions have spawned many more challenges.
>
> [Emphasis added]

[304] The provisions of Chapter 12 regarding the possible Nisga'a court seem designed primarily to set the parameters for the jurisdiction that may be conferred on the court, rather than to create such jurisdiction.

[305] There is not yet a Nisga'a court, and indeed it is possible that there may never be one. This is evident in the opening words of Chapter 12, para. 33, "If the Nisga'a Lisims Government decides to establish a Nisga'a Court...." Further, there is no evidence of the passage of Nisga'a laws purporting to confer jurisdiction upon such a court.

[306] I have concluded that the plaintiffs' argument regarding contravention of s. 96 is wholly hypothetical in the absence of a court and in the absence of laws conferring jurisdiction upon such a court.

[307] I note the recent decision of the Ontario Court of Appeal in *Abou-Elmaati v. Canada (Attorney General)*, 2011 ONCA 95. There, it was argued that the exclusive jurisdiction conferred on the Federal Court by s. 38 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, was inconsistent with s. 96 of the *Constitution Act, 1867*. Mr. Justice Sharpe observed at para. 39:

> It is not only unnecessary but also usually unwise to attempt to decide constitutional issues in the absence of a concrete factual situation. As this court stated in *Clark v. Peterborough Utilities Commission* (1998), 40 O.R. (3d) 409 at p. 413, citing *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97 at p. 111, "courts should only rule on constitutional issues when it is necessary to do so".

[308] I should explain why this s. 96 issue is different from the other issues that I have addressed in this case (the alleged contravention of the federal-provincial division of powers through the self-government provisions of the *NFA*, and the

alleged contravention of constitutional requirements for valid taxation through the taxation provisions of Chapter 16, para. 1 of the *NFA*).

[309] Both of those challenges are based upon existing Treaty provisions. Those challenges raise the question whether it was constitutionally permissible for the federal and provincial governments, through legislation, to delegate to the Nisga'a the self-government or taxation powers found in the Treaty. That question can be answered by reference to the detailed provisions of the *NFA* and to constitutional principles.

[310] The plaintiffs' challenge based on s. 96 raises a different question, dependent upon speculation as to the future. The plaintiffs argue that if a Nisga'a court is created and judges are appointed to it, with jurisdiction yet to be determined, those judges will be, in effect, exercising jurisdiction belonging to superior courts. Ascertaining whether that is the case would require applying the test from *Re Residential Tenancies Act (1981)*, [1981] 1 S.C.R. 714, as modified by *MacMillan Bloedel v. Simpson* (see *Hogg* at pp. 7-42) to the particulars of the jurisdiction conferred upon the judges. That is an impossible task since there is no court, and there are no Nisga'a laws conferring jurisdiction upon a court.

[311] I conclude that, for those reasons, the plaintiffs have failed to make a justiciable claim regarding the Treaty's inconsistency with s. 96 of the *Constitution Act, 1867*.

CONCLUSION

[312] The plaintiffs' claim for declaratory relief is dismissed.

"Lynn Smith J."

APPENDIX A
BACKGROUND AND PROCEDURAL HISTORY

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

1998

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

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

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

1998

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

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

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

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

  The plaintiffs did not seek an order setting aside the entire Treaty. They sought an order that the settlement legislation passed by Parliament and the Legislative Assembly of British Columbia which gives effect to the Nisga'a Final Agreement, and which gives it its status as a treaty, is inconsistent with the Constitution of Canada and therefore of no force and effect, to the extent that they allow the

Nisga'a Government to make laws that prevail over federal and provincial laws, or limit to Nisga'a citizens the right to vote or to be candidates for Nisga'a Government.

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

2000

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

  a) declarations that the federal and provincial settlement statutes giving effect to the Nisga'a Final Agreement were inconsistent with various parts of the Constitution of Canada, including the Canadian Charter of Rights and Freedoms, and

  b) injunctions restraining the federal and provincial executive branches and various federal and provincial officials from taking steps to bring the federal and provincial settlement statutes into effect.

- The plaintiffs applied for interim injunctive relief restraining the two levels of government from bringing the settlement statutes into effect.

  On April 5, 2000, the interim injunction application was dismissed by Mr. Justice Williamson for two reasons: to allow the injunction would be inconsistent with his decision to delay the hearing of the *Campbell* matter until Parliament's deliberative function had been completed; and because, given the extraordinary nature of the injunctions sought, they should only be issued (if at all) with the fullest argument [*Chief Mountain et al. v. HMTQ in Right of Canada et al.*, Action No. L000808, Vancouver Registry. Oral Reasons pronounced in Chambers].

- The plaintiffs sought leave to appeal from the order made by Mr. Justice Williamson and sought the same interim injunctions from the B.C. Court of Appeal. On April 10, 2000, their application was dismissed [2000 BCCA 260].

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

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

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

2000

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

- On July 24, 2000, Mr. Justice Williamson dismissed the *Campbell* claim, holding that neither the Nisga'a Final Agreement nor the federal or provincial settlement legislation was inconsistent with the Constitution of Canada. This decision is reported at 2000 BCSC 1123, 79 B.C.L.R. (3d) 122.

Chief Mountain Action

2001

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

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

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

2001

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

Chief Mountain Action

2002

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

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

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

2003

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

  a) a declaration that the stay of proceedings had already been lifted,

  b) in the alternative, an order lifting the stay,

  c) leave to further amend the statement of claim by deleting still more of its provisions, and

  d) an order that the plaintiffs Barton and Watts cease to be plaintiffs.

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

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

- On October 16, 2003, the plaintiffs Robinson, Thomas and Wilp-lth Git Gingolx delivered a notice of motion for an order that the federal and provincial defendants pay their past and future legal fees, expenses and disbursements for the case. This motion does not appear to have gone to hearing.

2004

- On January 13, 2004, the plaintiff Watts applied for an order that he cease to be a party under Rule 15(5). His application was rejected by Chief Justice Brenner on January 14, 2004, at which time the Chief Justice also granted a stay of proceedings until the irregularity of the plaintiffs' lack of joint representation was resolved.

- Throughout 2004, the plaintiffs Robinson, Thomas and Wilp-lth Git Gingolx continued their efforts to have the plaintiffs Barton and Watts removed as parties under Rule 15(5).

2005

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

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

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

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

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

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

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

  b) participation in Nisga'a Government elections.

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

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

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

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

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

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

2006

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

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

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

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

2007

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

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

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

2008

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

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

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

- By consent, Mr. Justice Pitfield ordered that the statement of claim be amended.

2009

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

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

- At a case management conference on November 3, 2000, Mr. Justice Pitfield made an order in respect of filing a new summary trial motion as well as the delivery by each party of an index setting forth with particularity "all statutes, regulations, Orders in Council, debates and other documents of every nature and kind whatsoever" on which they purport to rely in respect of the summary trial motion.

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

2010

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

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

  a) the parties would exchange notice in writing specifying which documents identified on their lists of documents were tendered as authorities and which were tendered as evidence; and

  b) the hearing of the plaintiffs' summary trial application be adjourned to October 4, 2010.

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

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

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

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

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

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