COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Da'naxda'xw/Awaetlala First Nation v. British Columbia (Energy, Mines and Natural Gas),* 2016 BCCA 163

Date: 20160418
Docket: CA42531

Between:

Da'naxda'xw/Awaetlala First Nation and Kleana Power Corporation

Appellants/
Respondents on Cross Appeal
(Petitioners)

And

The Minister of Energy, Mines and Natural Gas, and Her Majesty the Queen in right of the Province of British Columbia

Respondents/
Appellants on Cross Appeal
(Respondents)

And

British Columbia Hydro and Power Authority

Respondent
(Respondent)

Before: The Honourable Mr. Justice Lowry
The Honourable Madam Justice Bennett
The Honourable Madam Justice Dickson

On appeal from: An order of the Supreme Court of British Columbia, dated January 8, 2015 (*Da'naxda'xw/Awaetlala First Nation v. British Columbia Hydro and Power Authority*, 2015 BCSC 16, Vancouver Docket S125757).

Counsel for the Appellants: P. A. Gall, Q.C.

Counsel for the Respondents, The Minister of Energy, Mines and Natural Gas, and Her Majesty the Queen in right of the Province of British Columbia: D. G. Cowie

Counsel for the Respondent, British Columbia Hydro and Power Authority: C. F. Willms and T. Ahmed

Place and Date of Hearing: Vancouver, British Columbia
March 1 and 2, 2016

Place and Date of Judgment: Vancouver, British Columbia
April 18, 2016

Written Reasons by:
The Honourable Mr. Justice Lowry

Concurred in by:
The Honourable Madam Justice Bennett
The Honourable Madam Justice Dickson

Summary:

Appeal from the disposition of an application for the judicial review of a direction given pursuant to a commitment made by a minister of the provincial government to a First Nation and a private company that sought to develop a hydro-electric power project within the First Nation's traditional territories to their mutual financial advantage. The project could not be developed without the alteration of the boundary of an environmentally protected area, which would take time and impair the prospect of the company competing for an electricity purchase agreement. The commitment was made in 2008 to provide a solution. The issue was its terms. The minister was said to have committed to no more than directing the public utility involved to negotiate an agreement with the company (apart from the competition) at such time as it became ready to proceed. That was the direction given four years later in 2012 when, following the court's intervention, the boundary was amended. But by then the price of electricity had fallen to the extent that the project was no longer viable. The First Nation and the company contended the commitment had been much broader, requiring a direction to negotiate on the terms and at the pricing of the projects that had been successful in the 2008 competition. On the application being heard, it was held the commitment was limited to the direction that was given. However, the province was declared to have failed in its duty to consult with the First Nation in an attempt to find a reasonable accommodation for which the judge considered the First Nation was entitled to a remedy. The primary ground of appeal was that the judge had made an overriding and palpable error in what she found the commitment to have been. Two alternative grounds of appeal were advanced and the declaration made was challenged by cross appeal. Held: Appeal dismissed; cross appeal allowed with the application remitted to the judge. There was no error in the judge's finding of fact as to what the commitment was. The alternative grounds advanced were not sound. The declaration made had not been sought. It was appropriate that the application be remitted to the judge to reconsider the remedy to which the First Nation may be entitled.

Reasons for Judgment of the Honourable Mr. Justice Lowry:

[1] This appeal arises out of the second of two applications for judicial review concerning a commitment given to a First Nation and a private company in dealings with the provincial government concerning the alteration of the boundary of a designated environmental protection area within the First Nation's asserted traditional territories. The alteration was required to permit the company to develop a run-of-the-river hydro-electric power project for the long-term financial benefit of both the company and the First Nation. The commitment was given to forestall litigation against the government and adverse media attention. Its terms were the primary issue in both applications.

[2] The terms for which the First Nation and the company contended on the first application are not the same as those for which they contended on the second. Both Madam Justice Fisher, who heard the first application to review a decision of the Minister of Environment, and Madam Justice Adair, who heard the second to review a decision of the Minister of Energy, Mines, and Natural Gas ("Minister of Energy"), found the terms to be other than as contended in any event. Both, however, granted declaratory relief requiring consultation with the First Nation to attempt to find a reasonable accommodation.

[3] The First Nation and the company advance the appeal primarily on the ground that the judge made an error of fact – amounting to an overriding and palpable error – in what she found the terms of the commitment to be. They advance, as well, two alternative grounds of appeal. A cross appeal challenges the declaratory relief she granted.

The Commitment

[4] The lengthy history of this matter is fully detailed in the comprehensive reasons for judgment given in both the first application (2011 BCSC 620) and the second (2015 BCSC 16).

[5] Da'naxda'xw/Awaetlala Nation, also known as Da'naxda'xw First Nation, being an amalgamation of two tribes, has for some time been in treaty negotiations. Its asserted traditional territories include land that runs from the source of the Klinaklini River to where it flows into Knight Inlet on the north coast of the province. Kleana Power Corporation ("Kleana") is an independent developer and operator of hydro-electric projects. In 2005, it proposed an arrangement with the Da'naxda'xw. Subject to obtaining a contract referred to as an Energy Purchase Agreement ("EPA") with British Columbia Hydro and Power Authority ("BC Hydro"), a Crown corporation, for the sale of the electricity to be produced, Kleana would develop a power project on the Upper Klinaklini River on the basis that revenues would be shared with the First Nation and employment provided to its people. The Da'naxda'xw endorsed the proposal. Kleana then embarked on preparation of the response it would make to compete in BC Hydro's next request for proposals regarding projects for the sale of electricity to BC Hydro, which was expected within a couple of years. BC Hydro issued what was titled its Clean Power Call Request for Proposals (the "Call") in June 2008.

[6] The two people most involved with the proposal and in dealing with the government were Alexander Eunall, the president of Kleana, and Fred Glendale, a councillor and resource manager for the Da'naxda'xw who was made a director of Kleana. Mr. Glendale passed away in August 2012 after the first application for judicial review. Dallas Smith, the president of the Nanwakolas Council, assembled in February 2007 and consisting of eight First Nations including the Da'naxda'xw, also became involved.

[7] In 2006, the place where Kleana proposed to build the project was within a protected area under the *Environment and Land Use Act,* R.S.B.C. 1996, c. 117, which temporarily precluded projects of that kind and others. In that year, the government announced an agreement with a number of stakeholders, including the Da'naxda'xw, that would lead to the designation of over 100 protected areas in the central and north coast regions of the province to be identified as "conservancies"

under the *Protected Areas of British Columbia Act,* S.B.C. 2000, c. 17. All conservancies were to be subject to a shared ecosystem-based management approach. Some 24 were designated that year and a further 85 were expected to be designated the next year.

[8] The site of Kleana's project as initially proposed was not within a planned conservancy, but environmental and engineering studies showed the intake for the project needed to be constructed at a higher elevation, about five kilometres north of the border of the planned Dzawadi/Upper Klinaklini River Conservancy. When the conservancy was designated, the project would be precluded as it had been under the *Environment and Land Use Act*.

[9] From 2006 onward, there were two administrative processes pursued to advance the project. The first was Kleana's application through the Environmental Assessment Office to obtain federal and provincial environmental approval for the project. The second was the effort to have the proposed boundary of the Dzawadi/Upper Klinaklini River Conservancy altered to accommodate the project, which the Da'naxda'xw sought to have done before the conservancy was designated as such by legislation. It suffices to say now that, over the course of the next two years, both administrative processes, led by Mr. Glendale and Mr. Eunall, with the intervention of Mr. Smith, proceeded in a positive way through the exchange of information and ideas in correspondence and at several meetings with government personnel. Many other conservancies were designated but, because of the Da'naxda'xw effort to have the boundary altered, the Dzawadi/Upper Klinaklini River Conservancy was not. Then, in late April 2008, without first informing the Da'naxda'xw, the Minister of Environment introduced Bill 38 in the Legislature to designate further conservancies as such. These included the Dzawadi/Upper Klinaklini River Conservancy, without the boundary amendment.

[10] The Da'naxda'xw threatened litigation and sought a meeting with the government. On May 22, 2008, Mr. Glendale, Mr. Eunall and Mr. Smith met with four cabinet Ministers: the Honourable Michael de Jong, Minister of Aboriginal

Relations and Reconciliation; the Honourable Barry Penner, Minister of Environment; the Honourable Patrick Bell, Minister of Agriculture and Lands; and the Honourable Richard Neufeld, Minister of Energy, who was later appointed to the Senate. They also met with several of their Deputy Ministers and staff. No one representing BC Hydro attended.

[11] The Call was expected shortly. The Da'naxda'xw and Kleana administrative processes were well advanced, although not complete. Where the effort had been to amend the boundary of the Dzawadi/Upper Klinaklini River Conservancy before it was designated as such in legislation, the passing of Bill 38 would mean having to amend enacted legislation to alter the boundary. That served to complicate, undermine, and delay Kleana's being put in a position to fully compete in the Call.

[12] The discussion at the meeting focused on the difficulty the unamended conservancy boundary created for the project and Kleana's participating in the Call, on the one hand, and the government's wish to have the bill passed as introduced and to avoid litigation and adverse media attention, on the other. Timing was a concern on both sides. By way of compromise, the ministers proposed a commitment be given, with a letter being sent to the Da'naxda'xw, in return for their permitting the bill to pass, as they did, without initiating legal proceedings or airing their grievance over it with the media. Minister Neufeld wrote to Mr. Glendale in June, July, and October, 2008.

[13] For the Minister, it is contended that the commitment was as narrow as he stated it to be in what he wrote to the Da'naxda'xw: specifically, that (quite apart from the Call) when Kleana was ready to proceed with its Upper Klinaklini River power project, he would direct BC Hydro to enter into negotiations with the company for an EPA. The Da'naxda'xw and Kleana maintain what the Minister wrote does not express the whole of the commitment given at the meeting. They say the commitment was much broader. With respect to an EPA, they say the Minister committed to direct BC Hydro to negotiate a contract on the "factors and terms" of the Call at a price that would be "linked to" – meaning the average of – the price

BC Hydro contracted to pay for the electricity to be delivered from similar projects that were the subject of the proposals that were accepted.

[14] At the end of May, having been passed by the Legislature, Bill 38 was given Royal Assent, thereby designating the conservancies which it addressed, including the Dzawadi/Upper Klinaklini River Conservancy without any amendment of its boundary.

[15] In the first of the three letters Minister Neufeld wrote to Mr. Glendale with respect to the commitment, dated June 10, 2008, he said:

> … the establishment of these conservancies does not necessarily preclude future consideration by Cabinet and the Legislative Assembly of possible amendments to a conservancy boundary in the future that might enable these projects to proceed.
>
> Given the timing of BC Hydro's 2008 Clean Power Call, I would like to draw to your attention the future opportunities to pursue electricity purchase agreements for your projects. One opportunity is to bid these into future BC Hydro requests for proposals. Pursuing electricity purchase agreements outside of a formal request for proposal process may also be a future option.
>
> However, regardless of the process that may be pursued, the electricity purchase agreement would be subject to the British Columbia Utilities Commission assessing that the agreement was in the interests of BC Hydro's ratepayers. One of the main considerations would be the price of the electricity. Benchmarking electricity prices to similar projects in recent BC Hydro call processes was an approach taken for previous electricity purchase agreements that took place outside of a formal process. …

[16] Mr. Eunall took exception to the contents of the letter as amounting to much less than had been said at the meeting. He first wrote to Mr. Glendale. Mr. Eunall recognized there was no commitment from BC Hydro, nothing was said about a place being held open for Kleana in the Call, and that all concerned were to have participated in the wording of the letter. He then emailed the Deputy Minister. Generally, consistent with the notes he made the day after the meeting, he maintained Kleana was to have a place held for it in the Call enabling it to incur the expense of making a proposal without concern about time constraints and that what was required for this was a "confidential commitment" from BC Hydro to this effect. He said that, at the meeting, the Deputy Minister had "cautioned" the need for a

linkage between "the electricity purchase rate" of the Call results and the rate described in what would be a bilateral contract. He added that Kleana would have wanted to have a part in the wording of the letter before it was issued.

[17] The Minister's second letter to Mr. Glendale, dated July 3, 2008, was written to clarify what he had said in the first. He wrote:

> … to reiterate, the establishment of these conservancies does not necessarily preclude future consideration by Cabinet and the Legislative Assembly of possible amendments to a conservancy boundary to enable these projects to proceed.
>
> I also mentioned that pursuing electricity purchase agreements outside of a formal process may be a future option. At the time you are ready to move forward with your project, and there is not a BC Hydro acquisition process available for you to bid into, I will request that BC Hydro enter into negotiations with you for the acquisition of power from your power project.
>
> Any resulting electricity purchase agreement would be subject to the British Columbia Utilities Commission review and acceptance under Section 71 of the *Utilities Commission Act*. A key consideration would be the price of the electricity. As mentioned in my June 11, 2008 letter, benchmarking prices to similar projects in recent BC Hydro call processes was an approach taken for previous electricity purchase agreements that took place outside of a formal call process. …

[18] Mr. Glendale responded to the Minister on July 10, 2008, to "set out clearly the commitments made by government" at the meeting in May. He stated the government had "promised" to make an amendment to the boundary of the Dzawadi/Upper Klinaklini River Conservancy within a reasonable time on its own initiative and, in recognition of the delay this would entail, the Minister said he would "direct" (not "request") BC Hydro to "enter into negotiations with [Kleana]" with respect to a hydro-electric power contract upon the boundary being amended. He then said:

> It was understood that any electricity purchase agreement between KPC and BC Hydro would be subject to BC Utilities Commission processes and that price would be a matter for negotiation, recognizing, as you say in your July 3 letter, that BC Hydro has in the past benchmarked prices in bilateral negotiations by reference to prices for similar successful projects in call processes.

[19] The Minister did not respond until October 15, 2008, when, in his third letter to Mr. Glendale, he wrote:

> With respect to a potential Electricity Purchase Agreement (EPA) with BC Hydro, I am happy to clarify that, if at the time you are ready to move forward with your project there is not a BC Hydro acquisition process available to bid into, it is my intention to direct BC Hydro to enter into negotiations with KPC for the acquisition of power from the KPC's proposed project that falls within the new Conservancy. As noted in my previous correspondence, any resulting EPA would be subject to the review and acceptance of the British Columbia Utilities Commission.

[20] Given that the amendment of conservancy boundaries was properly within the mandate of the Minister of Environment, Minister Neufeld advised Mr. Glendale his letter had been forwarded to Minister Penner for "consideration and response" in that regard. There was thereafter further correspondence with Minister Penner on that subject. Mr. Glendale, Mr. Eunall, and Mr. Smith had a meeting with him in November which, if encouraging, was inconclusive, and there was no follow-up over the next year.

[21] The Call opened in June 2008 and closed in November, five months later. Early on, the initial target of 5,000 gigawatt hours of electricity per year was reduced to 3,000 gigawatt hours per year. The Request for Proposals containing the terms upon which proposals were entertained extends to 300 pages. Importantly, it contains provisions that afford BC Hydro complete and unfettered discretion in the acceptance and rejection of proposals and negates any contractual liability apart from the final acceptance of a proposal and execution of an EPA. There were 68 proposals made by 43 different participants for a total of 17,000 gigawatt hours per year. Kleana submitted its proposal for the Klinaklini River project in November offering 2,000 gigawatt hours. Clearly, it did so in expectation of the Dzawadi/Upper Klinaklini River Conservancy boundary being amended.

[22] It would have been for BC Hydro to assess the proposals with a view to selecting those that would, in combination, best serve the interests of the ratepayers of this province, having particular regard for the price to be paid for the electricity to

be delivered under any given EPA. Presumably that meant giving consideration to the developmental, technical, and financial risks of each proposed project in weighing the deliverability of the electricity it represented over the term of a contract that could be up to 40 years. An independent observer was engaged by BC Hydro to monitor the fairness of the evaluation process.

[23] In November 2009, BC Hydro announced that it was moving ahead with 13 proposals and that 34 others, of which Kleana was one, were to be given the opportunity to make their proposals more cost effective. All were informed there was no guarantee of an EPA. Meetings were then held with various proposers including Kleana. Ultimately, BC Hydro informed Kleana that it required comfort from the government with respect to the Dzawadi/Upper Klinaklini River Conservancy boundary being amended if their proposal was to be considered further. Mr. Glendale and Mr. Eunall approached Minister Penner, and consulted with others in his ministry, but no comfort was forthcoming.

[24] In January 2010, the Da'naxda'xw made an application to Minister Penner under the *Park Act,* R.S.B.C. 1996, c. 344, to have the boundary amended.

[25] In March, BC Hydro announced that 23 proposals totalling 2850 gigawatt hours had been selected for contracts. Kleana was not one of them.

[26] In April, the prospect of the Da'naxda'xw having the boundary of the Dzawadi/Upper Klinaklini River Conservancy amended came to an end. Minister Penner wrote to inform them, with a copy to BC Hydro, that a balancing of the considerations involved – principally the advantages for the First Nation and the electrical power that could be produced, weighed against environmental and ecological disadvantages, all of which he set out – had caused him to decide not to recommend the amendment to Cabinet. In May, BC Hydro wrote to Kleana informing the company its proposal had not been successful.

[27] Thereafter, BC Hydro accepted four more proposals that brought the total to 3265 gigawatt hours. The consideration of proposals made in response to the Clean Power Call was then concluded.

[28] In August 2010, the Da'naxda'xw applied for the judicial review of the decision Minister Penner had made. In so doing, it contended that at the meeting in May 2008, there had been a commitment to amend the Dzawadi/Upper Klinaklini River Conservancy boundary.

The First Judicial Review

[29] In their petition, filed August 31 and amended December 3, 2010, the Da'naxda'xw and Kleana pleaded the terms of what they contended the commitment given at the meeting in May 2008 to have been:

> 22. On May 22, 2008, four Ministers of the Provincial Crown … met with representatives of the Da'naxda'xw, Nanwakolas Council and Kleana, and undertook on their own behalf and on behalf of the Province to the Da'naxda'xw and Kleana that:
>
> a. a correction would be made to the boundary of the Upper Klinaklini Conservancy, only not before Bill 38 was enacted, because the timing was bad for the government;
>
> b. if as a result of the delay in correcting the boundary, Kleana lost the opportunity to compete successfully in a clean power call by BC Hydro, Minister Neufeld would direct BC Hydro to enter into negotiations with Kleana for an EPA; and
>
> c. the Four Ministers would instruct their Deputy Ministers to produce a letter to the Da'naxda'xw documenting these undertakings.

[30] Significantly, what was said to be the commitment contained no mention of the factors and terms of, or pricing being linked to, the Call.

[31] On the application, an order was sought quashing the Minister's decision and a declaration requiring him to recommend to Cabinet an amendment to the boundary of the Dzawadi/Upper Klinaklini River Conservancy through amending legislation.

[32] In May 2011, following an eight-day hearing, Fisher J. gave judgment. She found that, on a balance of probabilities, no commitment to amend the boundary of the Dzawadi/Upper Klinaklini River Conservancy had been made. She first recognized that Minister Penner, who was said to have given the commitment, did not have the authority to do more than make a recommendation to Cabinet; an amendment would require legislation. She then found the evidence of Mr. Glendale, Mr. Eunall, and Mr. Smith to be inconsistent as to what commitment had been given, although she said she did not find them to be untruthful but rather giving evidence of the impression they had formed about the boundary being amended. Finally, she found what Minister Neufeld wrote to Mr. Glendale following the meeting did not support a finding that Minister Penner committed to have the boundary amended.

[33] However, Fisher J. did find there had been failures on the part of Minister Penner to consult the Da'naxda'xw:

> [198] ... the Crown failed to fulfill its duty to consult. The consultation carried out in respect of the boundary amendment request was inadequate. Prior to the enactment of Bill 38, despite the efforts of Ministry staff, the Minister did not consider at all the specific concerns of the Da'naxda'xw regarding the boundary of the Upper Klinaklini Conservancy [Dzawadi/Upper Klinaklini River Conservancy] in relation to the Project. Subsequently, the Minister failed to provide the Da'naxda'xw with an opportunity to respond to his concerns about the potential environmental impacts of the Project and failed to consider any form of accommodation.

[34] The Minister's decision not to recommend a change in the conservatory boundary to Cabinet could not stand. While Fisher J. did not consider it appropriate to direct the Minister to make a recommendation, she was of the view that it was incumbent on him to attempt to find a reasonable accommodation for the Da'naxda'xw before having made a decision that would bring the proposed Upper Klinaklini River project to an end. She granted the following relief (para. 234):

> 1. an order in the nature of *certiorari*, quashing the Minister's decision of April 27, 2010;
>
> 2. a declaration that the Minister has a legal duty to consult with the Da'naxda'xw about their request for an amendment to the boundary of the

> Upper Klinaklini Conservancy, with a view to considering a reasonable accommodation; and
>
> 3. a declaration that the Minister failed to fulfill his constitutional duty to adequately consult with the Da'naxda'xw in the course of deciding whether to recommend an amendment to the boundary of the Upper Klinaklini Conservancy to Cabinet.

[35] Consultation between the Ministry of Environment and the Da'naxda'xw began soon after the judgment was rendered. It is clear that the only accommodation the First Nation sought was the amendment of the Dzawadi/Upper Klinaklini River Conservancy boundary – that is, that Minister Penner make the recommendation to Cabinet that Fisher J. had declined to order him to make. They prepared and presented a statement of what was sought. After consideration and discussion over some months, it was substantially accepted. The Minister's recommendation was made and the boundary was amended to accommodate Kleana's Upper Klinaklini River project by the enactment of Bill 49 on May 31, 2012, proclaimed in force by Order in Council No. 430/2012 on June 22, 2012. The amendment is said to have been qualified in that the boundary will revert to what it was if the project is not developed.

[36] The Da'naxda'xw and Kleana sought to have the then Minister of Energy, the Honourable Richard Coleman, direct BC Hydro to enter into negotiations for a hydro-electric power contract with the company. They had their solicitors write to him on June 21, 2012. The solicitors discussed the history of the matter at some length. Most significantly they said:

> A second matter was discussed at the meeting in May 2008. This concerned the process by which an electricity purchase agreement could be negotiated in respect of the project. The problem was that Bill 38, once enacted, would potentially prevent Kleana from negotiating a power purchase agreement with BC Hydro. This could effectively kill the project.
>
> Accordingly, the Honourable Richard Neufeld, Minster of Energy, provided assurances to my clients that if the conservancy prevented BC Hydro from entering into a contract with Kleana, <u>then at such time as the conservancy boundary was amended the government would direct BC Hydro to enter into negotiations for an electricity purchase agreement with Kleana</u>.

> Minister Neufeld sent three letters to my clients to confirm this critically important assurance. ...
>
> ...
>
> Now that the conservancy issue has been resolved by Bill 49 it is time for government to honour the promise Minister Neufeld made in 2008. Accordingly, we now request the government to direct that BC Hydro enter into negotiations with Kleana with respect to concluding an electricity purchase agreement.
>
> This project has been much delayed, at great cost to Kleana and the members of the Da'Naxda'xw First Nation. For four years the project was delayed by the government's breach of its duty to the Da'Naxda'xw in failing to consult honourably. There is no need or reason for further delay. My clients are ready, willing and able to enter into negotiations with respect to the sale of electricity from the Kleana project on commercially reasonable and viable terms. We ask you to direct that such negotiations take place forthwith.
>
> [Emphasis added.]

[37] The solicitors wrote to the Minister again on July 13, 2012, requesting some communication from BC Hydro and emphasizing "the next step in the process would be for government to honour Minister Neufeld's 2008 promise". The solicitors then received an email from BC Hydro with respect to arranging a meeting with Kleana that gave rise to the issue that led to the second application for judicial review.

[38] By 2012, BC Hydro's need for hydro-electric power was not what it was when the Call opened four years earlier, and certainly not at the price that BC Hydro agreed to pay for electricity in the EPAs resulting from that process. Indeed, BC Hydro informed Kleana the price it would be considering would be 25% less than what Kleana had proposed in its final negotiating meetings with BC Hydro in 2010. Kleana and BC Hydro had a meeting in July but it was unproductive. It was evident that, at a commercially reasonable price for electricity, the development of the project was not viable.

[39] The position Da'naxda'xw and Kleana took was expressed in a letter from their solicitors to BC Hydro before the meeting. In that letter, dated July 20, 2012, they advanced a decidedly different position than what had been said a month earlier when their solicitors wrote to Minister Coleman. They said that, with the

conservancy boundary resolved, the Minister's commitment came into effect and it was time, not to negotiate, but to "conclude" the EPA that could not be concluded in 2010, essentially at the price negotiated then:

> The result is that the "only significant hurdle" to the conclusion of a power purchase agreement with BC Hydro – the issue that caused Kleana's proposal to be dropped from the 200[8] Clean Power Call – has been resolved. Accordingly, our client's position is that Minister Neufeld's promise comes into play, and it is time to conclude the contract with BC Hydro that could not be concluded in 2010 because of the conservancy boundary issue.
>
> The question is not, therefore, whether BC Hydro needs the output of the Kleana project. BC Hydro certainly needed power at the time of the Clean Power Call, and must be taken to have known of Minister Neufeld's promise. From our clients' perspective, the parties are back at the point they were when negotiations were terminated by BC Hydro in early 2010, waiting for BC Hydro's final offer to reach an agreement. Minister Neufeld's promise would be meaningless if at this stage BC Hydro could avoid it by saying it did not need the power.
>
> It is also our client's position that the contract price must be at the least consistent with what was already negotiated for this project in the 200[8] Clean Power Call, adjusted, however, for inflation. Again, the whole point of Minister Neufeld's promise was to ensure that a delay in resolving the boundary problem would not count against the project. ...
>
> [Emphasis added.]

The Second Judicial Review

[40] In August 2012, the Da'naxda'xw and Kleana filed a petition and made application for judicial review seeking an order requiring Minister Coleman to direct BC Hydro to enter into negotiations with Kleana. The original petition stated the commitment in terms that are consistent with Minister Neufeld's third of his three letters to Mr. Glendale and Mr. Glendale's response to the second in 2008:

> 14. During a meeting with various Ministers of the Government, still prior to the passing of Bill 38, Kleana expressed its concern that Bill 38 would result in it losing the ability to participate in BC Hydro's Clean Power Call. As a compromise, the Minister of Energy, Mines and Petroleum Resources – Minister Neufeld – undertook to direct BC Hydro to negotiate an Energy Purchase Agreement with Kleana if there was no suitable power call available when the boundary issue was resolved. This promise was reiterated and confirmed in a letter dated October 15, 2008, from Minister Neufeld to the Da'naxda'xw.

[41] In September 2012, the Minister issued a letter to BC Hydro referencing the three letters Minister Neufeld had written to Mr. Glendale and providing:

> … I write to direct the British Columbia Hydro and Power Authority to enter into negotiations with Kleana Power Corporation with respect to their proposed hydroelectric project on the Klinaklini River.
>
> As my predecessor stated, any resulting Electricity Purchase Agreement (Agreement) would be subject to review and approval of the British Columbia Utilities Commission to ensure the Agreement is in the interests of BC Hydro's ratepayers. One of the main considerations would be the price of the electricity. I direct that you enter into good faith negotiations with this mandate in mind.

[42] BC Hydro informed Kleana it would follow the Minister's direction.

[43] The Da'naxda'xw and Kleana then had their solicitors write to BC Hydro raising two requirements. The first, contrary to what was provided for by Minister Neufeld and acknowledged by Mr. Glendale, was to dispense with the approval normally required by the Utilities Commission, as had apparently been done for all EPAs awarded out of the Call. The second was that the negotiations had to be conducted within the same average pricing framework (adjusted for inflation) and terms used in similar project proposals in the Call. In effect, they took the position that, by virtue of the commitment Minister Neufeld had given, BC Hydro was to negotiate a contract for the purchase of electricity at a price that would burden ratepayers with the cost of purchasing hydro-electric power from a project the development of which, at least in 2012, was not viable at what was then a reasonable commercial price. They were informed the requirements were not acceptable.

[44] The Da'naxda'xw and Kleana amended their petition in October, and then, a year later, amended it again in November 2013. They sought an order that the Minister's direction be quashed and that he be required to issue a new direction to BC Hydro. This new direction was to include the requirement that BC Hydro negotiate with Kleana on the same "factors and terms" applied to power projects under the Call. As pleaded, the commitment for which they then contended was:

> 20. At that meeting, the Minister of Energy told the Petitioners that if the conservancy boundary was not amended to exclude the area of the Petitioners' project in time for the Clean Power Call, the Government would direct BC Hydro to keep a place open to allow Kleana to enter into negotiations and to conclude an Electricity Purchase Agreement with BC Hydro, and that the price for power would be tied to the prices paid in the 2008 Clean Power Call. These representations were subsequently confirmed in letters to Mr. Glendale, who was the representative of the Da'naxda'xw.

[45] To be clear, there was no representation in the Minister's letters to Mr. Glendale (nor in his response) that the price for power would be tied to prices paid in the Call. To the contrary, as quoted, it was said price would be a key consideration and that it would be a matter of negotiation.

[46] In January 2015, following another eight-day hearing at which Senator Neufeld, Mr. Eunall, and Mr. Smith were cross-examined on the affidavits they swore, Adair J. gave judgment. She determined Minister Coleman's direction to BC Hydro could properly be the subject of judicial review because there is a sufficient statutory basis to ground his giving that direction as the exercise of a statutory power. Her reasons then contain a detailed review of the evidence, much of which she quoted.

[47] The essence of the material evidence, for present purposes, can be shortly summarized. Mr. Glendale's evidence (taken from his affidavit filed on the first judicial review application) is to the effect that Minister Neufeld said that if there was no hydro-electric power call when Kleana was ready to proceed, i.e., when the Dzawadi/Upper Klinaklini River Conservancy boundary was amended, he would direct BC Hydro to negotiate an EPA with the company. Consistent with Mr. Glendale's responding letter to the Minister in July 2008, his evidence makes no mention of a place being held open in the Call or, for that matter, any terms that would limit the scope of negotiations. By contrast, the evidence of both Mr. Smith and Mr. Eunall, consistent with Mr. Eunall's notes made the day after the meeting, is to the effect that what the Minister said was that he would direct BC Hydro to hold a place in the Call open for Kleana which would allow the company to enter into

negotiations and complete an EPA with BC Hydro at a price that would be linked to the successful proposals submitted in the Call. All three deposed a letter was to be forthcoming, the contents of which were discussed with Deputy Ministers after the meeting. Senator Neufeld deposed that his three letters state the extent of the commitment made at the meeting.

[48] The judge identified frailties she saw raised in cross-examination concerning the evidence of Mr. Eunall and Mr. Smith with respect to supporting the scope of the commitment for which the Da'naxda'xw and Kleana contended. She specifically found Mr. Eunall's evidence to be unreliable given that one aspect of it appeared tailored to support the words "factors and terms" employed in the amended petition. He had sworn four affidavits and deposed to those terms only in the affidavits he swore after the petition was amended to include those words.

[49] She then turned to considering what the commitment was that Minister Neufeld gave to the Da'naxda'xw and Kleana. She set out the contention they advanced, recognizing they maintained the actual commitment was given at the May 22 meeting and that the Minister's three letters written thereafter have to be read in that context, not the reverse. She rejected the contention, concluding the discussion at the meeting, which she found to be equivocal, had to be considered in the context of what followed – the letters. She said:

> [185] However, in my opinion, the evidence does not support the conclusion that the petitioners wish me to draw. In particular, I am not persuaded that the Energy Minister's commitment was fully and finally expressed at the May 22 meeting. Contrary to the position taken by the petitioners, the discussion at the May 22 meeting must, in my view, be considered in the context of the 2008 Letters that followed, and the Letters narrow the scope of the commitment the petitioners assert was made to them at the May 22 meeting.

[50] The judge considered the Minister did not have the authority to make the commitment the Da'naxda'xw and Kleana contended he made:

> [186] The Energy Minister did not have the power to bind BC Hydro – a separate legal entity – to anything in the nature of future contractual terms with a third party such as Kleana. Notwithstanding his statutory mandate over energy, the Energy Minister's power in respect of BC Hydro was limited. He did not have the power to direct BC Hydro to "conclude an EPA" with Kleana, and he did not have the power to direct BC Hydro to confine its negotiations with Kleana (especially in relation to price) within certain predetermined limits. In my opinion, the 2008 Letters reflect the reality that the Energy Minister's power to give a direction to BC Hydro in relation to the negotiation of an energy purchase agreement was limited.

[51] What the judge said appears to be entirely consistent with the provisions of the *Hydro and Power Authority Act,* R.S.B.C. 1996, c. 212, and the *Utilities Commission Act,* R.S.B.C. 1996, c. 473. BC Hydro is governed by its directors who must act in the best interests of the corporation, and it is regulated by the Utilities Commission serving the interests of the ratepayers of this province. Under the *Ministry of Energy and Mines Act,* R.S.B.C. 1996, c. 298, the Minister of Energy is the minister "responsible" for BC Hydro. Under s. 4 his duties and powers include "all matters relating to energy". They do not, however, extend to requiring BC Hydro to enter into agreements to purchase energy based on set prices, let alone agreements of that kind free of Utilities Commission approval. Such would appear to require legislation under s. 38(2) of the *Hydro and Power Authority Act* in the form of a regulation issued by order in council (prescribing for BC Hydro different purposes and/or additional classes of activities under s. 12(1.1) and (1.2)) as well as a regulation under s. 3 of the *Utilities Commission Act* directing the commission to effectively ignore considerations of energy and price in reviewing what would be unregulated agreements. Short of legislation then, it would be for BC Hydro to accept or reject any direction or request a Minister of Energy might give with respect to the awarding of an EPA.

[52] The finding the judge then made as to what the commitment was is based largely on Mr. Glendale's evidence, and in particular his letter of response to Minister Neufeld in July of 2008:

[188] Mr. Glendale's evidence is that Minister Neufeld told the meeting that "[i]f there was not a power call when we were ready, Minister Neufeld said that he would direct BC Hydro to negotiate a purchase agreement with us." Mr. Glendale's evidence is consistent with the final statement of the commitment in the Energy Minister's October 15, 2008 letter. Mr. Glendale also said that in the October 15, 2008 letter, the Energy Minister "documented his promise that if there was not a power call when we were ready, he would direct BC Hydro to negotiate a purchase with us." Mr. Glendale's evidence (including what he stated in his July 10, 2008 letter) is consistent on this point. It does not support the position being taken by the petitioners concerning the scope of the commitment.

* * *

[196] In my opinion, the conclusion best supported by the evidence is that the written confirmation (as set out in the 2008 Letters) was intended to state the scope of the Energy Minister's commitment. Thus, the discussions at the May 22 meeting have to be read in the context of what followed, rather than the reverse.

[197] When Minister Neufeld's first two letters arrived, Mr. Eunall had concerns about the contents and he expressed those concerns to Mr. Glendale. However, it was left to Mr. Glendale to communicate with Senator Neufeld, which he did.

[198] The [stated] purpose of Mr. Glendale's July 10, 2008 letter was "to set out clearly the commitments made by government" at the May 22 meeting. I find that that was, in fact, Mr. Glendale's purpose. He reminded the Energy Minister that the commitment made at the May 22 meeting was not to "request" that BC Hydro enter into negotiations for the acquisition of power, but to "direct" this. The strength of the commitment was important, and it was not captured by the word "request." Mr. Glendale acknowledged that "[i]t was understood that any electricity power agreement" between Kleana and BC Hydro "would be subject to BC Utilities Commission processes and that price would be a matter for negotiation, recognizing . . . that BC Hydro has in the past benchmarked prices in bilateral negotiations by reference to prices for similar successful projects in call processes."

* * *

[202] In my opinion, Mr. Glendale's letter is evidence that the petitioners understood that: (a) the discussions at the May 22 meeting were not intended to be the last word and the scope of the commitment would be later confirmed in writing; and (b) price was something to be negotiated and subject to BC Utilities Commission "processes." It is also evidence that the petitioners understood that prices might be (not would be) "benchmarked" by reference to prices for similar successful projects in call processes, but in any event would still [be] subject to BC Utilities Commission review and approval.

* * *

[205] Therefore, in my opinion, the Energy Minister's commitment, as finally expressed, is more narrow tha[n] what the petitioners assert. It is a commitment, once the conservancy boundary is amended, to direct BC Hydro

> to enter into negotiations with Kleana for the acquisition of power from the Project. "Benchmarking" might be an approach taken in the negotiations, but there is no commitment that it would be (nor was the Energy Minister in a position to bind BC Hydro in that respect). Any resulting energy purchase agreement would be subject to review and acceptance by the B.C. Utilities Commission. In my opinion, the petitioners have failed to prove that the Energy Minister made a clear commitment that, once the conservancy boundary was amended, he would direct BC Hydro to negotiate an electricity purchase agreement with Kleana on the basis of factors and terms that applied to power projects under the 2008 Clean Power Call.

[53] On what the judge found, the Minister's commitment stated in the letters to Mr. Glendale in June, July, and October of 2008 was fulfilled by the direction Minister Coleman gave to BC Hydro in September 2012.

[54] The judge then considered whether the Da'naxda'xw and Kleana nonetheless had a basis for a remedy, given that the Upper Klinaklini River project was, by September 2012 when the Minister's direction was given, no longer viable. She considered four grounds.

[55] The first basis for a remedy was the duty to consult and accommodate Aboriginal interests. The Da'naxda'xw contended there were two aspects to be considered. First, they said that further relief was required to remedy Minister Penner's breach of his duty to consult when deciding not to recommend an amendment to the conservancy boundary to Cabinet in 2010 as declared by Fisher J. Second, they said the direction given by Minister Coleman was a further and separate breach of the duty to consult and accommodate entitling them to a remedy. The Da'naxda'xw maintained the accommodation they received from Minister Penner in the conservancy boundary being amended in 2012 was incomplete, and indeed pointless, in the absence of the direction to BC Hydro they sought from Minister Coleman.

[56] After discussing the applicable legal principles, the judge concluded:

> [231] In my opinion, the Da'naxda'xw cannot succeed on the second aspect of this part of their claim. I am not persuaded that the Direction is a further and separate breach of the Crown's duty to consult and accommodate. I see this aspect of the Da'naxda'xw's claim as being dependent on my accepting

> the petitioners' version of the nature and scope of the Energy Minister's commitment in 2008. However, I have not.
>
> [232] However, I find the Da'naxda'xw's position on the first aspect of this part of their claim – that further relief is required to remedy the breaches of duty found by Madam Justice Fisher – compelling.

[57] The judge said that, as Fisher J. had found, there had been a breach of the duty to consult with the Da'naxda'xw before Bill 38 was introduced in the Legislature in 2008, as well as before Minister Penner made his decision not to recommend the conservancy boundary be amended in 2010. She then said that the First Nation and the company were, as a consequence of the ensuing delay in the boundary being amended as it was in 2012, deprived of BC Hydro's complete assessment of the project which otherwise was to have been expected, such being a lost opportunity for the Da'naxda'xw affecting the future use of lands they assert to be part of their traditional territories. The accommodation following Fisher J.'s decision served no purpose. The project is at an end. The judge reasoned:

> [236] … Therefore, the accommodation that was arrived at following the consultations ordered by Madam Justice Fisher is, in the circumstances, pointless. The adverse impact on the Da'naxda'xw is not speculative.
>
> [237] As a result, the original adverse effect on the Da'naxda'xw's interests, of the Environment Minister's decision and of the failure to consult prior to the introduction of Bill 38 into the Legislature, remains unresolved. I do not see how this result can be consistent with the honour of the Crown and the constitutional duty to consult and (if appropriate) accommodate the interests of the Da'naxda'xw. In my view, it is not.

[58] The judge then said:

> [241] The consultations that followed *Da'naxda'xw 2011* [Fisher J.'s decision] did not address the scenario where the Project cannot proceed because the boundary amendment comes too late. Rather, it was assumed that the boundary amendment would be an appropriate form of accommodation. No other form of accommodation was considered. However, on the facts, the assumption is false. In my opinion, a form of accommodation based on a false assumption, when in fact the accommodation is pointless, cannot be consistent with the honour of the Crown or be adequate to discharge the Crown's duty to consult with the Da'naxda'xw.

> [242] I conclude, therefore, that the Province has failed to fulfill its duty to consult, as ordered by Madam Justice Fisher, and with a view to considering a reasonable accommodation of the Da'naxda'xw's interests. The Da'naxda'xw are entitled to a remedy on that basis.
>
> * * *
>
> [255] … I have concluded that the Da'naxda'xw are entitled to further relief and a remedy in respect of the original breaches of the duty to consult owed by the Environment Minister as found by Madam Justice Fisher. In the circumstances, the consultations that followed as a result of Madam Justice Fisher's orders have proved inadequate and the accommodation reached is pointless. The Da'naxda'xw continue to suffer the adverse impacts of the Province's conduct, and the Direction does not ameliorate those impacts. They have lost a unique opportunity – participation in the Project – which is significant to them, especially considering the remote location of their traditional territories.

[59] The judge then considered three other grounds for a remedy: public law estoppel; the doctrine of legitimate expectations; and whether Minister Coleman's direction was an unreasonable decision and abuse of discretion. She concluded none of those remedies were available given her finding of what the extent of the commitment given to the Da'naxda'xw and Kleana was and the fact that Minister Coleman's direction was consistent with it.

[60] The judge dismissed the Da'naxda'xw and Kleana's application for the only order sought which was a direction to be given by Minister Coleman to BC Hydro. But she then granted a broadened declaration of the declaration granted by Fisher J:

> [259] I therefore declare that:
>
> (a) the Province has failed in its constitutional duty to consult with the Da'naxda'xw in the course of deciding to establish the Upper Klinaklini Conservancy and whether to recommend an amendment to the boundary of the Conservancy, and has failed in its constitutional duty to consult with the Da'naxda'xw concerning how and whether the Da'naxda'xw's interests may be accommodated; and
>
> (b) the Province has [a] legal duty to consult with the Da'naxda'xw on those matters, with a view to considering a reasonable accommodation.

[61] Consistent with their pleadings, the Da'naxda'xw and Kleana sought no more than a determination that Minister Coleman was required to give a broader direction to BC Hydro, one that was consistent with the commitment for which they contended. As the first of the two aspects of their submission concerning the duty to consult that the judge considered, they did maintain that, even if the commitment was as narrow as the judge found it to be, it was incumbent on Minister Coleman to give a broader direction. They maintained the direction had to be sufficient to remedy Minister Penner's failure to offer a more meaningful accommodation following Fisher J.'s declaration in 2012, given that by the time the conservancy boundary was amended it was too late for the project to be considered by BC Hydro in the Call. But it was not contended that the remedy lay in the declaration the judge made or any other. From the parties' perspective, the remedy the judge fashioned was first raised in her reasons for judgment. On what the judge said, the declaration is to remedy Minister Penner's failure to adequately consult with the Da'naxda'xw before he decided to introduce Bill 38 in 2008; before he decided not to recommend an amendment to the Dzawadi/Upper Klinaklini River Conservancy boundary in 2010; and before (as well as after) he decided to recommend the amendment in 2012, although he is not named as a respondent in the petition for the second judicial review.

The Appeal

[62] The Da'naxda'xw and Kleana appeal because they say the judge's declaration does not afford a meaningful remedy. Without a direction being given to BC Hydro consistent with the broad form of commitment for which they contend, the Upper Klinaklini River hydro-electric power project cannot proceed at current prices. It is difficult to see that further consultation concerning the decisions made by Minister Penner in 2008 and 2010 could now lead to anything other than a discussion about some measure of compensation and, as the Da'naxda'xw and Kleana plead, the loss of what is said to be a unique development opportunity is not

adequately compensable with money. They maintain their remedy lies in what they say is the direction that must be given to BC Hydro.

[63] They raise three grounds of appeal in support of the direction for which they contend.

(i) An Error of Fact

[64] The Da'naxda'xw and Kleana first contend that the judge erred in finding that the direction given to BC Hydro by Minister Coleman is consistent with the commitment given to them by Minister Neufeld. They say that, while the error is one of fact, it is open to this Court to intervene because the finding amounts to an overriding and palpable error.

[65] The principles applicable were recognized by this Court in *Sandegren v. Hardy; Dzugan v. Canpro Construction Ltd.*, 1999 BCCA 221 at para. 24, quoting *Delgamuukw v. R.* (1993), 104 D.L.R. (4th) 470 (B.C.C.A.):

> A 'palpable and overriding error' exists firstly, when it can be demonstrated there was no evidence to support a material finding of fact of the trial judge; secondly, when the trial judge wrongly overlooked admissible evidence relevant and material to the issue before the court; or thirdly, where the trial judge's finding of fact cannot be supported as reasonable, regardless of what the trial judge saw or heard during the course of the trial. An assessment of palpable error should be made on the totality of the evidence. [at 564-5]

[66] The Da'naxda'xw and Kleana contend that in determining what commitment was given to them, the judge ignored, or wrongly overlooked, what Senator Neufeld testified in cross-examination as to what "he said" at the May 22 meeting in 2008, and wrongly found, in the absence of any evidence, that the commitment was only fully and finally expressed in the three letters he wrote to Mr. Glendale.

[67] The judge recognized the Da'naxda'xw and Kleana considered the senator's testimony to be "strong support" for the commitment for which they contend. She first quoted his affidavit (para. 68):

> 3. In advance of making this affidavit, I reviewed three letters dated June 10, 2008, July 3, 2008, and October 15, 2008, signed by me in my Ministerial capacity and addressed to Mr. Fred Glendale. A copy of the three letters is attached to this affidavit as Exhibit "A".
>
> 4. To the best of my recollection, these three letters accurately state the extent of the commitment made by the Province of British Columbia to Kleana Power Corporation in the course of the May 22, 2008, meeting referenced in the letters.

[68] She then quoted the whole of what they said was the critical passage of the transcript of his testimony. The senator was asked only one question about what he actually said in proposing a solution at the meeting (six years earlier) and, in answer to that question, understandably, he testified to what he "would have" said. It was put to him that what he proposed at the meeting was that, if the boundary amendment was delayed beyond the Call, he would in effect save a place for the project in the Call by directing BC Hydro to consider the project afterwards. He said it was not correct to say a place would be saved and he was then asked what he did say. He testified that he "would have said" he "could direct Hydro to actually negotiate outside of the call" with Kleana to "try and get an energy purchase agreement". Most of everything else he was asked thereafter was about his understanding of what that meant.

[69] He said it meant that Kleana could bid into the Call from outside of the Call. He said he intended it to be meaningful. When asked if the negotiation would be on the same basic terms as the Call, he said they would negotiate "around those parameters" and that, at the end of the day, the BC Utilities Commission would have to review and approve it. He was asked if his deputy minister had at one point in the meeting said "something to the effect" that the pricing of the hydro-electric power in the negotiations would have to be tied to the pricing of the Call to which he said, "That would [be] understandable, yes." When asked if by making the proposal he was "in essence saying" Kleana was to be put in the same position as if it had an opportunity to participate in the Call, he repeated "all the parameters" of the Call would apply. He was asked if the Da'naxda'xw and Kleana wanted confirmation in writing, to which he said "yes". In re-examination, he said BC Hydro would be under

no obligation to enter into an EPA with any participant in the Call and it would be the same for Kleana.

[70] The Da'naxda'xw and Kleana say Senator Neufeld's testimony is clear and unequivocal. If it is, it lends little, if any, support to the commitment for which they contend. The issue the judge had to resolve was what commitment was given – what was said or written; not what the Minister who gave it understood the commitment meant. What Senator Neufeld testified he "would have" actually said at the meeting is consistent with his three letters to Mr. Glendale.

[71] In any event, the judge did not ignore or overlook what Senator Neufeld said in being cross-examined. She not only quoted all of his testimony that was said to be critical but she also directly addressed what was contended about it:

> [192] [Counsel] argued that when Senator Neufeld used the word "parameters" in describing the discussion at the May 22 meeting, he was treating it as synonymous with "factors and terms." Therefore, in their submission, Senator Neufeld's evidence supported Mr. Eunall's later and more expanded version of the discussion at the May 22 meeting, and supported the petitioners' position concerning the commitment made to them at that time.
>
> [193] However, I do not agree. As of the May 22 meeting, BC Hydro's RFP [the Call] had not yet been issued, and so any discussion about "parameters" was being carried on in the abstract. When the RFP was published (the day after the first of the 2008 Letters), the RFP included many terms, conditions, factors and "parameters," including terms that gave BC Hydro very wide discretion concerning acceptance (or non-acceptance) of any proposal. No one's project was guaranteed an award of an energy purchase agreement. Moreover, Senator Neufeld's oral evidence also confirmed that the discussion at the May 22 meeting was to be confirmed in writing.

[72] The Da'naxda'xw and Kleana contend that, while Senator Neufeld deposed that the commitment he gave was accurately stated in the three letters he wrote to Mr. Glendale, he did not say that the three letters constituted the whole commitment. They say that, consistent with the evidence of Mr. Eunall and Mr. Smith, the purpose of the letters was confined to affording comfort to Kleana's investors, meaning the letters need not have contained a statement of the whole of the commitment given at the May 22 meeting. While this was not put to Senator Neufeld, the judge is said to

have erred in concluding the three letters contained the whole of the commitment when no witness deposed or testified that they did. She is then said to have erred in formulating a different commitment than any of the witnesses described, one that is contrary to all of the evidence.

[73] There would appear to be little merit in the contention. In the first place, it completely overlooks Mr. Glendale's evidence and, in particular, his responding letter to the Minister in July 2008 wherein he stated, as the judge found, the purpose of his writing was to "set out clearly the commitments made by government at our meeting in Victoria on May 22". What is now the material commitment he set out was the "direction" (the Minister had written "request") to BC Hydro to enter into negotiations with Kleana with respect to an EPA once the boundary amendment was made. Any EPA would be "subject to BC Utilities Commission processes" and "price would be a matter for negotiation". The Minister's third letter effectively confirmed what Mr. Glendale had written in material terms. Thus, it cannot be said the judge found the commitment to be one that is unsupported by the evidence.

[74] Indeed, it could hardly be accepted that Kleana's investors, who were not at the meeting, were for some unstated reason to be informed of only part of a much broader commitment even if, as Mr. Eunall and Mr. Smith deposed (but the judge did not necessarily accept), the letters were principally for the investors' benefit. Common sense would dictate the letters were, as confirming letters generally are, sent to document the whole of the commitment given, for the benefit of all interested parties, in order to provide a record and avoid misunderstanding. That must be why first Mr. Eunall and then Mr. Glendale sought to have what the Minister wrote accord with what they took him to have said would be the commitment.

[75] The evidence can be said to be less than consistent as to whether the commitment was given at the meeting, with confirmation to follow, or, as the judge concluded, was given in what the Minister wrote to Mr. Glendale. There is no question a letter was to follow what was said at the meeting, but it may not be clear whether it was to be the commitment or confirmation of the commitment given.

However, quite apart from the evidence of any witness, the tenor of the three letters is consistent with what the judge found: they (particularly the third letter) contain the commitment. The letters do not reference a commitment given at the meeting as they would if they were written in confirmation of such. They state the commitment. It was then open to the judge, in drawing an inference of fact, to conclude as she did.

[76] Beyond that, Mr. Eunall's notes of the May 22 meeting and the emails he sent to Mr. Glendale and the Deputy Minister make it clear he understood the letters were the commitment inasmuch as he recorded telling the Minister the solution proposed would depend on the strength of the letter that was to be written and that all concerned were to participate in preparing what was given, as indeed he attempted to do in writing to the Deputy Minister, and as Mr. Glendale did in writing to the Minister. Certainly, it would appear Mr. Glendale had a different perception. On what he wrote, he was confirming the commitment given at the meeting. It was for the judge to decide.

[77] However, whether what was said at the meeting was the commitment of the direction to be given to BC Hydro that was later confirmed, as Mr. Glendale's letter suggests, or whether it was only what was given in written form that was the commitment, as the judge found, is now of no particular consequence. The judge effectively found what Mr. Eunall and Mr. Smith took to have been said by the Minister at the meeting was not reliable in the face of the three letters the Minister wrote to Mr. Glendale and his response. Nothing Senator Neufeld testified he said at the meeting, or even his understanding of what it meant, as considered and explained by the judge, undermines her evidentiary analysis, certainly not to amounting to her having made an overriding and palpable error. It was open to the judge to find, as she did, the three letters to Mr. Glendale accurately stated the commitment that was given, as Senator Neufeld deposed they did, and that it was the whole commitment. To the extent it was an inference of fact she drew on her

consideration of the whole of the evidence, it was an inference she was clearly entitled to draw.

(ii) A Duty to Consult

[78] The Da'naxda'xw and Kleana contend that, even if Minister Neufeld's commitment was as the judge found it to be, the direction Minister Coleman gave to BC Hydro must still be quashed because the judge erred in concluding the Minister was not in breach of his duty to consult with the Da'naxda'xw before the direction was given. As quoted above, the judge said she saw this aspect of the Da'naxda'xw and Kleana's case as being dependent on her finding the commitment given by Minister Neufeld was the broad commitment for which they had contended (as indeed they had pleaded), but that was not the commitment she found had been given.

[79] The contention now is that, given Minister Penner acceded to the accommodation (the only accommodation) the Da'naxda'xw sought following the first judicial review in having the boundary of the Dzawadi/Upper Klinaklini River Conservancy amended, it was incumbent on Minister Coleman to give a direction to BC Hydro that gave meaning and effect to the amendment such as to permit the project to proceed to what is said to be the next stage, which appears can only mean giving BC Hydro the broad form of direction for which the Da'naxda'xw and Kleana contend – a direction BC Hydro would not have had to accept. It is then said that, at a minimum, Minister Coleman was required to consult with the Da'naxda'xw to find a way to ensure they were not prejudiced by the delay in the boundary being amended, although no suggestion is advanced as to what that way could possibly be, short of the broad form of direction for which they contend. They say this duty arises out of the honour of the Crown and s. 35 of the *Constitution Act, 1982,* citing *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73; and *Mikisew Cree First Nation v. Canada,* 2005 SCC 69.

[80] It is difficult to see how Minister Coleman could now be faulted for having given the very direction the Da'naxda'xw and Kleana insisted be given to BC Hydro when their solicitors wrote to him twice, sent copies of Minister Neufeld's three letters, and actually stated the commitment they sought to have honoured: "at such time as the conservancy boundary was amended the government would direct BC Hydro to enter into negotiations for an electricity purchase agreement with Kleana". There was not then or at any later time any suggestion of a desire or need for consultation. Rather, the two letters to the Minister emphasized the urgency of the direction being given, stating, "There is no need or reason for further delay." It was only upon BC Hydro informing the Da'naxda'xw and Kleana of the current circumstances regarding its need for hydro-electric power from the project and the pricing to be considered that it became evident the project was no longer viable.

[81] Consultation requires a government to attempt to find reasonable accommodation of Aboriginal concerns relating to the use of lands in asserted traditional territories. Even if a duty to consult arose, no consultation between the Minister and the Da'naxda'xw would have served to change the circumstances in which Kleana and BC Hydro found themselves when they canvassed the feasibility of the negotiations they were to have had, and, given the circumstances, there was no reasonable accommodation the Da'naxda'xw might have been afforded. There was then no error in the judge's concluding the direction the Minister gave was not to be quashed because of a lack of consultation. Minister Coleman gave the direction Minister Neufeld committed would be given.

(iii) An Unreasonable Direction

[82] The Da'naxda'xw and Kleana also contend the judge erred in concluding Minister Coleman's direction was not to be quashed on the basis that it was unreasonable. They contend that, based on the history of their dealings with the government, it was not reasonable for Minister Coleman to give the direction Minister Neufeld committed would be given. They say they were throughout encouraged to pursue the project in the expectation that the boundary of the

Dzawadi/Upper Klinaklini River Conservancy would be amended such that the project could proceed and, when it was, the direction that was given to BC Hydro effectively brought the project to an end. That is, they say, unreasonable. They then say the reasonable direction required was one in the nature of the broad form of direction for which they contend, which, again, BC Hydro need not have accepted.

[83] As Fisher J. found, the Da'naxda'xw and Kleana were not given a commitment that the conservancy boundary would be amended. However, it may well be right to say that, during the time they were in discussions with the government, from 2006 through the May 22 meeting in 2008 and onward to 2010 when Minister Penner informed them he had decided against recommending the amendment, they had good reason to be encouraged an amendment would be made. Although, given that four years elapsed, they must have realized that what they sought was by no means assured; there must have been competing interests and concerns as reflected in Minister Penner's decision. In any event, it cannot be right to suggest they were wrongfully encouraged, nor, for that matter, is it quite right to say it was the direction given to BC Hydro that brought the project to an end. It was the change in circumstances with respect to the demand for the hydro-electric power the project would produce and the price that would be paid for it in 2012 that rendered what Kleana considered to have been a viable project in 2008 no longer viable.

[84] Having considered the submission the Da'naxda'xw and Kleana advanced, the judge concluded that based on what was before Minister Coleman when he gave the direction to BC Hydro, the direction was not unreasonable. What was before him would have included Minister Neufeld's three letters to Mr. Glendale as well as the two letters the solicitors for Da'naxda'xw and Kleana had written to Minister Coleman insisting on the direction he gave, and the petition before it was amended, which stated the narrow direction it was then said was to be given. The judge said the

direction fell within a range of possible outcomes. Her conclusion that the direction was reasonable is one of mixed fact and law which is clearly entitled to deference.

[85] It appears clear the appeal must be dismissed.

The Cross Appeal

[86] In the main, it is contended it was not open to the judge to grant the declaration she did, directed at the province, when it was not sought either in the petition or in submissions. The Da'naxda'xw and Kleana sought no order declaring there had been a breach of the duty to consult in 2008, 2010, 2012 or later. In particular, there was no pleaded allegation that there had been any failure to fulfill a duty to consult as declared by Fisher J., or any relief sought in that regard, that would support a remedy to which the judge found the Da'naxda'xw were entitled (para. 242, as quoted above).

[87] The order sought in the amended petition, and for which the Da'naxda'xw and Kleana contended in the submissions they made, was limited to quashing the direction Minister Coleman had given to BC Hydro and requiring him to give the broad form of direction that the Da'naxda'xw and Kleana contend Minister Neufeld committed would be given. It is said that, in the absence of any pleaded failure on the part of Minister Penner with respect to his consulting with the First Nation (beyond what Fisher J. found), and declaratory relief being expressly sought in that regard, there is no basis for the declaration the judge granted in this judicial review proceeding. Indeed, it may be questionable that recognition of a duty to further consult is an appropriate remedy in the circumstances: *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 at paras. 48-54.

[88] While the declaration the judge granted appears to address failings on the part of the Minister of Environment, Minister Penner, it is not he, but only the Minister of Energy, Minister Coleman, who is specifically named as a respondent in this proceeding. The Minister of Environment was not named as a minister whose

exercise of statutory power was being challenged, as he was in the first application for judicial review: The Minister of Environment as represented by the Attorney General of British Columbia. It is not his decisions the Da'naxda'xw and Kleana seek to have quashed or otherwise altered in the narrow remedy they seek.

[89] In contending the declaration made can be upheld, the Da'naxda'xw and Kleana first say they are not to be held to their pleadings in judicial review proceedings of this kind. They first say that under s. 2(2) of the *Judicial Review Procedure Act* relief that can be granted is not limited to the relief for which the application is made. The section provides that, on an application for judicial review, the court may grant any relief to which the applicant would be entitled in proceedings for a declaration or injunction in relation to the exercise of a statutory power. But the section does not provide for granting relief which is not sought on the application, or, more particularly, for granting a declaration where none is sought.

[90] It is then contended that courts exercising discretion are not bound by the specific remedies sought. Reliance is placed on authorities that recognize either that the particular declaratory relief ultimately granted need not be as sought in the pleadings: *Solosky v. The Queen,* [1980] 1 S.C.R. 821 at 833; and *William v. British Columbia,* 2012 BCCA 285 at para. 114; or that the factual basis for relief pleaded may, in some circumstances, not be consistent with the relief ultimately granted: *Lax Kw'alaams Indian Band v. Canada (Attorney General),* 2011 SCC 56 at paras. 45-46; and *Tsilhqot'in Nation v. British Columbia,* 2014 SCC 44 at paras. 20-23. It has been recognized that a measure of flexibility is required with respect to pleadings and prayers for relief when considering Aboriginal claims in particular.

[91] The qualification, however, appears to be that the responding party must in no way be prejudiced in the sense that there must be no doubt about what relief is sought: *Lax Kw'alaams Indian Band* at para. 45; and *Delgamuukw v. British Columbia,* [1997] 3 S.C.R. 1010 at para. 76. In *Native Woman's Assn. of Canada v. Canada,* [1994] 3 S.C.R. 627, the Supreme Court of Canada recognized that where a prerogative remedy that was sought had been found to be inappropriate,

declaratory relief could be granted even though it had not been pleaded. Relying to some extent on a "basket clause" in the prayer for relief seeking such other remedy as to the court "may seem just", it was said (p. 647):

> … The declaration that was ultimately granted by the Federal Court of Appeal hinged on the violation of *Charter* rights that was specifically argued at the Trial Division. It cannot be said that the appellant was taken by surprise or prejudiced in any way. Nothing different could have been argued by the parties had the declaration specifically been sought.

[92] Here the basket clause employed in the prayer for relief was limited to such further remedy as "counsel may advise" with no advice having been given.

[93] In any event, where the relief ultimately sought has differed from the relief originally sought in the pleadings, it appears to have been entertained only in instances where the underlying legal issues have been fully canvassed, as in Native *Woman's Assn., Solosky* and *William*, with both sides being heard. Such is not the case here. It is not a matter of the declaration granted being a somewhat different form of relief than what was sought on the basis of pleaded facts, or the pleaded facts being other than entirely consistent with the declaration granted. Here, no declaration was sought and, perhaps most significantly, no pleaded case of a failure to comply with the order of Fisher J was advanced.

[94] Given the recognized extent of flexibility with respect to pleadings there is in cases of this kind, it does appear that, having concluded the Da'naxda'xw are entitled to a remedy beyond what was sought, the judge might have invited submissions from counsel as to what, if any, remedy may be available to the Da'naxda'xw and how best to proceed. Such would be consistent with the course followed in *Wii'litswx v. British Columbia (Minister of Forests),* 2008 BCSC 1139 at paras. 251-260.

[95] The declaration cannot now stand; the cross appeal must be allowed.

Disposition

[96] I would dismiss the appeal, allow the cross appeal, set aside the declaration, and remit the application for judicial review to the judge to proceed to reconsider the remedy for the Da'naxda'xw as she may see fit.

"The Honourable Mr. Justice Lowry"

I agree:

"The Honourable Madam Justice Bennett"

I agree:

"The Honourable Madam Justice Dickson"