# RAVEN

**Tracing Precedents, Mapping Impact**

**Pro Bono Students Canada & RAVEN**

Part One: drafted by Victoria Kacer

***First Nation of Nacho Nyak Dun v. Yukon*, 2017 SCC 58**
https://www.canlii.org/en/ca/scc/doc/2017/2017scc58/2017scc58.html?resultIndex=1

**Summary**

Modern treaties[1] and land claims agreements in Yukon set out a collaborative, intergovernmental land use planning process that recognizes First Nations' traditional territories and their right to participate in managing public resources in those territories. This land use planning process outlines roles and responsibilities for:

- The Yukon Government;
- The Canadian Government; and
- Yukon First Nations
    - In this case, First Nation of Na-Cho Nyak Dun, Tr'ondëk Hwëch'in, and Vuntut Gwitchin First Nation.

Chapter 11 of the Yukon Umbrella Final Agreement[2] allows the Yukon Government to make changes to a collaboratively-developed Final Recommended Land Use Plan[3] as long as these changes are either:

(a) Based on suggestions that the Yukon Government raised during the consultation process; or
(b) Developed in response to changing circumstances.

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[1] Modern treaties are nation-to-nation agreements between Indigenous Nations, the federal government, and a provincial or territorial government. Modern treaties, also known as land claims agreements, are usually signed in areas where Indigenous title and rights have not been settled and are not addressed by an historic treaty. Modern treaties define Indigenous Nations' land and resource rights and address such other matters as environmental protection, employment, and self-governance. Modern treaties are constitutional documents under section 35 of the *Constitution Act, 1982* which holds that "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." https://landclaimscoalition.ca/modern-treaty/#:~:text=Modern%20treaties%20are%20nation%2Dto,in%20some%20cases%2C%20a%20territory.&text=Also%20known%20as%20comprehensive%20land,rights%20have%20not%20been%20settled

[2] The Yukon Umbrella Final Agreement is a modern treaty that was finalized in 1990 and represents the political agreement between Yukon First Nations, the Government of Canada, and the Yukon Government. Each of the 14 Yukon First Nations can negotiate a legal Final Agreement with the federal and territorial governments; however, each Final Agreement includes the full text of the Umbrella Final Agreement supplemented by Nation-specific sections. Chapter 11 of the Umbrella Final Agreement covers land use planning.

[3] Chapter 11 of the Umbrella Final Agreement allows Government and Yukon First Nations to agree to establish a Regional Land Use Planning Commission to develop a regional land use plan. Chapter 11 sets out the collaborative process this Commission must follow in developing a Final Recommended Land Use Plan. The Commission then forwards the Recommended Plan to the Yukon Government who "shall approve, reject or propose modifications" to the Recommended Plan. https://cyfn.ca/agreements/umbrella-final-agreement/

This case arose out of the land use planning process for the Peel Watershed. After nearly a decade of consultations and negotiations, the Yukon Government adopted a Final Land Use Plan which would have significantly increased access to and development in the Peel Watershed region.

As the Yukon Government had never suggested these changes during the collaborative planning process, First Nation of Na-Cho Nyak Dun, Tr'ondëk Hwëch'in, and Vuntut Gwitchin First Nation (the "Yukon First Nations") brought this legal action. The Yukon First Nations asked the Court to invalidate the Yukon Government's Final Land Use Plan and require them to adopt a revised plan on the basis of the intergovernmental discussions required by the Umbrella Final Agreement.

The trial judge determined that the Yukon Government acted in a manner that was inconsistent with the required collaborative process. Therefore, the Final Land Use Plan was invalid.

The Yukon Court of Appeal agreed that the Final Land Use Plan was invalid; however, they would have required the parties to return to an earlier stage of the planning process where the Yukon Government could raise their suggested changes for discussion.

At the Supreme Court of Canada (SCC), the Yukon Government and the Yukon First Nations both agreed that the Yukon Government did not respect the required collaborative land use planning process. The parties disagreed on whether the Final Land Use Plan was valid and what the appropriate solution should be. Using a framework of judicial review,[4] the SCC concluded that:

1) The Yukon Government's Final Land Use Plan was invalid because it was developed after, not through, the collaborative land use planning process set out in the Umbrella Final Agreement.
2) The Yukon Court of Appeal's decision was incorrect. The Yukon Government should not be allowed to go back and raise their suggested changes because they chose not to do so during the original consultations.
3) The parties should return to the stage of the process where the Yukon Government could "approve, reject, or [slightly] modify" the Final Recommended Land Use Plan. As the Yukon Government's changes were substantial, they could not be legitimately raised at this point of the process.

[4] Judicial review is the process whereby courts assess the legality of government action. In this case, the SCC used the established process of judicial review to determine if the Yukon Government was legally allowed to adopt the modified Final Land Use Plan.
https://irwinlaw.com/cold/judicial-review/

**Why is this judgment important?**

The SCC took this opportunity to provide instructions for judges deciding cases which involve modern treaties. The SCC clarified that modern treaties are intended to renew relationships and foster reconciliation between Indigenous peoples and the Crown. Reconciliation requires that Indigenous peoples and the Crown govern together and work out their differences. Therefore, courts should focus on the question of whether the challenged decision was *legal*. Courts should not examine the parties' conduct at every stage of the decision-making process. However, the SCC emphasized that the Crown must always act in a manner that is consistent with the Constitution. Overall, judges must walk the fine line of ensuring that Crown conduct is constitutional while still taking a hands-off approach that allows the parties to work out their differences together.

The SCC also highlighted the importance of the "honour of the Crown." This is a foundational principle of Aboriginal law which arises from the Crown asserting sovereignty over Indigenous lands and resources. The honour of the Crown requires that the Crown act honourably in their interactions and relationships with Indigenous peoples. Therefore, when making land use planning decisions, the Yukon Government must always act honourably and in good faith. The Yukon Government's decision to change the Final Recommended Land Use Plan *after* the collaborative land use planning process was completed did not correspond with their duties arising from the principle of the honour of the Crown.

Finally, the SCC summarized the law on interpreting modern treaties with the overall aim of advancing reconciliation. In general, courts must pay close attention to and attempt to enforce the exact wording of modern treaties, recognizing their constitutional importance and the role that they play in supporting reconciliation.

**Case Citations**

*First Nation of Nacho Nyak Dun v. Yukon* ("*Nacho Nyak Dun*") has been referenced in 15 different cases decided by courts across the country.

<u>British Columbia:</u>

1) *West Moberly First Nations v. British Columbia*, 2020 BCCA 138 (Court of Appeal)
    - <u>https://www.canlii.org/en/bc/bcca/doc/2020/2020bcca138/2020bcca138.html?resultIndex=1</u>
    - *First Nation of Nacho Nyak Dun v. Yukon* was considered in both the majority and dissenting judgments.
    - The Court cited *Nacho Nyak Dun* in support of two claims:
        - (1) Treaties are distinct from commercial contracts; however, courts can use principles of contract interpretation when interpreting

modern treaties if these principles are consistent with the honour of the Crown.
    - (2) Historical treaties are distinct from modern treaties and should be treated as such.
2) *Council of the Haida Nation v. British Columbia (Forests, Lands, Natural Resource Operations and Rural Development)*, 2018 BCSC 1117 (Supreme Court)
    - https://www.canlii.org/en/bc/bcsc/doc/2018/2018bcsc1117/2018bcsc1117.html?resultIndex=1
    - In this case, Haida Nation used *Nacho Nyak Dun* to support their argument that achieving reconciliation is in the public interest. While Justice Weatherill did not disagree with this point, he concluded that the balance of interests in this case favoured the defendant forestry company.

Federal Court:

3) *Kaur v. Canada (Citizenship and Immigration)*, 2020 FC 513
    - https://www.canlii.org/en/ca/fct/doc/2020/2020fc513/2020fc513.html?resultIndex=1
    - In this case, the Minister of Citizenship and Immigration argued that *Nacho Nyak Dun* stands for the principle that judges are not to examine the legality of decisions which were made prior to the one being challenged. Justice McHaffie concluded that *Nacho Nyak Dun* allows a judge to consider prior decisions if they are relevant to the decision being challenged in the case.
4) *Makivik Corporation v. Canada (Environment and Climate Change)*, 2019 FC 1297
    - https://www.canlii.org/en/ca/fct/doc/2019/2019fc1297/2019fc1297.html?resultIndex=1
5) *Jim Shot Both Sides v. Canada*, 2019 FC 789
    - https://www.canlii.org/en/ca/fct/doc/2019/2019fc789/2019fc789.html?resultIndex=1
    - Justice Zinn cited *Nacho Nyak Dun* in support of his conclusion that, while treaties are distinct from commercial contracts, courts can use principles of contract interpretation when interpreting modern treaties if they are consistent with constitutional principles such as the honour of the Crown.
6) *Wells v. Canada (Attorney General)*, 2018 FC 483
    - https://www.canlii.org/en/ca/fct/doc/2018/2018fc483/2018fc483.html?resultIndex=1

Manitoba:

7) *Manitoba Metis Federation Inc. v. Brian Pallister et al.*, 2020 MBQB 49 (Court of Queen's Bench)
    - https://www.canlii.org/en/mb/mbqb/doc/2020/2020mbqb49/2020mbqb49.html?resultIndex=1
    - In this case, Justice Joyal distinguished the agreement at issue from the Treaty in *Nacho Nyak Dun* and concluded that the principles elaborated in *Nacho Nyak Dun* were, therefore, not applicable in this case.

Newfoundland and Labrador:

8) *Nunatsiavut Government v. Newfoundland and Labrador*, 2020 NLSC 129 (Supreme Court – General Division)
    - https://www.canlii.org/en/nl/nlsc/doc/2020/2020nlsc129/2020nlsc129.html?autocompleteStr=2020%20nlsc%20129&autocompletePos=1
9) *Benoit v. Federation of Newfoundland Indians*, 2018 NLSC 141 (Supreme Court – General Division)
    - https://www.canlii.org/en/nl/nlsc/doc/2018/2018nlsc141/2018nlsc141.html?resultIndex=1
    - Justice Butler referenced *Wells v. Canada (Attorney General)* wherein the Court decided that, while the agreement at issue was not a modern treaty, the principles from *Nacho Nyak Dun* applied.

Quebec:

10) *R. c. Iserhoff*, 2019 QCCQ 2339 (Court of Quebec – Criminal Division)
    - https://www.canlii.org/en/qc/qccq/doc/2019/2019qccq2339/2019qccq2339.html?resultIndex=1
    - In this judgment determining the proper sentence for two members of the Cree First Nation of Mistissini convicted of aggravated assault, Justice Ladoucer cited *Nacho Nyak Dun* when discussing the proper role of courts deciding cases under modern treaties. Justice Ladoucer concluded that decisions regarding the sentencing of Cree offenders must at least be consistent with the principles outlined in the *James Bay and Northern Quebec Agreement.*
11) *Bombardier Aéronautique inc. c. Tribunal administratif du travail,* 2017 QCCS 5488 (Superior Court)
    - https://www.canlii.org/fr/qc/qccs/doc/2017/2017qccs5488/2017qccs5488.html?resultIndex=1
    - No English translation of this judgment

Saskatchewan:

1) *R. v. Desjardin*, 2018 SKPC 52 (Provincial Court)

- https://www.canlii.org/en/sk/skpc/doc/2018/2018skpc52/2018skpc52.html?resultIndex=1
- *Nacho Nyak Dun* was listed as one of the authorities considered by the Court.

Yukon:

2) *Dickson v. Vuntut Gwitchin First Nation*, 2020 YKSC 22 (Supreme Court)
   - https://www.canlii.org/en/yk/yksc/doc/2020/2020yksc22/2020yksc22.html?resultIndex=1
   - This case asked whether the *Charter of Rights and Freedoms* (the "*Charter*") applies to Vuntut Gwitchin First Nation (VGFN)'s laws which were enacted under the authority of VGFN's Constitution and the VGFN Final Agreement. Justice Veale cited *Nacho Nyak Dun* to support his conclusion that modern treaties should not be interpreted as if they are everyday commercial contracts. Justice Veale also used *Nacho Nyak Dun* to support his conclusion that, as treaties are constitutional documents which grant First Nations the authority to create legislation, the *Charter* applies to Vuntut Gwitchin First Nation's laws.
3) *Kaska Dena Council v. Yukon (Government of)*, 2019 YKSC 13 (Supreme Court)
   - https://www.canlii.org/en/yk/yksc/doc/2019/2019yksc13/2019yksc13.html?resultIndex=1
   - Justice Veale cited his decision in *Teslin Tlingit Council v. Canada (Attorney General)* which highlighted *Nacho Nyak Dun* in its summary of the principles regarding declaratory relief.[5]
4) *Teslin Tlingit Council v. Canada (Attorney General)*, 2019 YKSC 3 (Supreme Court)
   - https://www.canlii.org/en/yk/yksc/doc/2019/2019yksc3/2019yksc3.html?resultIndex=1
   - Justice Veale cited *Nacho Nyak Dun* in support of the principle that, within the context of modern treaties, courts must only assess the parties' conduct to the extent necessary to ensure constitutional compliance. Justice Veale used this principle, and others, to conclude that declaratory relief should be granted in this case. In other words, Justice Veale legally declared that Canada must negotiate a Self-Government Financial Transfer Agreement with Teslin Tlingit Council (TTC) as the TTC Final Agreement – a modern treaty – requires them to do so.

[5] Declaratory relief is a judicial remedy. In providing declaratory relief, the court formally declares the law, confirming whether a certain action or decision is legal or not.
https://irwinlaw.com/cold/declaration/

**Case Study: *Nunatsiavut Government v. Newfoundland and Labrador*, 2020 NLSC 129**

This case arose out of a mining revenue-sharing agreement between the Province of Newfoundland and Labrador and the Labrador Inuit (now represented by the Nunatsiavut Government). The Labrador Inuit Land Claims Agreement (the "Treaty") provided the Nunatsiavut Government with 5% of the revenues earned from nickel mining in Voisey's Bay, located in the heart of the Labrador Inuit's traditional territory. The Treaty also imposed on the Province a duty to consult with the Nunatsiavut Government when making decisions regarding the Voisey's Bay area.

In 2002, without consulting the Nunatsiavut Government, the Province entered into an agreement with the Voisey's Bay mining developer which drastically decreased the Labrador Inuit's share of the revenues. The Nunatsiavut Government argued at trial that:

(a) The Province improperly calculated the Labrador Inuit's share of the revenues; and
(b) The Province failed to consult with the Nunatsiavut Government as required by the Treaty.

Like the Umbrella Final Agreement in *First Nation of Nacho Nyak Dun v. Yukon* ("*Nacho Nyak Dun*"), the Treaty is a constitutionally-protected modern treaty. In deciding that the Province both improperly calculated the Labrador Inuit's share of the revenues and breached its duty to consult with the Nunatsiavut Government, Justice Khaladkar referenced the SCC's discussion of modern treaties from *Nacho Nyak Dun*, writing:

> [40] […] I am bound to take into account the treaty text as a whole and pay particular attention to the treaty's objectives. And, as instructed by the Court's decisions in *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 and *Nacho Nyak Dun*, while I must strive to respect the handiwork of the parties to a modern treaty, this is subject to such constitutional limitations as the honour of the Crown.

While the extent to which these instructions influenced Justice Khaladkar's reasoning is unclear, it is significant that *Nacho Nyak Dun* was referenced as one of the cases which provide judges with mandatory directions to follow when deciding cases involving modern treaties.

**Case Study: *Makivik Corporation v. Canada (Environment and Climate Change)*, 2019 FC 1297**

Makivik Corporation challenged the Minister of Environment and Climate Change (the "Minister")'s unilateral decision which varied the Total Allowable Take[6] of Southern

[6] The Total Allowable Take refers to the number of polar bears which may be lawfully harvested under the Agreements.

Hudson Bay polar bears under the Nunavik Land Claims Agreement (NILCA) and the Eeyou Marine Region Land Claims Agreement Act (EMRLCA). The NILCA established a co-management regime for polar bears which uses both Inuit and Western scientific knowledge. Makivik Corporation clarified that, while important, this case was not really about the polar bears; rather, it was about their constitutionally-protected rights under the NILCA, a modern treaty.

The Court concluded that the Minister followed the proper decision-making process outlined in the NILCA and that the Minister's decision was reasonable. As the decision was temporary, the Court decided to dismiss the case because doing otherwise would contradict the SCC's instructions in *Nacho Nyak Dun*. Justice Favel concluded that making a decision in this case would require micromanaging the parties' conduct, writing that

> [215] By declining to grant relief in the present application, I am of the view that the parties would continue "to govern together and work out their differences" and "to work out their understanding of a process – quite literally, to reconcile – without the Court's management of that process" (*Nacho Nyak Dun* at paragraphs 33 and 60).

While the long-term impacts of this decision remain to be seen, Makivik Corporation maintains that this decision negatively impacted their ability to harvest and manage polar bears, a species of extreme cultural importance that the Nunavik Inuit have hunted for millennia.

**Case Study: *Wells v. Canada (Attorney General)*, 2018 FC 483**

In this case, David and Sandra Wells challenged the rejection of their applications for membership in the Qalipu Mi'kmaq First Nation Band. In 2008, Canada and the Federation of Newfoundland Indians signed an Agreement for the Recognition of the Qalipu Mi'kmaq Band (the "Agreement"). The Agreement established a process for applying for membership in the Band. This process was later amended to require applicants to produce more evidence in support of their application. The Court concluded that the decision to amend the Agreement was reasonable, but granted David and Sandra Wells the right to appeal their rejection.

Although the Agreement explicitly states that it is not a modern treaty, Justice Zinn agreed with Canada's argument that the Agreement should be interpreted using the SCC's instructions in *Nacho Nyak Dun* "because, like there, this is a situation where the Court is required to examine an agreement relating to Aboriginal rights." In deciding this case, Justice Zinn therefore followed the SCC's instructions to scrutinize the parties' conduct only to the extent necessary to ensure constitutional compliance.

This decision suggests that the approach outlined by the SCC in *Nacho Nyak Dun* applies whenever the courts are called upon to interpret an agreement which

affects Aboriginal rights. While this is a positive development in that the Crown will be held to a higher standard in their relationships with Indigenous peoples, it may also weaken the protection of Aboriginal rights as courts must focus their attention on the legality of the decision as opposed to the parties' ongoing conduct.

**Blogs & Case Commentaries**

**Lorne Sossin, "Constitutional Cases 2017: An Overview" (2019) 88:1 SCLR: Osgoode's Annual Constitutional Cases Conference 3.**
https://www.canlii.org/en/commentary/doc/2019CanLIIDocs4052#!fragment//BQCwhgziBcwMYgK4DsDWszIQewE4BUBTADwBdoByCgSgBpltTCIBFRQ3AT0otokLC4EbDtyp8BQkAGU8pAELcASgFEAMioBqAQQByAYRW1SYAEbRS2ONWpA

Justice Sossin argues that ongoing developments in Canadian constitutional law have resulted in "fewer bold, open-ended decisions and more pragmatic, strategic decisions." To illustrate this trend, Justice Sossin discusses a set of 2017 constitutional cases where the SCC linked its decisions to the broad goal of reconciliation. One of these cases is *Nacho Nyak Dun*.

Justice Sossin argues that *Nacho Nyak Dun* demonstrates the limits of reconciliation. Rather than using the concept of reconciliation to ensure that Indigenous people receive justice, the SCC seems to embrace reconciliation only to the extent that it informs consultative and collaborative decision-making processes. In other words, the SCC will step in to ensure that the process used to reach an outcome was just regardless of the fairness of the outcome ultimately reached. Overall, Justice Sossin notes that recent constitutional decisions illuminate fundamental differences in Indigenous and non-Indigenous understandings of reconciliation:

> In the view of the Supreme Court, the goal of Reconciliation remains how to address "Aboriginal rights" in the context of Canadian law and Crown sovereignty. In the eyes of many First Nations and Indigenous Peoples, however, Reconciliation must in the end address Indigenous laws and sovereignty as well. It remains under whether the section 35 jurisprudence of the Supreme Court (or whether the Supreme Court as an institution itself rooted in Canadian claims to sovereignty) is up to the challenge of Reconciliation conceived in this way.

**Nigel Bankes, "Court Confirms that Good Faith Fulfilment of Modern Treaties is Essential to the Project of Reconciliation" (14 December 2017), online: *ABlawg* <https://ablawg.ca/2017/12/14/court-confirms-that-good-faith-fulfilment-of-modern-treaties-is-essential-to-the-project-of-reconciliation/>**

In this case commentary, Professor Bankes summarizes *Nacho Nyak Dun* and critically analyzes the SCC's reasons. To begin, Professor Bankes agrees with the SCC's choice to reject the Yukon Court of Appeal's decision and send the parties back to a stage of the planning process which limited the Yukon Government's ability to edit

the Final Recommended Land Use Plan. However, Professor Bankes also suggests that, while the SCC's framing of the issues in this case initially seems to favour the Yukon First Nations, upon closer inspection, their approach may not be consistent with the ideal of a consent-based relationship between Indigenous Nations and the Canadian state.

The SCC assessed the issues in this case using a framework of judicial review. The purpose of judicial review is not to ensure "the good faith fulfillment of consent-based relationships" between sovereign nations. Rather, judicial review aims to ensure the legality of government action based on the values of the colonial legal system. While Professor Bankes notes that framing the issues in this way did not make a significant difference in *Nacho Nyak Dun*, this framing may be problematic in future cases for four reasons:

1) Judicial review is not a constitutional concept. Using this framework to assess nation-to-nation relationships within the context of modern treaties downplays their significance as constitutional documents.
2) Judicial review requires some level of deference to government decision-making. There is no place for deference to the Canadian state in intergovernmental relationships.
3) Judicial review is a colonial legal concept which does not account for Indigenous norms or legal orders.
4) Judicial review makes the legal questions solutions-oriented as opposed to assessing Canada's responsibilities towards Indigenous Nations on their own terms.

In concluding, Professor Bankes is careful to note that he is not suggesting that judicial review should never be used in the context of modern treaties. Rather, he emphasizes that:

> [Modern treaties] […] are normatively complex instruments, part contract, part treaty, part statute, [and] part constitutional instrument and [therefore], we should be open to considering a range of remedies that best fulfil the overall objective of the agreements – remedies that judicial review cannot always provide.

**Legal Encyclopedias**

**Halsbury's Laws of Canada (online), *Aboriginal*, "Historical and Legal Background: Constitutional Law Section 35 of the *Constitution Act, 1982* – Nature of Aboriginal and Treaty Rights" (I.2.(3(e)(i)) at HAB-19 "Recognition of s. 35 aboriginal and treaty rights" (2020 Reissue).**

This encyclopedia entry cites *Nacho Nyak Dun* in a footnote supporting the claim that section 35 of the Constitution applies equally to Treaty rights and Aboriginal rights. As modern treaties are constitutional documents, *Nacho Nyak Dun* supports the

conclusion that, when acting within the context of a modern treaty, the Crown must always act in a way that is consistent with its obligations under section 35.

**Halsbury's Laws of Canada (online), *Aboriginal,* "Aboriginal and Treaty Rights: Treaty Rights – General" (IV.3.(1)) at HAB-153 "Rules of interpretation" (2020 Reissue).**

This encyclopedia entry references *Nacho Nyak Dun* when noting that modern treaties are significantly different from historical treaties and should be treated as such:

> When a court construes a modern treaty, it should defer to the parties and allow them to work out their disputes where possible; this approach recognizes the constitutional status of modern treaties while leaving space for reconciliation between the Crown and Aboriginal people.

**Academic Literature**

**Felix Hoehn, "The Duty to Negotiate and the Ethos of Reconciliation" (2020) 83 Sask L Rev 1.**
https://www.canlii.org/en/commentary/doc/2020CanLIIDocs692#!fragment//BQCwhgziBcwMYgK4DsDWszIQewE4BUBTADwBdoByCgSgBpltTCIBFRQ3AT0otokLC4EbDtyp8BQkAGU8pAELcASgFEAMioBqAQQByAYRW1SYAEbRS2ONWpA

Professor Hoehn argues that the duty to negotiate[7] supports reconciliation and, as a result, should play a more prominent role in defining Indigenous and non-Indigenous relationships. Professor Hoehn cites *Nacho Nyak Dun* as an example of the SCC recognizing the importance of modern treaties as constitutional documents.

Overall, Professor Hoehn presents *Nacho Nyak Dun* as a case which outlines the instructions for courts assessing the adequacy of intergovernmental negotiations within the broader context of reconciliation. Courts must act with some restraint; they should not make decisions about matters that would best be determined by the parties as this would foster division as opposed to reconciliation. At the same time, courts cannot exercise this restraint if doing so would allow the Crown to act unconstitutionally. Therefore, when assessing whether the Crown has fulfilled their duty to negotiate, courts must ensure that they support the goals of reconciliation while still enforcing the Canadian Constitution.

**Alejandro Gonzalez, "The Evolution of the Duty to Consult: A Framework for Improving Consultations, Negotiations, and Reconciliation" (2020) 10:1 Western J Leg Studies 1.**
https://ojs.lib.uwo.ca/index.php/uwojls/article/view/10229

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[7] In *Tsilhqot'in Nation v. British Columbia*, the SCC recognized that the Crown has "a legal duty to negotiate in good faith to resolve land claims" with a focus on reconciliation.
*Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 at para 17.

In this paper, Gonzalez focuses on the duty to consult[8] as it relates to natural resource developments with the aim of providing recommendations for project proponents and for the Crown. Gonzalez cites *Nacho Nyak Dun* in the first section of this paper which outlines the history and the framework of the duty to consult, noting that *Nacho Nyak Dun*, "put simply, [means that] the Crown must not agree to one thing only to do another."

**Lynda Collins & Lorne Sossin, "In Search of an Ecological Approach to Constitutional Principles and Environmental Discretion in Canada" (2019) 52 UBC L Rev 293.**
https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=3740&context=scholarly_works

In this paper, Professor Collins and Justice Sossin explore the possibility of recognizing "ecological sustainability" as a principle of Canadian constitutional law and the potential implications of this for reconciliation. Collins and Sossin present *Nacho Nyak Dun* as an example of a case elaborating the duty to consult which arose in the context of the government participating in discretionary environmental decision-making.

***Lameman v. Alberta* Overview**

In this legal action against Alberta and Canada, Beaver Lake Cree Nation (BLCN) argued that the oil sands and other developments in their traditional territories in Alberta have negatively affected and continue to negatively affect the exercise of their Treaty rights, including their rights to hunt, trap, and fish.

BLCN argued that Treaty 6 imposes an obligation on the Crown to manage the cumulative effects of these developments to ensure that BLCN's Treaty rights may be meaningfully exercised. BLCN did not challenge any individual project authorizations or decisions; rather, they argued that the Crown's overall failure to adequately manage the effects of these developments and continuing neglect of their duty to consult and accommodate[9] BLCN negatively affects their Treaty rights.

While the vast majority of cases which cited *Lameman v. Alberta* ("*Lameman*") referred to it when discussing procedural[10] concepts which extend far beyond the

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[8] The duty to consult requires the federal and provincial governments to consult with Indigenous Nations or groups whenever the government is contemplating an action or decision which may negatively impact Aboriginal and/or Treaty rights.
*Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73.

[9] The duty to consult also requires the government to accommodate Indigenous peoples where appropriate. In other words, the government must engage in a dialogue with potentially affected Indigenous Nations or groups and, where possible, accommodate their rights and interests by modifying the proposed action or decision.
*Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73.

[10] Procedural law refers to the laws which outline the processes for enforcing rights and duties. Substantive law refers to the laws which create, define, or regulate rights and duties. In other words,

confines of Aboriginal law, *Lameman* remains an important case as the Court allowed a claim based on the cumulative effects of development on Aboriginal and Treaty rights to proceed to trial. While the success of this argument at trial remains to be seen, this decision sets an important precedent for future Aboriginal law cases in Canada.

***Lameman v. Alberta*, 2011 ABQB 40**
https://www.canlii.org/en/ab/abqb/doc/2011/2011abqb40/2011abqb40.html?resultIndex=1

**Summary**

In this case, Beaver Lake Cree Nation (BLCN) sought an adjournment[11] of Canada and Alberta's applications to strike their claims.[12] BLCN argued that the case should be adjourned as the issues were complex and they intended to amend their arguments. Additionally, BLCN could not afford to pay their lawyer's estimated fees. They had been promised pro bono support from another firm; however, this firm could not provide assistance until the spring.

Justice Yamauchi concluded that the case should be adjourned. While he clarified that BLCN did not require an adjournment to amend their arguments and reprimanded BLCN for failing to raise their financial issues sooner, he decided that BLCN's case could be irreparably damaged if he refused to adjourn the case. Justice Yamauchi decided that any impacts the adjournment would have on Alberta or Canada could be addressed by granting a costs order.[13] In reaching this conclusion, Justice Yamauchi summarized the law outlining the factors that a court should consider when deciding whether to grant an adjournment.

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*Lameman* was largely about *how* to engage in the process of determining whether BLCN's Treaty rights were affected by the developments as opposed to examining whether BLCN's Treaty rights were affected by the developments.
https://www.merriam-webster.com/legal/procedural%20law

[11] To adjourn a case means to re-schedule or temporarily postpone it.
https://irwinlaw.com/cold/adjournment/

[12] An application to strike requests that the court dismiss a case. There are several reasons why a court may choose to strike a case; however, in general, a court will strike a case if it does not raise a reasonable claim or defence. The goal of the application to strike is to ensure that judicial resources are not wasted on cases which have no reasonable chance of success.
http://www.thecourt.ca/to-strike-or-not-to-strike-that-is-the-question-reconciling-conflicting-case-law-on-government-liability-in-her-majesty-the-queen-in-right-of-canada-v-imperial-tobacco-canada/

[13] Costs refer to the attorney and court fees paid by a party in raising or defending a case. In general, the losing party pays the winning party's costs; however, deciding whether to require one party to pay another party's costs is a discretionary decision. While BLCN "won" in that Justice Yamauchi granted the adjournment, the further delay in the case was caused solely by BLCN and would negatively affect Canada and Alberta. These factors suggest that BLCN should pay Canada and Alberta's costs for the adjournment argument and delay.
http://www-personal.umich.edu/~purzel/national_reports/Canada.pdf

As this case is largely focused on the process of and factors to be considered when granting an adjournment, it is unlikely that it will significantly affect Aboriginal rights in Canada.

**Case Citations**

*Lameman v. Alberta* ("*Lameman*") was referenced in 5 different cases decided by courts across the country.

Alberta:

1) *Anderson v. Alberta (Attorney General)*, 2020 ABCA 238 (Court of Appeal)
    - https://www.canlii.org/en/ab/abca/doc/2020/2020abca238/2020abca238.html?resultIndex=1
    - This is a subsequent case in BLCN's legal battle. *Lameman* was cited as a part of this case's procedural history.
2) *Attila Dogan Construction v. AMEC Americas Limited*, 2015 ABQB 120 (Court of Queen's Bench)
    - https://www.canlii.org/en/ab/abqb/doc/2015/2015abqb120/2015abqb120.html?resultIndex=1
    - This case cited paragraph 33 of *Lameman* where Justice Yamauchi listed the factors which a court may consider when deciding whether to grant an adjournment.

Nunavut:

3) *R.N., et al. v. Haulli*, 2018 NUCJ 10 (Court of Justice)
    - https://www.canlii.org/en/nu/nucj/doc/2018/2018nucj10/2018nucj10.html?resultIndex=1
    - This case cited paragraph 33 of *Lameman* where Justice Yamauchi listed the factors which a court may consider when deciding whether to grant an adjournment.

Ontario:

4) *Ludmer v. Ludmer*, 2012 ONSC 5738 (Superior Court of Justice)
    - https://www.canlii.org/en/on/onsc/doc/2012/2012onsc5738/2012onsc5738.html?resultIndex=1
    - This case cited paragraph 33 of *Lameman* where Justice Yamauchi listed the factors which a court may consider when deciding whether to grant an adjournment.

Saskatchewan:

5) *Banilevic v. Cairney*, 2020 SKQB 25 (Court of Queen's Bench – Family Law Division)

- https://www.canlii.org/en/sk/skqb/doc/2020/2020skqb25/2020skqb25.html?resultIndex=1
- This case cited paragraph 33 of *Lameman* where Justice Yamauchi listed the factors which a court may consider when deciding whether to grant an adjournment.

**Academic Literature**

**Neil Craik, "Process and Reconciliation: Integrating the Duty to Consult with Environmental Assessment" (2016) 53 Osgoode Hall LJ 632.**
https://digitalcommons.osgoode.yorku.ca/ohlj/vol53/iss2/8/

In this article, Professor Craik examines the duty to consult[14] within the context of Environmental Assessment (EA) (now called Impact Assessment) and proposes a broader approach to EA which could support reconciliation. Professor Craik references *Lameman v. Alberta* (2011 ABQB 40, 2012 ABCA 59, and 2013 ABCA 148) within his discussion of the degree to which EA examines cumulative effects.

The cumulative effects of development and natural resource extraction are essential to assess, both for the duty to consult and as a factor in EA more broadly. As the Federal Court noted in *Brokenhead Ojibway First Nation v. Canada (Attorney General)*, 2009 FC 484 at paragraph 28, "while the environmental footprint of any one project might appear quite modest, the eventual cumulative development on the rights and traditional interests of Aboriginal peoples can be quite profound."

Professor Craik argues for a more strategic approach to EA which considers cumulative effects on a regional scale. This would assist Indigenous Nations and communities, such as BLCN, whose rights are negatively affected by each new development. Rather than being forced to challenge each individual authorization, a cumulative effects assessment would allow Indigenous Nations and communities to bring comprehensive, big-picture claims to court. This would require courts to assess the full impacts of development on Aboriginal and Treaty rights as opposed to viewing individual decisions on a case-by-case basis, wasting judicial and taxpayer resources while simultaneously failing to meaningfully vindicate Indigenous peoples' rights.

***Lameman v. Alberta*, 2011 ABQB 532**

**Summary**

This judgment was released to provide supplementary reasons for the decision made in *Lameman v. Alberta*, 2011 ABQB 40. In these reasons, Justice Yamauchi

[14] The duty to consult requires the federal and provincial governments to consult with Indigenous Nations or groups whenever the government is contemplating an action or decision which may negatively impact Aboriginal and/or Treaty rights.
*Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73.

addressed the issue of costs[15] arising out of his decision to adjourn[16] Canada and Alberta's applications to strike[17] Beaver Lake Cree Nation (BLCN)'s claims. Canada and Alberta argued that BLCN should pay for the documents they filed in support of their applications as well as for the legal costs of arguing against adjourning the case.

In these reasons, Justice Yamauchi provided an overview of the law in Alberta regarding the Court's discretion to award costs or not. Justice Yamauchi ordered BLCN to immediately pay a portion of Canada and Alberta's costs due to the lengthy procedural history of the case and the fact that this adjournment would result in a further delay. While this may affect Aboriginal rights in Alberta with regard to costs, these effects are not Indigenous-specific nor are they likely to significantly change the outcome of any Aboriginal law cases.

**Case Citations**

*Lameman v. Alberta* ("*Lameman*") was referenced in 18 different cases decided by the Court of Queen's Bench in the province of Alberta:

1) *956126 Alberta Ltd. v. JMS Alberta Co. Ltd.*, 2021 ABQB 121
    - https://www.canlii.org/en/ab/abqb/doc/2021/2021abqb121/2021abqb121.html?resultIndex=1
2) *Battaglini v. Battaglini*, 2021 ABQB 89
    - https://www.canlii.org/en/ab/abqb/doc/2021/2021abqb89/2021abqb89.html?resultIndex=1
3) *PricewaterhouseCoopers Inc. v. Perpetual Energy Inc.,* 2020 ABQB 513
    - https://www.canlii.org/en/ab/abqb/doc/2020/2020abqb513/2020abqb513.html?resultIndex=1
4) *Vestby v. Galloway*, 2020 ABQB 470
    - https://www.canlii.org/en/ab/abqb/doc/2020/2020abqb470/2020abqb470.html?resultIndex=1
5) *Lloyd Gardens Inc. v. Chohan*, 2020 ABQB 343
    - https://www.canlii.org/en/ab/abqb/doc/2020/2020abqb343/2020abqb343.html?resultIndex=1

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[15] Costs refer to the attorney and court fees paid by a party in raising or defending a case. In general, the losing party pays the winning party's costs; however, deciding whether to require one party to pay another party's costs is a discretionary decision.
http://www-personal.umich.edu/~purzel/national_reports/Canada.pdf

[16] To adjourn a case means to re-schedule or temporarily postpone it.
https://irwinlaw.com/cold/adjournment/

[17] An application to strike requests that the court dismiss a case. There are several reasons why a court may choose to strike a case; however, in general, a court will strike a case if it does not raise a reasonable claim or defence. The goal of the application to strike is to ensure that judicial resources are not wasted on cases which have no reasonable chance of success.
http://www.thecourt.ca/to-strike-or-not-to-strike-that-is-the-question-reconciling-conflicting-case-law-on-government-liability-in-her-majesty-the-queen-in-right-of-canada-v-imperial-tobacco-canada/

6) *P.L.C. v. C.G.*, 2020 ABQB 211
    - https://www.canlii.org/en/ab/abqb/doc/2020/2020abqb211/2020abqb211.html?resultIndex=1
7) *Montgomery Estate v. Montgomery*, 2019 ABQB 833
    - https://www.canlii.org/en/ab/abqb/doc/2019/2019abqb833/2019abqb833.html?resultIndex=1
8) *C.Z. v. R.B.*, 2019 ABQB 367
    - https://www.canlii.org/en/ab/abqb/doc/2019/2019abqb367/2019abqb367.html?resultIndex=1
9) *Northern Air Charter (P.R.) Inc. v. Alberta Health Services*, 2019 ABQB 333
    - https://www.canlii.org/en/ab/abqb/doc/2019/2019abqb333/2019abqb333.html?resultIndex=1
10) *Gilmar v. Gilmar*, 2018 ABQB 285
    - https://www.canlii.org/en/ab/abqb/doc/2018/2018abqb285/2018abqb285.html?resultIndex=1
11) *Strategic Acquisition Corp. v. Multus Investment Corporation*, 2017 ABQB 297
    - https://www.canlii.org/en/ab/abqb/doc/2017/2017abqb297/2017abqb297.html?resultIndex=1
12) *Gault Estate (Re)*, 2017 ABQB 182
    - https://www.canlii.org/en/ab/abqb/doc/2017/2017abqb182/2017abqb182.html?resultIndex=1
13) *Blankenship v. Jenks-Cochrane Properties Ltd.*, 2016 ABQB 642
    - https://www.canlii.org/en/ab/abqb/doc/2016/2016abqb642/2016abqb642.html?resultIndex=1
14) *McKercher v. The Renovation Store Ltd.*, 2015 ABQB 748
    - https://www.canlii.org/en/ab/abqb/doc/2015/2015abqb748/2015abqb748.html?resultIndex=1
15) *V.A.S. v. Grace*, 2014 ABQB 268
    - https://www.canlii.org/en/ab/abqb/doc/2014/2014abqb268/2014abqb268.html?resultIndex=1
16) *V.A.S. v. Grace*, 2014 ABQB 150
    - https://www.canlii.org/en/ab/abqb/doc/2014/2014abqb150/2014abqb150.html?resultIndex=1
17) *Stagg v. Condominium Plan No. 882-2999*, 2013 ABQB 684
    - https://www.canlii.org/en/ab/abqb/doc/2013/2013abqb684/2013abqb684.html?resultIndex=1
18) *Louw v. Hamelin-Chandler*, 2012 ABQB 52
    - https://www.canlii.org/en/ab/abqb/doc/2012/2012abqb52/2012abqb52.html?resultIndex=1

**Case Studies**

In all of the above cases, the Court cited paragraph 6 of *Lameman* wherein Justice Yamauchi decided that the Court must judicially exercise its discretion with regard to costs in a manner that is consistent with established legal principles.

***Lameman v. Alberta*, 2011 ABQB 724**

**Summary**

In this case, Beaver Lake Cree Nation (BLCN) sought permission to appeal the costs order[18] made in *Lameman v. Alberta*, 2011 ABQB 532. Justice Yamauchi summarized the law on appealing a costs order and the purpose of allowing a limited number of appeals to proceed.

Justice Yamauchi noted that the Court had been involved in this case for years and had provided BLCN with numerous opportunities to inform the Court of their financial issues. BLCN did not take these opportunities, costing Canada and Alberta significant amounts of money.

After running through the factors that courts must consider when deciding whether to grant permission to appeal a costs order, Justice Yamauchi decided to deny BLCN's request to appeal. As with *Lameman v. Alberta*, 2011 ABQB 532, while this may affect Aboriginal law cases in Alberta when making decisions regarding costs, it is unlikely to have any significant effect on the outcome of any Aboriginal law cases. However, it is possible that this decision may deter Indigenous Nations and organizations from pursuing legal action if they lack the financial resources to do so.

**Case Citations**

*Lameman v. Alberta* ("*Lameman*") was referenced in 11 different cases decided by courts in the province of Alberta:

1) *Battaglini v. Battaglini*, 2021 ABQB 89 (Court of Queen's Bench)
    - https://www.canlii.org/en/ab/abqb/doc/2021/2021abqb89/2021abqb89.html?resultIndex=1
2) *PricewaterhouseCoopers Inc. v. Perpetual Energy Inc.,* 2020 ABQB 513 (Court of Queen's Bench)
    - https://www.canlii.org/en/ab/abqb/doc/2020/2020abqb513/2020abqb513.html?resultIndex=1
3) *Vestby v. Galloway*, 2020 ABQB 470 (Court of Queen's Bench)

[18] Costs refer to the attorney and court fees paid by a party in raising or defending a case. In general, the losing party pays the winning party's costs; however, deciding whether to require one party to pay another party's costs is a discretionary decision. While BLCN "won" in that Justice Yamauchi granted the adjournment, the further delay in the case was caused solely by BLCN and would negatively affect Canada and Alberta. These factors suggest that BLCN should pay Canada and Alberta's costs for the adjournment argument and delay.
http://www-personal.umich.edu/~purzel/national_reports/Canada.pdf

- https://www.canlii.org/en/ab/abqb/doc/2020/2020abqb470/2020abqb470.html?resultIndex=1

4) *P.L.C. v. C.G.*, 2020 ABQB 211 (Court of Queen's Bench)
   - https://www.canlii.org/en/ab/abqb/doc/2020/2020abqb211/2020abqb211.html?resultIndex=1
5) *Montgomery Estate v. Montgomery*, 2019 ABQB 833 (Court of Queen's Bench)
   - https://www.canlii.org/en/ab/abqb/doc/2019/2019abqb833/2019abqb833.html?resultIndex=1
6) *C.Z. v. R.B.*, 2019 ABQB 367 (Court of Queen's Bench)
   - https://www.canlii.org/en/ab/abqb/doc/2019/2019abqb367/2019abqb367.html?resultIndex=1
7) *Northern Air Charter (P.R.) Inc. v. Alberta Health Services*, 2019 ABQB 333 (Court of Queen's Bench)
   - https://www.canlii.org/en/ab/abqb/doc/2019/2019abqb333/2019abqb333.html?resultIndex=1
8) *Jackson v. Canadian National Railway Company*, 2015 ABCA 89 (Court of Appeal)
   - https://www.canlii.org/en/ab/abca/doc/2015/2015abca89/2015abca89.html?resultIndex=1
9) *Stagg v. Condominium Plan No. 882-2999*, 2013 ABQB 684 (Court of Queen's Bench)
   - https://www.canlii.org/en/ab/abqb/doc/2013/2013abqb684/2013abqb684.html?resultIndex=1

In the above cases, *Lameman* was cited in conjunction with *Lameman v. Alberta*, 2011 ABQB 532 as the former judgment refused BLCN permission to appeal the latter.

10) *Bun v. Seng*, 2015 ABCA 165 (Court of Appeal)
   - https://www.canlii.org/en/ab/abca/doc/2015/2015abca165/2015abca165.html?resultIndex=1
   - In this case, *Lameman* was cited for Justice Yamauchi's summary of the law regarding granting permission to appeal a costs decision.
11) *L.D.W. v. K.D.M.*, 2012 ABQB 128 (Court of Queen's Bench)
   - https://www.canlii.org/en/ab/abqb/doc/2012/2012abqb128/2012abqb128.html?resultIndex=1
   - In this case, *Lameman* was cited for Justice Yamauchi's summary of the law regarding granting permission to appeal a costs decision.

## ***Lameman v. Alberta*, 2011 ABQB 396**

**Summary**

In this case, Beaver Lake Cree Nation (BLCN) applied for an order allowing lawyers from Tooks Chambers, UK (the "Tooks lawyers") to assist with their case. BLCN

highlighted that they could not afford to proceed with the case and the Tooks lawyers had offered pro bono assistance. However, the Tooks lawyers had been trained and called to the bar in England and Wales; they were not members of the Alberta Law Society.

Alberta's *Legal Profession Act* prohibits lawyers who are not members of the Alberta Law Society from representing clients in proceedings in Alberta. As the Tooks lawyers did not fall under any of the categories of exceptions listed in the legislation, Justice Yamauchi decided that they could not represent BLCN in this case. This judgment was affirmed in *Lameman v. Alberta*, 2012 ABCA 59.

Due to the unique nature of this proceeding, it is highly unlikely that this will have any effect on future Aboriginal law cases. While it may prevent parties from bringing claims if they cannot afford Canadian representation, this judgment was based on a relatively clear law that only applies in Alberta. Therefore, outside of solidifying one interpretation of the legislation, this case is unlikely to have any broader effects on Aboriginal rights in the province of Alberta.

**Case Citations**

*Lameman v. Alberta* ("*Lameman*") was referenced in 3 different cases decided by the Court of Queen's Bench in the province of Alberta:

1) *908077 Alberta Ltd. v. 1313608 Alberta Ltd.*, 2015 ABQB 108
    - https://www.canlii.org/en/ab/abqb/doc/2015/2015abqb108/2015abqb108.html?resultIndex=1
2) *Paniccia Estate v. Toal*, 2012 ABQB 11
    - https://www.canlii.org/en/ab/abqb/doc/2012/2012abqb11/2012abqb11.html?resultIndex=1
3) *R. v. Potts*, 2011 ABQB 816
    - https://www.canlii.org/en/ab/abqb/doc/2011/2011abqb816/2011abqb816.html?resultIndex=1

in all three cases listed above, the Court cited *Lameman* for its interpretation of the *Alberta Rules of Court* and the *Legal Profession Act* which strictly prohibits lawyers who are not qualified to practice law in Alberta from representing parties in Alberta.

## ***Lameman v. Alberta*, 2012 ABCA 59**

**Summary**

This judgment affirmed the Court's decision in *Lameman v. Alberta,* 2011 ABQB 396. Justice Côté concluded that it is not within a judge's power to allow someone to break a law as this would require endorsing the commission of an offence.

**Case Citations**

*Lameman v. Alberta* ("*Lameman*") was referenced in 20 different cases decided by courts across Canada.

Alberta:

1) *Anderson v. Alberta*, 2020 ABCA 238 (Court of Appeal)
    - https://www.canlii.org/en/ab/abca/doc/2020/2020abca238/2020abca238.html?resultIndex=1
    - This is a subsequent case in BLCN's legal battle. *Lameman* was cited as a part of this case's procedural history.
2) *Japan Canada Oil Sands Limited v. Toyo Engineering Canada Ltd.*, 2018 ABQB 844 (Court of Queen's Bench)
    - https://www.canlii.org/en/ab/abqb/doc/2018/2018abqb844/2018abqb844.html?resultIndex=1
    - This case cited *Lameman* for its discussion of the law surrounding hearsay evidence.
3) *Health Sciences Association of Alberta v. Alberta College of Paramedics*, 2016 ABQB 723 (Court of Queen's Bench)
    - https://www.canlii.org/en/ab/abqb/doc/2016/2016abqb723/2016abqb723.html?resultIndex=1
    - In this case, the defendant argued that a particular legal test outlined in *Lameman* should be applied. Justice Graesser held that this argument was not relevant to the dispute at hand.
4) *Park Avenue Flooring Inc. v. EllisDon Construction Services Inc.*, 2016 ABCA 327 (Court of Appeal)
    - https://www.canlii.org/en/ab/abca/doc/2016/2016abca327/2016abca327.html?resultIndex=1
    - This case cited *Lameman* for its interpretation of s. 106 of the *Legal Profession Act* which limits who can practice law and represent clients in the province of Alberta.
5) *Zelman v. Taler Resources Incorporated*, 2016 ABCA 318 (Court of Appeal)
    - https://www.canlii.org/en/ab/abca/doc/2016/2016abca318/2016abca318.html?resultIndex=1
    - This case cited *Lameman* for its interpretation of s. 106 of the *Legal Profession Act* which limits who can practice law and represent clients in the province of Alberta.
6) *Real Estate Strategies Group Inc. v. Prairie Communities Corp.*, 2016 ABCA 286 (Court of Appeal)
    - https://www.canlii.org/en/ab/abca/doc/2016/2016abca286/2016abca286.html?resultIndex=1

- This case cited *Lameman* for its interpretation of s. 106 of the *Legal Profession Act* which limits who can practice law and represent clients in the province of Alberta.

7) *Park Avenue Flooring Inc. v. EllisDon Construction Services Inc.*, 2016 ABCA 211 (Court of Appeal)
   - https://www.canlii.org/en/ab/abca/doc/2016/2016abca211/2016abca211.html?resultIndex=1
   - This case cited *Lameman* for its interpretation of s. 106 of the *Legal Profession Act* which limits who can practice law and represent clients in the province of Alberta.
8) *Law Society of Alberta v. Beaver*, 2016 ABQB 250 (Court of Queen's Bench)
   - https://www.canlii.org/en/ab/abqb/doc/2016/2016abqb250/2016abqb250.html?resultIndex=1
   - This case cited *Lameman* for its interpretation of s. 106 of the *Legal Profession Act* which limits who can practice law and represent clients in the province of Alberta.
9) *Royal Bank of Canada v. Wapiti Waste Management Inc.*, 2016 ABQB 145 (Court of Queen's Bench)
   - https://www.canlii.org/en/ab/abqb/doc/2016/2016abqb145/2016abqb145.html?resultIndex=1
   - This case cited *Lameman* for its interpretation of s. 106 of the *Legal Profession Act* which limits who can practice law and represent clients in the province of Alberta.
10) *National Leasing Group Inc. v. Acme Enterprises Ltd.*, 2015 ABQB 631 (Court of Queen's Bench)
   - https://www.canlii.org/en/ab/abqb/doc/2015/2015abqb631/2015abqb631.html?resultIndex=1
   - In this case, Master Schlosser cited *Lameman* in support of their conclusion that judges cannot authorize breaking a law or committing an offence.
11) *R Floden Services Ltd. v. Solomon,* 2015 ABQB 450 (Court of Queen's Bench)
   - https://www.canlii.org/en/ab/abqb/doc/2015/2015abqb450/2015abqb450.html?resultIndex=1
   - This case cited *Lameman* for its interpretation of s. 106 of the *Legal Profession Act* which limits who can practice law and represent clients in the province of Alberta.
12) *Landmass Dirtworx Ltd. v. Prairie Mountain Construction (2010) Inc.*, 2015 ABQB 362 (Court of Queen's Bench)
   - https://www.canlii.org/en/ab/abqb/doc/2015/2015abqb362/2015abqb362.html?resultIndex=1

- This case cited *Lameman* for its interpretation of s. 106 of the *Legal Profession Act* which limits who can practice law and represent clients in the province of Alberta.

13) *908077 Alberta Ltd. (Escape & Relax) v. 1313608 Alberta Ltd.*, 2015 ABCA 117 (Court of Appeal)
    - https://www.canlii.org/en/ab/abca/doc/2015/2015abca117/2015abca117.html?resultIndex=1
    - This case cited *Lameman* for its interpretation of s. 106 of the *Legal Profession Act* which limits who can practice law and represent clients in the province of Alberta.
14) *R v. Peers*, 2015 ABQB 129 (Court of Queen's Bench)
    - https://www.canlii.org/en/ab/abqb/doc/2015/2015abqb129/2015abqb129.html?resultIndex=1
    - This case cited *Lameman* for its interpretation of s. 106 of the *Legal Profession Act* which limits who can practice law and represent clients in the province of Alberta.
15) *908077 Alberta Ltd. v. 1313608 Alberta Ltd.*, 2015 ABQB 108 (Court of Queen's Bench)
    - https://www.canlii.org/en/ab/abqb/doc/2015/2015abqb108/2015abqb108.html?resultIndex=1
    - This case cited *Lameman* for its interpretation of s. 106 of the *Legal Profession Act* which limits who can practice law and represent clients in the province of Alberta.
16) *Scotia Mortgage Corporation v. Gutierrez*, 2012 ABQB 683 (Court of Queen's Bench)
    - https://www.canlii.org/en/ab/abqb/doc/2012/2012abqb683/2012abqb683.html?resultIndex=1
    - This case cited *Lameman* for its interpretation of s. 106 of the *Legal Profession Act* which limits who can practice law and represent clients in the province of Alberta.
17) *Evraz Inc. NA Canada v. Alberta*, 2012 ABQB 173 (Court of Queen's Bench)
    - https://www.canlii.org/en/ab/abqb/doc/2012/2012abqb173/2012abqb173.html?resultIndex=1
    - This case cited *Lameman* for its discussion of the law surrounding hearsay evidence.

Northwest Territories:

1) *Di Pietro v. Law Society of the Northwest Territories*, 2016 NWTSC 11 (Supreme Court)
    - https://www.canlii.org/en/nt/ntsc/doc/2016/2016nwtsc11/2016nwtsc11.html?resultIndex=1

- In this case, Justice Smallwood cited *Lameman* in support of their conclusion that the Court should not get involved in matters properly decided by the Law Society.

Nunavut:

2) *Chwyl v. Law Society of Nunavut*, 2014 NUCJ 9 (Court of Justice)
    - https://www.canlii.org/en/nu/nucj/doc/2014/2014nucj9/2014nucj9.html?resultIndex=1
    - In this case, Justice Johnson quoted Justice Côté's reasoning in *Lameman* at paragraph 17 which discussed the objectives and purposes of the *Legal Profession Act*.
3) *1910878 Ontario Inc. (c.o.b. Mississauga Chinese Centre) v. 2551204 Ontario Inc. (c.o.b. Blue Lagoon Seafood Master)*, 2020 ONSC 3415 (Superior Court of Justice)
    - https://www.canlii.org/en/on/onsc/doc/2020/2020onsc3415/2020onsc3415.html?resultIndex=1
    - This case cited *Lameman* for its discussion of the law surrounding hearsay evidence.

**Academic Literature**

**Neil Craik, "Process and Reconciliation: Integrating the Duty to Consult with Environmental Assessment" (2016) 53 Osgoode Hall LJ 632.**
https://digitalcommons.osgoode.yorku.ca/ohlj/vol53/iss2/8/

In this article, Professor Craik examines the duty to consult[19] within the context of Environmental Assessment (EA) (now called Impact Assessment) and proposes a broader approach to EA which could support reconciliation. Professor Craik references *Lameman v. Alberta* (2011 ABQB 40, 2012 ABCA 59, and 2013 ABCA 148) within his discussion of the degree to which EA examines cumulative effects.

The cumulative effects of development and natural resource extraction are essential to assess, both for the duty to consult and as a factor in EA more broadly. As the Federal Court noted in *Brokenhead Ojibway First Nation v. Canada (Attorney General)*, 2009 FC 484 at paragraph 28, "while the environmental footprint of any one project might appear quite modest, the eventual cumulative development on the rights and traditional interests of Aboriginal peoples can be quite profound."

Professor Craik argues for a more strategic approach to EA which considers cumulative effects on a regional scale. This would assist Indigenous Nations and

[19] The duty to consult requires the federal and provincial governments to consult with Indigenous Nations or groups whenever the government is contemplating an action or decision which may negatively impact Aboriginal and/or Treaty rights.
*Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73.

communities, such as BLCN, whose rights are negatively affected by each new development. Rather than being forced to challenge each individual authorization, a cumulative effects assessment would allow Indigenous Nations and communities to bring comprehensive, big-picture claims to court. This would require courts to assess the full impacts of development on Aboriginal and Treaty rights as opposed to viewing individual decisions on a case-by-case basis, wasting judicial and taxpayer resources while simultaneously failing to meaningfully vindicate Indigenous peoples' rights.

## ***Lameman v. Alberta*, 2012 ABQB 195**

### Summary

In this case, Alberta and Canada asked the Court to strike Beaver Lake Cree Nation (BLCN)'s claims, precluding them from proceeding to trial. Alberta and Canada conceded that the issue of whether the cumulative effects of development have negatively affected BLCN's Treaty rights should proceed to trial; however, they argued that the remainder of BLCN's claims were too broad and vague to be allowed to proceed. BLCN had asked the Court to legally declare that:

1) BLCN has a constitutional right to hunt, trap, and fish in the area under Treaty 6.
2) The cumulative effects of development have unjustifiably infringed BLCN's Treaty rights.
3) Alberta and Canada have a duty to consult[20] with BLCN regarding the cumulative effects.
4) Alberta and Canada have a duty to revoke the authorizations for developments which negatively affect BLCN's Treaty rights.
5) Alberta and Canada should not be allowed to unconstitutionally authorize any further developments until they have consulted with BLCN. In other words, the Court should grant an injunction[21] against the Crown.

Canada argued that it should not be part of this case because the vast majority of the authorizations were granted by Alberta. Justice Browne held that, as Canada signed Treaty 6, they owe a fiduciary duty[22] to BLCN and must be part of the case.

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[20] The duty to consult requires the federal and provincial governments to consult with Indigenous Nations or groups whenever the government is contemplating an action or decision which may negatively impact Aboriginal and/or Treaty rights.
*Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73.

[21] An injunction is a court order for a party to either do or not do something. In this case, BLCN requested a court order that the Crown be prohibited from authorizing any further developments until they had consulted with BLCN.
https://irwinlaw.com/cold/injunction/

[22] In general, a fiduciary duty arises in relationships of power imbalance. The SCC has concluded that, in certain situations, the Crown owes a fiduciary duty to Indigenous peoples. This requires that Crown actions meet a higher standard and requires the Crown to act in the best interests of the Indigenous Nation or group. In this case, the history of Treaty 6 and Crown-Indigenous relations in Canada have created a power imbalance between Canada and BLCN. Therefore, Canada owes a fiduciary duty to act

Justice Browne struck the portion of BLCN's arguments which requested that Canada and Alberta revoke past authorizations, noting that "any trial in which there would be discussion of each of the 19,000 activities that may have been approved in the Core Traditional Territory would be unworkable and unmanageable."

Finally, Justice Brown concluded that, while the law generally does not allow for injunctions to be granted against the Crown, there are exceptions to this rule. One exception arises in this case as BLCN sought a temporary injunction to prevent the Crown from acting unconstitutionally. This decision was affirmed in *Lameman v. Alberta*, 2013 ABCA 148.

It is important to note that this decision was made in the context of a motion to strike.[23] When applying for a motion to strike another party's claims, the applying party (in this case Alberta and Canada) faces an uphill battle. The Court will only strike a claim where it is "plain and obvious" that the claim could not succeed at trial. This does not guarantee that BLCN's arguments will be successful at trial, but it is significant that Justice Browne found that they were strong enough to proceed to that stage. In this way, Justice Browne implicitly recognized the validity and importance of cumulative effects claims in the context of Aboriginal rights.

**Case Citations**

*Lameman v. Alberta* ("*Lameman*") was referenced in 2 different cases decided by courts in the province of Alberta:

1) *Anderson v. Alberta*, 2020 ABCA 238 (Court of Appeal)
    - https://www.canlii.org/en/ab/abca/doc/2020/2020abca238/2020abca238.html?resultIndex=1
    - This is a subsequent case in BLCN's legal battle. *Lameman* was cited as a part of this case's procedural history.
2) *Kang v. M.B.*, 2019 ABQB 246 (Court of Queen's Bench)
    - https://www.canlii.org/en/ab/abqb/doc/2019/2019abqb246/2019abqb246.html?resultIndex=1

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in BLCN's best interests, a duty which may have been breached by authorizing developments which negatively affected BLCN's Treaty rights.
http://businesstorts.ca/breach-of-fiduciary-duty

[23] A motion to strike requests that the court dismiss a case. There are several reasons why a court may choose to strike a case; however, in general, a court will strike a case if it does not raise a reasonable claim or defence. The goal of the application to strike is to ensure that judicial resources are not wasted on cases which have no reasonable chance of success.
http://www.thecourt.ca/to-strike-or-not-to-strike-that-is-the-question-reconciling-conflicting-case-law-on-government-liability-in-her-majesty-the-queen-in-right-of-canada-v-imperial-tobacco-canada/

- In this case, Justice Mandziuk concluded that the case law, including *Lameman*, discussing striking out a claim remained valid despite the changes made to the *Alberta Rules of Court.*

**Blogs & Case Commentaries**

**John Olynyk & JoAnn P. Jamieson, "Cumulative Impacts on Treaty Rights: Update on the Beaver Lake Cree Nation Litigation" (May 2012), online (pdf): *Lawson and Lundell LLP's Energy Law Bulletin* < https://www.lawsonlundell.com/media/news/296_Beaver%20Lake%20Cree%20Nation%20Litigation.pdf>**

In this overview, Olynyk and Jamieson summarize BLCN, Alberta, and Canada's arguments in *Lameman* as well as the Court's decision. They argue that there are four implications of this decision for *Lameman* and for the legal system more broadly:

1) In *Lameman*, the authorizations issued by Alberta in support of developments will provide important background; however, they are no longer the central issue in the case.
2) In *Lameman*, the focus of the case has shifted to questions surrounding the duty to consult and accommodate and the Crown's responsibility to compensate Indigenous Nations.
3) While this particular decision was procedural[24] in nature, *Lameman* "remains an important case, the result of which will have a significant bearing on oil sands development as well as developments in other areas where cumulative effects have become a major issue."
4) This decision suggests that consultations regarding cumulative effects should not occur during consultations on individual project applications; rather, discussions regarding cumulative effects should occur at a higher level and must involve governments, not just project proponents.

**Academic Literature**

**Tyler Paquette, "The Inhabitants of an Imagined Body: The Crown's Duty to Consult and Accommodate Indigenous Communities in the Arctic Adversely Affected by Climate Change" (2020) 15:2 MJSDL 141.**
https://www.mcgill.ca/mjsdl/files/mjsdl/tyler-paquette-imagined-body.pdf

[24] Procedural law refers to the laws which outline the procedures for enforcing rights and duties. Substantive law refers to the laws which create, define, or regulate rights and duties. In other words, *Lameman* was largely about *how* to engage in the process of determining whether BLCN's Treaty rights were affected by the developments as opposed to examining whether BLCN's Treaty rights were affected by the developments.
https://www.merriam-webster.com/legal/procedural%20law

In this article, Paquette argues that the duty to consult and accommodate could arise in the context of climate change; however, its application is dependent upon identifying the particular Crown "conduct" at issue. Paquette proposes three possible ways to define Crown conduct: (1) a single action or decision that will increase greenhouse gas emissions (GHGs); (2) a constellation of decisions or actions that will increase GHGs; and (3) regulations or policies that will increase GHGs.

Paquette cites *Lameman* in support of his claim that the second approach outlined above could work in the context of a climate change-related duty to consult and accommodate. Overall, while Paquette clarifies that *Lameman* should not be considered "a resounding endorsement of a constellation-based approach," the case suggests that this approach could trigger the duty to consult and accommodate and that this duty "would not be limited to Crown actions and decisions but could include past Crown conduct as well, so long as revocation of past authorizations is not sought."

**Adam Driedzic & Brenda Heelan Powell, "Buying a Better Environment? Market-Based Instruments & the *Alberta Land Stewardship Act*" (2016), online (pdf): *Environmental Law Centre (Alberta)* < https://www.canlii.org/en/commentary/doc/2016CanLIIDocs473#!fragment//BQCwhgziBcwMYgK4DsDWszIQewE4BUBTADwBdoByCgSgBpltTCIBFRQ3AT0otokLC4EbDtyp8BQkAGU8pAELcASgFEAMioBqAQQByAYRW1SYAEbRS2ONWpA>**

In this paper, Driedzic and Powell reference *Lameman* as one of a number of decisions wherein judges considered cumulative effects. They argue that these cases outline five general principles for cumulative effects assessments:

1) Courts can look to government documents to define cumulative effects if they are not defined in legislation.
2) It may be mandatory in some cases to consider matters beyond the individual project at issue.
3) Finding that a project will have no significant effects does not necessarily mean that it will not contribute to cumulative effects.
4) Courts should only consider *likely* cumulative effects.
5) Courts must ensure that decision-makers follow proper processes when making decisions.

## ***Lameman v. Alberta*, 2013 ABCA 148**

### Summary

This judgment affirmed Justice Browne's decision in *Lameman v. Alberta*, 2012 ABQB 195. On appeal, Canada and Alberta argued that Justice Browne did not go far enough by solely striking the portion of Beaver Lake Cree Nation (BLCN)'s arguments which requested that the governments revoke past project authorizations.

At this stage, BLCN was no longer requesting the revocation of these past authorizations, but they still referred to them in their written arguments. The Court noted that BLCN's arguments were based on a foundation of cumulative effects; therefore, BLCN could not properly argue their case if they did not refer to the project authorizations which caused these effects.

Despite the fact that BLCN never claimed that they had a right to hunt, fish, or trap for profit, Alberta argued that since BLCN had not explicitly clarified this point, their Treaty rights claims should be struck. The Court concluded that the fact that BLCN did not specifically say that they did not have commercial rights should not prevent them from proceeding to trial. In fact, the Court said that this issue would be better raised at trial where the parties could fully present their arguments with evidence to support them.

Alberta and Canada argued that Justice Browne was incorrect in deciding that BLCN could request an injunction[25] against the Crown. Significantly, the Court decided that it would not be proper to strike BLCN's request for either an interim[26] or a permanent injunction, despite the fact that there has not yet been a situation where a permanent injunction has been issued against the Crown.

Finally, Canada argued that Justice Browne incorrectly conflated the Crown's fiduciary duty[27] with "the honour of the Crown"[28] and the duty to consult.[29] The Supreme Court of Canada (SCC) has clarified that fiduciary duty and the honour of the Crown are distinct concepts and that the Crown does not owe a fiduciary duty in all cases where

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[25] An injunction is a court order for a party to either do or not do something. In this case, BLCN requested a court order that the Crown be prohibited from authorizing any further developments until they had consulted with BLCN.
https://irwinlaw.com/cold/injunction/

[26] An interim injunction is an injunction which lasts at least until a final decision has been issued in a trial and aims to ensure that a party's rights do not continue to be infringed as the trial proceeds.
https://irwinlaw.com/cold/injunction/

[27] In general, a fiduciary duty arises in relationships of power imbalance. The SCC has concluded that, in certain situations, the Crown owes a fiduciary duty to Indigenous peoples. This requires that Crown actions meet a higher standard and requires the Crown to act in the best interests of the Indigenous Nation or group. In this case, the history of Treaty 6 and Crown-Indigenous relations in Canada have created a power imbalance between Canada and BLCN. Therefore, Canada owes a fiduciary duty to act in BLCN's best interests, a duty which may have been breached by authorizing developments which negatively affected BLCN's Treaty rights.
http://businesstorts.ca/breach-of-fiduciary-duty

[28] The "honour of the Crown" is a foundational principle of Aboriginal law which arises from the Crown asserting sovereignty over Indigenous lands and resources. The honour of the Crown requires that the Crown act honourably in their interactions and relationships with Indigenous peoples.
https://www.justice.gc.ca/eng/csj-sjc/principles-principes.html

[29] The duty to consult requires the federal and provincial governments to consult with Indigenous Nations or groups whenever the government is contemplating an action or decision which may negatively impact Aboriginal and/or Treaty rights.
*Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73.

they are dealing with Indigenous peoples. The Court in this case concluded that Justice Browne's supposed misstatement did not affect her decision; regardless of whether her decision was based on Canada's fiduciary duty to BLCN or the honour of the Crown, BLCN's claims should still be allowed to proceed to trial.

**Case Citations**

*Lameman v. Alberta* ("*Lameman*") was referenced in 29 different cases decided by courts across Canada.

Alberta:

1) *NOV Enerflow ULC (NOV Pressure Pumping ULC) v. Enerflow Industries Inc.*, 2020 ABQB 347 (Court of Queen's Bench)
    - https://www.canlii.org/en/ab/abqb/doc/2020/2020abqb347/2020abqb347.html?resultIndex=1
    - In this case, Justice Nixon cited *Lameman* when concluding that a request for particulars[30] is context-dependent as it allows a defendant to identify their defences to a claim.
2) *Anderson v. Alberta*, 2020 ABCA 238 (Court of Appeal)
    - https://www.canlii.org/en/ab/abca/doc/2020/2020abca238/2020abca238.html?resultIndex=1
    - This is a subsequent case in BLCN's legal battle. *Lameman* was cited as a part of this case's procedural history.
3) *Ruby v. Mills*, 2020 ABCA 223 (Court of Appeal)
    - https://www.canlii.org/en/ab/abca/doc/2020/2020abca223/2020abca223.html?resultIndex=1
    - In this case, the Court cited *Lameman* when discussing the correct standard[31] on which to review certain legal questions when making discretionary decisions.
4) *Anglin v. Resler*, 2020 ABCA 184 (Court of Appeal)
    - https://www.canlii.org/en/ab/abca/doc/2020/2020abca184/2020abca184.html?resultIndex=1

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[30] A request for particulars is a request for a party to increase the level of specificity they use in their written arguments. In other words, a request for particulars asks a party to be more specific about what they are intending to prove at trial.
https://wt.ca/particularizing-your-claim-in-pleadings/

[31] The standard of review refers to the level of scrutiny a court applies when examining a decision. The two main standards of review in Canada are reasonableness and correctness. The choice of which standard to apply is dependent on a number of factors and often requires a preliminary assessment before addressing the challenged decision itself.
http://www.thecourt.ca/canada-minister-of-citizenship-and-immigration-v-vavilov-the-supreme-court-of-canada-gifts-administrative-law-a-new-standard-of-review/
https://irwinlaw.com/cold/standard-of-review/

- In this case, the Court cited *Lameman* when discussing the correct standard on which to review certain legal questions when making discretionary decisions.

5) *T.A. v. Alberta (Children's Services)*, 2020 ABQB 97 (Court of Queen's Bench)
   - https://www.canlii.org/en/ab/abqb/doc/2020/2020abqb97/2020abqb97.html?resultIndex=1
   - In this case, the Court cited *Lameman* when discussing the test to apply when deciding whether to strike a claim.[32]
6) *Fort McKay Métis Community Association v. Métis Nation of Alberta Association*, 2019 ABQB 892 (Court of Queen's Bench)
   - https://www.canlii.org/en/ab/abqb/doc/2019/2019abqb892/2019abqb892.html?resultIndex=1
   - In this case, the Court cited *Lameman* when discussing the test to apply when deciding whether to strike a claim.
7) *ANC Timber Ltd. v. Alberta (Minister of Agriculture and Forestry)*, 2019 ABQB 710 (Court of Queen's Bench)
   - https://www.canlii.org/en/ab/abqb/doc/2019/2019abqb710/2019abqb710.html?resultIndex=1
   - This case cited *Lameman* when discussing exceptions to the rule that courts cannot grant an injunction against the Crown. The *Lameman* decision highlights that an injunction can be ordered against the Crown where it has been alleged that the Crown has acted unconstitutionally.
8) *Alberta Union of Provincial Employees v. Alberta*, 2019 ABQB 577 (Court of Queen's Bench)
   - https://www.canlii.org/en/ab/abqb/doc/2019/2019abqb577/2019abqb577.html?resultIndex=1
   - This case cited *Lameman* when discussing exceptions to the rule that courts cannot grant an injunction against the Crown. The *Lameman* decision highlights that an injunction can be ordered against the Crown where it has been alleged that the Crown has acted unconstitutionally.
9) *Kang v. M.B.*, 2019 ABQB 246 (Court of Queen's Bench)
   - https://www.canlii.org/en/ab/abqb/doc/2019/2019abqb246/2019abqb246.html?resultIndex=1
   - In this case, *Lameman* was cited in conjunction with *Lameman v. Alberta*, 2012 ABQB 195 as the former judgment affirmed the latter.

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[32] An application to strike requests that the court dismiss a case. There are several reasons why a court may choose to strike a case; however, in general, a court will strike a case if it does not raise a reasonable claim or defence. The goal of the application to strike is to ensure that judicial resources are not wasted on cases which have no reasonable chance of success. http://www.thecourt.ca/to-strike-or-not-to-strike-that-is-the-question-reconciling-conflicting-case-law-on-government-liability-in-her-majesty-the-queen-in-right-of-canada-v-imperial-tobacco-canada/

10) *Mikkelsen v. Truman Development Corporation,* 2019 ABQB 112 (Court of Queen's Bench)
    - https://www.canlii.org/en/ab/abqb/doc/2019/2019abqb112/2019abqb112.html?resultIndex=1
    - In this case, the Court cited *Lameman* when discussing the test to apply when deciding whether to strike a claim.
11) *Edmonton Kenworth Ltd. v. Kos*, 2018 ABQB 439 (Court of Queen's Bench)
    - https://www.canlii.org/en/ab/abqb/doc/2018/2018abqb439/2018abqb439.html?resultIndex=1
    - In this case, the Court cited *Lameman* when discussing the test to apply when deciding whether to strike a claim.
12) *Sangha v. Alberta*, 2018 ABCA 32 (Court of Appeal)
    - https://www.canlii.org/en/ab/abca/doc/2018/2018abca32/2018abca32.html?resultIndex=1
    - In this case, the Court cited *Lameman* when discussing the correct standard on which to review certain legal questions when making discretionary decisions.
13) *Twinn v. Twinn*, 2017 ABCA 419 (Court of Appeal)
    - https://www.canlii.org/en/ab/abca/doc/2017/2017abca419/2017abca419.html?resultIndex=1
    - In this case, the Court cited *Lameman* when discussing the correct standard on which to review certain legal questions when making discretionary decisions.
14) *Clark v. Hunka*, 2017 ABCA 346 (Court of Appeal)
    - https://www.canlii.org/en/ab/abca/doc/2017/2017abca346/2017abca346.html?resultIndex=1
    - In this case, the Court cited *Lameman* when discussing the correct standard on which to review certain legal questions when making discretionary decisions.
15) *Waquan v. Canada (Attorney General)*, 2017 ABCA 279 (Court of Appeal)
    - https://www.canlii.org/en/ab/abca/doc/2017/2017abca279/2017abca279.html?resultIndex=1
    - In this case, the Court cited *Lameman* when discussing the correct standard on which to review certain legal questions when making discretionary decisions.
16) *Grenon v. Canada Revenue Agency,* 2017 ABCA 96 (Court of Appeal)
    - https://www.canlii.org/en/ab/abca/doc/2017/2017abca96/2017abca96.html?resultIndex=1
    - In this case, the Court cited *Lameman* when discussing the correct standard on which to review certain legal questions when making discretionary decisions.

17) *Trimove Inc. v. Servus Credit Union Ltd.*, 2017 ABQB 50 (Court of Queen's Bench)
    - https://www.canlii.org/en/ab/abqb/doc/2017/2017abqb50/2017abqb50.html?resultIndex=1
    - In this case, the Court cited *Lameman* when discussing the test to apply when deciding whether to strike a claim.
18) *Health Sciences Association of Alberta v. Alberta College of Paramedics*, 2016 ABQB 723 (Court of Queen's Bench)
    - https://www.canlii.org/en/ab/abqb/doc/2016/2016abqb723/2016abqb723.html?resultIndex=1
    - *Lameman* was listed as one of the authorities considered by the court.
19) *HOOPP Realty Inc. v. The Guarantee Company of North America*, 2015 ABCA 336 (Court of Appeal)
    - https://www.canlii.org/en/ab/abca/doc/2015/2015abca336/2015abca336.html?resultIndex=1
    - In this case, the Court cited *Lameman* when discussing the test to apply when deciding whether to strike a claim.
20) *Peter Lehmann Wines Ltd. v. Vintage West Wine Marketing Inc.*, 2015 ABQB 481 (Court of Queen's Bench)
    - https://www.canlii.org/en/ab/abqb/doc/2015/2015abqb481/2015abqb481.html?resultIndex=1
    - This case cited *Lameman* when discussing exceptions to the rule that courts cannot grant an injunction against the Crown. The *Lameman* decision highlights that an injunction can be ordered against the Crown where it has been alleged that the Crown has acted unconstitutionally. The Court in this case concluded that *Lameman* suggests that an injunction may be granted against the Crown where the claim is novel and the area of law is rapidly evolving.
21) *Alberta v. Altria Group Inc.*, 2015 ABQB 390 (Court of Queen's Bench)
    - https://www.canlii.org/en/ab/abqb/doc/2015/2015abqb390/2015abqb390.html?resultIndex=1
    - In this case, the Court cited *Lameman* when discussing the test to determine whether a court should order particulars.
22) *Harrison v. XL Foods Inc.*, 2014 ABQB 431 (Court of Queen's Bench)
    - https://www.canlii.org/en/ab/abqb/doc/2014/2014abqb431/2014abqb431.html?resultIndex=1
    - In this case, the Court cited *Lameman* when discussing the test to apply when deciding whether to strike a claim.
23) *Polsom v. Couston*, 2014 ABQB 43 (Court of Queen's Bench)
    - https://www.canlii.org/en/ab/abqb/doc/2014/2014abqb43/2014abqb43.html?resultIndex=1

- In this case, the Court cited *Lameman* when discussing the test to apply when deciding whether to strike a claim.

24) *Derks (Trustee of) v. Derks*, 2013 ABCA 195 (Court of Appeal)
- https://www.canlii.org/en/ab/abca/doc/2013/2013abca195/2013abca195.html?resultIndex=1
- In this case, the Court cited *Lameman* when discussing the correct standard on which to review certain legal questions when making discretionary decisions.

25) *Repchuk v. Silverberg*, 2013 ABQB 305 (Court of Queen's Bench)
- In this case, the Court cited *Lameman* when discussing the correct standard on which to review certain legal questions when making discretionary decisions.

Federal Court:

1) *Coldwater First Nation v. Canada (Indian Affairs and Northern Development)*, 2016 FC 595
   - https://www.canlii.org/en/ca/fct/doc/2016/2016fc595/2016fc595.html?resultIndex=1

Newfoundland and Labrador:

2) *Newfoundland and Labrador (A.G.) v. Rothmans Inc.*, 2015 NLTD(G) 191 (Supreme Court – Trial Division (General))
   - https://www.canlii.org/en/nl/nlsctd/doc/2015/2015canlii85679/2015canlii85679.html?searchUrlHash=AAAAAQAIcm90aG1hbnMAAAAAAQ&resultIndex=1
   - In this case, the Court cited *Lameman* when discussing the test to determine whether a court should order particulars.

Northwest Territories:

3) *Tlicho Government v. Canada (Attorney General)*, 2015 NWTSC 9 (Supreme Court)
   - https://www.canlii.org/en/nt/ntsc/doc/2015/2015nwtsc9/2015nwtsc9.html?resultIndex=1

Ontario:

4) *Her Majesty the Queen in Right of Ontario v. Rothmans Inc.*, 2016 ONSC 59
   - https://www.canlii.org/en/on/onsc/doc/2016/2016onsc59/2016onsc59.html?resultIndex=1
   - In this case, the Court cited *Lameman* when discussing the test to determine whether a court should order particulars.

**Case Study: *Coldwater First Nation v. Canada (Indian Affairs and Northern Development)*, 2016 FC 595**

In this case, Coldwater Indian Band ("Coldwater") asked the Court to review the Minister of Indian Affairs and Northern Development (the "Minister")'s decision to re-assign a pipeline right-of-way (or route) that was granted to Trans Mountain Oil Pipeline to Kinder Morgan. This right-of-way ran through Coldwater's reserve lands. While Kinder Morgan consulted with Coldwater, they failed to effectively address Coldwater's concerns regarding the pipeline.

Coldwater argued that the Minister owed them a fiduciary duty which required him to refuse to re-assign the right-of-way unless he was satisfied that the decision was in Coldwater's best interests. Justice Heneghan held that the Minister had met his fiduciary duty and was not required to renegotiate the terms of the right-of-way when re-assigning it to Kinder Morgan.

Justice Heneghan referenced *Lameman* when exploring the requirements of the Minister's fiduciary duty to Coldwater:

> [182] […] Fiduciary duties do not automatically arise simply because the Crown is dealing with Aboriginals. While there is no question that the relationship between the Crown and First Nations has fiduciary aspects, not all dealings between the Crown and First Nations will give rise to a fiduciary duty. As *Wewaykum Indian Band v. Canada,* 2002 SCC 79 noted at paragraph 81, "the fiduciary duty imposed on the Crown does not exist at large but in relation to specific Aboriginal interests."

As all the parties in this case agreed that the Minister owed a fiduciary duty to Coldwater, it is unlikely that this reference to *Lameman* had any significant impact on the outcome of the case. However, it is clear that *Lameman* plays a role in informing Canadian courts' understandings of the Crown's fiduciary duties to Indigenous peoples.

**Case Study: *Tlicho Government v. Canada (Attorney General)*, 2015 NWTSC 9**

In this case, the Tlicho Government applied for interim injunctive relief[33] against Canada. Canada had enacted the *Northwest Territories Devolution Act* (the "*Act*") which would have eliminated the Wek'èezhii Land and Water Board (WLWB). The WLWB was created under the Tlicho Agreement, a modern treaty, which allowed the Tlicho Government to appoint half of the members of the WLWB. The Tlicho Government argued that eliminating the WLWB would violate their protected Treaty rights and that Canada failed to properly consult them prior to enacting the *Act.* The Tlicho Government requested an injunction which would exempt the WLWB from the *Act* until a final

[33] An interim injunction is an injunction which lasts at least until a final decision has been issued in a trial and aims to ensure that a party's rights do not continue to be infringed as the trial proceeds. https://irwinlaw.com/cold/injunction/

decision was made in the case. Justice Shaner concluded that, given the constitutional rights at stake, the injunction should be granted at least until the case was fully decided.

Canada argued that the *Crown Liability and Proceedings Act* prevented the Court from granting an injunction against them. Justice Shaner cited *Lameman* in rejecting this argument. While *Lameman* focused on Alberta's *Proceedings Against the Crown Act*, the two pieces of legislation are considered to be equivalent. Therefore, the decision in *Lameman* can apply to federal cases as well as provincial. Justice Shaner concluded that, as the Crown's actions must always be constitutional, the Court must be allowed to grant an injunction against the Crown to ensure that constitutional rights are protected. As the *Act* threatened the Tlicho Government's constitutionally-protected right to participate in land use planning through the WLWB, it was essential to grant the injunction against the Crown to ensure that the Tlicho Government's constitutional rights would be protected.

**Academic Literature**

**Tyler Paquette, "The Inhabitants of an Imagined Body: The Crown's Duty to Consult and Accommodate Indigenous Communities in the Arctic Adversely Affected by Climate Change" (2020) 15:2 MJSDL 141.**
https://www.mcgill.ca/mjsdl/files/mjsdl/tyler-paquette-imagined-body.pdf

In this article, Paquette argues that the duty to consult and accommodate could arise in the context of climate change; however, its application is dependent upon identifying the particular Crown "conduct" at issue. Paquette proposes three possible ways to define Crown conduct: (1) a single action or decision that will increase greenhouse gas emissions (GHGs); (2) a constellation of decisions or actions that will increase GHGs; and (3) regulations or policies that will increase GHGs.

Paquette cites *Lameman* in support of his claim that the second approach outlined above could work in the context of a climate change-related duty to consult and accommodate. Overall, while Paquette clarifies that *Lameman* should not be considered "a resounding endorsement of a constellation-based approach," the case suggests that this approach could trigger the duty to consult and accommodate and that this duty "would not be limited to Crown actions and decisions but could include past Crown conduct as well, so long as revocation of past authorizations is not sought."

**Nathalie J. Chalifour & Jessica Earle, "Feeling the Heat: Climate Litigation under the Canadian Charter's Right to Life, Liberty, and Security of the Person" (2018) 42 Vermont L Rev 689.**

In this article Chalifour and Earle cite *Lameman* as an example of a case where the plaintiffs argued their claims using an integrative (or cumulative) approach rather than challenging a single law or decision. This article was cited in Paquette's article

above in support of his “constellation-based approach” to a climate change-related duty to consult and accommodate.

**Robert Normey, “Removing all Reasonable Cause of Discontent: Noteworthy Decisions of the Alberta Court of Appeal in Aboriginal Litigation” (2014) 52:1 Alta L Rev 99.**
https://www.albertalawreview.com/index.php/ALR/article/view/14/14

in this article, Normey highlights *Lameman* as an important case in Aboriginal law in the province of Alberta:

> […] because it highlights complex and crucial issues for First Nations and society as a whole as we look ahead over the coming decades. The issue of cumulative effects through major developments over time is novel and will require the weighing and balancing of a number of factors as part of the [judicial] process.

Part Two: Drafted by Jason Hemmerling

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**Trans Mountain Challenge #1: *Tsleil-Waututh Nation v Canada***

The *Tsleil-Waututh Nation v Canada* judgement further clarified the Canadian Crown's duty to consult in relation to Indigenous peoples. Tsleil-Waututh Nation, along with several other Indigenous groups, nonprofits and municipalities, challenged the National Energy Board's report on the Trans Mountain Pipeline extension project. Upon the court determining that the report itself was not subject to judicial review, the applicants challenged the reasonableness of the decision of the Governor in Council to approve the project. This case further clarified the role of the courts in reviewing administrative board reports, as well as establishing the standard of review to be used in these instances and in regard to the duty to consult. In reviewing the decision of the Governor in Council, as well as the report, the court found several serious flaws which resulted in the temporary rejection of Trans Mountain's application.

This challenge consisted of several hearings, which determined the scope of the challenge and the parties who may be able to take place. The proposed project would twin the existing trans mountain pipeline, adding 987 km of new pipe. The project would also require the construction of several new infrastructure sites along the pipeline route, including pumping stations, and holding tanks. The project also included the construction of new pipelines from the Burnaby storage facility, to the new Westridge Marine terminal, as well as increased dock infrastructure in Burnaby. One of the most damaging aspects of the project on the environment of British Columbia would stem from the 700% increase in oil tanker traffic which would ship diluted bitchumen to markets in the pacific; this pipeline would also encourage the usage of aframax class tankers which are substantially larger than the current oil tankers which operate on the coast of British Columbia. The impact of a spill would be devastating over any of the water tables which the pipeline traverses, as well as in any river which it crosses, and on the endangered species which inhabit the coastal waters. During the review process, the National Energy Board declined to include the impacts of marine traffic in the project description, which resulted in the impacts being excluded from the Environmental Assessment. In a rush to approve the project, the government of Canada neglected to adequately consult the Indigenous communities whose land would be impacted by the pipeline expansion. The proposed mitigation measures which the Indigenous applicants suggested were more often than not, ignored.

In determining whether the National Energy Board report, which the Governor in Council relied upon to grant the project a Certificate of Public Convenience and Necessity, was reviewable the courts relied on the analysis in *Gitxaala*, which held that only decisions with legal or practical interests could be reviewed. The report itself held no weight, only the order by the Governor in Council created legal interest. As a result, the court determined that decisions such as the National Energy Board report could not be subject to a judicial review. This determination would be applied in other proceedings, either in the form of the 'prematurity principle' or in a determination that the court should practice deference to legislated, expert decision makers.

The duty to consult was carried out utilizing the framework presented in the *Gitxaala* case. While the court in that instance approved the four phase framework, they emphasized that the duty to consult is beyond simple note-taking, but does not require full consent either. The current framework for the Trans Mountain pipeline was found to be legally adequate to carry out the consultation, however the consultation itself did not meet the requirements to fulfil the duty owed. The consultation was flawed, as the court in this instance stated that consultation requires a two-way dialogue; Canada's consultation mostly consisted of listening to the concerns of the Indigenous communities who would be impacted by the project, and recording the concerns. The government was under the incorrect assumption that they could not modify the project plan, and therefore could not address the concerns presented. These flaws in consultation were substantial enough that the court found the project could not continue until the crown's legal obligation to consult was fulfilled. The court unfortunately determined that this would not result in the project being sent back to the beginning of the application phase, but instead allowed the proponents to fix their consultation errors without beginning anew.

The project ran into further legal troubles in this challenge due to the inadequacy of the environmental assessment. The courts determined that the National Energy Board's decision to exclude the impacts of the marine tankers, meant that they presented the Governor in Council with a materially deficient report which could not be relied upon to make a reasonable determination as to whether the project was in the public interest. The Environmental Assessment did not comply with the *Species at Risk Act* due to the failure to include marine tanker's impacts on protected species on the coast, and the proponents would have to address these issues as well in order to proceed with the project.

In addressing these shortcomings in the project's application, the court nullified the Certificate of Public Convenience and Necessity issued by the Governor in Council, which was required to begin work on the project. The Governor in Council was required to resubmit the report to the National Energy Board for further consideration. The

Governor in Council would also have to solve the issues with phase III of the consultations. The result was that in the short term, the project was halted, however the challenge also helped clarify what the lowest bar of consultation is that the courts will accept. Following these decisions, and subsequent attempts to fix the consultation process and the Board's report, the applicants attempted to challenge the project at the Supreme Court of Canada. The Supreme Court denied the appeal without giving reasons. This challenge represented a short term victory, but not the end of the Trans Mountain debate in Canada.

An important note to make about the proceedings is presented by the court in their reasons. The Indigenous applicants were supposed to receive participatory funding to aid in their legal challenge, as addressing the questions in a fair manner would be in the interest of everyone impacted by the pipeline. The court noted that most applicants deemed the compensation vastly insufficient. As an example, Tsleil-Waututh Nation, who had partaken in the challenge for years, was granted $40 000 despite applying for compensation of $766 000 for the legal cost inherent in shouldering such a monumental legal challenge. Other applicants noted similarly insufficient funds, as well as delays in receiving funds. This aspect of the case highlights the crucially important role which Raven Trust has in aiding access to justice in Canada. The legal process is expensive, however ensuring that those with a claim to legal relief can afford to participate is invaluable.

***CASE STUDIES***:

*Sipekne'katik v Alton Natural Gas Storag*e, 2020 NSSC 111

In this case the appellant, the Sipekne'katik band, challenged a decision of the Minister of the Environment based on the grounds of inadequate consultation. The minister had issued an Industrial Approval of the Alton Natural Gas Storage Project, on a conclusion that the consultation with Indigenous communities had been adequate. The Minister focused on the environmental impacts on the Indigenous communities, and tailored any mitigation measures towards that end.

In arguing that the consultation was inadequate based on the circumstances and the treaty rights asserted, the counsel for the Sipekne'katik Band utilized the judgement in *Tsleil-Waututh* to argue that consultation should not be considered an afterthought, and should be based on the impacts of the project on treaty rights, not simply on the environmental impact. The result of this case was that the court found the consultation process between the province of Nova Scotia and the Sipekne'katit Band was insufficient, and required a consultation period. The court found that the Minister's decision that the consultation was sufficient was not supported by the evidence available, and actually pointed to a different conclusion. The consultation had been

primarily concerning environmental impacts, and not the impacts on the treaty rights of Indigenous communities. In the decisions, the court stated that “The ‘afterthought’ observation in the quote from *Tsleil* is strikingly resonant where, as discussed, the Province did not address the title issue until after the Minister had made her decision.”

The Minister in this case had committed a palpable error, which was easier to assert in part due to the growing jurisprudence in relation to the Trans-Mountain legal challenges. The court also granted Sipekne’katit court costs as the successful litigant, and ordered that the consultation must resume, but only once the Chief Medical Officer of Health declared that the COVID 19 pandemic is over, or a remote arrangement is agreed upon by the parties.

*Sagkeeng v. Government of Manitoba*, 2020 MBQB 83

This case contained an appeal of the decision of the Minister of Sustainable Development in Manitoba regarding the Manitoba-Minnesota Transmission Project. The Minister had granted the project a class 3 license, which allowed construction to begin. The project would be situated predominantly on the traditional and ancestral territory of the Sagkeeng Anicinabe, and would result in the clearing of the natural habitat for right of ways and infrastructure for the project. The Sagkeeng Anicinabe expressed concerns over the environmental impacts of the project as well as impacts on their treaty rights. The province, and Manitoba Hydro sought a motion in this case to declare that a judicial review would be premature for similar grounds as the first action in the *Tsleil-Waututh* legal challenge. They submit that the Sagkeeng Anicinabe had not exhausted the statutory appeal process by appealing the decision to the Lieutenant Governor in Council. The court, in citing the 2016 *Tsleil-Waututh* decision, stated that “The parties seem to agree that the administrative process of adjudications and appeals must be followed to completion, unless exceptional circumstances exist”, and deemed this, the Prematurity Principle. They rely in part on the court's assertion in the *Tsleil-Waututh* case that administrative decisions should be exhausted first in an effort to seek a legal remedy, as it would better support the legislature’s intention that certain issues be dealt with by “expert administrative decision makers”. The court also relied on the principles in the *Tsleil-Waututh* case and the *Coldwater* legal challenge to assert that the standard of review for questions of whether the duty to consult had been met, should be based on the standard of reasonableness.

In summary, the courts relied on the principles of the *Tsleil-Waututh* legal challenge to determine that a judicial review of the administrative decision regarding the Manitoba-Minnesota Transmission Project was premature. The court then determined that should the motion by the Sagkeeng Anicinabe not be premature, in relying partly on the *Tsleil-Waututh* jurisprudence, the standard of review for consultation is reasonableness, not correctness. This decision carried the implication that although the

consultation did not result in complete agreement, the determinations and consultations were reasonable and justified under the law. The court would dismiss Sagkeeng Anicinabe's motion, and would grant the motion by the province of Manitoba to declare that the appeal was premature.

*Dixon v. TD Bank Group,* 2020 FC 1054

This case, regarding an appeal of a decision by the Canadian Human Rights Commission, dealt with allegations of discrimination towards the appellant by TD Bank. The appellant sought a subpoena for the bank to produce the security video from his interaction at the bank, where other customers behind him in line were helped first. The Commission held that the claim was frivolous, and that Dixon failed to establish that he was discriminated against based on race, age, disability, nationality or ethnic origin, and that the claim was frivolous. Dixon argued that the security video should be produced, as it pertains to the question of why the bank declined to deal with his complaint, and why the commission dismissed it.

In relying on the judgement of the *Tsleil-Waututh* case, the court stated that in reviewing administrative decisions, the courts will only admit new evidence in exceptional instances. In *Tsleil-Waututh*, this 'exceptional instance' which permitted additional evidence being produced for the court was the ongoing consultation and the allegations of the flaws apparent in the consultation process. The court also relied on the test in the *Tsleil-Waututh* decision regarding when the usage of the subpoena powers is permissible. The "*Tsleil-Waututh* test" allowed subpoenas when: the evidence is necessary, there is no other way of procuring the evidence, the applicant is not engaged in a fishing expedition, but has reasonable ground for review, and that a witness is likely to have information on the matter. The court in Dixon determined that the "*Tsleil-Waututh* test" is conjunctive, meaning that one must meet every aspect in order to pass the test. This test was utilized in this case to determine that Dixon did not have grounds to subpoena evidence from the bank, as he did not meet the first part of the test. The court rejected Dixon's motion for more evidence, and continued with the proceedings with the evidence available before the Human Rights Commission.

*Fisher River Cree Nation v. Manitoba*, 2020 MBQB 9

Application by the Fisher River Cree Nation for judicial review of a decision of the Minister of Sustainable Development that confirmed the issuance of a revised licence to harvest peat to Sunterra Horticulture. Sunterra harvested peat on the West shore of Lake Winnipeg, on Crown land in the applicant's traditional territory. The licence was issued with several conditions. Prior to the issuance of the revised licence, which allowed Sunterra to expand its operation, Manitoba consulted with the applicant over a two-year period, including correspondence and in-person meetings. The applicant had

agreed to the consultation process, though following the decision by the Minister, argued that the consultation was insufficient to discharge the Crown's duty to consult. The Fisher River Cree Nation also argued that the Minister's decision to grant a license to Sunterra Horticulture was unreasonable, as the Minister failed to hold a public hearing as per *The Environment Act*. The Fisher River Cree Nation relied on the *Tsleil-Waututh* decision to argue that the consultation was inadequate on the grounds that it was not a true two-way dialogue. The consultation failed to address most of the concerns forwarded by the Fisher River Cree Nation; however, the court found that this case could be differentiated on the grounds that the Crown did partake in a two-way dialogue to some degree, and attached conditions to the licensing process. The court found that based on the evidence, Manitoba had recorded the concerns of the Fisher River Cree Nation including concerns about treaty rights and environmental protections. The government of Manitoba had responded to the concerns and carried out an ongoing consultation. The court also found that the concerns of the public were addressed by the project's mitigation measures, and that the requirement for a public hearing was unnecessary in the current circumstances.

This case highlights the fact that while the *Tsleil-Waututh* decision expanded on the jurisprudence around the duty to consult, it also provided project proponents and the government with a better idea of what is minimally required to fulfill the duty to consult. The duty to consult can be discharged without fully reaching agreement with Indigenous communities regarding mitigation measures and the impacts of proposed projects.

***Commentary***:

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2. Opinion: "Respect for First Nations rights could've spared us this panic over Trans Mountain" - Macleans Online - https://search-proquest-com.ezproxy.library.uvic.ca/docview/2099010264?pq-origsite=summon&accountid=14846
3. Opinion: "In the Trans Mountain feud, a B.C. First Nation paves its own path of resistance and prosperity: For the Tsleil-Waututh, real estate and development on their lands are a lucrative business - one that would be in danger if a pipeline extension goes ahead in their backyard. Here's how a nation of 500 became the legal and logistical heart of opposition to big oil" - Globe and Mail -

https://search-proquest-com.ezproxy.library.uvic.ca/docview/2382838466?pq-origsite=summon

4. Academic: “Visual Storytelling, Intergenerational Environmental Justice and Indigenous Sovereignty: Exploring Images and Stories amid a Contested Oil Pipeline Project” Spiegel, Samuel J., Sarah Thomas, Kevin O'Neill, Cassandra Brondgeest, Jen Thomas, Jiovanni Beltran, Terena Hunt, and Annalee Yassi. 2020., *International Journal of Environmental Research and Public Health* 17 (7): 2362. https://libkey.io/libraries/55/articles/378438939/full-text-file?utm_source=api_496

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**Trans-Mountain Challenge #2: Coldwater Indian Band v Canada**

The *Coldwater Indian Band v. Canada* legal challenge to the Trans Mountain expansion was another Raven supported attempt to force the courts to consider the wider impacts of the project. In this instance, the legal challenge refined not only the duty to consult, which was addressed in the *Tsleil-Waututh* decision, but also expanded on the concept of the crown's fiduciary duty to Indigneous peoples. This challenge commenced with an appeal by Coldwater Indian Band, and a cross appeal by Kinder Morgan, regarding a decision over two pipeline easements which operate on Coldwater Indian Band's reserve land. During this proceeding, the court addressed issues regarding the duty which the Minister of Indian Affairs and Northern Development had towards the Coldwater Indian Band in assigning the rights over the easements to Kinder Morgan. Coldwater had expressed in clear terms, their non support for assigning, or transferring, the right of way for use in the Trans Mountain expansion project. Initially, Coldwater challenged the ability for the Minster to transfer the land without Coldwater's support. The trial judge found that while the minister did not require absolute consent from Coldwater to grant the right of way to Kinder Morgan, they ought to reconsider until Kinder Morgan offered Coldwater better terms. This "middle ground" approach resulted

in the appeal by Coldwater, which still held that the Minister was obligated to receive consent, as well as the cross appeal by Kinder Morgan which held that the trial judge's decision was premature and the court should not get involved. The appellate court agreed with Kinder Morgan that the review process was premature. The court determined that the administrative process should be allowed to run its course before any federal court should get involved. They further determined that the subsequent decision from the minister would carry legal weight and could be reviewed at that time.

In the following 2017 appeal, the court addressed Coldwater's arguments that the crown owed them a fiduciary duty, which would require renegotiations over the terms of the easement, or reconsideration of transferring the easement in general, in light of Kinder Morgans' proposed pipeline expansion. The appellate court agreed with Coldwater Indian Band that the Government of Canada owed them a fiduciary duty, and that the terms of the easement were outdated and potentially unfair. The courts agreed that there was no indication that the minister had considered the adequacy of compensation when transferring the assignment, as well the court found that the minister did not adequately inquire into whether the assignment would impair Coldwater Indian Band's interest in the land. A decision not to address the concerns of the Coldwater Indian Band, or to adequately consider aspects that fall within the fiduciary duty, rendered the Minister's decision unreasonable. The court set aside the decision made by the Minister as a result, and ordered the decision to be reconsidered in light of the reasons expressed by the court. This had an important impact on the understanding of the fiduciary duty which the government of Canada owes to the Indigenous peoples within.

This legal challenge also presented the opportunity for the applicants in the *Tsleil-Waututh* case to further argue against the Trans Mountain expansion project. The applicants argued that the renewed consultation that began after the court's quashing of the Governor in Council's decision, remained inadequate and did not properly remedy the flaws which had emerged from the 2018 *Tsleil-Waututh* decision. The court found that the Governor in Council's decision to re-approve the pipeline was reasonable, as this time the consultation had been a two-way dialogue. Many of the matters raised by the applicants were outside the scope of the appeal, or had not been raised previously and would not be permitted in this challenge. As a result, the court had no reason to determine that the Governor in Council was acting unreasonably in determining that the pipeline was in the public interest. The court stated that it was not their place to determine the merits of the project, or to interject their opinion in the way of the Governor in Council; their role was limited to reviewing the legality of the decisions.

The result of this legal challenge was to further demonstrate the extent of the crown's fiduciary duty, as well as the extent of the crown's duty to consult. In the fiduciary duty analysis, the courts outlined some of the considerations which may weigh on the

government when considering what is required of the fiduciary duty when approving projects. When considering the duty to consult, the court in this challenge further cemented the threshold which must be met to legally fulfill the duty.

***CASE STUDIES***:

*Redmond v. British Columbia,* 2020 BCSC 561

In this case, Mr. Redmond sought an appeal from a decision by the Director of the Ministry of Forests, Lands, Natural Resources Operations and Rural Development in 2017 to disallow his application for a land tenure of Crown land to build a small run-of-river power plant. The land tenure which Mr. Redmond sought overlapped the traditional territory of several First Nations. The consultation process which the government engaged in resulted in a number of concerns, including concerns about the impact on the Cheam's religious practices on the river which the hydro plant would be situated. Mr. Redmond raised several arguments about the government's decision not to approve his project, including that the decision represented a charter violation by recognizing and prioritizing the Indigneous spiritual significance of the waterway.

The court relied on the *Coldwater* decision to justify the standard of review which they utilized in assessing the adequacy of the duty to consult, as well as the role public interest plays in assessing competing interests with the duty to consult. The court found that, as was the case in *Coldwater*, "this Court is dealing with a constitutional duty of high significance to the Cheam which engages important questions regarding the balancing of public interests and the role of all

Canadians in the ultimate constitutional objective of reconciliation." The court found that, similar to *Coldwater*, the standard of review was reasonableness, and the decision of the Director was reasonable in the circumstances. The court practiced deference in their review, stating that ensuring the duty to consult is adequately carried out, and assessing the public interest in a project is a scenario where deference should be given to the expert legislated decision makers.

Fort Chipewyan Métis Nation of Alberta, Local 125 v. Alberta, 2016 ABQB 713

This appeal was brought by the Fort Chipewyan Métis Nation of Alberta against the Ministry of Aboriginal Relations in Alberta in relation to the Teck Frontier Oil Sands Mine Project. The project was to establish an oilsands operation on the traditional territory of the Fort Chipewyan Métis Nation, and triggered the crown's duty to consult. The Chipewyan Métis Nation argued that the consultation process was inadequate, and that the project would present environmental harms which would impact their cultural practices as well as their asserted Aboriginal rights. The respondent Government of

Alberta argued that the Chipewyan Métis Nation of Alberta Local 125 did not offer adequate information about who they represented for the purpose of asserting Indigenous rights over the region, including the right to consultation.

In relying on the *Coldwater* decision, the Alberta crown argued that the duty to consult should not be subject to judicial review in this case, as the process was ongoing and that any issues with consultation could still be remedied under the legislative administrative process. The court mostly accepted the assertion of law by Alberta, and citing *Coldwater* stated that “Case law has confirmed that a review by the court of ongoing administrative processes should not be permitted, absent exceptional circumstances.” The court decided that in this instance, there were circumstances which permitted them to review the process. While the consultation process was still ongoing, the decision that the Fort Chipewyan Métis Nation were not owed the duty to consult carried legal weight and should be judicially reviewable prior to project authorization.

*Stagg v. Canada,* 2019 FC 630

This case followed an application forwarded by the Dauphin River First Nation for judicial review of a decision made by Indigenous Services Canada regarding evacuee benefits for the flooding of their reserve lands. Indigenous Services Canada determined that, upon rebuilding of the houses destroyed in the flood, that the evacuation was over and that evacuee benefits should be terminated. Many of the families in the Dauphin River First Nation had to temporarily move to Winnipeg or other regions in Manitoba, and the rebuilt houses did not sufficiently house enough families for the evacuees to return. Dauphin River First Nation submitted that when they were evacuated, Indigenous Services Canada informed them that a house would be built for every evacuated family. The government denied that such a promise was made, and held that more houses were built with lower occupancy than before the flooding. The Dauphin River First Nation submitted that the process was procedurally unfair, while the government holds that the decision is the prerogative of the government, which the court does not have the authority to review.

The court disagreed with Manitoba’s assertion that the court did not have jurisdiction to review the decision, though they did not find that the process was procedurally fair, and denied the application for appeal. In determining that the process upheld the government’s fiduciary duty, the court utilized the *Coldwater* decision to demonstrate that there are multiple conceptions of fiduciary duty which the crown may hold towards Indigenous peoples, and not all of these result in a legally cognizable duty. The fiduciary duty which was owed in this instance, similar to the *Coldwater* case, was a collective duty, and did not extend to the individual members or households of the Dauphin River First Nation. In this instance, the decision of the government took into account the collective needs of the community, and they were not required to look into the individual

circumstances. The court found that this approach was reasonable, and dismissed the appeal.

***Commentary***:

1. News: “Supreme Court rejects Indigenous groups' appeal to halt Trans Mountain expansion: The Coldwater Indian Band, Squamish Nation and Tsleil-Waututh Nation have vowed to keep fighting the expansion after the court would not hear their appeal” - Globe and Mail Online - https://search-proquest-com.ezproxy.library.uvic.ca/docview/2419493846?pq-origsite=su mmon
2. News: “Band asks court to reject oil pipeline expansion; Coldwater takes feds, Kinder Morgan to court” - Kamloops Daily News - https://search-proquest-com.ezproxy.library.uvic.ca/docview/1321291884?pq-origsite=su mmon
3. News: “Pipeline's future fuzzy after appeal ruling; Court decision notes B.C. government failed to protect interests of Coldwater Indian Band” Globe and Mail - https://go-gale-com.ezproxy.library.uvic.ca/ps/i.do?p=CPI&u=uvictoria&id=GALE%7CA5 06957325&v=2.1&it=r&sid=summon
4. Academic: Datta, Ranjan and Margot A. Hurlbert. 2019. "Pipeline Spills and Indigenous Energy Justice." Sustainability (Basel, Switzerland) 12 (1): 47. https://www-mdpi-com.ezproxy.library.uvic.ca/2071-1050/12/1/47/htm

Citing Cases:

*Gupta v. Canada (Attorney General),* 2020 FC 952

*Sagkeeng v. Manitoba (Minister of Sustainable Development)*, 2020 MBQB 83
*Calandrini v. Canada (Attorney General),* 2 018 FC 52

*Morris v. Law Society of Newfoundland and Labrador,* 2 017 NLCA 50

*Fort Chipewyan Métis Nation of Alberta Local #125 v. Alberta (Minister of Aboriginal Relations)*, 2016 ABQB 713

*Coldwater Indian Band v. Canada (Minister of Indian Affairs and Northern Development),* 2016 FC 595

*Omobude c. Canada (Ministre de la Citoyenneté et de l'Immigration),* 2015 FC 602

*Mikisew Cree First Nation v. Canada (Minister of Aboriginal Affairs and Northern Development)*,

2014 FC 1244

*Dauphin River First Nation v. Canada (Attorney General),* 2019 FC 630

*Taseko Mines Ltd. v. Canada (Minister of the Environment),* 2 017 FC 1100

*Canada (Commissioner of Competition) v. Parrish & Heimbecker, Ltd*. , 2020 Comp Trib 15

*Morin v. Enoch Cree Nation,* 2 020 FC 696

*Terrigno v. Calgary (City)*, 2021 ABQB 41

*'Namgis First Nation v. Canada (Minister of Fisheries, Oceans and Canadian Coast Guard)*, 2020 FCA 122

*Redmond v. British Columbia (Forests Lands Natural Resource Operations and Rural Development)*, 2020BCSC561

*Sipekne'katik v. Nova Scotia (Minister of Environment),* 2 020 NSSC 111 *Ohwofasa v. Canada (Minister of Citizenship and Immigration)*, 2020 FC 266

**Trans Mountain Challenge #3: Stk'emlupsemc te Secwepemc Nation v. Canada**

This legal challenge correlated with the *Tsleil-Waututh Nation* challenge of the approval of the Trans Mountain Pipeline expansion project, as well as the *Coldwater Indian Band* c hallenge. In the first Raven supported case in this series of proceedings, the court determined that the Tsleil-Waututh Nation violated a court order which allowed applicants to appeal the Governor in Council's decision on only three specific grounds. The Tsleil-Waututh Nation raised seven additional issues which were beyond the scope granted by the court. Trans Mountain argued that as a result of this breach, Tsleil-Waututh Nation should not be allowed to participate in the upcoming review of the government's consultations over the project. The court also found that the appeals which the Tsleil-Waututh Nation were attempting to raise, could not be raised in the court as a matter of procedure.

The court allowed the Tsleil-Waututh Nation to continue in the proceedings with amended issues which remained within the scope prescribed by the court. The Tsleil-Waututh Nation had been integral in the legal challenges against the Trans Mountain pipeline, and the court thought it would be in the interest of justice to allow them to proceed, in compliance with the court's orders. The court also addressed allegations of bias raised by the Tsleil-Waututh Nation, which furthered the jurisprudence regarding claims of judicial bias. In denying these claims, the court

explained the legal obligations and the procedure of the court, and set the threshold which ought to be met for claims of bias. The court addressed other procedural matters such as the role of Attorney Generals as intervenors in consolidated proceedings such as this challenge. While this case did not stop the Trans Mountain expansion project, it did allow the applicants to raise issues in relation to the duty to consult. Despite the issues raised by the applicants, the court found that the consultation process after the 2017 *Tsleil-Waututh* decision was adequate to discharge the duty to consult, and a subsequent appeal to the Supreme Court was denied without reasons.

Following the decisions of the two *Stk'emlupsemc te Secwepemc Nation v. Canada* c ases, the Upper Nicola Band and the Stk'emlupsemc te Secwepemc reached an agreement with Trans Mountain pipeline, and ceased participating in the appeals arguing against the validity of the consultation process.

***Case Studies***:

Canada v. Canadian Council for Refugees, 2021 FCA 13

This case pertains to a legal challenge against the government of Canada for their policies in assessing refugee status. There were 6 motions by 13 parties to intervene in the proceedings. These included well known groups such as the BCCLA, and the Canadian Lawyers for International Human Rights, among several others. The court weighed the case law and court procedures for admitting intervenors, and relying in part on the decision of the

*Stk'emlupsemc te Secwepemc Nation* case, determined that the motions should be dismissed. The court referenced this case in asserting that admitting late intervenors to a proceeding may bring about prejudice or procedural unfairness and can disrupt the orderly manner in which a proceeding should be conducted. The court asserted that the intervenors did not meet the test for intervenor status regardless, under rule 109 of the *Federal Court Rules*, and that the arguments which some desired to raise were outside the issues at hand in the case. The judge also quoted from the *Tsleil-Waututh Nation* decisions, where the court described the process for an intervenor as "In this Court, interveners are guests at a table already set with the food already out on the table. Interveners can comment from their perspective on what they see, smell and taste. They cannot otherwise add food to the table in any way." Raising new issues, creating procedural unfairness, and violating the rules for intervention resulted in the court rejecting all the motions.

Raincoast Conservation Foundation v. Canada, 2019 FCA 259

The Raincoast Conservation Foundation v. Canada case, which was another legal challenge to the Trans Mountain Pipeline Extension Project, was dismissed by the court relying almost entirely on the jurisprudence created in the Stk'emlupsemc te Secwepemc Nation case. The judge reiterated that the principal consideration in dismissing *Tsleil-Waututh's* request for appeal in that case was that the court in question could not appeal decisions from that court. The judge went on in this case to state that "*Ignace* [*Stk'emlupsemc te Secwepemc Nation*] could not be clearer in rejecting an implied right to appeal generally and under this statutory regime... there is no implied or express authorization of any appeal from an order of this Court to this Court", "an appeal from this Court to this Court...does not lie", and "[t]his Court never sits in appeal of itself." The court also addressed concerns by the applicants, but stated that regardless of the courts view on the matter, they must abide by the law. While the law has changed recently, placing greater emphasis on the environmental cost of pipeline projects, the law which governs the issues around Trans Mountain is still the previous enactment. The judge did state that while the court in this case cannot hear an appeal of a decision from this court, one option which remains open for continuing the challenge is available in the Supreme Court of Canada.

Coldwater First Nation v. Canada, 2020 FCA 34

This Raven Supported case, which represented a large, consolidated proceeding against the approval of the Trans Mountain Pipeline, and the government's discharge of the duty to consult, made reference to the jurisprudence and decisions in the *Stk'emlupsemc te Secwepemc* case. This proceeding built off the legal challenges presented in *Tsleil-Waututh Nation*,and*Stk'emlupsemcteSecwepemc*, aswellastheprevious*Coldwater*proceedings,and eventually resulted in the court's dismissal of the appeal. The court quoted the *Stk'emlupsemc te Secwepemc* decision to assert that the court in this instance is only able to review the decisions made by the administrative decision maker, and may not judge the situation on the merits. The court also utilized teh *Stk'emlupsemc Te Secwepemc* decisions to reiterate that the parties were instructed to focus on the decision of the Governor in Council and the standard of review, but instead opted to focus on the merits of the court decision itself. In the end, the court found that the submissions by the applicants did not take away from the reasonableness of the Governor in Councils' decision. The court found that the flaws which were present in the *Tsleil-Waututh* decision had been remedied to a degree that allowed the Governor in Council to make the decision as to whether the project was in the public interest. The court also found that many of the submissions which were raised by the applicants were beyond the scope of the court, had not been raised previously and were unable to be raised in this review, or had been previously addressed.

Commentary:

1. “First Nations file new challenge of Trans Mountain: B.C. Indigenous plaintiffs say extra consultation on pipeline expansion was flawed because 'Canada was biased'” - Globe and Mail - https://search-proquest-com.ezproxy.library.uvic.ca/docview/2254272340?pq-origsite=summon&accountid=14846
2. “Pair of First Nations in B.C. quit appeal of Trans Mountain expansion: The Trans Mountain expansion poses significant risks to endangered orcas through acoustic disturbance, vessel strikes, oil spills and cumulative effects” - Globe and Mail - https://search-proquest-com.ezproxy.library.uvic.ca/docview/2382126792?pq-origsite=summon
3. “Court allows six Trans Mountain appeals focusing on Indigenous consultation” The Canadian Press -https://search-proquest-com.ezproxy.library.uvic.ca/docview/2285409449?pq-origsite=summon&accountid=14846

Citing Cases:

*Dixon c. Groupe Banque TD*, 2021 FC 101

*Dugré c. Canada (Procureur général)*, 2021 CAF 8

*Canada (Minister of Citizenship and Immigration) v. Canadian Council for Refugees,*

2020 FCA 181

*Collins v. Canada Post Corp.,* 2020 FC 969

*Bombardier Recreational Products Inc. v. Arctic Cat, Inc.,* 2020 FC 946

*Lill c. Canada (Procureur général)*, 2020 FC 551

*Coldwater Indian Band v. Canada (Attorney General),* 2020 FCA 34

*Raincoast Conservation Foundation v. Canada (Attorney General)*, 2019 FCA 259

*Canada (Minister of Citizenship and Immigration) v. Canadian Council for Refugees,*

2021 FCA 13

*Coldwater Indian Band v. Canada (Attorney General),* 2020 FCA 34

Part Three: Drafted by Kari Dressler

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Northern Gateway Project Gitxaala Nation v. Canada

Citation: Gitxaala Nation v Canada, 2016 FCA 187, [2016] FCR 418

RAVEN Case Summary:

Gitxaala Nation v Canada clarified the standard required for the Crown's duty to consult, sending a strong signal to the Crown that mere notetaking will not satisfy the duty. Several nations, including Gitxaala Nation, applied for a judicial review of an Order for the National Energy Board to issues two certificates for the Northern Gateway Project. The Project consisted of two pipelines transporting oil and condensate on Indigenous land and Project facilities including a tank and marine terminal. Upon finding that the Order was reasonable under the principles of administrative law, turned to whether the Crown fulfilled its duty to consult with the Nations affected by the Project.

While the Court stated that the duty to consult would not require the consulted Nation's consent, there must be a reasonable satisfaction that the Crown has fulfilled their duty to consult. The court held that the extent or content of the duty of consultation is based on the relevant facts, may create a duty to accommodate, and is not a momentary duty but required throughout all stages. Based on the strong first impression of a claim to Aboriginal title, the significant potential impact on the consulted First Nations, and as the infringement likely could not be compensated, the Project required a deep consultation process.

Ultimately the question was: were reasonable efforts made to inform and consult? The court's answer: no. The Crown failed to fulfill its constitutional duty to consult. The consultation framework set out included multiple phases and the Crown was obligated to fulfill the duty to consult at each phase. During Phase IV of the Crown's consultation framework, the consultation fell well below the level of reasonable satisfaction by failing to "engage, dialogue, and grapple with the concerns expressed" by the First Nations (para. 279). The Court proceeded to evaluate the Crown's efforts in Phase IV.

Numerous issues were identified in Phase IV. The consulted Nations had expressed concerns over "arbitrarily short" timelines that made meaningful consultation difficult (para. 246). While the Nations had requested an extension and the Court found there were ample reasons for an extension to be granted, the Court found "no evidence" that the request for an extension was considered (para. 251). The related legislation, the National Energy Board Act, included a subsection that would have allowed the Governor in Council to extend the deadline in question. The disclosure of information

regarding the extent and strength of the Nation's claim comprised another failure in the consultation process. Disclosing the extent and strength of an affected First Nation's claim is a critical component of the duty to consult process, it guides the level of obligation to consult and accommodate if required and identifies the subjects that must be discussed (para. 290). Another noted deficiency in the Crown's efforts was the three instances of inaccurate information that the Nations brought to the Crown's attention and subsequently the Crown took no steps to correct. Overall, the Court found that the Crown did not engage in meaningful dialogue with the Nations but moved directly to accommodation before discussing the extent and strength of the claim affected by the project. As the Court found the Crown had failed to fulfill its duty to consult, the Order to issue the two certificates for the Northern Gateway Project was set aside.

List of Cited in Cases:

● Tsleil-Waututh Nation v Canada (National Energy Board), 2016 FCA 219 ● Link:

https://www.canlii.org/en/ca/fca/doc/2016/2016fca219/2016fca219.html?autocompleteStr=2016%20

FCA%20219&autocompletePos=1

● Tsleil-Waututh Nation v Canada (Attorney General), 2017 CAF 128 ● Link:

https://www.canlii.org/en/ca/fca/doc/2017/2017fca128/2017fca128.html?resultIndex=1&searchUrlH

ash=AAAAAQAIZ2l0eGFhbGEAAAAAAQ&offset=0

● Tsleil-Waututh Nation v Canada (Attorney General), 2018 CAF 153

● Link:
https://www.canlii.org/en/ca/fca/doc/2018/2018fca153/2018fca153.html?resultIndex=1&searchUrlH ash=AAAAAQAIZ2l0eGFhbGEAAAAAAQ&offset=9087

● Taseko Mines Limited v Canada (Environment), 2019 FCA 319

●Link:https://www.canlii.org/en/ca/fca/doc/2019/2019fca319/2019fca319.html?searchUrlHash=AAAAAAAAAAEAFTIwMTYgRkNBIDE4NyAoQ2FuTElJKQA ● Taseko Mines Limited v Canada (Environment), 2017 FC 1100

● Link:
https://www.canlii.org/en/ca/fct/doc/2017/2017fc1100/2017fc1100.html?searchUrlHash=

AAAAAAAAAAEAFTIwMTYgRkNBIDE4NyAoQ2FuTElJKQAAAAEACy8yMDE2ZmNhMTg3AQ&resultIndex=5

● Bigstone Cree Nation v Nova Gas Transmission Ltd, 2018 FCA 89 ● Link:

https://www.canlii.org/en/ca/fca/doc/2018/2018fca89/2018fca89.html?searchUrlHash=AAAAAAAAAAEAFTIwMTYgRkNBIDE4NyAoQ2FuTElJKQAAAAEACy8yMDE2ZmNhMTg3AQ&resultIndex=2

● West Moberly First Nations v British Columbia, 2018 BCSC 1835 ● Link:

https://www.canlii.org/en/bc/bcsc/doc/2018/2018bcsc1835/2018bcsc1835.html?searchUrlHash=AAAAAAAAAAEAFTIwMTYgRkNBIDE4NyAoQ2FuTElJKQAAAAEACy8yMDE2ZmNhMTg3AQ&resultI ndex=4

● Raincoast Conservation Foundation v Canada (Attorney General), [2020] 1 FCR 362 ● Link:

https://www.canlii.org/en/ca/fca/doc/2019/2019fca224/2019fca224.html?searchUrlHash=AAAAAAAAAAEAFTIwMTYgRkNBIDE4NyAoQ2FuTElJKQAAAAEACy8yMDE2ZmNhMTg3AQ&resultIndex=6

● Coldwater First Nation v Canada (Attorney General), 2020 FCA 34 ● Link:

https://www.canlii.org/en/ca/fca/doc/2020/2020fca34/2020fca34.html?searchUrlHash=AAAAAAAAAAEAFTIwMTYgRkNBIDE4NyAoQ2FuTElJKQAAAAEACy8yMDE2ZmNhMTg3AQ&resultIndex=8

● Cold Water First Nation v Canada (Attorney General), 2019 FCA 292

● Link:
https://www.canlii.org/en/ca/fca/doc/2019/2019fca292/2019fca292.html?resultIndex=1

● Sierra Club Canada Foundation v Canada (Environment and Climate Change), 2020 FC 663 ● Link:

https://www.canlii.org/en/ca/fct/doc/2020/2020fc663/2020fc663.html?searchUrlHash=AAAAAAAAAAEAFTIwMTYgRkNBIDE4NyAoQ2FuTElJKQAAAAEACy8yMDE2ZmNhMTg3AQ&resultIndex=3

● Squamish Nation v British Columbia (Environment), 2018 BCSC 844

- Link: https://www.canlii.org/en/bc/bcsc/doc/2018/2018bcsc844/2018bcsc844.html?resultIndex=1

Focus Case Narratives:

**Tsleil-Waututh Nation v Canada (Attorney General) 2018 CAF 153**

In *Tsleil-Waututh Nation*, the Nations challenged the Governor in Council's Order for the National Energy Board to issue a certificate approving the construction and expansion of the Trans Mountain pipeline system. When reviewing the Governor in Council's decision, the Federal Court of Appeal relied on Gitxaala that the standard of review is "reasonableness" (para. 206).

The Nations argued that: (1) the Board's process and findings were so flawed that the Governor in Council could not reasonably rely on the Board's report when deciding to make the Order and (2) that the Crown failed to fulfill its constitutional duty to consult. The Court found both of the Nation's arguments successful. First, the report omitted a crucial element of the project, tanker traffic. This omission amounted to a report that was so deficient, it did not satisfy the legislation's meaning of report and could not be reasonably relied on. Next, the Court relied on *Gitxaala* to determine whether the Crown fulfilled its duty to consult. The principles referenced from *Gitxaala* supported the finding that the Crown owes a duty to consult with each First Nation who may be unfavourably affected by the Project. When assessing whether the Crown fulfilled its constitutional duty to consult, the Court applied the principle from *Gitxaala* that the Crown must engage, dialogue, and grapple with the Nation's concerns (para. 599). Based on this principle, the Court found that the Crown fell short of fulfilling the *Gitxaala* principle in Phase III of the consultation process.

In consideration of the report's omission of tanker traffic and the Crown's failure to meet the consultation requirements outlined in *Gitxaala*.

**Squamish Nation v British Columbia (Environment), 2018 BCSC 844**

In *Squamish Nation*, the British Columbia Supreme Court considered a petition from the Nation for judicial review of the Minister of the Environment and Natural Gas Development's decision to issue an Environmental Assessment Certificate for the Trans Mountain Pipeline Expansion Project. Throughout the case, the Nation referenced the decision in *Gitxaala* to support the argument that the Crown's consultation was insufficient. The Nation argued that the duty to consult cannot be fulfilled due to gaps of information remaining. Further, the Nation argued that *Gitxaala* required the Crown to discuss and share its assessment of the strength and extent of the Nation's claim.

While the Court held that the Crown must share its strength and extent of claim analysis with the Nation as outlined in *Gitxaala*, the Court held that the Crown fulfilled this requirement with the *Review of Anthropological and Historical Resources* in a footnote (para. 140). The Court distinguished the conduct present in *Gitxaala*, stating that the Crown representatives grappled with the Nation's concerns of the Trans Mountain Project and considered them.

The Nation argued that during significant projects such as the pipeline expansion, the Crown cannot put off consultation after the permit has been ordered. Therefore, the information gaps required resolution before the duty to consult could be fulfilled. The Court agreed that as in *Gitxaala*, consultation cannot be postponed to the "final point in a series of decisions", however, it did not find that resolving the information gaps was required for adequate consultation (para. 167). In summary, the Court dismissed the petition, finding that the Crown's consultation was reasonable.

**Bigstone Cree Nation v Nova Gas Transmission Ltd., 2018 FCA 89**

In *Bigstone Cree Nation*, the Federal Court of Appeal heard a request for judicial review of the Governor in Council's Order to issue an environmental assessment decision and to issue a Certificate of Public Convenience and Necessity that would authorize the construction and operation of an expansion to the Nova Gas Transmission pipelines. Referencing *Gitxaala*, the Court held that the applicable standard of review for the decision was one of reasonableness and deference as the decision is based on Cabinet's considerations of policy and public interest (para. 31). After establishing the appropriate standard for review, the Court turned to the Nation's argument that the Crown's consultation was insufficient and inadequate.

To confirm that the Crown's duty to consult arose, the Crown referenced *Gitxaala* and *Haida* in conjunction that "every time the Crown has actual or constructive knowledge of the potential existence of Section 35 Rights and contemplates conduct that might adversely affect those rights" the duty to consult is triggered (para. 47). Utilizing this principle, the Crown was obliged to consult the Nation. Based on the decision in *Gitxaala*, after recognizing that the pipeline project could impact the Section 35 Rights of the Nation, the Governor in Council must ensure that the duty to consult has been fulfilled before deciding to issue the certificate. In conclusion, the Court found that the Crown fulfilled its duty to consult through reasonable efforts, including making commitments to protect the Caribou and Caribou habitat, a key concern of the Nation.

**Taseko Mines Limited v Canada (Environment), 2017 FC 1100**

In *Taseko Mines Limited v. Canada*, the applicant, Taseko Mines Limited, sought judicial review of the Governor in Council's decision to not issue an Order approving the New

Prosperity Gold-Copper Mine. The Governor in Council decided that the project's likely significant adverse environmental effects were not justified. The project in question included a mine site in the Tsilhqot'in peoples' traditional territory.

Discussing the Crown's consultation process and referencing the decision in *Gitxaala*, the Court found that post-report consultation may not be merely appropriate, but necessary (para. 89). Further, the Court stated there existed a strong argument that the *Gitxaala* requirements for the post-report consultation were not satisfied for the project. The two-way dialogue mentioned in *Gitxaala* was not present. As an example, the Court referenced how the Minister and the CEAA assured the Tsilhqot'in Nation Government that their concerns would still be considered but did not provide an indication of their intentions before releasing the decision. However, this manner was not decided in this case (para. 90). In further discussion of the duty to consult, the Court referenced *Gitxaala* when outlining the considerations that the legislation's environmental assessments should make inquiries concerning their effect on the Nation. In summary, the Court dismissed Taseko Mines Limited's application for judicial review, leaving the Governor in Council's decision to not issue an Order for the project untouched.

Commentary:

Grace Nosek, Re-imagining Indigenous Peoples' Role in Natural Resource Development Decision making: Implementing Free, Prior, and Informed Consent in Canada through Indigenous Legal Traditions

Citation: Nosek, G. (2017, February). *Re-imagining Indigenous Peoples' Role in Natural*

*Resource Development Decision making: Implementing Free, Prior, and Informed Consent in Canada through Indigenous Legal Traditions.* UBC Law Review.
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Mini-Description:

In a case study on the Northern Gateway project, Grace Nosek discusses the *Gitxaala* case and proposes arguments that can be drawn from it for incorporating free, prior, and informed consent in Canada as enshrined in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). This would expand the reasonable standard to requiring consent from Indigenous communities to fulfill the duty to consult for major developments such as the Northern Gateway project. However, free, prior, and informed consent is not directly discussed in the *Gitxaala* case, the reasonable standard for consultation in the case states that consent is not required to dismiss the duty to consult.

Matthew J. Hodgson, Pursuing a Reconciliatory Administrative Law: Aboriginal Consultation and the National Energy Board

Citation: Hodgson, M. (2017) *Pursuing a Reconciliatory Administrative Law: Aboriginal*

*Consultation and the National Energy Board*. Osgoode Hall Law. Journal 125. https://www.canlii.org/en/commentary/doc/2017CanLIIDocs3695?zoupio-debug#!fragment/zoupio-_Toc Page45/(hash:(chunk:(anchorText:zoupio-_TocPage45),notesQuery:'',scrollChunk:!n,searchQuery:/2016 fca187,searchSortBy:RELEVANCE,tab:search))

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Mini Description:

In *Pursuing a Reconciliatory Administrative Law: Aboriginal Consultation and the National Energy Board*, Matthew J. Hodgson discusses the Crown's failure to share the strength of claim assessments with the Plaintiffs in *Gitxaala* and the importance of the Crown sharing this information. Hodgson

proposes that when there is a more credibly asserted right, the Crown should undertake a higher degree of consideration and consultation (p. 166).

Hodgson writes at p. 167 :

“Although one can appreciate that the Board’s mandate does not extend to a final legal determination of the scope of the claimed right, one wonders how it is possible to evade a judgment concerning the parameters of an asserted right, given that the Board is required to evaluate the sufficiency of the proposed mitigation of impact on that right”

By failing to share this information with consulted Nations, Hodgson illustrates how concerns of transparency arise as to the degree of consideration and consultation required.

Site C Dam

Prophet River First Nation v. British Columbia (Minister of Environment)

Citation: Prophet River First Nation v British Columbia (Minister of Environment), 2015 BCSC 1682 (CanLii)

RAVEN Case Summary:

*Prophet River First Nation v. BC (Minister of Environment)* (“*Prophet River*”) regarded a petition by Treaty 8 signatories, Prophet River First Nation and West Moberly First Nations, for judicial review and quashing of the Environmental Assessment Certificate issued by the Minister to BC Hydro for the Site C Dam project. The project included building a hydroelectric dam and additional infrastructure on the Peace River south of Fort St. John in northern British Columbia. The project would affect the First Nation petitioners in particular as key areas of the project including their spiritual and cultural sites would be flooded by a new reservoir (para. 8).

The First Nations argued that the Certificate should be quashed on constitutional and administrative grounds. First, the First Nations argued that the Minister did not determine whether the dam would infringe their treaty rights and failed to determine whether the Crown satisfied its constitutional duty to consult. The First Nations argued that the project would infringe on their Treaty 8 rights and would therefore require justification under the *Sparrow* test. After establishing that there has been an infringement on a treaty right, the Sparrow test would require the Crown to prove that the infringement is justified based on a proportionality assessment requiring that the infringement is necessary to achieve the Crown’s goal, goes no further than is required to achieve the goal and that the benefits from the goal are not outweighed by the unfavourable effects on the Aboriginal interests (para. 76). Under this, the First Nations

argued that the project was not justified as current electrical resources would provide energy for British Columbia until at least 2028 (para. 76). After reviewing the relevant legislation, the Court stated that the environmental assessment process was not intended to resolve the First Nations' treaty rights-based claim, nor did the legislation intend for the Minister to decide whether an infringement of the First Nations treaty rights occurred. Based on these findings, the Court stated that the issue of whether the project infringes on the First Nations' Treaty 8 rights would have to be determined through a separate legal action. As a result, the Court found that the *Sparrow* test should not be applied in this case.

Next, the Court turned to the question of whether the Crown satisfied its duty to consult. The Court found that the Minister correctly understood the Crown's duty regarding the First Nations' rights In particular that the Crown was required to understand the degree to which the project would unfavourably affect the First Nations' treaty right to hunt, trap and fish, and to communicate this finding to the First Nations and attempt to work in good faith towards addressing the First Nations' concerns (para. 152). Based on this, the Court confirmed that a deep level of consultation was required for the environmental assessment process (para. 152). Using a reasonableness standard, the Court concluded that the Crown satisfied its constitutional duty to consult. The Court found that while the object of consultation and accommodation is reconciliation between governments and First Nations, reconciliation was not achieved in this case as the government decided the project was in the interests of the province whereas the First Nations found that there was no adequate accommodation for the significant adverse effects the project proposed (para. 160). The Court applied the notion from *Haida* that the duty to consult does not require the consent of affected First Nations.

Second, the First Nations argued based on administration law that the Ministers' decision was unreasonable and that there was a reasonable apprehension of bias on behalf of the Minister. Concerning reasonableness, the Court found that the Ministers' decision was reasonable based on the information before them and that the decision was entitled to a high degree of deference. Based on a reasonable apprehension of bias, the Court did not agree with this claim. Overall, the Court dismissed the case's petition and upheld the Ministers' decision to issue the Certificate.

List of Focus

Cited in Cases:

British Columbia Hydro and Power Authority v Boon, [2016] BCSC 355 (CanLii) • Link:

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Raincoast Conservation Foundation v Canada (Attorney General), 2019 FCA 224 (CanLII), [2020] 1 FCR 362

● Link: https://www.canlii.org/en/ca/fca/doc/2019/2019fca224/2019fca224.html?autocompleteStr=2019%20 fca%20224&autocompletePos=1

William v British Columbia (Attorney General), [2019] BCCA 112 (CanLii) ● Link:

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Xeni Gwet'in First Nations v British Columbia (Chief Inspector of Mines), 2019 BCCA 74 (CanLii)

● Link: https://www.canlii.org/en/bc/bcca/doc/2019/2019bcca74/2019bcca74.html?resultIndex=1

Case Narratives:

**Xeni Gwet'in First Nations v British Columbia (Chief Inspector of Mines), 2019 BCCA 74 (CanLii)**

In *Xeni Gwet'in First Nations v British Columbia* ("*Xeni Gwet'in First Nations*"), the Xeni Gwet'in First Nations Government along with the Tsilhqot'in Nation appeal a previous court decision, seeking judicial review of the province's approval of an exploratory drilling program by Taseko Mines Limited. The British Columbia Court of Appeal dismissed the appeal of the judicial review decision, holding that the province's decision was reasonable, and that the Government did not fail its constitutional duty to consult.

The Court referenced *Prophet River* to state that the standard of judicial review applicable in this case is one of reasonableness. Relying on *Prophet River*, the Court stated the in assessing whether the province's decision was reasonable, the Court must

consider whether the process followed in the course of consultation and accommodation was reasonable in consideration of the standard's application in previous cases (para. 52). Further referencing *Prophet River*, the Court noted factors to be considered when applying the reasonableness standard and noting that meaningful consultation in the law may include parties being unable to agree or reconcile differences including a fundamental disagreement of whether the project should be permitted to proceed. (para. 37). Ultimately, the Court finds that consultation and accommodation will not fail to meet the reasonableness standard due to impacts that are unable to be made less severe. As the case occurred in a Court of Appeal, the Court referenced *Prophet River* lastly to note that the Court's discretion is limited to determining whether the chamber judge applied the standard of reasonableness properly. In other words, the Court was not able to complete a fresh analysis and determination regarding whether the province's decision was reasonable but was only able to assess whether the chamber judge applied the law correctly.

**William v British Columbia (Attorney General), [2019] BCCA 112**

In *William v British Columbia (Attorney General)* ("*William*"), the British Columbia Court of Appeal heard an application for a stay of the province's order allowing exploratory drilling by Taseko Mines Limited to continue in Tsilhqot'in traditional territory. The Tsilhqot'in Nation holds proven hunting, trapping, and trade rights in the drilling area. The applicant, Chief Roger William on his behalf and behalf of the other members of the Xeni Gwet'in First Nations Government and the Tsilhqot'in Nation, had filed for leave to appeal a decision regarding the judicial review (2019 BCCA 74) of the province's order to the Supreme Court of Canada. While waiting to receive notice of whether the case would be allowed to appeal to the Supreme Court of Canada, Chief Roger brought this application to stop the exploratory drilling until it is decided whether the judicial review case will proceed to the Supreme Court of Canada.

The respondents in the case for the stay of the order, British Columbia, argued that the matter at hand is settled law and therefore will not likely be granted leave to appeal at the Supreme Court of Canada. They referenced *Prophet River* as a comparable case to support their argument that the matter at hand is settled. However, the Court disagrees with this argument. The Court finds *Prophet River* distinguished from the case regarding the province's decision to allow the exploratory drilling program, as *Prophet River* concerned Treaty 8 rights while the case seeking leave to appeal at the Supreme Court of Canada regards proven existing s.35 Aboriginal Rights (para. 41). The Court affirmed Chief Roger William's argument, finding that the continuance of the exploratory drilling would cause irreparable harm if the grant to stay is not allowed. Based on a finding of irreparable harm if the grant to stay is not allowed and the balance of convenience, the Court that the applicants successfully met the test for a stay of proceedings. As a result,

the approval of the exploratory drilling program on Tsilhqot'in traditional territory was halted pending the determination of the application for leave to appeal.

Commentary

Alan Hanna, Reconciliation Through Relationality in Indigenous Legal Orders

Citation: Hanna, A. (2019, March). *Reconciliation Through Relationality in Indigenous*

*Legal Orders*. Alberta Law Review.
https://www.albertalawreview.com/index.php/ALR/article/view/2524

Link: https://www.albertalawreview.com/index.php/ALR/article/view/2524

Mini-Description: Alan Hanna in Reconciliation Through Relationality in Indigenous Legal Orders discusses how the narrowing of the duty to consult to not include a veto or require consent benefits Canadian governments most. Hanna discusses how the Court in *Prophet River* and other duty to consult cases can be seen as teaching the Crown that "the standard of review for decisions to authorize projects will shift from correctness in the discharge of its duty to consult, to a standard of deference in a Minister's authorization of a project" (p. 826). Alan Hanna holds a Juris Doctor from the University of Victoria and is a Ph.D. Candidate in Law at the University of Victoria.

Rachel Gutman, The Stories We Tell: Site-C, Treaty 8, and the Duty to Consult and Accommodate

Citation: Gutman, R. (2018). *The Stories We Tell: Site-C, Treaty 8, and the Duty to Consult and Accommodate*. 23 Appeal
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EJhcCWfKWr1m7SADKeUgCElAJQCiAGVsA1AIIA5AMK2RpMACNoUnYhISA

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EJhcCWfKWr1m7SADKeUgCElAJQCiAGVsA1AIIA5AMK2RpMACNoUnYhISA

Mini-Description: Rachel Gutman in the Appeal: Review of Current Law and Law Reform argues that the duty to consult requires expansion to include a determination of infringement. Gutman discusses the Court's treatment of the written text of Treaty 8 in *Prophet River* and the First Nation signatories' understanding of the meaning and scope of the rights in Treaty 8 (para 10). Further, Gutman states that the Court's holding that the issue of treaty infringement is best considered in a separate action as suggesting that "the burden lies with the

impacted Treaty Nation to ensure that the Crown does not infringe constitutionally enshrined rights" (para. 46). Gutman discusses the implications that a separate legal action would carry, considering that no court has ruled on a case where a treaty beneficiary alleges the taking up of land has infringed or is about to infringe a treat right, that the lengthy nature of court action will likely mean that the project will be far into construction and that the determination of infringement would be made after irrevocable harm to treaty rights has occurred (para. 61). Gutman critiques the court in *Prophet River*, stating that the court relies on an interpretation of the text of Treaty 8 that fails to consider the First Nation signatories' perspectives.

West Moberly First Nations v. British Columbia

Citation: West Moberly First Nations v British Columbia, 2018 BCSC 1835

RAVEN Case Summary:

In *West Moberly v. British Columbia* ("*West Moberly*"), the British Columbia Supreme Court heard West Moberly First Nations' application for an interlocutory injunction. If granted, the interlocutory injunction would halt the construction of the Site C Dam while the applicants wait for the infringement claim to reach trial. Three major questions were confronted: (1) whether West Moberly First Nation has a serious question to be tried in their appeal case, (2) whether there is a risk that West Moberly First Nation will suffer irreparable harm if no injunction is granted, and (3) whether the balance of convenience favours an injunction.

On the issue of whether West Moberly First Nation has a serious question to be tried, the Court found that they did. While the Court stated that this does not mean the case had a clear path to success, the claim satisfies the requirement outlined in the previous case law that the claim must not be "obviously frivolous" (para. 253). Having found that the claim has a serious issue to be tried, the Court discussed how West Moberly First Nations might successfully prove their claim. The Court noted that the Crown's execution of the "taking up" power in Treaty 8 cannot be used if it leaves West Moberly

First Nation with “no meaningful way to exercise its treaty rights” (para. 258). While the Court discusses the infringement claim’s strength, this is not a matter that the Court decides in this case as it is left to be evaluated at trial. In summary, the Court’s first question in the injunction application was affirmed, West Moberly First Nations advances a serious question.

Next, the Court turns to the question of whether West Moberly First Nations will suffer irreparable harm if neither the permanent nor interlocutory injunction is granted. The Court found that the preparatory work at Site C Dam that would occur before the infringement claim trial would indeed have the potential to cause irreparable harm to West Moberly’s Treaty 8 rights (para. 284). However, the Court does note that it finds the potential for harm before the flooding of the project area would be on a more “modest scale” (para. 284). Part of the irreparable harm that West Moberly First Nations pointed to was the clearing of trees and the destruction of wildlife habitat. While the respondents, British Columbia, argued that the trees would grow back, the Court stated that it agreed with West Moberly First Nations that this could still be irreparable harm even if the trees would grow back as they may be a part of an essential habitat for wildlife. Further, the Court noted that there is evidence that the irreparable harm could take form in harming the fish habitat and construction impacts on archaeological sites (para. 285). For the second question, the Court found that West Moberly First Nations established that a risk of irreparable harm existed if the injunction was not granted.

For the third question, the Court held that the balance of convenience did not favour an injunction. As the Court did not believe the infringement claim to be particularly strong, the Court limited the weight it gave to protecting its interest (para. 288). Based on the large financial expenditure to date on the project and the impact the injunction would have on the project, the Court found that the balance of inconvenience did not favour granting the injunction (para. 344). The Court concluded by directing the parties to the infringement trial to agree on a schedule to have the trial finish in mid-2023.

List of Cited in Cases:

- Nuchatlaht v. British Columbia, 2018 BCSC 796 (CanLii)

- Link:
https://www.canlii.org/en/bc/bcsc/doc/2018/2018bcsc796/2018bcsc796.html?autocompleteStr=201 8%20bcsc%20796&autocompletePos=1

- Yahey v British Columbia, 2018 BCSC 829 (CanLii) - Link:

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ey%20v.%20British%20Columbia%20&autocompletePos=9

● CMC Engineering and Management Ltd v Pinnacle Renewable Energy Inc, 2018 BCSC 2457 (CanLii)

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● British Columbia (Director of Civil Forfeiture) v Angel Acres Recreation and Festival Property Ltd, 2019

BCSC 275

● Link:

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● Can-West Development Ltd v Parmar, 2019 BCSC 1573 ● Link:

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● Dickson v Vuntut Gwitchin First Nation, 2020 YKSC 22 ● Link:

https://www.canlii.org/en/yk/yksc/doc/2020/2020yksc22/2020yksc22.html?autocompleteStr=2020% 20yksc%2022&autocompletePos=1

Focus Case Narratives:

**Nuchatlaht v. British Columbia, 2018 BCSC 796**

In *Nuchatlaht v. British Columbia* ("*Nuchatlaht*"), the British Columbia Supreme Court reviewed a demand from the province for the particulars on which the plaintiffs, Nuchatlaht Nation, will rely on in their claim. In the claim, Nuchatlaht Nation is seeking to have Aboriginal title recognized in the claim area and to have it declared that the Forest Act and the Park Act do not apply in the claim area. The case references *West Moberly* when discussing the use of

particulars in related cases, such as the treat violation case in respect to Site C Dam (para 12). The Court cited Choi J. in *West Moberly* several times to discuss the approach courts should take with Aboriginal rights pleadings. In it, the Court concluded that Choi J's statement that in light of the importance of reconciliation to all peoples of Canada, the court should not take an overly technical approach to these pleadings (para. 12). Further, the Court referenced the particulars ordered in *West Moberly* as outlining the proper particulars to be provided in an Aboriginal title case. The Court noted that as in *West Moberly*, evidence and facts regarding context do not need to be provided (para. 15). As a result, the court ordered for the plaintiffs, within 60 days to provide particulars of the material facts on which they intend to rely to prove their claim. However, the Court did not order Nuchatlaht Nation to provide particulars for certain demands that fell into the category of exclusion in *West Moberly*, evidence and not facts (para. 21). In summary, the Court relied on *West Moberly* to define the type of particulars that must be provided in Aboriginal title claims.

### Yahey v British Columbia, 2018 BCSC 829

In *Yahey v. British Columbia* ("*Yahey*"), the British Columbia Supreme Court assessed an application from the Blueberry River First Nations for authorization to use interactive Google Earth as an aid to witnesses. Also, the province brought an application to declare an expert report inadmissible on relevance and reliability grounds. Both of the applications are based on a treaty infringement brought by the Blueberry River First Nations against the province.

The Blueberry First Nations' application was allowed in part. The Court found that an interactive use of Google Earth would raise procedural issues, however, a static version could mitigate those issues. In consideration of the expert report in question, the Court found that it was admissible but that commentary by the witness beyond their

area of expertise was excluded. The Province reference *West Moberly* regarding the expert report. The Province argued that the document is inadmissible because it "does nothing more than comment on the opinions of other unidentified individuals, as was the case in *West Moberly*" (para 50). Further, the Province relied on *West Moberly* that the report was inadmissible due to the authors being unknown, referencing *West Moberly* that it makes the examination inherently difficult (para. 50). However, Blueberry River First Nations argued that the report should be distinguished from that in *West Moberly* as the expert conducted his own independent analysis and reached his own conclusion, not simply adopt another's opinion (para. 51). The Nation referenced the requirement in *West Moberly* that an expert's opinion must be the result of independent analysis to be admissible. The court agreed with Blueberry River First Nations that the report satisfied

the requirement in *West Moberly*, therefore, finding the report admissible less the commentary beyond the expert's area of expertise.