COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Gamlaxyeltxw v. British Columbia (Minister of Forests, Lands & Natural Resource Operations),* 2020 BCCA 215

Date: 20200727
Docket: CA45235

Between:

Gamlaxyeltxw also known as Wilhelm Marsden, Wii'litsxw, also known as Gregory Rush, Luuxhon, also known as Don Russell, Gwass Hlaam also known as George Philip Daniels, Malii also known as Glen Williams, Haizimsque also known as Ken Russell, Gwinuu also known as Phyllis Haizimsque, Watakhayetsxw also known as Agatha Bright, on behalf of themselves and in their capacity as the Gitanyow Hereditary Chiefs and on behalf of all Gitanyow persons

Appellants
(Petitioners)

And

Minister of Forests, Lands and Natural Resource Operations and Nisga'a Nation

Respondents
(Respondents)

And

Union of BC Indian Chiefs, Nak'azdli Whut'en First Nation and Lax Kw'alaams

Intervenors

Before: The Honourable Mr. Justice Harris
The Honourable Mr. Justice Hunter
The Honourable Madam Justice Griffin

On appeal from: An order of the Supreme Court of British Columbia, dated March 20, 2018 (*Gamlaxyeltxw v. British Columbia (Minister of Forests, Lands & Natural Resource Operations)*, 2018 BCSC 440, Vancouver Docket S159630).

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Place and Date of Hearing:	Vancouver, British Columbia January 28–30, 2020
Place and Date of Judgment:	Vancouver, British Columbia July 27, 2020

Written Reasons by:
The Honourable Mr. Justice Hunter

Concurred in by:
The Honourable Mr. Justice Harris
The Honourable Madam Justice Griffin

Summary:

The Gitanyow have a claim for Aboriginal rights in territory that overlaps with an area subject to the Nisg̲a'a Treaty. They sought the right to be consulted concerning two decisions to be made by the Minister of Forests pursuant to that Treaty, the approval of the total allowable harvest of moose in the overlap area and the approval of the annual management plan for the Nisg̲a'a hunters. The Minister agreed to consult on the total allowable harvest, but not on the annual management plan. On judicial review, the chambers judge held that the duty to consult was not triggered by the approval of the annual management plan, and that the consultation in relation to the total allowable harvest was adequate. The chambers judge also held that the Haida test to determine when a duty to consult arose should be modified when consultation had the potential for interfering with a treaty right. The Gitanyow appeal.

Held: Appeal dismissed. It was unnecessary to modify the Haida test to determine when a duty to consult arose. Applying the Haida test, the Minister did not err in concluding that the duty to consult was not triggered in relation to the annual management plan. The consultation undertaken by the Minister in relation to the total allowable harvest was adequate in the circumstances.

Reasons for Judgment of the Honourable Mr. Justice Hunter:

[1] This appeal requires consideration of the scope of the duty of the Crown to consult with an Indigenous nation that claims Aboriginal rights recognized in s. 35 of the *Constitution Act, 1982,* in areas that overlap with lands that are the subject of a modern treaty with a different Indigenous nation. The issue arises in connection with the Nisg̲a'a Treaty between the Nisg̲a'a Nation and the Crown in right of Canada and British Columbia, which came into effect in May, 2000.

[2] The Nisg̲a'a Treaty sets out the s. 35 rights of the Nisg̲a'a, the geographic extent of those rights and the limitations to those rights. It provides that nothing in the Treaty affects any s. 35 rights for any Aboriginal people other than the Nisg̲a'a Nation.

The Nisg̲a'a Treaty established a hunting area known as the Nass Wildlife Area where the Nisg̲a'a have non-exclusive rights to hunt. The Treaty provides among other things that the Crown, now represented by the Minister of Forests, Lands and Natural Resource Operations (the "Minister"), has certain decision-making responsibilities in relation to determining the total allowable harvest in the Nass

Wildlife Area ("TAH") and the annual management plan which regulates Nisga'a citizens' hunting ("AMP"). The nature and scope of the Crown's decision-making responsibilities are set out within the text of the Nisga'a Treaty.

[3] The appellants are hereditary chiefs of the Gitanyow people. I will refer to them collectively as the Gitanyow. The Gitanyow have an outstanding claim for s. 35 Aboriginal rights in an area described as the Gitanyow Lax'yip. The Gitanyow Lax'yip overlaps with the Nass Wildlife Area. As a result, decisions made concerning the Nass Wildlife Area may have the potential for affecting activities within the Gitanyow Lax'yip.

[4] The issue of the Crown's consultation obligations arises because the precise scope and nature of the Gitanyow's rights have yet to be determined, either through negotiation of a modern treaty or adjudication in the courts. In order to protect the rights of Indigenous groups such as the Gitanyow pending claims resolution, the Crown has a duty to consult and, where appropriate, accommodate in circumstances where the Crown has knowledge of the potential existence of an Aboriginal right and contemplates conduct that might adversely affect it. This is known as the *Haida* test, deriving from *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73.

[5] The British Columbia Government has been aware of the Gitanyow's claim for many years and has formally recognized that in the absence of a treaty with the Gitanyow, the Crown has an ongoing duty to consult and seek workable accommodation of Gitanyow's Aboriginal rights within the Gitanyow Lax'yip. This ongoing duty is triggered whenever the Crown contemplates conduct that might adversely affect the Gitanyow's claims.

[6] This appeal concerns two decisions of the Minister made in October 2016 approving the total allowable harvest of moose and the annual management plan for the 2016-2017 hunting season in the Nass Wildlife Area. Prior to making these decisions, the Minister had consulted with the Gitanyow concerning the total allowable harvest, but not concerning the annual management plan. The Gitanyow had taken the position that the Minister should accommodate their interests by

reducing the allocation of moose to Nisga'a hunters in a manner inconsistent with the Nisga'a Treaty. The Minister declined to do so. With respect to the annual management plan, the Minister had expressed the view that it had no potential to adversely affect Gitanyow interests, and accordingly there was no duty to consult the Gitanyow in respect of its approval.

[7] The Gitanyow brought proceedings by judicial review to challenge the Minister's decisions. In their petition, the Gitanyow sought declarations that the Minister was under a constitutional obligation to consult with the Gitanyow and, where appropriate, accommodate their interests before making a decision to approve either the total allowable harvest or the annual management plan. The Gitanyow also sought a declaration that the Gitanyow wildlife harvest in the Gitanyow Lax'yip has constitutional priority over the Nisga'a wildlife allocations set out in the Nisga'a Treaty, although that claim has not been pursued in this Court.

[8] The chambers judge declined to make the declarations sought and dismissed the petition. She held that the Minister did have a duty to consult with respect to the total allowable harvest of moose, but that he had complied with that duty. The chambers judge concluded, however, that the annual management plan decision did not have the potential to adversely affect the Gitanyow's s. 35 rights, and accordingly did not trigger the duty to consult.

[9] In reviewing these issues, the chambers judge concluded that the *Haida* test to determine the existence of a duty to consult was not adequate to deal with the circumstance where a conflicting treaty right was at issue. She concluded that the *Haida* test required modification to preclude a duty to consult an Indigenous group claiming s. 35 rights when the recognition of such a duty would be inconsistent with the Crown's duties and responsibilities to the Indigenous peoples with whom it has a treaty. The Gitanyow challenge this modification of the *Haida* test as inconsistent with the underlying rationale for the duty to consult.

[10] In this Court, the Gitanyow have taken a somewhat different position than they did before the chambers judge. Before the chambers judge, they sought

accommodation in the form of an order that would have been contrary to the treaty rights of the Nisga'a; in this Court they acknowledge that accommodation of their interests cannot require the Minister to act in contravention of the Nisga'a Treaty. They argue, however, that the chambers judge erred in concluding that a potentially inconsistent treaty right is a factor that negates entirely the entitlement to consultation. They submit that the duty to consult the Gitanyow was not necessarily in conflict with the treaty rights of the Nisga'a, and the chambers judge was wrong to introduce treaty rights into the *Haida* test in such a way as to impose an additional hurdle to the Gitanyow in ensuring that their concerns were heard.

[11] With respect to the annual management plan, the position of the Gitanyow is that both the Minister and the chambers judge erred in law in concluding that the decision of the Minister to approve the management plan did not have the potential to adversely affect the Gitanyow's rights, such that the duty to consult did not arise. Both the Crown and the Nisga'a support the Minister's decision.

[12] I agree with the position advanced by the Gitanyow in this Court that notwithstanding the overlapping claims in the Nass Wildlife Area, the duty to consult the Gitanyow about actions that might adversely affect their claims is not inherently in conflict with the Nisga'a treaty rights. The Crown has an undoubted duty to act in conformity with treaty obligations and to implement treaty rights in good faith. In this Court, the Gitanyow have not argued otherwise. The duty to consult, on the other hand, is a measure designed to protect claimed rights pending claims resolution. The acceptance by the Minister of a duty to consult in respect of the total allowable harvest in the Nass Wildlife Area illustrates the compatibility of these two fundamental requirements.

[13] The existence of treaty rights that may limit the available accommodation pending claims resolution is not in my opinion relevant to the existence of a duty to consult an Indigenous group with credible s. 35 claims such as the Gitanyow. To the extent that the implication of the chambers judge's proposed modification of the *Haida* test might suggest otherwise, I respectfully disagree. I do agree that the

existence of treaty rights may limit any accommodation a rights claimant may seek, as the Crown cannot be required to breach a treaty in order to preserve a right whose scope has not yet been determined. That I think was the substance of the chambers judge's concern, but in my view it is unnecessary to modify the *Haida* test in order to recognize the limits of accommodation that treaty rights impose. The *Haida* test that has been applied consistently over the past 15 years has sufficient flexibility within it to encompass these issues.

[14] In this case, the reviewing judge made specific findings as to the objectives of the appellants in the consultation process, and held that the consultation by the Minister concerning the total allowable harvest was adequate to meet the honour of the Crown. I am not persuaded that this decision was in error.

[15] As to the annual management plan, it is my opinion that the Minister did not err in concluding that the plan presented in 2016 did not have the potential to adversely affect the Gitanyow's rights. The annual management plan is directed to Nisga'a hunters, and is expressly not applicable to non-Nisga'a hunters such as the Gitanyow. The chambers judge reviewed the additional factual arguments raised by the appellants and confirmed the Minister's view that the annual management plan did not have the potential to affect the hunting rights claimed by the Gitanyow. The issues sought to be raised by the Gitanyow, including conservation concerns that were emphasized in this Court, can be addressed in the consultation process relating to the total allowable harvest. There is nothing in the inherent structure of the annual management plan as it is set out in the Nisga'a Treaty that would trigger a right to consult the Gitanyow in respect of the annual approval of this plan.

[16] For the reasons that follow, I would dismiss the appeal.

A. Background

[17] The foundation of this dispute is the overlapping territorial claims of the Gitanyow and Nisga'a peoples to areas of the Nass River watershed. The Nisga'a have a modern treaty with the Crown that confers hunting rights in an area described in the treaty as the Nass Wildlife Area. The Gitanyow have a credible claim to

protected s. 35 rights in an area that overlaps the Nass Wildlife Area. The Gitanyow are participating in the treaty process, but the scope and extent of their rights have not yet been settled.

[18] In reasons indexed as 2018 BCSC 440, the chambers judge provided an extensive review of the circumstances that gave rise to this dispute. I will summarize the most salient factors that are necessary to explain the legal issues that arise in this appeal.

The Nisga'a Treaty

[19] The Nisga'a Treaty came into effect on May 11, 2000. It was acknowledged by the Nisga'a and the Crown to be a treaty within the meaning of sections 25 and 35 of the *Constitution Act*, *1982*. Under the Treaty, certain lands were designated as Nisga'a Lands, owned by the Nisga'a Nation in fee simple. A large area of just over 16,000 km^2 was designated as the Nass Wildlife Area. The Treaty describes the rights of the Nisga'a people in the Nass Wildlife Area in this way:

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

[20] The Crown maintains wildlife management responsibilities through para. 3 of Chapter 9 of the Treaty:

> 3. Notwithstanding paragraphs 1 and 2, the Crown may authorize uses of or dispose of Crown land, and any authorized use or disposition may affect the methods, times, and locations of harvesting wildlife under Nisga'a wildlife entitlements, provided that the Crown ensures that those authorized uses or dispositions do not:

> a. deny Nisga'a citizens the reasonable opportunity to harvest wildlife under Nisga'a wildlife entitlements; or
>
> b. reduce Nisga'a wildlife allocations.

[21] Two provisions of the Treaty require an approval of the Minister on behalf of the Crown provincial. The first concerns the hunting of moose and other designated species in the Nass Wildlife Area. Each year, the Minister is to approve the maximum number of moose that may be harvested in the Nass Wildlife Area. This number is described in the Treaty as the total allowable harvest or TAH. The procedure for this determination is that a Wildlife Committee is established under chapter 9 of the Treaty. The Wildlife Committee has the general responsibility to recommend to the Minister any conservation requirements it considers advisable for wildlife species within the Nass Wildlife Area. Each year, the Wildlife Committee recommends to the Minister and the Nisga'a Lisims Government the total allowable harvest for each designated species, including the geographic distribution of the harvest within the Nass Wildlife Area and the sex and age composition of the harvest. Only the moose harvest is at issue in these proceedings.

[22] In considering the recommendations of the Wildlife Committee, the Minister must take into account the factors set out in para. 59 of chapter 9, which include conservation requirements, the availability of wildlife resources, any Nisga'a preferences in respect of harvest locations, methods or times stated in the recommendations, among other considerations. The Minister must then either approve or reject the recommended TAH. If the recommendation is rejected, written reasons for the rejection are required.

[23] Once the total allowable harvest has been set by the Minister, the Treaty provides that the Nisga'a receive an allocation of moose for hunting calculated as a percentage of the TAH. Under the terms of the Treaty, the Nisga'a receive 80% of the first 50 moose, 32% of the next 50 moose and 56% of all remaining moose, to a maximum of 170. In the present case, the Wildlife Committee recommended a TAH of 32 moose, all bulls, which was accepted by the Minister. According to the provisions of the Treaty, this results in an allocation of 25 bulls to Nisga'a hunters.

While the Nisga'a hunting rights in the Nass Wildlife Area are subject to measures that are necessary for conservation, the Minister does not retain any residual discretion to unilaterally alter the Nisga'a allocation of the TAH. Provisions providing for review of the Nisga'a allocation and, if necessary, arbitration, are found in paras. 30–34 of Chapter 9 of the Treaty. Those provisions are not engaged in this case.

[24] Although it is perhaps implicit in this structure that the balance of the total allowable harvest would be available for non-Nisga'a hunters such as the Gitanyow, the Ministry does not at present seek to regulate the Gitanyow hunt. Nevertheless, the Gitanyow consider that the determination of the total annual harvest has the potential to affect their ability to hunt what is a limited resource.

[25] During the consultation prior to the Minister's approval of the 2016/17 TAH, the Gitanyow proposed that the allocation of the 32 bulls be divided equally between the Nisga'a and the Gitanyow, so that each would receive an allocation of 16 moose. This would have required a reduction in the Nisga'a harvest from 25, as designated in the Treaty, to 16. The Gitanyow also proposed geographical limitations for the Nisga'a harvest.

[26] The second set of provisions of the Treaty at issue in these proceedings can be found in paras. 56–67 of Chapter 9 of the Treaty. These concern the preparation and approval of the Nisga'a Nation's annual management plan or AMP for its moose harvest. The procedure for determining this management plan is set out in the Treaty. The chambers judge summarized the procedure in this way:

> [110] The Nisga'a Lisims Government proposes an AMP [the annual management plan] for designated species each year, and that AMP must: be consistent with the Nisga'a wildlife entitlement; set out any preferences for methods, timing and locations of harvest; and take into account any management concerns identified by either the Minister or the Nisga'a Lisims Government (para. 56). The Nisga'a Lisims Government forwards its proposed AMP to the Wildlife Committee which then considers the proposed plan and how it takes into account matters stipulated in para. 59, makes appropriate adjustments and then makes recommendations to the Minister and the Nisga'a Lisims Government (para. 58).

> [111] Paragraph 59 states that "[i]n considering the recommendations of the Wildlife Committee or its members, the Minister will take into account" seven listed factors, most of which are aimed at sustainability of the species. If the AMP is consistent with the Treaty, the Minister must approve it (para. 62). If the AMP is not approved, the Minister must provide written reasons and "specify what changes are necessary for its approval" (para. 64). Unlike with the TAH, the Minister does not have the explicit power to reject an AMP recommended by the Wildlife Committee (paras. 64 and 65(a)).

[27] The annual management plan for the 2016-2017 moose hunting season was directed solely to the harvesting activities of Nisga'a hunters.

The Claims of the Gitanyow

[28] The Gitanyow claim Aboriginal title and rights in an area known as the Gitanyow Lax'yip. The Gitanyow Lax'yip overlaps approximately one-third of the Nass Wildlife Area, and the Nass Wildlife Area covers approximately 84% of the Gitanyow Lax'yip. The Crown is aware of the Gitanyow's claims, and has accepted that the Gitanyow have Aboriginal rights in the Gitanyow Lax'yip. In 2012, the Gitanyow and the Province entered into what was referred to as the Gitanyow Huwilp Recognition and Reconciliation Agreement, in which this acknowledgement is expressly made.

[29] This agreement also contains an express acknowledgement by British Columbia of its duty to consult the Gitanyow in respect of its claimed territory:

> 6.5 British Columbia recognizes that in the absence of a treaty that defines the responsibilities and rights of the Parties, its duty to consult and to seek workable accommodation of Gitanyow's Aboriginal Rights within the Gitanyow Lax'yip is an ongoing duty.
>
> 6.6 British Columbia acknowledges that it and Canada provides in modern Treaties with British Columbia First Nations that those Treaties do not "affect any rights under Section 35 of the Constitution Act, 1982 for any Aboriginal people other than" the Nation with whom it has made a Treaty.

[30] The evidence before the chambers judge was that at the time of the hearing, the Gitanyow were at Stage 4 of treaty negotiations with the Crown, and had also commenced litigation to prove their Aboriginal rights and title. To date, although the Province has acknowledged that the Gitanyow have Aboriginal rights in the

Gitanyow Lax'yip, the specific location, scope and nature of those rights have not been determined through either agreement with the Crown or judicial determination.

The Decision Under Review

[31] The Gitanyow initiated legal proceedings in November 2015, seeking among other things a declaration that the Minister had a constitutional obligation to consult with the Gitanyow and, where appropriate, accommodate Gitanyow rights and/or title with regard to the total allowable harvest and the Nisga'a annual management plan. The Minister subsequently advised the Gitanyow that he would consult with them concerning the total allowable harvest for the 2016/2017 harvest, but not the Nisga'a annual management plan.

[32] The consultation process began in June 2016 and continued through the summer and into the fall. On October 18, 2016, the Minister issued his decision approving the recommendations of the Wildlife Committee concerning the total allowable harvest for the Nass Wildlife Area and the annual management plan for the Nisga'a harvest of designated species for 2016/2017. This was the decision challenged in these proceedings.

[33] In explaining his decision, the Minister stated that he took into account the matters set out in para. 59 of Chapter 9 of the Nisga'a Treaty, as well as the rationale of the Wildlife Committee for its total allowable harvest recommendations. The Minister was satisfied that conservation requirements were met.

[34] He further explained his decision in these terms:

> I am satisfied that the AMPs for designated species are consistent with the [Nisga'a Treaty], and, in accordance with paragraph 62 of Chapter 9 of the [Treaty], I have approved the AMPs.
>
> I also considered whether the Crown had met its duty to consult and, if necessary, to accommodate the Gitanyow in respect of the 2016/17 TAH for moose. I reviewed the record of consultation, including the submission made by the Gitanyow Hereditary Chiefs dated September 6, 2016, and I am satisfied that consultation was adequate in the circumstances and was consistent with the honour of the Crown.
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> I have considered the potential for the 2016/2017 TAH for moose to adversely affect Gitanyow's aboriginal rights, including title. In light of the

> Wildlife Committee's rationale for its TAH recommendations, with which I generally agree, and that the TAH does not limit or restrict Gitanyow's harvest of moose, I do not believe that the proposed TAH of 32 bulls will adversely affect Gitanyow's aboriginal interests.
>
> The AMP sets out the management provisions that apply to the Nisga'a in respect of their right to harvest designated species under the [Treaty], and must be consistent with the [Treaty]. I am satisfied that the AMP has no potential to adversely impact Gitanyow interests and that no duty to consult the Gitanyow exists in respect of the approval of the AMP.

[35] Independent of the decision under review, the Minister proposed developing a Nass Moose Management Plan which would involve both the Gitanyow and the Nisga'a Nation. The proposal was for a recovery plan that would include establishing a population objective for the Nass Wildlife Area with individual action plans for implementation by the Gitanyow and the Nisga'a Nation. In March 2015, the Minister prepared a Nass Scoping Document in consultation with the Nisga'a Nation and Gitanyow representatives which addressed topics relating to moose management.

The Gitanyow Application for Declaratory Relief

[36] Following the decision of the Minister to consult on the TAH (but not the AMP), the Gitanyow Petition was amended, and by the time it reached a hearing, had been amended again to focus on the process by which the Minister had approved the TAH and AMP for 2016/2017.

[37] Although the proceeding was instituted before the Minister made his decisions concerning the 2016/2017 hunting season, the parties have treated the proceeding as an application for judicial review of the TAH and AMP decisions made in October 2016. In their factum, the appellants have framed the appeal in this way:

> For the Gitanyow, the judicial review on appeal concerned their right to be consulted by the Respondent Minister when he made two decisions under the *Nisga'a Final Agreement*. The decisions related to Nisga'a moose hunting in a treaty-created area …
>
> The Appellants argued that the questions to decide were, first, whether the Minister ought to have consulted the Gitanyow on one decision and whether consultation on the second was adequate.

[38] Before the chambers judge the claim as pleaded was for various forms of declaratory relief, including declarations as to the Crown's duty to consult, a declaration that when consulting with the Gitanyow the Minister must take into account Gitanyow law, and a declaration that the Gitanyow wildlife harvest in the Gitanyow Lax'yip has constitutional priority over the Nisga'a wildlife allocations set out in the Nisga'a Treaty. In this court, the only declaration that is sought is a declaration that the Minister has a constitutional obligation to consult annually with the Gitanyow and, where appropriate, accommodate Gitanyow rights and/or title with regard to the Nisga'a annual management plan.

Decision of the Chambers Judge

[39] Although the Minister had accepted that he had a duty to consult the Gitanyow before making a decision whether to approve the TAH, the Nisga'a contested the requirement of such an obligation. Accordingly, the judge considered it necessary to determine whether the Minister had the duty that he had assumed.

[40] After reviewing the relevant provisions of the Treaty and identifying the claims of the Gitanyow, the chambers judge addressed the three-part test for the duty to consult set out in *Haida* in relation to the TAH decision. She concluded that the first two elements of the test, knowledge of the Gitanyow claims and the contemplation of conduct that engaged those claims, were easily met. She then addressed the third element, potential for adverse impact, which was contested by the Nisga'a, and came to the following conclusion:

> [157] The purpose of consultation is to protect the resource pending final determination of Aboriginal rights so that the asserted right does not become worthless because decisions made in the meantime have diminished the resource. Thus, on a basic analysis, the number of moose available for the Gitanyow to harvest could be negatively impacted by the Minister's decision of the maximum number of moose that can be harvested in the NWA, regardless of whether the TAH is enforced against the Gitanyow.

[41] Although this conclusion, if supportable, would appear to be sufficient to meet the low threshold required to impose a duty to consult in relation to the TAH, the judge was concerned about the possible impact of consultation on Nisga'a treaty

rights, and concluded that in these circumstances, the three-part test set out in the authorities required modification by addressing a fourth question: whether recognition of a duty to consult the Gitanyow about the TAH would be inconsistent with the Minister's duties under the Treaty. She then applied this additional test to her consideration of the Minister's duty to consult, but concluded that recognition of such a duty in relation to the TAH would not be inconsistent with the Minister's duties under the Treaty. Accordingly, the judge agreed with the Minister that he had a duty to consult the Gitanyow before approving the TAH.

[42] The judge then considered the Minister's obligations with respect to the AMP approval. She concluded that the AMP did not have the potential for affecting any claimed rights of the Gitanyow, as it related only to the Nisga'a hunters. She came to this conclusion:

> [241] The considerations listed in para. 59 (which apply to all recommendations of the Wildlife Committee, including the TAH) are applicable to the AMP, but only to the extent the AMP applies to Nisga'a Nation citizens. The AMP only concerns and addresses harvest of moose by Nisga'a citizens; it applies to no one else. The AMP manages how Nisga'a citizens will exercise their allotment of the TAH for moose in the NWA, and as such, it is an element of the Nisga'a Nation's internal governance.

[43] Although this conclusion, if supportable, would appear to negate the need for consultation under the *Haida* test, the judge went on to apply her modification of the *Haida* test to this question as well, and concluded that recognizing a duty to consult the Gitanyow would be inconsistent with the Minister's duties under the Treaty.

[44] Finally, the judge addressed the question whether the Minister's consultation in relation to the TAH was adequate. She reviewed the voluminous record before her regarding the Province's consultation efforts and concluded that the Province provided "fair, timely and sufficient opportunity to the Gitanyow to engage in genuine consultation about the TAH decision to the appropriate degree": para. 291. She also made a finding that the Province provided for even more meaningful participation through the Moose Management Program. It was the insistence of the Gitanyow that the Minister reduce the Nisga'a allotment, which was guaranteed by the terms of the

Treaty and which the Minister had no authority to change at the Gitanyow's request, that made more detailed consultation fruitless:

> [293] I find that the Gitanyow were adamant about deep consultation on the TAH and AMP decisions because they did want direct input and ultimately accommodation with regard to both the Nisga'a allotment and the manner in which the Nisga'a Nation exercised its harvest rights under the Treaty. As I have explained in this judgment, neither option is available to the Gitanyow.

[45] As a result, the judge dismissed the applications for declaratory relief sought by the Gitanyow.

The Gitanyow Appeal

[46] The Gitanyow allege three errors by the chambers judge:

(i) changing the test for when the duty to consult arises by modifying the *Haida* test with a fourth step;

(ii) erring in her conclusion that the TAH consultation was adequate by adding to the factors involved in assessing the scope of consultation and by failing to take into account the Crown's recognition of Aboriginal hunting rights throughout British Columbia as a relevant fact in determining the scope of the Crown's duty to consult; and

(iii) determining that no consultation was required regarding the annual management plan.

[47] The appellants also seek a declaratory order from this Court that the Minister must consult annually with the Gitanyow, and where appropriate, accommodate Gitanyow rights and/or title, with regard to the Nisga'a annual management plan.

B. Standard of Review

[48] The standard by which a decision of a chambers judge on a duty to consult case is reviewed in this Court will vary, depending on the extent to which it was necessary for the chambers judge to make original findings of fact.

[49] In *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 [*Agraira*], Justice LeBel for the Court set out a general standard for an appeal to a court of appeal from a judgment of a superior court on an application for judicial review of an administrative decision in these terms:

> [45] … The proper approach to this issue was set out by the Federal Court of Appeal in *Telfer v. Canada Revenue Agency*, 2009 FCA 23, 386 N.R. 212, at para. 18:
>
> > Despite some earlier confusion, there is now ample authority for the proposition that, on an appeal from a decision disposing of an application for judicial review, the question for the appellate court to decide is simply whether the court below identified the appropriate standard of review and applied it correctly. The appellate court is not restricted to asking whether the first-level court committed a palpable and overriding error in its application of the appropriate standard.
>
> [46] In *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23, at para. 247, Deschamps J. aptly described this process as "'step[ping] into the shoes' of the lower court" such that the "appellate court's focus is, in effect, on the administrative decision" (emphasis deleted).
>
> [47] The issue for our consideration can thus be summarized as follows: Did the application judge choose the correct standard of review and apply it properly?

[50] In *Prophet River First Nation v. British Columbia (Environment),* 2017 BCCA 58 at para. 48, this Court observed that the *Agraira standard* was qualified with respect to clear findings of fact by the reviewing judge, citing the following passage from *Hupacasath First Nation v. Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4:

> [75] *Agraira v. Canada (Public Safety and Emergency Preparedness),* [2013] 2 S.C.R. 559, 2013 SCC 36 at paragraph 46 stands for the proposition that we are to stand in the shoes and consider whether the Federal Court properly applied the standard of review. I do not believe that this allows us to substitute our factual findings for those made by the Federal Court.
>
> [76] In my view, as is the case in all areas of appellate review, absent some extricable legal principle, we are to defer to findings that are heavily suffused by the first instance court's appreciation of the evidence, not second-guess them. Only palpable and overriding error can vitiate such findings.

[51] Justice Lowry for the Court went on to conclude that in reviewing the decision of a reviewing judge in these circumstances, "no clear findings of fact made by [the

review judge] are to be altered in the absence of palpable and overriding error": para. 52. Palpable and overriding error is the standard for review of findings of fact set out in the leading decision of *Housen v. Nikolaisen*, 2002 SCC 33. This qualification was reinforced in *Squamish Nation v. British Columbia (Environment),* 2019 BCCA 321 at paras. 72–73.

[52] In *Apotex Inc. v. Canada (Health),* 2018 FCA 147 [*Apotex*], Laskin J.A. expressed this exception in this way:

> [57] … The *Agraira* standard of appellate review does not necessarily apply with respect to all of the issues decided in an application for judicial review. Both this Court and other appellate courts have recognized that where the application judge made findings of fact or mixed fact and law based on the consideration of evidence at first instance, rather than on a review of the administrative decision, these findings are reviewable on the *Housen* standard [of palpable and overriding error] …

[53] This conclusion is consistent with the analysis by Justice Deschamps in *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 [*Merck Frosst*], relied on by LeBel J. in *Agraira*. Justice Deschamps referred to the process of stepping into the shoes of the lower court as the "classic" process, but went on to state that:

> [248] There are exceptions to this classic process. Under s. 44 of the *Access to Information Act*, R.S.C. 1985, c. A-1 ("*ATIA*"), the appeal court's focus is on the reviewing judge's findings, and the rule from *Housen* applies to *that court's* decision …
>
> [Emphasis in original.]

[54] Justice Deschamps pointed out that there were peculiarities in the statutory review process at issue in *Merck Frosst*, and concluded that the reviewing judge was "the first impartial gatekeeper" for the questions at issue in that case. Although Justice Deschamps was writing in dissent in *Merck Frosst*, I note that the majority judgment was to similar effect, though with less elaboration:

> [54] The decision of the judge conducting a review under the Act, which will often have a significant factual component, is subject to appellate review in accordance with the principles set out in *Housen v. Nikolaisen*, 2002 SCC 33 …

[55] In this appeal, the factors relied on by the Minister are stated in brief terms, referencing the Treaty provisions but without analysis of the factual matters raised by the Gitanyow. The reviewing judge reviewed the evidence external to the terms of the Treaty and made a number of findings of fact in confirming the conclusion of the Minister that approval of the AMP did not have the potential for affecting the Aboriginal rights claimed by the Gitanyow.

[56] Review of a decision by the Crown concerning its constitutional obligation not to engage in conduct that has the potential for affecting credible claims for protected Aboriginal rights without consulting the affected Aboriginal group has a distinct constitutional element. On this issue the reviewing judge may fairly be described as the "first impartial gatekeeper" to ensure that the Crown's obligations of honourable dealings are fulfilled. In these circumstances, I consider that this Court must defer to the findings of fact of the chambers judge, and review them on a *Housen* standard. The conclusions of Laskin J.A. in *Apotex* are apposite:

> [58] Here, the finding of the application judge as to what motivated Health Canada was an original finding of fact, not a finding made at first instance by the regulator. In making this finding the application judge was performing functions the same in substance as those performed by trial judges. He was thus better placed to make this finding than an appellate court, and the rationales for application of the *Housen* standard apply …

[57] Subject to this factual review, the decision of the chambers judge will be reviewed for correctness.

C. Did the Judicial Review Judge apply the Correct Test?

[58] Before addressing the factual conclusions reached by the chambers judge, I propose to deal with the modification of the *Haida* test proposed by the judge.

The Test for the Duty to Consult

[59] The foundation for the Crown's duty to consult is the seminal Supreme Court of Canada decision in *Haida Nation v. British Columbia*. In *Haida*, the Court was dealing with a situation where "Aboriginal rights and title have been asserted but have not been defined or proven": para. 18. In writing for the Court, Chief Justice

McLachlin explained that the duty to consult arises "when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it": para. 35. This formulation of the test was repeated in *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74 at para. 25, and was reiterated in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 at paras. 31, 51 and 79 [*Rio Tinto*], where the test was broken down into three elements:

> (i) the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right;
>
> (ii) contemplated Crown conduct; and
>
> (iii) the potential that the contemplated conduct may adversely affect an Aboriginal claim or right.

[60] This test has been consistently applied in reviewing decisions by governmental authority that have the potential to affect s. 35 rights, whether or not those rights have been determined with sufficient precision to be enforceable.

The Chambers Judge's Proposed Modification

[61] The chambers judge was concerned that recognition of a duty to consult the Gitanyow about a decision arising from the Nisga'a Treaty had the potential for undermining Nisga'a treaty rights. To the three questions referred to in *Rio Tinto*, she proposed a fourth:

> [222] In my respectful view, it is appropriate to modify the analysis of the duty to consult to accommodate the nature of interests at stake in this case. This must be done in order to resolve the very real conflict presented on these facts to the fundamental nature of the Crown's duty to each of the Nisga'a Nation and the Gitanyow.
>
> [223] If one only asks if the TAH decision may adversely impact the Gitanyow's asserted rights, the potential negative impact on the Nisga'a Nation's rights is ignored. The concern is not theoretical; the Gitanyow explicitly submit they are entitled to share in the Nisga'a Nation's allotment.
>
> [224] That is why in deciding if a duty to consult the Gitanyow exists, I find it necessary to ask an additional question: would recognizing that the Crown owes a duty to consult the Gitanyow about to the TAH decision, be

> *inconsistent* with the Minister's duties and responsibilities under the Treaty, or the Crown's fiduciary duties to the Nisga'a Nation *in a way that may negatively impact the Nisga'a Nation's rights*?
>
> [225] If the answer is yes, then in my respectful view, the treaty right must prevail over the duty to consult …
>
> [Emphasis in original.]

[62] The chambers judge applied this test to the two decisions to be made by the Minister. She held that recognizing a duty to consult the Gitanyow about the total allowable harvest decision would not be inconsistent with the Minister's duties and responsibilities under the Treaty, or the Crown's fiduciary duties to the Nisga'a Nation in a way that might negatively impact the Nisga'a Nation's rights, and accordingly that the Crown did have an obligation to consult the Gitanyow about the total allowable harvest. However, applying the same test to the approval of the annual management plan, she considered that recognizing such a duty would be inconsistent with the Crown's duties to the Nisga'a, and accordingly held that there was no duty to consult in relation to the management plan.

[63] The appellants submit that this modification of the *Haida* test is inconsistent with the purpose of the consultation obligation to protect s. 35 rights that have not yet been defined by agreement with the Crown or by judicial determination. They argue that if this modification were accepted, the focus of the inquiry would shift from whether the Crown has real or constructive knowledge of the potential existence of Aboriginal rights and title and contemplates conduct that may adversely affect those rights, to one of whether recognition of a consultation obligation is inconsistent with its treaty obligations.

[64] Before the Minister and on judicial review, the Gitanyow were seeking an order that the total allowable harvest be reallocated between the Nisga'a and the Gitanyow in a way that would have been inconsistent with Nisga'a treaty rights. They were effectively asking the Minister to make a decision that would have contravened the Treaty and was outside his authority. In this context, it is understandable that the chambers judge would conclude that the Minister was not required to consult over whether Nisga'a treaty rights should be abridged. But in my view, it was

unnecessary to modify the *Haida* test. The existing test is sufficiently flexible to resolve the questions before the Court.

[65] Where the scope and extent of the claimed Aboriginal interests have not yet been determined, the duty to consult derives from the need to protect these interests while land and resource claims are ongoing: *Rio Tinto* at para. 33. The purpose of the duty to consult, however, is not to provide claimants immediately with what they could be entitled to upon proving or settling their claims: *Ross River Dena Council v. Yukon*, 2020 YKCA 10 at para. 10.

[66] The issue of concern to the chambers judge is more appropriately addressed as a question of accommodation. The threshold for an obligation to consult is not high: *Rio Tinto* at para. 40. Consultation may lead to a need for accommodation, but accommodation is a separate question that is highly dependent on the particular circumstances. The accommodation stage was described in *Haida* in this way:

> [47] When the consultation process suggests amendment of Crown policy, we arrive at the stage of accommodation. Thus the effect of good faith consultation *may* be to reveal a duty to accommodate. Where a strong *prima facie* case exists for the claim, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns *may* require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim. …
>
> [Emphasis added.]

[67] The steps that are necessary "to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim" will vary with the specific conduct in contemplation. There may be circumstances where accommodation of the claimed right cannot be achieved without interfering with an established treaty right. But this does not mean that the Crown need not consult with an Indigenous group that has a credible claim for a s. 35 right that may be affected by the contemplated conduct. There may be other forms of accommodation that mitigate any impact on the rights claimed without interfering with settled s. 35 rights. While in the present case, no other form of accommodation was suggested, the purpose of consultation is to explore these questions in order to ensure that

Indigenous groups with credible s. 35 claims are treated honourably pending claims resolution.

[68] Accordingly, I conclude that it was unnecessary for the judge to modify the *Haida* test to determine when the duty to consult is triggered. If the Crown is aware of a credible claim for an Aboriginal right or title and contemplates conduct that might adversely affect the claimed right, the duty to consult is triggered. Whether any accommodation is required is a separate question. It may well fall within honourable dealing for the Crown to conclude after consultation that no accommodation is required, or accommodation different from that requested by the rights claimant is appropriate. But consultation is the necessary first step, once the conditions set out in the *Haida* test have been met.

[69] Despite my conclusion that the modification of the *Haida* test was unnecessary, I do not consider that the reviewing judge erred in her fundamental approach to the issue before her. The analysis of the chambers judge properly focused on the three-part *Haida* test, and in particular the third element, which asks whether the proposed Crown conduct has the potential for affecting the claimed right. This is primarily a question of fact, to be reviewed on a deferential basis.

D. Was the Minister Required to Consult Before Approving the Annual Management Plan?

Standard of Review on Judicial Review

[70] The first question the chambers judge addressed was whether the Minister had a duty to consult the Gitanyow with respect to the total allowable harvest (asserted by the Gitanyow, conceded by the Minister, opposed by the Nisga'a) and the annual management plan (asserted by the Gitanyow, opposed by the Minister and the Nisga'a). The chambers judge concluded that the standard of review she should apply to the Minister's decision as to whether a duty to consult was triggered was one of correctness:

> [30] … The Province and the Nisga'a Nation deny that the AMP decision triggers a duty to consult, whereas the Gitanyow argue it does. The Nisga'a Nation also argues that no duty arises when setting the TAH, whereas the

> Province and the Gitanyow contend that it does. Clearly, these issues involve questions of law, and therefore the standard of review is correctness.

[71] It is true that a failure to consult when the Crown has knowledge of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it would be an error of law, reviewable on a correctness standard. However, the threshold decision whether the Crown has a duty to consult a specific Indigenous group about a particular decision has both legal and factual elements. Whether the Crown agent has applied the correct legal test is a question of law, reviewed on a standard of correctness. But the correct legal test for the duty to consult as explained in *Haida* requires a consideration of whether the Crown is aware of a credible claim of s. 35 rights by a particular rights claimant, and whether the Crown is contemplating conduct that may adversely affect the claimed rights. These are considerations of a factual nature, to which some deference must be given to the decision-maker.

[72] This duality is explained in *Haida*:

> [61] … The existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However, it is typically premised on an assessment of the facts. It follows that a degree of deference to the findings of fact of the initial adjudicator may be appropriate. … Absent error on legal issues, the tribunal may be in a better position to evaluate the issue than the reviewing court, and some degree of deference may be required. In such a case, the standard of review is likely to be reasonableness. To the extent that the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness. However, where the two are inextricably entwined, the standard will likely be reasonableness. …

[73] This passage was cited by the Court in *Rio Tinto* to support the conclusion that it was "therefore clear that some deference is appropriate on matters of mixed fact and law, invoking the standard of reasonableness": para. 65.

[74] The Supreme Court's decision in *Rio Tinto* illustrates how these two standards of review can operate together in reviewing a decision as to whether the Crown's duty to consult arose. In *Rio Tinto*, the question was whether the governmental decision-maker had erred in concluding that no duty to consult was

triggered by a contemplated Energy Purchase Agreement because the agreement would not adversely affect any Aboriginal interest. The Court applied the dual standards of review in determining whether this conclusion was in error:

> [93] I conclude that the Commission took a correct view of the law on the duty to consult and hence on the question before it on the application for reconsideration. It correctly identified the main issue before it as whether the 2007 EPA had the potential to adversely affect the claims and rights of the CSTC First Nations. It then examined the evidence on this question. It looked at the organizational implications of the 2007 EPA and at the physical changes it might bring about. It concluded that these did not have the potential to adversely impact the claims or rights of the CSTC First Nations. It has not been established that the Commission acted unreasonably in arriving at these conclusions.

Application to the Present Case

[75] In the case at bar, the Minister had to determine if the duty to consult was triggered by the decision to be made whether to approve the annual management plan for the harvest. Whether the Minister applied the correct legal test to these determinations is a question of law reviewable on a correctness standard.

[76] I do not understand the appellants to take issue with the test applied by the Minister to determine whether he had a duty to consult the Gitanyow on the AMP. While the Minister did not articulate all the elements of the *Haida* test, he addressed his mind to the third element, potential impact of his decision on the Gitanyow claimed rights, which was the appropriate question for him to consider. The Gitanyow say, however, that he came to the wrong conclusion on the impact question.

[77] The determination of whether the approval of the AMP has the potential to affect the claimed rights of the Gitanyow is in principle a question of mixed fact and law to which deference would normally be given. *Rio Tinto* stands for the proposition that the standard of review of such a decision is reasonableness. However, in *Rio Tinto*, the decision-maker had examined the evidence and come to certain decisions. As the first instance decision-maker, deference would be given to such factual conclusions.

[78] In the case at bar, the Minister appears to have rested his decision on the nature of the AMP as relating solely to Nisga'a hunters. His statement that the AMP "sets out the management provisions that apply to the Nisga'a harvest in respect of their right to harvest designated species under the [Treaty]" suggests that the Minister came to his conclusion by reference to the text of the Treaty, which does not purport to apply the management plan to anyone other than Nisga'a hunters.

[79] The position of the Gitanyow is that there are factors external to the text of the Treaty that may have the effect of impacting their claimed rights. These are the factors that the chambers judge reviewed. Her decisions on these matters can fairly be described as original findings of fact, to which the *Housen* standard applies on appeal.

[80] To determine whether the reviewing judge committed a palpable and overriding error in her findings of fact, it is necessary to consider the nature of the annual management plan as set out in the Nisga'a Treaty, as well as the specific factual assertions made by the Gitanyow and assessed by the chambers judge. Before doing so, I propose to review the scope of the part of the *Haida* test at issue in these proceedings.

The Adverse Impact Test

[81] The element of the *Haida* test at issue is whether the approval of the 2016/17 AMP had the potential for adversely affecting the Aboriginal rights claimed by the Gitanyow.

[82] In *Rio Tinto*, this element of the *Haida* test was expressed in this way:

> [45] The third element of a duty to consult is the possibility that the Crown conduct may affect the Aboriginal claim or right. The claimant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights. Past wrongs, including previous breaches of the duty to consult, do not suffice.

[83] The Court went on to say at para. 46 that speculative impacts were not sufficient, and that:

> there must an "appreciable adverse effect on the First Nations' ability to exercise their aboriginal right". The adverse effect must be on the future exercise of the right itself; an adverse effect on a First Nation's future negotiating position does not suffice.

[84] Running through the decision of the chambers judge is the distinction between adverse effects caused by the Nisga'a Treaty, including the designation of the Nass Wildlife Area and the treaty right of the Nisga'a to hunt in that area, and adverse effects said to be caused by the specific terms of the AMP for which the approval of the Minister was required. The position of the Minister on this appeal was that the concerns of the Gitanyow arose from the terms of the Treaty, not the AMP, and as explained in *Rio Tinto*, there is no duty to consult in respect of the consequences of decisions made in the past.

Nature of the Annual Management Plan

[85] The annual management plan is a plan derived from the Nisga'a Treaty and explained in para. 55 of chapter 9 of the Treaty:

> 55. An annual management plan will set out the management provisions in respect of the Nisga'a harvest under this Agreement of designated species and other species that the Nisga'a Nation and British Columbia or Canada, as the case may be, have agreed should be included in the annual management plan. The plan will include, as appropriate, provisions consistent with this Agreement in respect of:
>
> a. the identification of Nisga'a harvesters;
>
> b. the methods, timing, and locations of the harvest;
>
> c. the sex and age composition of the harvest of designated species and other species as agreed;
>
> d. monitoring of the harvest and data collection;
>
> e. possession and transportation of wildlife or wildlife parts;
>
> f. the level of harvest of any designated and any other species that may be harvested on Nisga'a Public Lands by persons other than Nisga'a citizens, in accordance with the Access Chapter;
>
> g. angling guiding under paragraph 83; and
>
> h. other matters in respect of wildlife that the Nisga'a Nation and British Columbia or Canada, as the case may be, agree to include in the annual management plan.

[86] Under the Treaty, the Minister's role in relation to the annual management plan is limited. If the AMP is consistent with the Nisga'a Treaty, the Minister must approve it. The Minister cannot reject the plan. If the Minister does not approve the AMP, the Minister must provide written reasons and specify what changes are necessary for its approval.

Impact on the Gitanyow

[87] The evidence before the chambers judge was that the moose population in the Nass Wildlife Area was in decline. The Gitanyow argued that the decline was caused by the Nisga'a harvest, and that this fact supported their right to be consulted about the 2016/17 AMP as well as the TAH. The chambers judge reviewed the evidence tendered by both parties, including evidence that the harvest of cows may contribute to the decline because of the immediate reduction of the potential number of calves that the herd can produce. She concluded that the evidence was insufficient for her to make a finding as to what caused the decline in the moose population in the Nass Wildlife Area, and made this finding:

> [100] Accordingly, I cannot and do not find that the TAH and/or the AMP combined with Nisga'a Nation's harvest caused the decline in moose population, as asserted by the Gitanyow.

[88] The Gitanyow have not challenged this conclusion, which is based on an assessment of the evidence. I proceed on the basis that the Gitanyow have not established that the approval of the 2016/17 AMP had the potential to adversely affect the exercise of Gitanyow rights by affecting the size of the moose population.

[89] The Gitanyow also argued before the chambers judge, and in this Court, that because the AMP determines the methods, timing and location of the Nisga'a Nation annual moose harvest, it has the potential to adversely affect its hunting rights. The chambers judge addressed this argument in this way:

> [241] The considerations listed in para. 59 (which apply to all recommendations of the Wildlife Committee, including the TAH) are applicable to the AMP, but only to the extent the AMP applies to Nisga'a Nation citizens. The AMP only concerns and addresses harvest of moose by Nisga'a citizens; it applies to no one else. The AMP manages how Nisga'a

> citizens will exercise their allotment of the TAH for moose in the NWA, and as such, it is an element of the Nisga'a Nation's internal governance.
>
> [242] Like the TAH, the AMP does not operate independently. The potential negative impact of the AMP described by the Gitanyow, emanates from the combination of the Nisga'a Nation's treaty rights to harvest wildlife, the TAH, the Nisga'a allotment, and the AMP. However, the Treaty is not and cannot be challenged in this proceeding. Thus, from a conceptual perspective, the contribution of the AMP to the potential adverse impact the Gitanyow describe is marginal. In my view, that conceptual impact diminishes entirely in practice because the AMP is only an internal governance mechanism of the Nisga'a Nation over its citizens.
>
> [Emphasis added.]

[90] A marginal potential adverse impact is not an appreciable adverse effect on the Gitanyow's ability to exercise their Aboriginal right. Although the appellants have criticized the judge's characterization of the AMP as "an element of the Nisga'a Nation's internal governance", I can see no error in this description that would warrant appellate intervention. The AMP applies only to the harvesting activities of the Nisga'a hunters, in respect of their harvest of the share of the TAH that is allocated under the Treaty. The Gitanyow are not bound by the AMP. I would not interfere with the reviewing judge's conclusion that on the record before her, any impact on Gitanyow rights arising from the methods and timing of the Nisga'a hunt would be no more than marginal and insufficient to meet the *Haida* test for consultation.

[91] In this Court, the Gitanyow argued that there is a relationship between the sex and age composition of the Nisga'a moose harvest (a topic required for AMPs), and the number of moose in the Gitanyow Lax'yip, thereby supporting the conclusion that the AMP could affect the exercise of Gitanyow rights. While the sex composition of the harvest could affect moose numbers (for example, by harvesting too many cows to sustain the population), this is an issue that can properly be addressed in the TAH, for which the Gitanyow are consulted. In the TAH at issue in these proceedings, for example, the allowable harvest was fixed as 32 bulls, which addresses the sex composition of the harvest at issue in these proceedings.

[92] At a more general level, the chambers judge was alive to the causal factors relating to the TAH and the AMP. In considering the duty to consult concerning the TAH, the chambers judge found that:

> [157] … the number of moose available for the Gitanyow to harvest could be negatively impacted by the Minister's decision of the maximum number of moose that can be harvested in the NWA, regardless of whether the TAH is enforced against the Gitanyow.

[93] No similar finding was made concerning the relationship between the Nisga'a annual management plan and the number of moose available to the Gitanyow. On its face, the relationship seems more tenuous, and the conclusion of the chambers judge at para. 246 that "[t]he Gitanyow have not persuaded me that the AMP decision adversely affects their claim to rights or title" is a finding of mixed fact and law to which deference is owed.

[94] The judge went on to consider how her proposed modification of the *Haida* test applied to the AMP, and, applying that modified test, came to the same conclusion that the duty to consult had not been triggered. As I have indicated, I do not consider it necessary or appropriate to modify the *Haida* test. It is noteworthy that the judge's application of her modified test led her to the same conclusion as the application of the three-part test under *Haida*. In my view, the test whether the duty to consult is triggered remains the three-part test set out in *Haida* and elaborated in *Rio Tinto*.

[95] On appeal, the Gitanyow make an additional argument to support a duty to consult in relation to the AMP. They argue that the Nisga'a treaty rights are circumscribed by paragraph 33 of the Nisga'a Treaty, which they submit embodies the duty to consult neighbouring Indigenous groups and if appropriate, to accommodate their concerns.

[96] Paragraph 33 is one of three paragraphs found in chapter 2 of the Treaty under the sub-heading "Other Aboriginal People". The three paragraphs read as follows:

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

[97] The effect of these provisions is to ensure that the Nisga'a Treaty does not affect the s. 35 rights of other Indigenous groups. If an Indigenous group does establish s. 35 rights, either by final judicial determination or by negotiation with the Crown, and those rights are adversely affected by the provisions of the Nisga'a Treaty, the other rights will prevail, and appropriate measures will be negotiated to address the diminished Nisga'a rights. These provisions provide significant protection for Indigenous groups such as the Gitanyow that have not yet established the nature and scope of their s. 35 rights in a way that could permit enforcement. In my view, however, they are neutral in respect of the Crown's obligation to consult the Gitanyow and, if appropriate accommodate their concerns. They do not stand in the way of consultation by the Crown, nor do they require it. It is when an Indigenous

group's s. 35 rights have been established by treaty or land claims agreement with the Crown or, if necessary, by judicial determination that these provisions become operative.

[98] I can see no basis to interfere with the judge's conclusion confirming the Minister's decision that the 2016/17 AMP did not have the potential for affecting the exercise of the Aboriginal right to hunt moose claimed by the Gitanyow. On that basis, the *Haida* test is not met and no duty to consult on the approval of the AMP arose.

Is the Minister Required to Consult in respect of Future AMPs?

[99] In addition to an order allowing the appeal in respect of the Minister's decision concerning the 2016/2017 harvest, the appellants seek an order that the Minister must consult annually with the Gitanyow, and where appropriate accommodate Gitanyow rights and/or title, with regard to the annual management plan required under the Nisga'a Treaty. I would not make that declaration.

[100] For the reasons given, I am satisfied that the approval of the annual management plan for Nisga'a hunters does not by its terms affect the rights claimed by the Gitanyow, and approval of the 2016/2017 harvest did not affect these rights. Whether circumstances may arise in the future that demonstrate that a particular management plan has an appreciable adverse effect on the ability of the Gitanyow to exercise their Aboriginal rights is a matter to be assessed on the basis of circumstances at that time.

E. Was the Consultation in relation to the Approval of the Total Allowable Harvest Adequate?

[101] The Minister accepted that the decision whether to approve the total allowable harvest was one that had the potential for affecting the Aboriginal rights claimed by the Gitanyow, and that accordingly consultation was required. Consultation did occur, and the Minister was satisfied that it was adequate in the circumstances and was consistent with the honour of the Crown. The Gitanyow say that this conclusion was in error.

Standard of Review on Judicial Review

[102] The chambers judge held that the adequacy of the consultation undertaken by the Minister in respect of the total allowable harvest was to be analyzed under a standard of reasonableness. I agree.

[103] The role of a reviewing judge reviewing the adequacy of the consultation process was explained in *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54:

> [77] The Minister's decision that an adequate consultation and accommodation process occurred is entitled to deference: *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 62. The chambers judge was required to determine whether the Minister reasonably concluded that the Crown's obligation to consult and accommodate had been met. A reviewing judge does not decide the constitutional issues raised in isolation on a standard of correctness, but asks rather whether the decision of the Minister, on the whole, was reasonable.

[104] On this question as well, the Minister's decision was brief, and the chambers judge found it necessary to review the evidence and make findings of fact concerning the consultation process, including the motivation of the Gitanyow in the result sought in the consultation.

The Consultation Process

[105] Consultation with the Gitanyow was initiated by the Minister on June 7, 2016. At that time, the Wildlife Committee had recommended that the TAH for moose for the 2016/17 season be set at 32 bulls. Representatives from the Ministry and the Gitanyow met to exchange information and discuss issues and concerns. The Gitanyow were also given the opportunity to present views directly to the Minister.

[106] The focus of the concerns raised by Gitanyow was the sustainability of the moose population in the Nass Wildlife Area and the manner in which the harvesting of moose should be allocated between Nisga'a and Gitanyow hunters. Under the Nisga'a Treaty, Nisga'a hunters are allocated 80% of the total allowable harvest of moose if the TAH is less than 50 moose. Thus, for a TAH of 32, their allocation under the Treaty was 25 moose. The Nisga'a Treaty does not purport to limit directly

the number of moose harvested by other hunters in the Nass Harvest Area, and at the present time the Ministry does not attempt to impose harvesting limits on the Gitanyow, based on the TAH or otherwise. Nevertheless, the Gitanyow are concerned that too high a number of moose allocated to Nisga'a hunters will indirectly force a reduction in the Gitanyow hunt, in order to maintain sustainability of the moose population.

[107] The chambers judge reviewed the consultation process at paras. 272–294 of her judgment, and concluded that "the Province provided fair, timely and sufficient opportunity to the Gitanyow to engage in genuine consultation about the TAH decision to the appropriate degree." She also made a finding that the Province provided the opportunity for even more meaningful participation, akin to deep consultation, via the Moose Management Program. While the appellants are critical of the scope of the consultation, I can see no basis on which this Court could interfere with the findings of the Minister and the reviewing judge that the consultation was adequate in the circumstances.

[108] During the consultation process, the Gitanyow proposed a form of accommodation of their concerns in these terms:

> The Gitanyow propose for 2016/2017 that of the 32 moose presently proposed by the Nass Wildlife Committee for this year's TAH, 16 of those will be available to the Nisga'a only 8 of which can be harvested within the Gitanyow Lax'yip portion of the Nass Wildlife Area), and 16 of those will be available for the Gitanyow.

[109] The effect of this proposal would have been to decrease the Nisga'a Treaty entitlement of 25 moose to 16. This is a form of accommodation that would require the Minister to breach the Treaty. On this appeal, the Gitanyow accepted that reasonable accommodation cannot require the Crown to breach a treaty it has entered into with another First Nation. I agree.

[110] The chambers judge made a specific finding about the approach taken by the Gitanyow in the consultation:

> [293] I find that the Gitanyow were adamant about deep consultation on the TAH and AMP decisions because they did want direct input and ultimately accommodation with regard to both the Nisga'a allotment and the manner in which the Nisga'a Nation exercised its harvest rights under the Treaty. …

[111] No challenge was made in this Court to this finding, and I am satisfied that it supports the conclusion that the Crown's consultation was adequate in the circumstances presented by the appellants.

[112] While I accept that the Gitanyow proposal reflected a genuine concern about the sustainability of the moose harvesting levels in the Nass Wildlife Area, adequate consultation does not guarantee that, in the end, the specific accommodation sought will be warranted or possible. The s. 35 obligation to consult and accommodate regarding unproven claims is a right to a process, not to a particular outcome. The ultimate obligation is that the Crown act honourably: *Ktunaxa* at paras. 79–83.

[113] In this Court, the appellants do not criticize the Minister's decision not to accede to their request that the Nisga'a allocation of moose be reduced from 25 to 16. They agree that reasonable accommodation cannot require the Crown to breach a treaty right held by another First Nation. They say, however, that the chambers judge was wrong to reject the possibility of *any* accommodation of the Gitanyow's concerns because of the potential impact on Nisga'a rights, focusing on this statement by the chambers judge:

> [291] … Given the modification I have applied to the legal test about the existence of the duty, I also specifically find that the Province was not required to accommodate the Gitanyow's concerns in making the TAH decision. Doing so may have negatively affected the Nisga'a Nation's rights, or contravened specific Treaty provisions.

[114] The appellants submit that the duty to consult the Gitanyow is not necessarily in conflict with Nisga'a treaty rights. I agree, but the chambers judge was addressing the record before her, as must we. No other reasonable accommodation for the Gitanyow's concerns has been proposed, having in mind the Nisga'a treaty rights engaged in these proceedings.

[115] On appeal, the Gitanyow made an additional submission concerning the scope of the consultation that was required. They submit that the Province has recognized Aboriginal hunting rights throughout British Columbia as a relevant fact in determining the scope of the Crown's duty to consult regarding the TAH decision. The Minister submits that this argument is factually incorrect, and conflates the Province's general acknowledgement that there are s. 35 rights in existence that have not been defined with precision, with a conclusion that specific rights exist in all places in which they have been asserted. This is the dilemma that led to the recognition of the Crown's obligation to consult pending claims resolution.

[116] In my opinion, this additional submission does not affect the conclusion that the consultation process concerning the approval of the total allowable harvest adequately met the honour of the Crown.

Should a Declaration be Issued?

[117] The appellants have submitted that since the chambers judge found that the Minister was under a duty to consult them with respect to the total allowable harvest, the judge should have issued a declaration to that effect, as requested in their petition. They seek such a declaration from this Court.

[118] As the Minister has agreed to consult the Gitanyow on the total allowable harvest, I consider it unnecessary for this Court to issue a declaration on the subject, for two reasons. First, there was not an active dispute before this Court on the issue. The appellants and the Minister did not join issue on the question. The Nisga'a made it clear that they did not agree that the Minister had this obligation, but did not request an order to that effect. The parties appear to have arranged a workable approach to the consideration of the total allowable harvest, and I see no reason for this Court to interfere with that approach.

[119] Second, if the issue were a live one, a more complete record would be necessary in order to determine whether as a matter of fact the Gitanyow are affected by the approval of the total allowable harvest. The request for consultation would suggest that the Gitanyow considered themselves affected by the TAH, but

we were advised that the Minister does not seek to enforce the TAH restrictions on the Gitanyow and it is unclear from the record whether they consider themselves to be bound by them.

[120] In sum, I would leave the question whether the Minister is *required* to consult the Gitanyow on the total allowable harvest for a case in which there is adversity of position, and a more complete record on the actual impact of the TAH on the exercise of the ability of the Gitanyow to hunt moose in the Gitanyow Lax'yip. In making this comment, I do not wish in any way to undermine the common sense of consulting with all affected parties on matters of concern in this area of overlapping claims. It is to be hoped that the development of the Moose Management Plan, to which all parties will have input, will alleviate many of these concerns.

Conclusion

[121] The appellants have challenged two decisions of the Minister of Forests, Lands and Natural Resources Operations arising from the operation of the Nisga'a Treaty. The first was a decision not to consult the Gitanyow on the annual management plan for the Nisga'a harvest of moose in the Nass Wildlife Area. This decision turned on whether the annual management plan for the Nisga'a harvest of moose had the potential for affecting Aboriginal hunting rights claimed by the Gitanyow. The Minister concluded that the plan did not have that potential, based on the nature of the plan as set out in the Treaty. The judicial review judge came to the same conclusion after addressing specific factual issues, external to the Treaty, raised by the Gitanyow. I can see no error in the conclusion that the annual management plan did not affect Gitanyow hunting rights, and accordingly no duty to consult the Gitanyow arose.

[122] The chambers judge also held that the *Haida* test should be modified to take into account the potential for interfering with treaty rights. In my view, that modification is unnecessary, as the three-part *Haida* test is adequate to address the issues in this case. The proposed modification is not necessary to sustain the

chambers judgment, which is based on the judge's consideration of the third element of the existing *Haida* test.

[123] The second decision was that the consultation undertaken by the Minister in relation to the approval of the total allowable harvest in the Nass Wildlife Area had been adequate to meet the honour of the Crown. The Minister concluded that it was, and the chambers judge, after an independent review of the circumstances of the consultation and the position of the parties, agreed. I can see no error in this conclusion.

[124] For the foregoing reasons, I would dismiss the appeal.

"The Honourable Mr. Justice Hunter"

I AGREE:

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Madam Justice Griffin"