SCC File No. 37441

**IN THE SUPREME COURT OF CANADA**
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

**CHIEF STEVE COURTOREILLE ON BEHALF OF HIMSELF AND THE MEMBERS OF THE MIKISEW CREE FIRST NATION**

Appellants

AND:

**THE GOVERNOR GENERAL IN COUNCIL, MINISTER OF ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT, MINISTER OF FINANCE, MINISTER OF THE ENVIRONMENT, MINISTER OF FISHERIES AND OCEANS, MINISTER OF TRANSPORT, AND MINISTER OF NATURAL RESOURCES**

Respondents

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# FACTUM OF THE INTERVENER GITANYOW HEREDITARY CHIEFS

(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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## I. OPENING STATEMENT

1. This appeal, fundamentally, is about respect and relationships.

2. This appeal addresses whether the Crown is able to alter or introduce legislation and implement changes that would affect the rights of Indigenous peoples without consultation.

3. Over the last three decades, this Court has given shape to the Crown-Aboriginal relationship, acknowledging that:
    a. "For many years, the rights of the Indians to their aboriginal lands -- certainly as legal rights -- were virtually ignored."[1]
    b. "In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown."[2]
    c. There is a "special" relationship between Aboriginal peoples and the Crown.[3]

4. Guided by this Court, the Crown-Aboriginal relationship has evolved; however, its boundaries remain undefined. Aboriginal peoples are caught between the Crown's repeated confirmation of this special relationship, and the Crown's assertion that Aboriginal peoples do not have rights beyond those of other Canadians. The Crown gives assurances to Indigenous peoples with one hand, while clawing back their rights with the other.

5. This Court has stated that "[c]onsultation is, after all, '[c]oncerned with an ethic of ongoing relationships.'"[4] The Crown, aided by the courts, should no longer be allowed to paternalistically and unilaterally decide the terms of the relationship.

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[1] *R. v. Sparrow*, [1990] 1 SCR 1075, at p. 1103 [*Sparrow*]
[2] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, at para. 17 [*Haida*]
[3] *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53,at para. 62 [*Beckman*]; S*parrow*, *supra* note 1 at p. 1108; *R. v. Van der Peet*, [1996] 2 SCR 507, at paras. 23-25
[4] *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, at para. 24 [*Clyde River*]

## II. STATEMENT OF FACTS

6. The Gitanyow adopt the facts as presented by the Appellants.

7. The Gitanyow Hereditary Chiefs are an Aboriginal people under s. 35 of the *Constitution Act*, 1982. Justice Neilson (as she then was) in *Wii'litswx v. British Columbia* described the Gitanyow's traditional governance and social structure and lands management system. Neilson, J. found that the Gitanyow are organized matrilineally by Wilp, or house group, which "are the social, political and governing units of the Gitanyow."[5]

8. The Gitanyow do not have a treaty. In the absence of a treaty, the Gitanyow have entered into Recognition and Reconciliation agreements with the Crown to build on the Crown-Gitanyow relationship so as to guide land and natural resource management for the benefit of both parties.[6]

## III. STATEMENT OF ISSUES

9. The Gitanyow accept the issues as stated by the Appellants and will address the first issue. The Gitanyow's position is that Canada is not free to draft or amend legislation that could affect the constitutionally protected rights of Aboriginal peoples without consultation.

## IV. STATEMENT OF ARGUMENT

10. This case addresses the nature of the Crown's relationship with Aboriginal people. While Canada represents that it respects this relationship, it denies its special nature when it views Aboriginal peoples as asking for too much.

11. In the absence of a formal treaty, the Gitanyow are required to work within the "special relationship" with an honourable Crown, while also not infrequently colliding with the Crown's imposed limitations on that relationship.

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[5] *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1139, at para. 21 [*Wii'litswx*]
[6] *Ibid.*, at paras. 67-85

12. For non-treaty Aboriginal nations such as the Gitanyow, allowing this appeal is critical to safeguard the integrity of existing agreements with the Crown, and ensure the value of creating future agreements.

13. The Gitanyow agreements with the Crown are the result of years of work and compromise, sometimes with the aid of the courts,[7] to find ways for the Gitanyow to protect their "social, political and governing" system. This is reconciliation in action.[8]

14. If the Crown can unilaterally amend or introduce legislation that affects its agreements with Aboriginal peoples, their trust in the Crown's in good faith is misguided. Aboriginal nations which rely on non-treaty agreements with the Crown will have little motivation to enter into such agreements.

## A. Real Reconciliation in the Crown-Aboriginal Relationship Requires Respectful Consultation and Accommodation

15. The duty to consult stems from s. 35 and the reality that Aboriginal societies existed in what is now Canada prior to the assertion of Crown sovereignty, and continue to exist today.[9]

16. Aboriginal peoples routinely experience the rhetoric of reconciliation and nation-to-nation relationship building, but find that the Crown is quick to attempt to 'put Aboriginal peoples in their place' when their expectations go beyond what the Crown is either comfortable with or perceives as reasonable.

17. Justice Hughes in his Federal Court decision found that:

> …there is no special provision in Treaty No. 8 that characterizes the law-making process as Crown actions that would allow the Mikisew, *in preference to other Canadians*, to intervene in the legislative process before a bill that

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[7] *Ibid.*; *Gitxsan and other First Nations v. British Columbia (Minister of Forests)*, 2002 BCSC 1701; *Gitanyow First Nation v. British Columbia (Minister of Forests)*, 2004 BCSC 1734
[8] *Wii'litsxw, supra* note 5, at paras. 36-67
[9] *Haida, supra* note 2, at para. 32

> may, in some arguable way, interfere with the Mikisew's treaty rights of fishing and trapping.[10] (emphasis added)

18. The Crown argues:

> If this Court were to recognize a duty to consult the appellants on legislation, such recognition would create a hierarchy of consultation. Those whose Charter rights are abridged by legislation would have no right of consultation on legislation; however, Indigenous groups under s. 35 would have such a right of consultation. If Charter rights cannot be protected by the courts during the legislative process, it would seem inconsistent for rights flowing from s. 35 of the Constitution Act to be a basis for overturning parliamentary sovereignty.[11]

19. This argument contradicts reconciliation, thereby undermining the purpose of s. 35 (which is distinct from the *Charter*), to reconcile the pre-existence of Aboriginal societies with the assertion of Crown sovereignty.

20. Contrary to its stated goal of reconciliation with Aboriginal peoples, and the directions of this Court, the Crown argues that Aboriginal peoples in Canada should not have rights beyond those of other Canadians. The Crown is telling Aboriginal peoples that the Crown-Aboriginal relationship is special and requires deference only when such deference does not interfere with Crown objectives or the Crown power to legislate.

21. The Crown, in effect, argues that it alone can define the limits of the 'special' Crown-Aboriginal relationship and can propose legislation that limits Aboriginal rights with impunity. This approach mimics the Crown's earlier paternalistic colonial policies. In this case, the Crown wants the Court to endorse this position by barring Aboriginal peoples from access to consultation on legislation that could affect their s. 35 rights.

22. True reconciliation, based on a nation-to-nation relationship grounded in respect cannot exist when one party can unilaterally limit the terms of that relationship and exert its authority over the other.

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[10] *Courtoreille v. Canada (Aboriginal Affairs and Northern Development)*, 2014 FC 1244, at para. 71

[11] Factum of the Respondent Ministers, para. 93

## B. Ongoing Relations – Future Treaties and Agreements

23. As held by this court in *Beckman*:

> The reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship is the grand purpose of s. 35 of the *Constitution Act, 1982*. The modern treaties, including those at issue here, attempt to further the objective of reconciliation not only by addressing grievances over the land claims **but by creating the legal basis to foster a positive long-term relationship between Aboriginal and non-Aboriginal communities.** Thoughtful administration of the treaty will help manage, even if it fails to eliminate, some of the misunderstandings and grievances that have characterized the past. Still, as the facts of this case show, the treaty will not accomplish its purpose if it is interpreted by territorial officials in an ungenerous manner or as if it were an everyday commercial contract. **The treaty is as much about building relationships as it is about the settlement of ancient grievances. The future is more important than the past.** A canoeist who hopes to make progress faces forwards, not backwards.[12] (emphasis added)

24. Making agreements with the Crown, to date, has been the only way for the Gitanyow and other non-treaty Aboriginal peoples to implement a nation-to-nation relationship. To that end, these agreements represent the Gitanyow's best attempts at reconciliation.

25. This Court has repeatedly encouraged Crown-Aboriginal agreements over litigation, stating "[t]rue reconciliation is rarely, if ever, achieved in courtrooms."[13]

26. It is clear that from the outset of its consideration of Aboriginal rights, this Court contemplated that consultation would be afforded to Aboriginal peoples whose rights could be affected by proposed legislation or amendments to legislation:

> By giving aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal rights are affected. Implicit in this constitutional scheme is the obligation of the legislature to satisfy the test of justification. The way in which a legislative objective is to be attained must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples. **The extent**

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[12] *Beckman*, *supra* note 3, at para. 10
[13] *Clyde River*, *supra* note 4, at para. 24

> **of legislative or regulatory impact on an existing aboriginal right may be scrutinized so as to ensure recognition and affirmation.**[14] (emphasis added)

27. The British Columbia Court of Appeal has held that "claims of failure to consult and accommodate [are] upstream not only of the certificate of indefeasible title but also of the statutes under which the ministerial power has been exercised."[15] If claims for inadequate consultation are "upstream" of statutes, it would logically follow that consultation must extend to pre-tabling discussion of legislation that may impact Aboriginal rights.

28. In *Haida Nation*, this Court held:

> …the Province has a duty to consult and perhaps accommodate on T.F.L. decision. The T.F.L. decision reflects the strategic planning for utilization of the resource. **Decisions made during strategic planning may have potentially serious impacts on Aboriginal rights and title.**[16] (emphasis added)

29. The introduction or amendment of legislation is the highest form of "strategic planning". Legislation represents a strategic plan to achieve Canada's 'social and economic policy objectives'. Excluding Aboriginal peoples from consultation when considering how to implement those 'objectives' in law makes the Crown-Aboriginal goal of reconciliation hollow.

30. If the Crown is permitted to repeal, amend, or introduce legislation which impacts unextinguished Aboriginal rights without consultation, it will mean that the Crown's repeated assurances of the 'special nature' of the Crown-Aboriginal relationship are specious.

31. There is a conflict between the Crown's commitment to advance the goal of reconciliation through the creation of Crown-Aboriginal agreements, and its asserted ability to significantly

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[14] *Sparrow, supra* note 1 at p. 1110
[15] *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, 2005 BCCA 128, at para. 19
[16] *Haida Nation, supra* note 2, at para. 76

impact these agreements without any consultation. Allowing Crown actions of this nature would suggest to the Gitanyow that the last 20 years' work towards reconciliation is futile.

32. The Crown could gut agreements with the Gitanyow by legislative means with no obligation to consult with and accommodate the Gitanyow regarding impacts on Gitanyow rights. Such an outcome is the antithesis of reconciliation and implicitly upholds bad faith negotiations.[17]

33. Furthermore, the content of legislation can impact what the Crown will consult Aboriginal people about, and the extent of the accommodation measures it is willing to provide.[18]

34. If Aboriginal peoples are not consulted on legislation that delineates the extent of Crown consultation and accommodation, the effect is that the Crown can set its own boundaries for consultation and accommodation, and then rely on these boundaries to limit the consultation and accommodation provided.

35. As this Court has stated:

> Finally, the *United Nations Declaration on the Rights of Indigenous Peoples*, (the *UNDRIP*), was endorsed by Canada on November 12, 2010. …. Although this international instrument is, at the time being, a declaration and not a treaty or a covenant, and is not legally binding except to the extent that some of its provisions reflect customary international law, when Canada endorsed it, it reaffirmed its commitment to "…improve the well-being of Aboriginal Canadians."[19] (citation removed)

36. The UN Declaration contains the following provision:

> Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions[20], to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.[21]

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[17] *Luuxhon v. Canada*, 1999 CanLII 6180 (BC SC), at para. 74
[18] *Wii'litswx, supra* note 5 at para. 226
[19] *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2, at para. 452
[20] *Wii'litswx*, *supra* note 5 at para. 21,
[21] United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295, Article 20

37. Canada, in committing to the UN Declaration, recognized that its duty to Aboriginal peoples extends to supporting them in "maintaining their political, economic and social systems or institutions…". It cannot meaningfully do this if it insists on excluding them from any consultation regarding proposed laws or regulations that will impact those systems and institutions.

38. The Crown-Aboriginal relationship, combined with the requirement for the Crown to conduct itself honourably, creates a reality where Aboriginal peoples have special rights not enjoyed by non-Aboriginal Canadians. If the Crown-Aboriginal relationship is indeed special and meaningful, reconciliation demands courage, and a willingness to listen and change.

## V. SUBMISSIONS ON COSTS

39. The Gitanyow do not seek costs and request that none be awarded against them.

## VI. ORDER SOUGHT

40. The Gitanyow ask that this Court grant the relief sought by the Appellants.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 10th DAY OF November, 2017.

| | |
|---|---|
| fov Peter R. Grant | Karenna Williams |
| Counsel for the Appellants | |

## VII. TABLE OF AUTHORITIES

| CASES | AT PARAS |
|---|---|
| *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 | 3, 23 |
| *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40 | 5, 25 |
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## VIII. STATUTORY PROVISIONS

| **Legislation** | |
|---|---|
| *Constitution Act, 1982*, 5, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 | s.35 |
| **International Documents** | |
| United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295 | Article 20 |