COURT OF APPEAL

ON APPEAL FROM the order of the Honourable Mr. Justice Stephens of the Supreme Court of British Columbia pronounced the 17th day of January, 2024.

BETWEEN:

NISG̱A'A NATION as represented by NISG̱A'A LISIMS GOVERNMENT

Appellant (Applicant)

AND:

MALII also known as Glen Williams, GWAAS HLAAM also known as George Philip Daniels, LUUXHON also known as Don Russell, GAMLAXYELTXW also known as Wilhelm Marsden, SINDIHL also known as Robert Good, WATAKHAYETSXW also known as Agatha Bright, GWINUU also known as Phyllis Haizimsque, WII'LITSXW also known as Gregory Rush, HAIZIMSQUE also known as Ken Russell, on behalf of themselves and in their capacity as the GITANYOW HEREDITARY CHIEFS and on behalf of all members of the GITANYOW NATION

Respondents (Plaintiffs)

AND:

ATTORNEY GENERAL OF CANADA and
HIS MAJESTY THE KING IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA

Respondents (Defendants)

APPELLANT'S REPLY

NISG̱A'A NATION as represented by NISG̱A'A LISIMS GOVERNMENT

Nisg̱a'a Nation

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APPELLANT'S REPLY TO RESPONDENTS' FACTUM ON APPEAL

1. This is the Nisg̲a'a Nation's reply to the response factum of the respondents (plaintiffs), Malii also known as Glen Williams *et al.*, filed May 3, 2024 (the "**Response**"). Except as otherwise noted herein, this reply adopts the terms defined in the Nisg̲a'a Nation's factum filed March 13, 2024.

i. The Declarations Sought by the Plaintiffs Will Have an Immediate Effect on the Nisg̲a'a Nation's Treaty Rights

2. Paragraphs 26, 77, 80, and 84 of the Response highlight what lies at the heart of this appeal. The plaintiffs argue, and the chambers judge appears to have accepted, the proposition that (emphasis added):

> *… should [the plaintiffs] succeed, the day after the Gitanyow obtain a declaration of Aboriginal title, NLG rights will continue unaffected. The neighbouring nations will have the opportunity to determine, through their own legal processes and outside the courtroom, whether or not NLG harvesting rights and Gitanyow title can coexist. Only if that process fails will the court have to step in and determine the meaning and consequences of Ch. 2, s. 34 of the NFA: what "adversely affected" means and whether any such adverse effects have manifested*.[1]

3. With respect, this proposition is not sound. A declaration of law does not exist in some sort of suspended state pending a decision of the successful party at its discretion and convenience to initiate future litigation to enforce it.

4. More specifically, the suggestion that the Other Aboriginal People Provisions would not be in effect unless there was a further court order is incorrect. This Court has already ruled that, "[i]t is when an Indigenous group's s. 35 rights have been established … by judicial determination that these provisions become operative".[2]

5. As set out in the appellant's factum, if the Gitanyow were to obtain a declaration of Aboriginal title over the claimed portions of the Nass Area that are currently subject to Nisg̲a'a Treaty rights, they would immediately – not the day after, immediately –

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[1] Response at para. 80.
[2] *Gamlaxyeltxw v. British Columbia (Minister of Forests, Lands & Natural Resource Operations)*, 2020 BCCA 215 at paras. 96 – 97.

have, among other things, the right to exclusively use and occupy the land, and the right to choose the uses to which the land is put and to enjoy its economic fruits. These rights are subject only to inherent and internal limits.[3]

6. Moreover, the plaintiffs plead that they have the right to enforce these rights as against "other aboriginal and non-aboriginal peoples",[4] which obviously include the Nisg̲a'a Nation. But such rights, and their enforceability, are wholly incompatible with the Nisg̲a'a Nation's continuing and modified aboriginal title and rights to Nisg̲a'a Lands, Nisg̲a'a Fee Simple Lands, wildlife and fisheries management and harvesting rights, and involvement in environmental protection and assessment, all of which are set out in the Nisg̲a'a Treaty.[5]

7. It is difficult to envision what sort of "negotiations" could take place in the face of one party having a court declaration of exclusive ownership and control enforceable against the other, which it can "turn on" at its discretion. The reality is that if the plaintiffs succeed in obtaining their declarations, there will be an immediate and unavoidable impact on the interpretation or validity of the various provisions of the Nisg̲a'a Treaty that set out the Nisg̲a'a Nation's ongoing and modified aboriginal title and rights. The Nisg̲a'a Nation's ownership of their lands, their treaty rights in their traditional territory, their laws, their protection of their lands – all would be subject to a court order of Gitanyow exclusive ownership, made without the Nisg̲a'a Nation having been able to participate as a party.

8. There are only two possibilities. The declarations sought will be entirely and expressly without any effect on Nisg̲a'a Treaty rights, the interpretation and validity of any settlement legislation and every Nisg̲a'a law, and will not make the Other

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[3] See the appellant's factum at para. 61, quoting *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 at para. 67.
[4] Fourth FANOCC at para. 44 (Record, pg. 15). The plaintiffs correctly point out at footnote 95 of the Response that the appellant erroneously referred to this paragraph as being new, when in fact it was in a former pleading, but had been renumbered from para. 18 to 44. But the substance of the plaintiffs' pleading is the same.
[5] Appellant's factum at paras. 6 – 8.

Aboriginal People Provisions operative. Or, like all other declarations, they will be immediately enforceable against the Nisg̲a'a Nation, as well as the federal and provincial governments, as pleaded by the plaintiffs.

9. The plaintiffs have never said that the declarations they seek will not be binding on the Nisg̲a'a Nation. Neither did the chambers judge. Accordingly, it must be concluded that the interpretation and validity of provisions of the Nisg̲a'a Treaty, and the validity or applicability of settlement legislation and Nisg̲a'a Laws will arise, and that the Nisg̲a'a Nation has a direct interest in the outcome of the proceedings.

ii. The Chambers Judge Was Required to Deal with the Pleadings As they Are, Not as They Might Be Amended in the Future

10. The Nisg̲a'a Nation's application to be joined as a party needed to be considered on the basis of the pleadings that were before the Court. As set out in the appellant's factum,[6] those pleadings expressly raise issues concerning the interpretation or validity of the Nisg̲a'a Treaty, or regarding the validity or applicability of Nisg̲a'a laws. In their Response, the plaintiffs suggest that depending on the Crown defendants' responses to the Fourth FANOCC, the plaintiffs might amend their replies,[7] and they refer to the chambers judge's statement that because the parties may seek to make amendments as the trial approaches, it would be premature to make a finding "based solely on the current averments referring to the Nisg̲a'a Treaty in the defendants' responses to civil claim".[8]

11. The Nisg̲a'a Nation says in reply that it is an error of law to ignore pleadings by both the defendants and the plaintiffs that clearly and directly raise issues concerning the Nisg̲a'a Treaty on the basis that those averments may be amended in the future. The Nisg̲a'a Nation has the right to be joined as a party if a relevant issue has arisen, regardless of whether future amendments may or may not be made.

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[6] Appellant's factum at paras. 53 – 56.
[7] Response at para. 7.
[8] Response at para. 33. Note that the Nisg̲a'a Nation's argument was based on the issues arising from <u>both</u> the defendants' responses and the plaintiffs' replies, it was not based <u>solely</u> on the defendants' responses.

12. Further, regardless of whether amendments are made, forcing the Nisg̲a'a Nation to wait until 60 days before the trial before addressing its participation effectively precludes any possibility of the Nisg̲a'a Nation exercising its treaty right to "appear and participate in the proceedings as parties with the same rights as any other party".

13. The plaintiffs incorrectly characterize the Nisg̲a'a Nation's concern with the chambers judge ignoring the pleadings that raise issues in respect of the Nisg̲a'a Treaty, as claiming that he "failed to give them sufficient weight".[9] This is incorrect – the chambers judge gave them no weight at all.[10] If a relevant issue arises, then under *Dispute Resolution* paragraph 41 the Nisg̲a'a Nation has the right to be a party. There is no issue of "weight".

14. Finally, while the plaintiffs say that "… the judge was correct in concluding that the current pleadings do <u>not</u> give rise to 'discrete (if any) potential issues' around NFA interpretation" (emphasis added),[11] in fact, the chambers judge said the exact opposite. He said that the references to the Nisg̲a'a Treaty in the defendants' responses and one of the plaintiffs' reply pleadings do "… appear to raise only discrete (if any) potential issues of the interpretation of certain sections of the Nisg̲a'a Treaty."[12] As set out in the appellant's factum, the discrete and general issues raised in the pleadings do give rise to the Nisg̲a'a Nation's right to be a party.

iii. Appellate Courts May Review the Decisions of Lower Court Judges for Compliance with Horizontal Stare Decisis

15. The plaintiffs say, relying on a 2021 Federal Court of Appeal decision, that "… appellate courts do not review the decisions of trial judges for appropriate compliance with judicial comity, which does not bind judges in the same way *stare*

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[9] Response at para. 63.
[10] See the appellant's factum at paras. 54 – 56.
[11] Response at para. 63.
[12] Reasons, para. 87 (Record, pg. 134).

decisis does", and that it therefore cannot be an error of law for the chambers judge to have "diverged" from *Cowichan.*[13]

16. This ignores the 2022 decision of the Supreme Court of Canada in *R v. Sullivan*.[14] While the plaintiffs do refer to *Sullivan*, they refer only to paragraph 65 and do not engage with the more detailed analysis and rulings at paragraphs 75 to 78 relied on by the Nisg̲a'a Nation. And they fail to note that the Court itself reviewed the decision of the lower court for compliance with judicial comity and horizontal *stare decisis.*[15]

iv. The Nisg̲a'a Nation Claimed the Entire Nass Area in Calder

17. The plaintiffs incorrectly state, or at least give the strong impression, that the Nisg̲a'a Nation's claim in *Calder* did not include the Claim Area.[16] They say this without referring to the evidence, which clearly shows that while the Nisg̲a'a Nation's claim was for the entire area, <u>for the purposes of that action only</u>, it would proceed on the basis of a more limited area. The plaintiffs do refer to some comments by Professor Duff about *Calder*, but they fail to refer to his statement that the map in the litigation focused on areas where the Nisg̲a'a Nation had an "undisputed" claim, and the litigation was not to "settle the question of tribal boundaries".[17]

18. The plaintiffs should not mischaracterize what took place in *Calder*.

19. All of which is respectfully submitted.

Dated at the City of Vancouver, Province of British Columbia, the 10th day of May, 2024.

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[13] Response at paras. 67 – 68.
[14] Appellant's factum at para. 78; and Response at para. 67.
[15] *R v. Sullivan*, 2022 SCC 19 at paras. 81 – 86.
[16] Response at Chronology, 1967, and at paras. 10 and 14.
[17] Appellant's factum at para. 2. See also, Nguyen at Ex. D (AB, pg. 151).

APPENDICES: LIST OF AUTHORITIES

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N/A