COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Spookw v. Gitxsan Treaty Society,* 2017 BCCA 16

Date: 20170112
Docket: CA41986

Between:

Spookw also known as Geri McDougall on behalf of herself and other Gitxsan Chiefs and Members, Baskyalaxha also known as William Blackwater Sr., Suu Dii also known as Yvonne Lattie, Luutkudziiwuus also known as Charlie Wright, Xsimwits'inn also known as Lester Moore, Moolxhan also known as 'Noola and as Norman Moore, Gitanmaax Indian Band, Glen Vowell Indian Band, Gitwangak Indian Band, Kispiox Indian Band, and Gitksan Local Services Society

Appellants
(Plaintiffs)

And

Gitxsan Treaty Society, Her Majesty the Queen in Right of the Province of British Columbia, and the Attorney General of Canada

Respondents
(Defendants)

Before: The Honourable Mr. Justice Harris
The Honourable Mr. Justice Goepel
The Honourable Mr. Justice Savage

On appeal from: An order of the Supreme Court of British Columbia, dated June 18, 2014 (*Spookw v. Gitxsan Treaty Society*, 2014 BCSC 1100, Smithers Registry S15150).

Counsel for the Appellants:	M.L. Macaulay & B. Joseph
Counsel for the Respondent Gitxsan Treaty Society:	S.D. Hansen & A. Schalles
Counsel for the Respondent Attorney General of Canada:	N. Wright & A.P. Singh
Counsel for the Respondent Her Majesty the Queen in Right of the Province of British Columbia:	K. Phillips & R. Wilson

Place and Date of Hearing:	Vancouver, British Columbia September 12 and 13, 2016
Place and Date of Judgment:	Vancouver, British Columbia January 12, 2017

Written Reasons by:
The Honourable Mr. Justice Harris

Concurred in by:
The Honourable Mr. Justice Goepel
The Honourable Mr. Justice Savage

Summary:

The appellants, certain Gitxsan Chiefs, Indian Bands and the Gitksan Local Services Society, petitioned to the Supreme Court for the winding-up of the Gitxsan Treaty Society under the Society Act, R.S.B.C. 1996, c. 433. The chambers judge dismissed their petition on the basis that the petitioners, who were not members, lacked standing as "proper persons". He also dismissed their claims against Canada and British Columbia for breach of fiduciary duty and the honour of the Crown. Held: Appeal dismissed. The chambers judge properly considered the procedural history and circumstances of the appellants, and did nor err in exercising his discretion to deny them standing. The claims relating to fiduciary obligations and the honour of the Crown were properly dismissed as they are contrary to the principles of First Nation self-government and the statutory scheme established by the First Nations Summit, British Columbia, and Canada for tripartite and independent treaty negotiations.

Reasons for Judgment of the Honourable Mr. Justice Harris:

Introduction

[1] This is an appeal from an order of Mr. Justice McEwan in which he dismissed the appellants' claims against the Gitxsan Treaty Society ("GTS") and against Canada and British Columbia.

[2] The appellants' claim against the GTS is to wind it up or seek oppression remedies against it. The GTS is a society incorporated under the *Society Act*, R.S.B.C. 1996, c. 433.

[3] The appellants are certain Gitxsan Hereditary Chiefs, Indian Bands, and the Gitksan Local Services Society. They filed their original writ and statement of claim in December 2008. For introductory purposes, it is sufficient to observe the thrust of their claim against the GTS. The action arises in the context of treaty negotiations between the Gitxsan First Nation, Canada and British Columbia. The GTS receives funding for and negotiates with the Crown(s) on behalf of the Gitxsan people. The appellants contend that the GTS does not have a proper mandate from the Gitxsan people, is not representative of them, has not acted in their best interests, has restricted consultation and opportunities for participation or involvement in treaty

negotiations, all while assuming debt in excess of $21 million for which the Gitxsan people as a whole may ultimately be liable.

[4] The appellants are not members of the GTS. Their standing to seek remedies depended on being "proper persons" to do so under the applicable legislation. The chambers judge concluded, on an application for summary judgment brought by the GTS, that they were not proper persons and declined to grant them standing to pursue their claims. At the core of his reasoning is his conclusion that the Hereditary Chiefs had the opportunity to become members of the GTS and advance their concerns from within it, but did not do so, instead choosing to pursue their interests from the outside. One issue that divides the parties is whether he went further and found that, even if they had standing, their claim for relief was bound to fail.

[5] The appellants' claim against Canada and British Columbia sounds in breach of fiduciary duty and the honour of the Crown. They contend those duties were breached when the Crown(s) continued to negotiate with the GTS after receiving notice from the appellants that the GTS did not have the necessary mandate to negotiate on behalf of the Gitxsan people. More particularly, the Crown continued to fund the GTS by loans for which the Gitxsan people may be liable, negotiated about the termination of Indian Bands, band membership, and band lands (the Gitxsan Alternative Governance Model, or "GAGM") without the consent and participation of the bands, and improperly funded a forestry agreement. These issues also form part of the foundation of the claim against the GTS.

[6] Both Canada and British Columbia applied to have the claims dismissed, both as disclosing no reasonable cause of action and by way of summary judgment. The judge granted the order. As I read his reasons, he considered that the issues raised by the appellants engaged matters reflecting internal disputes within the Gitxsan people, most particularly with respect to the mandate and representativeness of the GTS. In the context of a treaty process, no fiduciary duty, as alleged, could arise because the British Columbia Treaty Commission ("BCTC") is statutorily mandated to assess the mandate of the entity representing the First Nation in arms-length,

government-to-government negotiations in which the Crown(s) represents non-Aboriginal interests. Furthermore, imposing an obligation on either Crown to intervene in an internal dispute would conflict with the principle of First Nations self-governance enshrined in the BC Treaty Process. There is some disagreement between the parties about whether the judge decided these issues and, if so, whether he dismissed the action on the basis that it was plain and obvious that it was bound to fail or whether he granted summary judgment on the basis of applying the law to uncontested facts.

[7] The appellants allege the following errors in judgment:

> In finding that the Appellants are not "proper persons" for the purpose of standing to advance their claim on the basis of the following errors:
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> i. in finding the Appellants could and should have become GTS members,
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> ii. in failing to consider the purposes of GTS as a society in determining what is just in the circumstances,
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> iii. in finding that the Appellants' interest was only a contingent interest in the outcome of negotiations, and
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> iv. in finding that the claim for winding up was bound to fail.
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> The Chambers Judge erred in failing to make a decision on the Appellants claims against the Crown for breach of fiduciary duty or honour of the Crown.
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> i. In the alternative, if the Chambers Judge did make a decision then he erred by failing to provide sufficient reasons for judgment,
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> ii. He erred in law in finding that the Respondents met the test for striking a claim.

[8] This appeal arises in the context of an action with a lengthy procedural history. Before turning more specifically to the errors alleged, I will provide some background that defines the context in which the issues arise and bears on the resolution of the issues on appeal. I will first outline the treaty process. Second, I will provide some description of the parties. Third, I will canvass the procedural history of this litigation insofar as it is relevant to the issues on appeal.

Background

The BC Treaty Process

[9] The BC Treaty Process provides a framework for negotiating treaties between First Nations, Canada and British Columbia. It is the product of an agreement, the British Columbia Treaty Agreement ("BCTA"), between Canada, British Columbia and the First Nations Summit. The BCTA was based on recommendations made in 1991 by a tripartite task force, with terms of reference endorsed by Canada, British Columbia and the First Nations Summit. Certain of those recommendations are relevant to the current case. First, a BCTC be established by agreement among the First Nations, Canada, and British Columbia to facilitate the process of negotiations. Second, the organization of First Nations for the negotiations is a decision to be made by each First Nation. Third, non-Aboriginal interests be represented at the negotiating table by the Crown(s). Fourth, the respective negotiating teams be sufficiently funded to meet the requirements of the negotiations. And fifth, the BCTC be responsible for allocating funds to the First Nations.

[10] The BCTA led to the passage of provincial (the *Treaty Commission Act*, R.S.B.C. 1996, c. 461 [*TCA*]) and federal legislation (the *British Columbia Treaty Commission Act,* S.C. 1995, c. 45 [*BCTCA*]). They set out the statutory framework for the BC Treaty Process, including creating the BCTC as an independent, arms-length entity that is not an agent of any of the Crowns or the First Nations Summit (*BCTCA* s. 4(3), *TCA* s. 4) and acts as "facilitator for negotiations in the BC Treaty Process (*BCTCA* s. 5(1), *TCA* s. 5(1)). The BCTC is responsible for assessing a First Nations' readiness to negotiate in the BC Treaty Process, for ensuring ongoing negotiation mandates, and for allocating funds.

[11] The BC Treaty Process contemplates a six-stage negotiation as follows:

1 Filing a Statement of Intent to Negotiate a Treaty
2 Preparing for Negotiations and Assessing Readiness
3 Negotiating a Framework Agreement
4 Negotiating an Agreement in Principle

5 Negotiating a Final Treaty

6 Implementing the Treaty

[12] Canada supported its summary judgment application with undisputed evidence describing the BC Treaty Process. This evidence confirms that the BCTC is responsible for assessing each party's negotiating mandate and allocating negotiation support loan funding. Further, the Statement of Intent informs the BCTC how the First Nation is mandated by its constituency to enter negotiations. The Statement of Intent can be returned by the BCTC if the First Nation body no longer has a mandate from its constituents. The BCTC's policies and procedures required each party to confirm its negotiating mandate at each stage in the process.

[13] Funding for negotiations by First Nations is governed by funding agreements. First Nations must have a legal entity to receive funding. The legal entity which enters negotiation support loan agreements for the Gitxsan First Nation is the GTS. The BCTC allocates the level of loan funding under the *BCTCA* and the *TCA* and in accordance with funding criteria jointly established by the First Nations Summit, Canada and British Columbia. Once BCTC allocates the level of loan funding for each year, it instructs Canada to enter into the negotiation support loan agreement. Canada is contractually required to enter into a negotiation support loan agreement on receiving those instructions.

[14] The Gitxsan First Nation filed a Statement of Intent with the BCTC and entered the BC Treaty Process on July 15, 1994. Negotiations are at stage 4, namely the negotiation of an agreement in principle. Hence, no binding agreements have been reached at the negotiating table and any treaty would require ratification, on a basis not yet determined, by the Gitxsan. Confirmation of a mandate is also required to progress to the next stage of negotiating a treaty. Negotiations have been supported by loan funding to the GTS. Funds have been allocated by the BCTC in an amount currently in excess of $21 million.

The Appellants and Their Place in Gitxsan Society.

[15] The appellants comprise five Hereditary Chiefs, four Indian Bands and the Gitksan Local Services Society. In the words of the appellants' factum:

> The plaintiffs (the Appellants) are Gitxsan Hereditary Chiefs and members of Gitxsan Houses and Indian Bands. In these proceedings each Chief acts in his or her personal capacity as Hereditary Chief and also represent his or her House. The Appellant Spookw (Geraldine McDougall) represents herself, as well as other Gitxsan Chiefs, matriarchs and members of other Gitxsan Houses who have signed a declaration opposing the conduct of treaty negotiations by GTS.
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> The Appellant Indian Bands, Gitanmaax, Glen Vowell, Gitwangak,and Kispiox, act in their capacity as elected governments and also represent their Band members. The Gitxsan Indian Bands have councils elected under the *Indian Act,* R.S.C. 1985 c.1-5 and hold 25 reserves totaling 6000 hectares and have over 5,000 Band members. The plaintiff Gitxsan Local Services Society (known as the Gitxsan Government Commission or "GGC") is a non-profit society, which delivers programs and services to members of five Gitxsan Bands.

[16] It appears that there is broad agreement between the parties about the structure of Gitxsan society and traditional governance, although, as I understand it, one point of contention within the Gitxsan First Nation lying behind the current dispute is the role and protection of the interests of those Gitxsan who are not members of Houses and the interests of Indian Bands. Nonetheless, I believe the following description, drawn substantially from the appellants' factum, is uncontentious, at least for the purpose of the issues in this appeal.

[17] Gitxsan governance and social structure consists of Houses (Wilps), Clans (Pdeeks) and communities. Gitxsan governance includes both a hereditary system and elected Band governments. There are four Clans and between 60 to 65 Houses. Each House has a Head Chief and Wing Chiefs. Each House has its own history and territory. Each Head Chief is a "trustee" responsible for protecting their House members' interests and managing the House's traditional lands and resources. Each House is autonomous. Under Gitxsan law, the Head Chief has authority to speak for the House territories, but no Chief can speak to another House's interests. Wing Chiefs are entitled to speak on behalf of the House but only in accordance with the direction of the Head Chief.

[18] There are six Gitxsan bands each with a band government elected under the *Indian Act,* R.S.C. 1985, c. I-5. Further, every person born of a Gitxsan woman is automatically a member of his or her mother's House or Clan. Some, but not all, Gitxsan Band members are also House members. Roughly 20% to 30% of the appellant Gitxsan Bands' members are not Gitxsan House members, because they do not have Gitxsan mothers. House membership is not required for a person to be considered Gitxsan. Persons may be recognized as Gitxsan if they are the father of a Gitxsan person, off-spring of a male Gitxsan or a registered status Indian with a Gitxsan Indian Band. Gitxsan Indian bands do not distinguish between members based on whether they belong to a Gitxsan House. All band members have equal rights whether they belong to a House or not.

The Gitxsan Treaty Society

[19] As noted, the existence of an entity such as the GTS is required if a First Nation is to enter into treaty negotiations. Under the BCTA, a First Nation is defined as:

> an Aboriginal governing body, however organized and established by Aboriginal people within their traditional territory in British Columbia, which has been mandated by its constituents to enter into treaty negotiations on their behalf with Canada and British Columbia.

[20] The BCTC's "Policies and Procedures" provide:

> The organization and establishment of a governing body for treaty negotiations is a decision to be made by the Aboriginal people it represents, namely the constituents of the First Nation.

[21] For current purposes, and in terms of the definition of a First Nation, the governing body of the Gitxsan is the Hereditary Chiefs, the Simgiigyet, structured as we have seen along matrilineal lines in autonomous Wilps.

[22] The GTS was incorporated by the Hereditary Chiefs, as required by the Treaty Process. The details of its incorporation will be canvassed later, but the GTS and the First Nation are distinct. The Simgiigyet, as the traditional leaders of the Nation, hold and exercise the Nation's Aboriginal rights, including title, on behalf of

their Wilp, not the GTS. The Gitxsan Nation, as represented by the Simgiigyet, is the party, the principal, in treaty negotiations with the Crown. The GTS undertakes administrative tasks, at the request of the First Nation, but the Gitxsan Nation retains ultimate control over the treaty process, including not having the GTS act on its behalf. The GTS cannot ratify a treaty. Ratification, and the basis for it, is a matter ultimately for the Gitxsan people.

[23] From a review of the pleadings, arguments and various judgments dealing with different issues within this litigation, it appears that a number of issues underlie division within the community, inform the issues on appeal, and partially explain why the GTS has become a lightning rod for criticism. By way of example, the appellant Hereditary Chiefs express concern that the Aboriginal title they hold is being bargained without recognition of their veto over any agreements to which they do not consent. The stated approach in negotiations that the Simgiigyet operates by consensus is inconsistent, the appellants contend, with traditional governance. Indeed, some of the appellants, we were told, object to any participation in treaty negotiations. Moreover, the model of membership in the GTS (which currently permits one representative of each House to be a member) denies recognition to Indian Bands, fails to recognize the interests of Gitxsan persons who are not House members, and is unduly restrictive. By relying on “indirect” membership, the GTS is insufficiently representative, undemocratic, and does not exemplify a principle of “universal suffrage”.

[24] These “structural” problems, which go to how the GTS is constituted within the Gitxsan Nation, is compounded, in the view of the appellants, by the way in which the GTS has acted and some of the agreements it is said to have reached. Of particular concern to the appellants is the Gitxsan Alternative Governance Model tabled by the GTS in negotiations. They contend this proposal would adversely affect Aboriginal and other rights and obligations of Gitxsan Hereditary Chiefs and House members, registered Gitxsan band members, band council and land holders on Indian reserve land. The appellants gave notice in 2008 to the Crown(s) and the

BCTC of their concerns, attempting to stop negotiations until the GAGM was addressed in the community and their concerns met.

Procedural History

[25] This action, as originally constituted, named the BCTC in addition to the GTS, Canada and British Columbia. The appellants alleged that the BCTC owed a duty of care in negligence to them to oversee the negotiation process, to ensure the readiness of the Gitxsan people to negotiate in the treaty process, to ensure on an ongoing basis that the negotiators have a mandate, and to allocate funds accordingly. They contended the BCTC breached its duty of care by failing to meet the standard of care required by a reasonable and prudent facilitator of the treaty process, including failing to ensure that the GTS has a valid mandate, is representative and accountable to the Gitxsan people, and in failing to exercise due care and diligence in lending funds to the GTS.

[26] For reasons indexed at 2011 BCSC 1001, Mr. Justice Kelleher dismissed the action, concluding that it was plain and obvious that no duty of care as alleged arose in the circumstances. He concluded that the BCTC could not have a duty to involve itself in the internal governance affairs of a First Nation to protect a minority within it. He found that recognizing a duty of care would conflict with the fundamental principle of self-governance for First Nations. In reaching this conclusion, he endorsed the view of Mr. Justice Cullen, as he then was, in *Tsimshian Tribal Council v. British Columbia Treaty Commission*, 2005 BCSC 860, where he said at para. 59:

> The question of for what and how the Tsimshian community should be negotiating is an internal question to be decided collectively by its membership. It cannot be decided by the BCTC or by the court. The requirement of securing and advancing a mandate is an open one conducive to debate, persuasion, and resolution through ongoing processes. It is through that essentially political process that the interests and views of those aggregating around the TTC can be furthered.

[27] Mr. Justice Kelleher's decision was not appealed. Although the claim sounded in negligence, the judgment reflected a theme that emerges in the judgment under review, namely that the courts should be cautious (at a minimum) about interfering in

the internal affairs of, or political conflicts within, First Nations, especially where they relate to self-government for the purpose of engaging in the Treaty Process. I make no comment on whether the appellants have any other recourse against the BCTC in the discharge of its duties to ensure a First Nation's mandate in treaty negotiations. The record discloses that the BCTC has been informed of the appellants concerns, but has not taken the position that the GTS has lost its original mandate to engage in the Treaty Process.

[28] The second issue that arose was an application pursuant to s. 85 of the *Society Act* for approval of a list of 37 new members so that the GTS could convene an extraordinary general meeting to decide on the constitution of its board of directors. The reasons approving the s. 85 petition are indexed at 2013 BCSC 974. As the chambers judge commented, those reasons are pertinent to some of the issues in this proceeding.

[29] The s. 85 issue arose because of a defect in the then existing GTS bylaws relating to the appointment of directors. The bylaws stipulated that the four clans (Pdeek) had the authority to appoint the GTS' directors. The *Society Act* mandates that the GTS' *members* have the authority to appoint directors. The structure that had been adopted was an effort to integrate models of Gitxsan governance with the requirements of governance of a society under the *Society Act*.

[30] The s. 85 issue came to light in the context of the GTS' initial application to strike the appellants' claim. As a result, the application was adjourned pending a resolution of the defect. As noted by the judge in the decision under appeal:

> [7] Among the features of the resolution of the s. 85 issue was a canvass of the whole Gitxsan community to create a representative body of voting members to convene an extraordinary general meeting to appoint a board of directors. The proposal this court approved was that voting members would include all the Hereditary Chiefs of Gitxsan Houses who submitted a membership application. Among the reasons for this Order was a concern that, as previously structured, the Hereditary Chiefs (which includes some of the plaintiffs), could not readily become members. This significantly undermined the GTS's position that in this proceeding the plaintiffs lacked standing because they were not members of the GTS. It seemed that an intelligible and more inclusive opportunity to apply for membership might

> result in a situation where the debates that drive these proceedings could take place *within* the GTS.
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> [8] None of the Hereditary Chiefs among the plaintiffs took up this invitation. The members ultimately entitled to vote at the extraordinary meeting included some 37 of the approximately 62 Hereditary Chiefs.

[31] More detail is provided in the s. 85 reasons: *Gitxsan Treaty Society,* 2013 BCSC 972. After describing some initial suggestions about how to overcome the defect, the judge described the process actually followed:

> [30] The process the GTS adopted was more extensive, given the court's direction to develop a model that would open participation to the broader community. I have set out the context at para. 5 of these reasons. The segment of the interested community represented by the *Spookw* plaintiffs have sought the dissolution of the society from outside, that is without standing as members. A rather brief investigation into how they might become members showed that it was rather difficult, and that in any event, membership under the current by-laws did not carry with it the necessary prerogative of a voice in the directors. It appears, in other words, that the only way to influence the governance of the GTS was from the outside.
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> [31] In order to address these issues, the GTS put forward a plan in four phases:
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> > Step one: Meeting of the Gitxsan Simgiigyet (Hereditary Chiefs) to update and consult with the Simgiigyet about the proposal for resolving the defect in the GTS's bylaws in a manner that adhered to both Ayookim Gitxsan and the March 27 Decision;
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> > Step Two: Meeting of the Simgiigyet and the broader Gitxsan Nation to appoint new members to the GTS. The GTS's proposed membership structure asked each Wilp (House) to appoint one member, if that Wilp wanted to participate in GTS governance;
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> > Step Three: GTS returns to court, seeking approval of new membership list that it obtained as a result of the previous two steps; and
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> > Step Four: GTS calls an extraordinary general meeting of new members to revise GTS bylaws.
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> [32] The BCTC was consulted and attended the meetings. A meeting of the Gitxsan Simgiigyet (Hereditary Chiefs) was held on June 26, 2012. Skanu'u (Ardythe Wilson), one of the chairs of the meeting, summarized the discussion as follows:
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> > Many of the Simgiigyet understood references to a "community based" solution in the June Materials to be a reference to *Indian Act* bands. The Simgiigyet firmly rejected any process for the GTS that was based on *Indian Act* governance. Instead, the Simgiigyet emphasized that they are the leaders of the Gitxsan Nation and are meant to control the GTS. They insisted that the Gitxsan's Wilp

(House) system must be respected, and must not be placed by *Indian Act* communities. During the meeting, GTS representatives clarified that any reference to "community-based" in the GTS's proposal was a reference to the Gitxsan Huwilp (Houses), and not Indian Bands, and the Simgiigyet accepted that clarification;

Many of the Simgiigyet questioned why it was necessary to prove the Gitxsan's hereditary system again, because the Gitxsan already had succeeded in doing so before the Supreme Court of Canada in the *Delgamuukw* case;

A large majority of the Simgiigyet agreed that if the GTS was broken, they had a responsibility to fix it. However, that "fix" must respect Ayookim Gitxsan (Gitxsan law). This point was stressed repeatedly at the meeting; and

The Simgiigyet did not want to accept foreign structures, like the provincial society, and expressed frustration that their own systems and laws were not being respected by the Crown. The Simgiigyet understood that they had no option but to use the provincial structure in order to be eligible for treaty funding, because of the Crown's position on that issue, but accepted the use of a provincial entity under a sense of duress, or because they felt they had no other choice.

[33] Ms. Wilson declared at the end of the meeting that a consensus had emerged approving the four step process.

[34] A further meeting was held July 17 - 19, 2012. Efforts were made to distribute materials giving notice of the meeting throughout the Gitxsan Nation. These included:

(a) the GTS posted the July Materials in public areas around the Gitxsan's territory, like Band offices and bulletin boards in the various Band communities. one was posted at the bulletin boards at the Kispiox Band Office and Glen Vowel Band Office, and also at the Royal Bank in Hagwilget;

(b) the GTS ensured the July Materials remained the top post on its website, beginning July 6 until the meeting concluded on July 19;

(c) the GTS posted the June Materials on a Facebook page used regularly by opponents of the GTS on July 6; and

(d) the GTS issued a news release about the July Meeting on July 10, clearly stating the meeting's purpose was "to admit new members to the GTS and re-affirm the GTS's continuing mandate to support the Simgiigyet and the Gitxsan people in their efforts to advocate for Gitxsan Aboriginal rights in treaty negotiations..." The news release also clearly stated that the meeting was "open to all Gitxsan".

[35] Ms. Wilson again co-chaired the meeting. She deposes that 66 Simgiigyet and 50 others attended; as well as the GTS "directors" and staff.

> [36] Each Wilp was told it could submit a membership application to the GTS if it wanted to appoint a GTS member. Each Wilp was left to decide internally whether it would do so. At the end of the meeting 37 names were put forward from Huwilp that were supportive. Some 18 Simgiigyet indicated that they did not wish to put forward a name from their Wilp.
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> [37] The GTS submits that this process demonstrates a substantial effort to involve all Gitxsan Huwilp, and gave everyone an opportunity to participate. They have now presented the 37 named individuals they propose should form the reconstituted membership of the GTS in order to make the necessary revisions to the GTS by-laws.

[32] The court approved the proposed structure. Before doing so, the judge had to decide whether he should grant the current appellants standing in that petition. The judge took note of the position of the appellant Hereditary Chiefs, who were respondents to the s. 85 petition, noting that none of them had taken up the opportunity to influence the GTS from within by becoming members. He acknowledged their submission (at para. 48) that:

> ... should only members have standing, an organization can immunize itself by limiting membership. GTS has deliberately kept its membership small in the past and, according to their proposal developed during the January 2012 Gimlitxwit meeting, they will have a maximum membership of approximately 65 members despite claiming to speak for all Gitxsan people. Some of the *Spookw* Plaintiffs, the Bands and those they represent, are completely excluded from membership. The other *Spookw* Plaintiffs, the Hereditary Chiefs, are unable to join in membership because they cannot agree with the membership structure adopted by GTS that unfairly restricts membership,... If the Respondents are not found to have standing, it would allow GTS to continue to restrict its membership so as to immunize itself from challenges on grounds of lack of standing. At the very least, the issue of standing cannot be decided as a preliminary matter, and can only be determined after hearing all of the evidence on the petition.

[33] In dealing with standing the judge observed that ordinarily, granting standing to non-parties is premised on there being no other way for a matter of importance to be brought before the court. It is not, he said, normally an alternative means by which people who have chosen not to take standing in a more conventional way (e.g., by participating in membership) can come before the courts. Second, he concluded that the GTS was not akin to a government. It was an agency of the Gitxsan Nation with only power to make recommendations that the community must ratify in order to be binding. The third is that the submission he noted in para. 48 was

premature. The proposal was only to create a slate of members who would then go on to appoint directors to do whatever the society chooses to do respecting membership. In refusing to participate, the respondents had given up an opportunity to persuade the other initiating members of their point of view.

[34] The appellants made various submissions before the chambers judge in the s. 85 proceeding, including alleging violations of Gitxsan law by the GTS and its proponents, as well as irregularities in the meetings that were held to consult the community about the new GTS structure: see paras. 57-64. The chambers judge noted the issue before him was narrow:

> [68] My task on this petition is not to pronounce on the merits of the larger controversies between the factions who support the treaty process and those who do not. It is to address the defect in an entity of some long standing that has to date, in the Treaty process, been accepted by the BCTC as an agency of the Gitxsan Hereditary Chiefs. As the BCTC has indicated, the GTS operates while it has the confidence of the Gitxsan Nation and could cease to be the negotiating agent for the Gitxsan if the Nation so decided.
>
> [69] The BCTC explained that its role in the meetings leading to the proposed restructuring process, in 2012, "related to the mandate issue"; it specifically wanted the GTS to seek confirmation from the Gitxsan Hereditary Chiefs and the broader Gitxsan community respecting their collective wishes regarding the GTS administration of treaty matters on behalf of the Gitxsan Nation. Nothing before me suggests that issue was settled in a way that presently compromises the standing of the GTS, although the question of "mandate" is not presently before the court.

Reasons for Judgment

[35] Given that the appellants were not members of the GTS, the relief they sought depended on them being found to be "proper persons" to seek its winding-up. This issue was governed by provisions of the *Society Act* and the *Company Act*, R.S.B.C. 1996, c. 62, in place at the time this action commenced in December 2008. There have been amendments since. At times relevant to these proceedings, s. 71 of the *Society Act* incorporated portions of the *Company Act*, which had, for other purposes, been repealed. Section 71 of the *Society Act* read as follows:

> Despite the repeal of the *Company Act,* R.S.B.C. 1996, c. 62, Part 9 of that Act continues to apply to a society and an extraprovincial society as though Part 9 of that Act had not been repealed.

Part 9 of the *Company Act* includes s. 271(1):

> A company, on the application of the company, member, director, creditor, a trustee for debentureholders, a receiver manager, or the minster may be wound up by court order.

Section 271(4) reads:

> For the purposes of this section, a member includes
>
> (a) a beneficial owner of a share in the company, and
>
> (b) any other person who, in the discretion of the court, is a *proper person* to make an application.

Section 272 allows a court hearing a winding up application brought by a member to make an order for winding up or under s. 200, the oppression provision, "if [the court] is of the opinion that the applicant is entitled to relief either by winding up the company or under s. 200".

[36] Much of the judgment is given over to a comprehensive summary of the arguments advanced by the parties on the issue of standing. In brief, the GTS argued that a grant of standing to non-members is available only on narrow grounds, typically where the non-member has a direct stake or financial interest in the affairs of a society, but owing to unforeseeable circumstances is not actually a member. The GTS acknowledged that the power to grant standing is discretionary, not disputing the proposition from *First Edmonton Place Ltd. v. 315888 Alberta Ltd.* (1988), 60 Alta. L.R. (2d) 122 (Q.B.), that the court has "a broad power to do justice and equity in the circumstances of a particular case, where a person, who otherwise would not be a "complainant", ought to be permitted to bring an action under [the Alberta *Business Corporations Act*] to right a wrong done…."

[37] The GTS stressed that the Hereditary Chiefs chose not to become members despite the opportunity to do so, and the Indian Bands are statutory entities with no relationship to the GTS. Although the appellants are or might be affected by the activities of the GTS and are persons whose interests are among those sought to be advanced by it in negotiations, the appellants are not stakeholders in the GTS and have no direct interest in its assets or liabilities (including any loan debts). Granting

standing would undermine the position of those who have actually participated in the GTS, effectively "hijacking" it.

[38] The appellants grounded their submission on an argument that any agreement negotiated by the GTS would have permanent effects on the Gitxsan people's rights. They claimed a direct interest in the assets and liabilities of the GTS. They contended that they had been excluded from involvement in treaty negotiations and their rights have been compromised without their knowledge, involvement or agreement. They contended that they have a direct interest in the treaty negotiations because it is their rights and interests that are the subject of negotiations. The GAGM would have profound effects on Gitxsan band members and their interests, including the abolition of the Indian Bands. This, they submit, is sufficient for granting standing to the appellant Bands. They argued that the GTS has no mandate and is unrepresentative. It is only just that they have standing to advance their claims. The appellants submit, moreover, that they are constituents of a "First Nation" as defined in the First Nation Negotiating Support Agreement and may thus be said to have a role in mandating the GTS to enter treaty negotiations on their behalf.

[39] The chambers judge acknowledged how the appellants may be affected by the conduct of the GTS, but noted that any agreement would have to be put to a vote of the Gitxsan people before it could be adopted (at para. 123). Moreover, he found that the appellants do not have a "direct" pecuniary interest in the GTS. Their interest is, at this point, only a contingent interest in the negotiations (at para. 125). The chambers judge noted the grounds for granting standing on indirect, non-pecuniary interests are "circumscribed", and considered the Hereditary Chiefs to have "forsworn the opportunity to work inside the GTS for the changes they would like to see" (at paras. 126-128). Finally, the chambers judge considered this to be a political dispute within the Gitxsan First Nation. The principle of self-government inherent in the Treaty Process should not be undermined or compromised through interference by the Crowns or the courts. In conclusion, the chambers judge noted:

> [136] The plaintiffs' submissions that the Gitxsan people are effectively members of a community that directs the GTS and are, therefore, "proper persons", would negate the purpose for which the GTS was incorporated, that

> is, to provide a legal entity which can negotiate with the Crown(s) in the Treaty process, and a mechanism for the receipt and accounting of Treaty negotiation funding. There are means to wind up the GTS if the community and its leaders decisively choose to use them.
>
> [137] As matters now stand, however, the plaintiffs' advance propositions that amount to dissenting political views they ask the court to endorse and impose, in circumstances where they have been unable (or unwilling) to carry the burden of persuasion of their point of view within the community as a whole.

Did the Judge Err in his Conclusion on Standing?

[40] The parties agree that the appellants' standing to seek winding-up remedies is dependent on them being found to be "proper persons" under the then-in-effect s. 271(4) of the *Company Act* which states:

> For the purpose of this section, a member includes
>
> (a) a beneficial owner of a share in the company, and
>
> any other person who, in the discretion of the court, is a proper person to make an application.

[41] Equally, it is common ground that conferring standing on this basis involves an exercise of discretion, albeit one that must be exercised judicially. Moreover, the fundamental proposition articulated in the *First Edmonton* case is sound. The section confers a power on the court to grant standing where in the circumstances of a particular case justice and equity require it. But the exercise of that power must take into account the general principles of law governing companies and societies, such as the "indoor management rule" which exemplifies the reluctance of courts to become involved in internal issues or to permit outsiders of the legal entity whose interests may be affected by its conduct to acquire rights conferred on those who are shareholders or members. It seems clear that the power to recognize someone as a "proper person" is one to be exercised in limited circumstances. In effect, a grant of standing confers upon a person the rights they would have had if they were a shareholder or a member, because justice and equity require it. Evidently, this is an unusual, if not extraordinary, remedy.

[42] Here, the appellants attack the exercise of a discretionary power. In my view, to do so successfully they would need to demonstrate that the judge erred in principle or came to a decision that is so clearly wrong as to amount to an injustice or that the judge had erred in giving no or insufficient weight to relevant considerations: see *Penner v. Niagara (Regional Police Services Board),* 2013 SCC 19 at para. 27.

[43] It appears to me from a reading of the chambers judge's reasons that a number of observations guided his exercise of discretion to deny the appellants standing: (1) the appellant Hereditary Chiefs have "forsworn the opportunity to work inside the GTS for the changes they would like to see" (at para. 128); (2) the appellants' interest is "an interest in negotiable aspects of the treaty process… [that] is, at this point, a contingent interest…" (at para. 125); and (3) turning over resolution of a "political dispute within the Gitxsan Community" to Canada, British Columbia, or the courts would undermine the "fundamental premises of self-government" of First Nations (at paras. 128, 130). As to the Bands and the Gitksan Local Services Society, the chambers judge considered them to be "organizational manifestations of the relationship between the government(s) and the Gitxsan people" (at para. 127).

[44] The appellants argue that the chambers judge erred in finding the appellant Hereditary Chiefs "could and should have" become GTS members, in failing to give sufficient weight to the purposes underlying the GTS, and in finding the appellants' interests to be "contingent."

[45] Finally, the parties disagree as to whether the chambers judge dismissed the winding-up petition on the threshold issue of standing, or on the basis of the merits.

The Appellant Hereditary Chiefs "Could and Should" Have Become Members of the GTS

[46] It is evident that a primary consideration in denying standing was that the Hereditary Chiefs had failed to take the opportunity to become members of the GTS during the s. 85 "restructuring" process. Instead, they have persisted in pursuing relief from the outside as if they were members.

[47] Most fundamentally, the judge recognized the opportunity that the Hereditary Chiefs had been given, as a result of the s. 85 petition proceedings, an opportunity to become, or to nominate, a member of the GTS representing their respective House. The judge concluded that the Hereditary Chiefs had available to them a means of direct engagement with the GTS, but that they had "forsworn the opportunity to work inside the [GTS] for the changes they would like to see" (at para. 128). In these circumstances, accepting the invitation to grant standing would involve the court in interfering in internal political disagreement within the Gitxsan nation, contrary to the principles embedded in the Treaty Process which call for recognition of the principle of self-government.

[48] The appellants say that the judge erred in finding that they could and should have become members of the GTS.

[49] The parties disagree about what the appellant Hereditary Chiefs could and should have done. On one hand, the GTS says, and the chambers judge agreed, it was open to the Hereditary Chiefs to submit an application to become, or to nominate someone to become, a member of the GTS as part of the s. 85 process (the "*could*"). Indeed, the chambers judge viewed the whole purpose of the s. 85 proceedings as directed towards making the GTS more inclusive and representative: *Gitxsan Treaty Society,* 2012 BCSC 452 at para. 43. The chambers judge viewed the s. 85 proceedings as an invitation for the appellant Chiefs to join if they wanted to voice their concerns about the GTS (the "*should*").

[50] The appellant Chiefs do not deny it was open to them to submit an application. As I understand their argument though, they submit that they "could not approve the scheme by putting their names forward for membership because it violated Gitxsan law, tradition and practice." Indeed, they submit that they "declined to apply for membership on grounds of this abuse of Gitxsan law."

[51] In approaching this question, it is important to note the careful considerations that courts must bring to bear in cases dealing with the interaction between indigenous legal traditions and those of non-Aboriginal sources, such as the *Company Act* and *Society Act,* and related case law.

[52] Although primarily expressed in the context of claims of Aboriginal title and other property rights (e.g., fishing rights), the Supreme Court of Canada has encouraged courts to be sensitive to Aboriginal perspectives, and to take them into account alongside the perspective of the common law: see generally *R. v. Sparrow,* [1990] 1 S.C.R. 1075 at 1112; *Delgamuukw v. British Columbia,* [1997] 3 S.C.R. 1010 at paras. 148-149; *R. v. Marshall; R. v. Bernard,* [2005] 2 S.C.R. 220 at para. 48; *R. v. Van der Peet,* [1996] 2 S.C.R. 507 at para. 42; *Tsilhqot'in Nation v. British Columbia,* 2014 SCC 44 at paras. 34-35.

[53] With this in mind, I understand the appellant Hereditary Chiefs' objections to the GTS membership structure. I also understand why they considered that they "could not" submit an application to join the GTS.

[54] Nonetheless, I am persuaded that the chambers judge was alive to these considerations. There was clearly a dispute, at least among certain Chiefs, about whether Gitxsan law precluded one from becoming a member of the GTS, as presently structured. The chambers judge's extensive reasons in the proceedings related to these disputes reflect his concern about the representativeness and transparency of the GTS, including the notion of community involvement in and engagement with Gitxsan traditions. With this concern in mind, he rejected the first "restructuring proposal" in the s. 85 proceedings, directing more extensive, community-wide consultations and participation. The appellants did not appeal the chambers judge's subsequent order approving the appointment of the 37 resulting members as members for the purposes of the extraordinary general meeting.

[55] Oral submissions before this Court suggested that, since the approval of the s. 85 petition, additional Houses have submitted applications for, and appointed representatives as, GTS members. On the record before us it remains open to the

appellant Hereditary Chiefs to become members. If the appellant Hereditary Chiefs were members, they would have had, and may still have, standing to bring a winding-up petition under the *Society Act* and *Company Act* provisions noted earlier.

[56] This is what the chambers judge had in mind when he observed the appellant Hereditary Chiefs were, improperly, making their arguments from the *outside*. I see no error in the chambers judge's observation that "there are means to wind up the GTS if the community and its leaders decisively choose to use them" (at para. 136). The current petition proceeding, as brought by the current appellants, is not one of those means.

[57] As the chambers judge correctly observed, as a general rule, "proper person" standing is granted where there is no other reasonable alternative to bring a question before the court. That is not the case here. I agree that the Hereditary Chiefs forswore their opportunity to become members and to influence the affairs of the GTS from within. The chambers judge, in considering what would be just in the circumstances, considered the history of the proceedings and the fact that other Houses have nominated members to join the GTS after the extensive consultation process. His finding that the appellant Hereditary Chiefs have forsworn their opportunity to become members was supported on the record. His consideration of this in exercising his discretion to deny standing was not an error.

[58] The appellants also say the judge erred in failing to consider the purpose of the GTS in determining what is just in the circumstances. But the judge did pay attention not only to the purposes of the society, but also to the context in which these issues had arisen, namely, a treaty process designed to achieve reconciliation between a First Nation and the broader community. Both in the reasons for judgment concerning the s. 85 petition and in the reasons leading to the order under appeal, the judge carefully analysed the role of the GTS as an instrument of the Gitxsan Nation in its negotiation with the Crown(s). He paid attention to its purpose as an entity capable of receiving negotiation funding, as well as its role as an instrumentality in the process of negotiation. He examined what the GTS could do,

and what it could not do, such as bind the Gitxsan nation without ratification. He took account of the current stage of negotiations. He recognized the degree to which the GTS could advance or affect the interests of the appellants. He explicitly referred to the fact that he had examined whether issues of standing should be more liberally construed in a context dealing with Aboriginal law. In my view, the appellants have not demonstrated that the judge erred by misunderstanding the role of the GTS, or by failing to consider the purpose of the GTS. Nor have they demonstrated any error in the way in which he took into account the purposes of the GTS in deciding the issue of standing.

Contingent Interests

[59] The appellants contend that the conclusion that they had only a contingent interest in the outcome of negotiations was an error. I am not persuaded that it was.

[60] The judge recognized that the appellants' interests could be affected by the activities of the GTS, but he concluded that the GTS had not done anything irrevocable or lasting, nor could it bind the Gitxsan people. He recognized the appellants' interest in treaty negotiations, describing that interest as "contingent" because any proposed treaty, the terms of which had not been negotiated in any event, would require ratification by the Gitxsan nation. He was not prepared to find that the appellants' concerns about debt financing or the way that monies had been spent established a direct pecuniary interest in the GTS's affairs. As I read his reasons, he did not conclude that a direct pecuniary interest was a prerequisite for standing as a "proper person". Instead, he found that the appellants did not have a direct pecuniary interest. This finding was open to him on the record, and it militated against exercising his discretion to allow standing.

[61] It is apparent that the judge accurately comprehended the role of the GTS in treaty negotiations, in which the principal is the Gitxsan Nation. The GTS is merely an agent. Negotiations are at stage 4, negotiating an agreement in principle. But no such agreement has yet been negotiated, and indeed, a confirmation of the mandate is required before advancing to the next stage. The judge understood the subject

matter of those negotiations, including discussion of matters such as Aboriginal title and the future of the Bands. He recognized that any treaty would require ratification by the Gitxsan nation, in a manner yet to be determined, and that the GTS could not bind the Gitxsan nation. In my view, the judge's reference to the appellants "having a contingent interest in the outcome of the negotiations" was simply a convenient shorthand characterization of the manner in which ongoing negotiations *might* affect the appellants' interests. I see nothing inaccurate in that characterization. Further, while the appellants have urged upon this Court to consider the sizeable debt to the Crown the GTS has incurred for treaty negotiations, I do not find this persuasive, and the chambers judge did not err in how he considered it. The debtor is the GTS, and the extent to which this debt becomes a liability for the individual appellants, members of their respective Houses, or the nation as a whole, would depend on the presently unknown, or contingent, outcome of the negotiations. I see nothing here that suggests the judge in anyway misapprehended the facts or misapplied any relevant principle in allowing this to inform his exercise of discretion to deny standing.

[62] Insofar as the Bands are concerned, the judge concluded that they were "organizational manifestations of the relationship between the government(s) and the Gitxsan people", but "they were not parties to the government-to-government negotiations represented in the treaty process" (at para. 127). This conclusion, as I read the judgment, is informed by an appreciation of the principles underlying the treaty process, a recognition that the manner in which a First Nation organizes itself to engage in that process is a matter of internal government, and also an awareness of his earlier ruling in the s. 85 petition which approved the membership structure of the GTS.

[63] I do not think the judge made any reversible error in denying the Bands and the Gitksan Local Services Society standing. The constitution of the GTS based on membership rooted in one potential member for each house, as approved and directed by the Head Chief, not only reflects important elements of traditional governance in the Gitxsan nation, but was also endorsed by the court's order

resulting from the s. 85 petition. That order approved the GTS's membership structure, which did not contemplate membership for the Indian Bands. No party appealed that judgment. These considerations informed the judge's exercise of discretion in not granting standing to the Bands. He correctly considered that to grant them standing would be inconsistent with the final outcome of the s. 85 petition insofar as the issues engaged in the current application are an attack on the structure and composition of the GTS, rather than merely its conduct.

[64] In my view, underlying the approach taken by the judge in handling this litigation is the recognition that the way in which the Gitxsan nation organizes itself to engage in treaty negotiation is a matter of internal self-government. What role, if any, the Bands and the Gitksan Local Services Society play in that process is to be decided by the community itself. Granting standing to these organizations as proper persons would be inconsistent with this approach. The judge's analysis of the Bands as being organizational manifestations of the relationship between government and the Gitxsan people is accurate, reflects the fact that the Bands do not form part of the traditional government of the Gitxsan nation, and in my view, was properly taken into account in denying them standing.

[65] Finally, the appellants contend that the judge erred in concluding that the claim for winding up was bound to fail. This issue raises a question pertaining to the scope of the reasons for judgment. The judge catalogued arguments advanced by the parties premised on the proposition that the appellants had standing (at paras. 72-95). The GTS contended that the claim, even so, was bound to fail because none of the circumstances that would justify a winding up of a society could be said to exist on the pleaded allegations, even if they were assumed to be true.

[66] On my review of the reasons for judgment, it is far from clear whether the judge went beyond concluding that the claim was bound to fail because the appellants did not have standing to raise it. It is not apparent that the judge went further and adopted the view that the claim was bound to fail on its merits (e.g., there was a loss of substratum, etc.). Since I would uphold the judge's order on the basis

that the appellants were correctly held not to be proper persons, I think it unnecessary to resolve this question. I would say no more about it.

[67] It is apparent that the guidance in the case law relating to the circumstances when a court should exercise its discretion to grant standing to someone as a "proper person" is relatively sparse. Given the unique circumstances of this case, I do not think this is the appropriate case to attempt to lay down any general principles about such matters as what kind of interest might entitle someone to standing, how direct or immediate must that interest be, to what extent should the interest be analogous to a shareholder's or member's interest, or how should the difference between a company and a society be reflected in any test. In my view, this appeal can be disposed of without laying down any general rules, but on the basis of the considerations and circumstances I discussed above, and considered by the judge in his exercise of discretion.

[68] As such, I conclude the chambers judge did not err in his exercise of discretion to deny the appellants standing in the winding-up claim against the GTS. I would not accede to this ground of appeal.

Fiduciary Duty

[69] The appellants query whether the judge made a decision on the claim against the Crown(s) sounding in breach of fiduciary duty and the honour of the Crown. If he did, they contend that his reasons were insufficient and, in any event, rested on an error in finding that the test for striking a claim had been met.

[70] In my view, it is clear that the judge did decide the question and, indeed, the order reflects that fact. The judge set out the submissions of the parties at length. He concluded that the declaration sought by the appellants of a duty owed to them failed to address the design of the treaty process which "is meant to place the governments in arms-length relationships with the Gitxsan intermediated by the BCTC" (at para. 131). This conclusion was based on two propositions. First, no fiduciary obligation could arise in the circumstances because of the role of the BCTC

in the treaty process, which role is endorsed by the statutory framework setting it up. Second, the responsibility to intervene in political disputes within the Gitxsan community cannot be turned over to the Crown or the courts because to do so would undermine the premise of self-government. The chambers judge put it this way:

> [116] There may be contexts in which such dealings would be grounds for a breach of fiduciary duty against the Crown, but it is difficult to see how that is possible within the treaty process, which puts the Crown(s) at arm's length with the BCTC as the intermediary. In *this* proceeding, in *Spookw v. Gitxsan Treaty Society*, 2011 BCSC 1001, Kelleher J. ruled that the BCTC has a duty to respect Gitxsan self-governance and ought not to be seen to have a duty to respond to factional disputes within the Gitxsan nation.
>
> [118] In the circumstances in which this matter first came before the court it was difficult to tell whether it was arguable that GTS, had in fact, retained its mandate. The BCTC appears, however, to have been satisfied that the GTS has maintained a mandate throughout its tenure as the negotiating agent for the Gitxsan people in the treaty process.
>
> [119] The structural problems with the composition of the GTS that came to light in the course of this litigation was resolved when this Court ultimately approved a resolution that came from the community itself. The Court was satisfied that a broad canvass of the community had been undertaken and that a resolution that offered the Hereditary Chiefs of each House an opportunity to participate in a meeting to elect directors and give further direction to the GTS properly balanced respect for the traditional form of Gitxsan governance and community-wide engagement.

[71] In my view, the judge was aware of, and acceded to, Canada's submissions to the effect that the essence of the litigation is a dispute within the Gitxsan community, in which the Crown has no role. The Treaty Process, established by parallel provincial and federal legislation, created an arm's-length entity to assess a First Nation entity's negotiating mandate and to allocate negotiation support funding. Accordingly, no fiduciary obligation can arise on the part of Canada with respect to that matter. The claim is premature as the harms alleged are contingent rather than imminent because there is still no agreement in principle. Similarly, as I will discuss later, the honour of the Crown cannot be relied on to require the Crown to intervene in an internal dispute. Such intervention would be in conflict with the principle of self-government. The Crowns' role and conduct are limited by their respective statutory obligations under the relevant legislation.

[72] More importantly, I think it important to note the unique dynamics engaged in treaty negotiations between the Crown(s) and indigenous peoples. The interests being negotiated are unique, and indeed, at least in part, *sui generis.* In this sense and given the principles informing the process, it is not inaccurate to describe the process as "nation to nation" negotiations. This dynamic recognizes the imperative of reconciliation of Aboriginal rights and title and the assertion of sovereignty in relation to which the Crown(s) certainly bear a duty of honour.

[73] It is in this context that the Crown(s) and the First Nations Summit came together to develop the BCTA framework. In the resulting framework, the Crown(s) are placed at arm's length from the First Nation, by way of the BCTC. Funding, for example, is placed beyond the control of the Crown(s). The BCTC manages funding requests and needs, and directs the Crown to provide the funding. Both the Crowns and the BCTC have an obligation to respect Gitxsan self-governance. It would be inconsistent with that obligation to require the Crown to respond to, or decide, factional disputes within the Gitxsan nation.

[74] In my view, the judge did not err in concluding that it was plain and obvious the claim was bound to fail. It is no barrier to such a conclusion that a case involves complex fiduciary duty claims or Aboriginal claims: see e.g., *Canada (Attorney General) v. Lameman,* 2008 SCC 14; *Nunavut Tunngavik Incorporated v. Canada (Attorney General),* 2014 NUCA 2; *Peter Ballantyne Cree Nation v. Canada (Attorney General),* 2014 SKQB 327, rev'd in part on other grounds 2016 SKCA 124; see generally, *Alberta v. Elder Advocates of Alberta Society,* 2011 SCC 24; and *Hryniak v. Mauldin,* 2014 SCC 7.

[75] It is important to note that while relationships between First Nations and the Crown may, generally, be fiduciary in nature, not all dealings between parties in a fiduciary relationship are governed by fiduciary obligations: *Manitoba Metis Federation Inc. v. Canada (Attorney General),* 2013 SCC 14 at para. 48, [*MMF*]. In *MMF,* the Supreme Court of Canada outlined how a fiduciary obligation can arise in the Aboriginal context:

> [49] In the Aboriginal context, a fiduciary duty may arise as a result of the "Crown [assuming] discretionary control over specific Aboriginal interests": *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73 (CanLII), [2004] 3 S.C.R. 511, at para. 18. The focus is on the particular interest that is the subject matter of the dispute: *Wewaykum Indian Band v. Canada*, 2002 SCC 79 (CanLII), [2002] 4 S.C.R. 245, at para. 83. The content of the Crown's fiduciary duty towards Aboriginal peoples varies with the nature and importance of the interest sought to be protected: *Wewaykum*, at para. 86.
>
> [50] A fiduciary duty may also arise from an undertaking, if the following conditions are met:
>
> > (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.
>
> (*Alberta v. Elder Advocates of Alberta Society,* 2011 SCC 24, [2011] 2 S.C.R. 261, at para. 36).

[76] Canada does not have unilateral or direct administrative control over the positions that are put forward on behalf of the Gitxsan community at the treaty table. To give Canada, or British Columbia, such control would compromise the integrity of that negotiation process. Canada, British Columbia and the Gitxsan Nation are separate and equal parties when negotiating a treaty. British Columbia and Canada represent distinct non-Aboriginal constituencies and interests in these negotiations. The Gitxsan Nation decides for itself which positions to put forward, if any, at the treaty table on behalf of its constituents.

[77] On occasion, the Crown is in an arm's-length or quasi-adversarial relationship with a First Nation. While treaty negotiations are not adversarial, I agree with the Crown respondents that the distinct interests and constituents represented by the parties to the negotiations imply that no fiduciary obligation arises here. I find support for this in *Gladstone v. Canada (Attorney General),* 2005 SCC 21 at para. 27. As noted earlier, the statutory scheme makes it clear that neither Crown respondents exercise any discretion over assessing the GTS's negotiating mandate, allocating negotiation support funding, or the positions advanced at the treaty table. The statutory scheme assigns these responsibilities to the BCTC, which is an independent, arm's-length entity.

[78] As Canada argues, relying on *MMF*, fiduciary obligations may be imposed on those who have expressly or implicitly undertaken them (at para. 50). The undertaking of a fiduciary obligation may be by statute, agreement or unilateral undertaking: *Guerin v. The Queen,* [1984] 2 S.C.R. 335 at 385.

[79] In my view, the Crown respondents have not undertaken to act in the appellants' best interests in the course of treaty negotiations. They have not undertaken to assess the GTS's mandate or funding. There are no such undertakings because to find they exist would be inconsistent with the nature of treaty negotiations, as envisioned by the statutory scheme described earlier

[80] The concept of arms-length treaty negotiations – and the fact that Canada represents all Canadians in the negotiations – precludes Canada from putting the appellants' best interests above all others in the negotiations. This applies similarly to British Columbia.

[81] In my view, the chambers judge correctly dismissed the claims against the Crown respondents for breach of fiduciary obligations. The chambers judge did not err in considering the law of fiduciaries relating to the Crown and First Nations, as developed in Supreme Court jurisprudence. His conclusion that no such obligations exist in the case at bar is correct, and I would not disturb it.

Honour of the Crown

[82] The duty of the honour of the Crown "arises from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people": *MMF* at para. 66, citing *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73, at para. 32. The ultimate purpose of the honour of the Crown is the reconciliation of pre-existing Aboriginal societies with the assertion of Crown sovereignty: *MMF* at paras. 66-67. The honour of the Crown governs treaty-making, imposing requirements on the respondent Crown(s), such as honourable negotiation and the avoidance of the appearance of sharp dealing: *MMF* at para. 73. However, the honour of the Crown is

not a free-standing cause of action; rather, it controls *how* obligations that attract it must be fulfilled: *MMF* at para. 73.

[83] The appellants argue that the Crown respondents have breached this honour in a number of ways, primarily by continuing to fund and negotiate with the GTS after receiving notice that the GTS does not represent the views of the appellants. The tabling of the GAGM and the adoption of a short-term forestry agreement are also identified as breaches of this obligation.

[84] In my view, the chambers judge correctly observed that breach of the duty of honour of the Crown is not a recognized cause of action. Equally, the alleged breaches of the honour of the Crown are inconsistent with the obligations undertaken by the Crown(s) within statutory framework governing the Treaty Process. Taken jointly, these conclusions are sufficient to uphold the judge's order.

[85] Evidently, there are serious disputes among the Gitxsan people as to how the treaty negotiation process should proceed, if at all. The GTS is an agent of the Gitxsan people. Through their Hereditary Chiefs, members of the Houses can have a voice in how or whether the GTS is to conduct negotiations with the Crown(s). It is not for the Crown(s) as a matter of a fiduciary duty or honour to interfere with that internal, political debate.

[86] Courts, in the context of the Treaty Process, as a general proposition, should respect how an indigenous community resolves internal issues and organizes itself to participate in the process. Similarly, the honour of the Crown is not a paternalistic concept. It does "not arise from a paternalistic desire to protect the Aboriginal peoples" (*MMF* at para. 66). The Treaty Process contemplates that the Crown(s) will respect the self-governance of indigenous communities, which includes how it resolves what, essentially, is political disagreement.

[87] The chambers judge was correct to note that the honour of the Crown does not require either British Columbia or Canada to assess GTS's mandate in the BC Treaty Process. The statutory scheme provides that the BCTC is the party

responsible for assessing the GTS's mandate and for allocating negotiation support funding, not Canada. This way, the Crown(s) cannot "manipulate" negotiation funding, or "pick and choose" which organization has a valid mandate, when negotiating with the First Nation. Again, within the tripartite, arm's-length negotiation process, Canada cannot be said to have acted dishonourably by complying with the statutory scheme, itself the product of extensive dialogue between the First Nations Summit and the Crown(s).

[88] The appellants indicate that they have informed the BCTC that the GTS is no longer acting on their behalf. It appears that the BCTC is satisfied that the GTS still has a valid mandate. The appellants have not, in the present action, advanced any claims against the BCTC, aside from the action in negligence which was dismissed. I would say no more respecting the appellants' claims, if any, against the BCTC, as the order dismissing that claim was not appealed and is not before us.

[89] In my view, the chambers judge correctly dismissed the appellants' claim of breach of the duty of the honour of the Crown in the way he did. This claim discloses no reasonable cause of action or genuine issue to be tried. It is not a recognized cause of action, is inconsistent with the principles of First Nations self-governance, and is contrary to the statutory scheme that emerged from agreement among the principals to the BCTA.

Conclusion

[90] The chambers judge did not err in exercising his discretion to refuse standing to the appellants. That is sufficient to dispose of the appeal as to the petition against the GTS.

[91] The chambers judge properly dismissed the claims against Canada and British Columbia for breach of fiduciary duty and honour of the Crown.

[92] Accordingly, I would dismiss the appeal.

"The Honourable Mr. Justice Harris"

I agree:

"The Honourable Mr. Justice Goepel"

I agree:

"The Honourable Mr. Justice Savage"