

THE *WII'LITSWX* CASE¹:

RECOGNITION AS THE FOUNDATION FOR RECONCILIATION

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A. Introduction

On August 21, 2008, Madame Justice Neilson (formerly of the BC Supreme Court and now Justice of the BC Court of Appeal) rendered a groundbreaking decision in *Wii'litswx v. British Columbia (Minister of Forests)*. Her decision clarifies and advances the law on consultation and accommodation in several ways, including providing the first clear statement by a Canadian court that reconciliation, of which consultation and accommodation are parts, is premised on recognition:

The process of consultation and accommodation is directed toward the ultimate goal of reconciliation of ... aboriginal rights with Crown sovereignty. In that process, the honour of the Crown requires it to recognize and acknowledge the distinctive features of aboriginal societies, since it is those features that must be reconciled with Crown sovereignty (para. 7).

Wii'litswx is the latest of three recent BC Supreme Court cases in which the Gitanyow Hereditary Chiefs have successfully challenged the Minister of Forests and Range for failing to

¹ *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1139 [*Wii'litswx*].

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meaningfully consult and reasonably accommodate their aboriginal rights prior to making forestry management/exploitation decisions affecting those rights.³

In *Wii'litswx*, the Gitanyow sought judicial review in regard to a decision by the Director of the Ministry of Forests [**Director**] to approve six Forest Licence Replacements [**Replacement Decision**], each covering a portion of Gitanyow Territory for a term of 15 years. Since the Crown and Gitanyow had consulted for roughly 17 months prior to the Replacement Decision, the dispute centered not on whether there had been any consultation but on whether the consultation and proposed accommodation were adequate.

Throughout the consultation process, the Gitanyow asked the Crown to:

- incorporate recognition of their rights and title into the licence replacements;
- ensure the sustainability of the forest and, in consequence, the Gitanyow way of life through adequate reforestation and fulfillment of silviculture obligations;
- implement or otherwise give effect to their joint Land Use Plan; and
- ensure to the Gitanyow a fair share of the wealth generated by forest harvesting in Gitanyow Territory.

Madame Justice Neilson agreed with the Gitanyow Hereditary Chiefs that the Minister's duty to consult and accommodate extended to all of the foregoing matters.

Wii'litswx is a significant advance in the law on consultation and accommodation specifically and Section 35 jurisprudence generally. It is a tribute to Gitanyow, their vision and their dedication. But just as it would be a mistake to see *Wii'litswx* as only a Gitanyow decision, of no legal import for other indigenous communities, so too it would be a mistake to believe its principles *in toto* are directly applicable to every First Nation-Crown consultation. The Gitanyow had laid the foundation for the *Wii'litswx* decision in previous litigation and in previous consultation and negotiations with the Crown. Other Nations who are considering a similar evolution of their work should keep these matters in mind.

³ The two earlier decisions are *Gwasslam #1*, supra note 2, and *Gwasslam #2*, supra note 2.

It is significant in this decision case that:

1. the BC Supreme Court had already found that the Gitanyow have a good *prima facie* case of title and a strong *prima facie* case of aboriginal rights;
2. the evidence established that the Gitanyow have a strong claim that their Wilp system is integral to Gitanyow way of life; and
3. the Crown had a track record of failing over several decades to fulfill its constitutional obligations to Gitanyow in its forestry and planning decisions in their territory.

Wii'litswx contains the first clear statement by a Canadian judge that reconciliation, of which consultation and accommodation are parts, is premised on recognition. In the focus on reconciliation as a fundamental purpose of Section 35 of the *Constitution Act, 1982* in the aftermath of the Supreme Court of Canada decision in *R. v. Van der Peet*, the Crown overlooked the basic point that the *reconciliation* of aboriginal and non-aboriginal peoples is *the goal*, the *recognition and affirmation of aboriginal and treaty rights, the means* to the goal.⁴ Reconciliation is built upon recognition affirmation. This is why the Court calls Section 35 “the framework for reconciliation”. *Wii'litswx* restores this foundational principle.

The significance of Madame Justice Neilson’s finding that “the Wilp are an integral and defining feature of Gitanyow’s society” (para. 222) cannot be overstated. In effect, she found that the Gitanyow have a strong *prima facie* claim to an aboriginal right to their Wilp system – their social, political, and governing structure.

In *Van der Peet*, the Supreme Court of Canada set the test for aboriginal rights as being a question of whether the right claimed is integral to the distinctive culture of the aboriginal claimant. If it is integral to the distinctive culture of the aboriginal claimant, it is an aboriginal right. Since the Gitanyow have a strong *prima facie* case that the Wilp system is, as found by

⁴ *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at pars. 31 & 36

Madame Justice Neilson, integral to Gitanyow culture, it merits, she goes on to say, “the protection of s. 35 of the *Constitution Act*.” This means that, given the restored notion of reconciliation, the Crown has a duty to *recognize* and *affirm* the Gitanyow Wilp system as part of its duty to accommodate and thus reconcile Gitanyow’s prior occupation, social organization, and sovereignty with the Crown’s asserted sovereignty.

Madam Justice Neilson likely had Gitanyow’s Wilp system in mind near the beginning of her decision when she paraphrased *Van der Peet*:

Thus, the court’s approach to the Crown’s s. 35 obligations is informed by the unique nature of the constitutional rights that this provision is designed to protect. As Lamer C.J.C. explained in *Vanderpeet*, s. 35 rights are different from Charter rights as they are held solely by aboriginal members of Canadian society. They arise from the existence of distinctive aboriginal communities that occupied the land for centuries before the arrival of Europeans (paras. 19 and 33). **Aboriginal rights arise not only from the prior occupation of land, but also from the prior social organization and distinctive cultures of aboriginal peoples who occupied that land** (para. 74). The process of consultation and accommodation is directed toward the ultimate goal of reconciliation of those aboriginal rights with Crown sovereignty. **In that process, the honour of the Crown requires it to recognize and acknowledge the distinctive features of aboriginal societies, since it is those features that must be reconciled with Crown sovereignty** (para. 57, emphasis).

Gitanyow’s Wilp system expresses their prior social organization. In short, Gitanyow’s Wilp system *is* their prior social organization. Gitanyow’s Wilp system also defines their collective identity and way of life. Or, as Madam Justice Neilson found, it is “an integral and defining feature of Gitanyow’s society.” Thus, the aboriginal rights that arise from their prior social organization and distinctive culture arise from their Wilp System.

Madam Justice Neilson apparently had in mind those aboriginal rights that arise from Gitanyow’s Wilp-based culture when she went on to say that Section 35 protects “the Wilp system *and the related aboriginal rights*... (para. 222).” As possible examples of those Wilp-related rights, her decision mentions governance (para. 21), management (paras. 22 & 26), Gitanyow Ayookw or law (para. 26), and stewardship (para. 150).

The case of Ayookw or Gitanyow law is significant. Since at least *Van der Peet*, the Supreme Court of Canada has expressly maintained that aboriginal people's pre-existing laws are, subject to certain qualification not relevant here, part of the common law and thus now protected by Section 35.⁵

The Gitanyow Wilp system is inseparable from their Ayookw. Their Ayookw has a constitutive and therefore constitutional status and function for the Gitanyow. Together with their Wilp system, their Ayookw is "an integral and defining feature of Gitanyow's society." Genuine recognition and affirmation of the Wilp system requires recognition and affirmation of the Ayookw.

A. Evolution of Recognition of Gitanyow Rights and Title

In *Gwasslam #1*, Mr. Justice Tysoe provided a preliminary assessment of the Gitanyow's claims for aboriginal rights and title. Based on the evidence put forward, he found that the Gitanyow have a strong *prima facie* case of aboriginal rights and a good *prima facie* case for aboriginal title with respect to at least part of the area claimed. Two years later in *Gwasslam #2*, Mr. Justice Tysoe reaffirmed his assessment of the strength of the Gitanyow claim and relied upon his earlier decision. He also found that, notwithstanding his first ruling, the Minister of Forests and Range had failed to properly accommodate the Gitanyow.

In August 2006 the Gitanyow entered into a Gitanyow Forestry Agreement [GFA] which incorporated a number of elements over and above the standard Forest and Range Opportunities.

In the GFA, British Columbia committed to recognition of the strength of the Gitanyow's rights and title as found by Mr. Justice Tysoe. As Justice Neilson found:

Section 1 of the GFA deals with recognition of Gitanyow's interests and rights and states in part:

⁵ See for example, *Van der Peet* at paras. 173, 247-249, 255, 263, & 268-269; *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911 at paras. 9-10, 62, 114 & 143.

1.1 British Columbia acknowledges that Justice Tysoe of British Columbia Supreme Court has found that Gitanyow have a good prima facie claim of aboriginal title and a strong prima facie claim of aboriginal rights to at least part of the Traditional Territory.

1.2 British Columbia recognizes that Gitanyow's Aboriginal Interests are linked to Gitanyow's good prima facie claim of aboriginal title and strong prima facie claim of aboriginal rights.

1.3 British Columbia recognizes that the historic and contemporary use and stewardship of land and resources by Gitanyow are integral to the maintenance of Gitanyow society, governance and economy within the Traditional Territory.

1.4 British Columbia recognizes that in the absence of a treaty that defines the responsibilities and rights of the Parties, its duty to consult and to seek workable accommodation of Gitanyow's Aboriginal Interests within the Traditional Territory is an ongoing duty.

1.5 British Columbia acknowledges that the Gitanyow Simgigyet represent the Huwilp.⁶

It is in this context where the BC Supreme Court already confirmed the strength of claim with respect to Gitanyow aboriginal rights and title and the Minister of Forests had signed an agreement with the Gitanyow confirming the recognition of the strength of claim that Madame Justice Neilson considered the conduct of the Director.

The GFA specifically excluded from the agreement and its accommodation, decisions such as the proposed Forest Licence Replacement Decision which were the decisions addressed in *Wii'llitswx*. The Gitanyow requested the Director to give the same recognition explicitly in the Forest Licence Replacements at the time of the replacement as well as the recognition of the Wilp system and the territories.

⁶ *Wii'llitswx*, at para. 62.

Madame Justice Neilson summarized the evidence of the Gitanyow Wilp system:

Gitanyow provided this historical background, which was not challenged by the Crown. Gitanyow is organized into eight matrilineal units, collectively called the Huwilp, and individually called Wilps, or Houses. Each Wilp has its own territory, and these collectively form Gitanyow traditional territory. The Huwilp are the social, political, and governing units of Gitanyow. They hold and exercise rights and title to the Gitanyow traditional territory on behalf of the Gitanyow people. Every Gitanyow person belongs to a Wilp. By virtue of this membership, each person has rights to the territory and resources owned by his or her Wilp, under the direction of the Hereditary Chiefs of each Wilp.

Each Wilp is identified in part by a unique Ayuuk, or crest, and Getimgan, or totem poles. These crests and totem poles demonstrate each Wilp's relationship to its territories. Each Wilp has a Hereditary Chief, who holds daxgyet, or power and authority of the Wilp, over its territories. The Hereditary Chiefs traditionally exercised their daxgyet through the management of their Wilp's lands and resources, and demonstrated their power and authority in feasting, gift-giving, and maintenance of their crests through the raising of totem poles.

There is evidence of Gitanyow occupation and use of resources on Gitanyow traditional territory since well before the arrival of the Europeans. This has been documented by the Gitanyow Adaawk, or oral histories, as well as anthropological papers based on information from Gitanyow Chiefs and Elders, and other authoritative research. Gitanyow's traditional uses of its territory have included fishing, hunting, habitation, trapping, worship and gathering resources for food, medicinal, cultural and ceremonial purposes. Each Wilp traditionally built cabins throughout its territory to facilitate access to its lands and resources.⁷

In the litigation history of the efforts by Gitanyow to seek recognition, it has become very clear that even with judicial recognition, at least prior to Justice Neilson's decision, the nature of recognition by the Crown's representation was minimized. As a result of the failure to give proper recognition to the Gitanyow there was a failure to address an appropriate accommodation.

The Gitanyow's relationship to their territory and resources is defined by the Wilp system. The Crown's failure to recognize this relationship led the Crown to continue its forest planning decisions with no regard for their effects on the Gitanyow's distinctive way of life. This was a disregard of its constitutional duty to recognize and affirm Gitanyow's way of life.

⁷ *Wii'litswx* (supra) at paras. 21-23

Accordingly, the Gitanyow asked the Crown to recognize their Wilp system and to give effect to its recognition at the Ministry's strategic planning level by including a map and description of the Wilp territories overlapping the Forest Licence in each of the replacement licences.

B. Adverse Cumulative Impacts on Gitanyow Territory

Lacking clear judicial guidance, up to now, the Crown has found it all too easy to consult and accommodate without recognizing and affirming the aboriginal rights of the aboriginal peoples they are consulting. In consequence, what the Crown offers by way of accommodation seldom reflects the rights at stake.

In an effort to reach an appropriate accommodation, the Gitanyow continue to seek a commitment from the Minister to reverse the effects of years of over harvesting and unfulfilled silviculture obligations which are devastating to their ability to exercise their aboriginal rights on Gitanyow Territory.

Gitanyow's concerns are longstanding. They had previously been acknowledged by Mr. Justice Tysoe in *Gwasslam #1* and *#2*.⁸ In the latter decision, he found that even two years after his first decision, the Crown had still not accommodated Gitanyow with respect to unfulfilled silviculture obligations. Subsequent to *Gwasslam #2*, the Ministry committed \$1 million to address reforestation and silviculture obligations. Although far short of the full cost of outstanding silviculture obligations in Gitanyow Territory, the Gitanyow acknowledged that it was a start.

Because their way of life is intertwined with the fate of the forest resources, these effects undermine the sustainability, not only of timber resources, but also of Gitanyow access to all resources and their social structure including the Wilp system within Gitanyow Territory. Madam Justice Neilson summed up the impact on the Gitanyow:

⁸ *Gwasslam #2* at paras 58-63

The Crown, through the MoF and its predecessors, has permitted logging on Gitanyow traditional territory for many years under varying regimes. Gitanyow's rights to the timber resources on its traditional territory has been a longstanding source of contention between the parties. The precise amount of timber that has been removed from the areas covered by Gitanyow traditional territory is disputed. **Nevertheless, there is no question that substantial logging and road building have occurred on those lands, and that these activities have had a significant impact on the sustainability of timber resources, and on other aspects of Gitanyow tradition and culture.** A Landscape Unit Plan developed for Gitanyow Traditional Territory in 2005 described this:

In the past several decades, clearcut timber harvesting operations have impacted much of Gitanyow lands, resulting in a loss of numerous traditional use sites, damaging or altering many areas where traditional uses were conducted, and converting structurally diverse mature and old growth forests to structurally simple young forests. **As a result of the conversion from mature and old growth forests to young growth forest, large areas of habitats required to support plants, birds, fish, animals that Gitanyow Huwilp members traditionally used for sustenance and cultural purposes have been lost to Gitanyow use for many decades into the future. Therefore, on those lands, the traditional use can no longer be conducted.** Gitanyow Huwilp members are concerned that timber harvesting will continue to alter the forest and stream habitats, thereby changing forest conditions required to produce the plants, animals, birds, and fish that are necessary for Gitanyow traditional uses.

Logging activity has impacted other aspects of Gitanyow culture as well. It has destroyed the Wilp cabins. Removal of resources has prevented the Hereditary Chiefs from carrying out their duties under Gitanyow Ayookxw, or law, to manage their Wilp territories and resources to ensure future sustainability. As well, they have been unable to draw on these resources to maintain their Wilp culture and traditional activities, and instead must use personal funds for these purposes. Gitanyow say that this has caused not only financial hardship, but pain and shame among its people.⁹ (emphasis added)

In the consultation on the proposed Forest Licence Replacements, the Gitanyow sought to have the Director explicitly ensure within the Forest Licence Replacements, that there would be serious consequences for the failure to address both the inherited outstanding silviculture obligations and new silviculture obligations.

⁹ *Wii'litswx* at pars 25-26

The Gitanyow proposed that silviculture deposits be required from the licensees in order to ensure that the silviculture obligations would be fulfilled at last. The Director rejected this approach in his decision.

C. Gitanyow Land Use Planning

By the time of the Replacement Decision in late February 2007, the Gitanyow were well advanced in the Joint Land Use Planning process. In summer, 2005, a draft Landscape Unit Plan [LUP] for the Cranberry/Kispiox Timber Supply Area was completed. Gitanyow and the Crown began to develop a Joint Sustainable Resource Management Plan [SRMP] for each of the Cranberry/Kispiox and the Nass timber supply areas and thus cover the whole of Gitanyow Territory.

Gitanyow's ultimate goal remains to ensure that the Gitanyow Land Use Plan is incorporated into a Joint Land Use Plan and that Joint Land Use Plan is given legislative force thereby binding other users of the lands and resources within the Gitanyow Territory.

Madam Justice Neilson described the Gitanyow Land Use Plan and explained why the Gitanyow considered the completion of the Land Use Plan as a vital element in accommodation and recognition:

Representatives of the MoF and Gitanyow participated in the plans to develop a landscape unit plan ("LUP") for the Cranberry/Kispiox TSA. The MoF retained a consultant to prepare a draft LUP, which was completed in the summer of 2005. This draft described the intent of the LUP as follows:

- To provide long-term sustainability of ecological resources.
- To accommodate Gitanyow cultural and heritage values and Gitanyow interests and plans for their future use of their territories.
- To provide for continued resource use and extraction in locations and at a rate that will sustain all forest resources at the landscape level.

This draft LUP considered the individual Wilp territories to be planning subunits. It documented and mapped the interests, knowledge, cultural and heritage sites, and practices for each individual Wilp. It envisaged developing management

objectives for Gitanyow cultural heritage resources and uses of the land, and for forestry resources, and ultimately designing a forest eco-system network that could compliment Gitanyow cultural values and achieve integrated management objectives.¹⁰

After the Replacement Decision, some licensees had agreed to voluntarily comply with the Land Use Plan in the development of their Forest Stewardship Plans. However, given the troubled history of failure to protect lands and resources within Gitanyow Territory, and the very significant cumulative impacts, the Gitanyow believed that it was not sufficient to base the protection of Gitanyow rights on “voluntary compliance” over fifteen years. Thus, the Gitanyow asked the Crown either to give legislative effect to the LUP prior to approving the Forest Licence Replacements or, at a minimum, to ensure that the replacement licences were specifically subject to the Land Use Plan as a current condition of those licences.

The Director rejected both Gitanyow proposals for accommodation.

For the Gitanyow, however, the proper recognition of the strength of claim of their rights and title and the common knowledge to both the Ministry and Gitanyow of the widespread cumulative impacts on their territory to the conclusion that the existing system of voluntary compliance certainly is not sufficient to protect Gitanyow rights.

D. The “Inescapable Economic Component” of Gitanyow’s Claim of Aboriginal Title

In *Delgamuukw*, the Supreme Court of Canada said that “aboriginal title ... has an inescapably economic aspect, particularly when one takes into account the modern uses to which lands held pursuant to aboriginal title can be put (para. 169).” For this reason, the Court explained, “[i]n keeping with the duty of honour and good faith on the Crown, fair compensation will ordinarily be required when aboriginal title is infringed (para. 169).” Compensation may also be required when other aboriginal rights are infringed.¹¹

¹⁰ *Wii’litswx* (supra) at para. 50-51

¹¹ See, for example, *R. v. Gladstone*, [1996] 2 S.C.R. 723, at para. 64.

Based upon Mr. Justice Tysoe's preliminary assessment of the strength of Gitanyow's title and rights claims in *Gwasslam #1*, Gitanyow and the Ministry entered into negotiations aimed at reaching an agreement on, among other things, the interim accommodation of the economic aspect of Gitanyow's title and rights with Crown/third party forestry development within their territory for a period of five years. The negotiations were at an impasse when Justice Tysoe delivered his judgment in *Gwasslam #2*.

At that time, Gitanyow was seeking revenue sharing reflective of their title and rights, the strength of their claims, and the seriousness of the adverse impacts on their title and rights and thus based on the volume of timber harvested in their territory. The Minister was sticking to his policy of revenue sharing based on per capita Band membership. Although Justice Tysoe recognized that Gitanyow's position on revenue sharing was "more theoretically logical," he also appreciated the fact that the Province, having at last established a system of compensation, was reluctant to deviate (para. 57). Rather than settle the issue, he urged the parties to resume negotiations of an Interim Accommodation Agreement with the benefit of his Reasons and the guidance of the then-recently released decisions of the Supreme Court of Canada¹².

Almost two years later in August 2006, Gitanyow and the Ministry concluded the GFA. The parties reached an interim accommodation on revenue sharing. Gitanyow accepted a share of forest revenues on a Band membership, per capita basis for a period of 5 years and the Minister of Forests committed to recalculate the amount and apply it retroactively should the parties agree to other eligibility criteria; to establish a working group to examine alternative revenue sharing options, with Gitanyow, having an opportunity to participate and to work with the First Nations Leadership Council to develop new approaches to revenue sharing under the New Relationship, with Gitanyow having the right to opt into such approaches as they become available.

At the time when the Gitanyow Forestry Agreement was finalized in August 2006, consultation on the proposed Forest Licence Replacements was still ongoing. The GFA specifically excluded consultation on the proposed Forest Licence Replacements.

¹² *Haida Nation v. British Columbia, Error! Main Document Only.*[2004] 3 S.C.R. 511; *Taku River Tlingit First Nation v. British Columbia, Error! Main Document Only.*[2004] 3 S.C.R. 550

Due to the magnitude of the infringements associated with a Crown decision to replace six forest licences for terms of 15 years - a decision to authorize the ongoing extraction of forest resource in limited supply - the Gitanyow pressed for a fair share of the revenue generated as part of the Replacement Decision. The Gitanyow sought economic accommodation reflective of their title and rights (including their Wilp system), the strength of their claims, and the seriousness of the adverse impacts on their title and rights. Accordingly, they asked for revenue sharing based on the volume of timber harvested from their territory.

E. Minister's Failure to Accommodate in the Replacement Decision

The Ministry's response to Gitanyow's concerns and requests, and thus its accommodation offer, remained essentially the same over the 18-month-long consultation process. Most significantly in the final six months from August 28, 2006, when the Director first related to Gitanyow the Ministry's proposals for dealing with their concerns including revenue sharing, up to February 28, 2007, when the Replacement Decision was made, there was no substantial change in the Director's response.¹³

The accommodation offered by the Ministry at the end of the consultation process in February 2007 was essentially the same as the accommodation initially offered in August 2006. During those seven months, and despite considerable effort by Gitanyow to come forward with alternate proposals to address an appropriate accommodation on all of these issues, the Director remained adamant and refused to amend its proposals in most respects. Justice Neilson found that "consultation . . . produced no economic accommodation for Gitanyow beyond the payments previously negotiated in the GFA".¹⁴

In effect, the Director's ignoring of the Gitanyow's efforts to resolve these matters after August 2006 failed to recognize the strength of Gitanyow title and rights including the Wilp system, failed to reflect the strength of Gitanyow's claim notwithstanding the decision of Justice

¹³ *Wii'litswx* (supra) at paras. 196-198

¹⁴ *Wii'litswx* (supra) at para. 213

Tysoe, and failed to reflect the seriousness of the potential infringements over the next 15 years in light of the historic over-harvesting within the Gitanyow Territory of forest resources.

1. Recognition

In response to Gitanyow's request for the recognition of their aboriginal title and rights, including their Wilp system and territories, in the Forest Licence Replacements, the Director refused to incorporate recognition of the Wilp system and territories into the licences for unexplained "practical reasons". At most, he was willing to advise licensees of Wilp territorial boundaries in the course of subsequent operational planning.

Justice Neilson found that the Director "unreasonably minimized the strength of Gitanyow's claim by placing too much weight on the fact that it is a claim of aboriginal title . . . [not] formally proven, instead of recognizing that the context for his assessment was the strength of asserted, rather than established, claims".¹⁵

The Director was not prepared to go beyond what had been agreed in August, 2006, and relied on the GFA as the basis of accommodation with respect to the Forest Licence Replacements. This was directly contrary not only to the intent of the parties at the time of the GFA but also to the express language in the GFA.¹⁶

2. Silviculture Obligations

The Court found that the Director was aware of the concerns regarding silviculture liabilities as he himself stated "the current state of silviculture liabilities on a number of the licences is in question."¹⁷ The Court then went on to find that "the Crown did not find any accommodation with respect to Gitanyow's silviculture concerns beyond the GFA".¹⁸

¹⁵ *Wii'litswx* (supra) at para. 156

¹⁶ *Wii'litswx* (supra) at paras. 94, 225, 226, 247.

¹⁷ *Wii'litswx* (supra) at para. 203

¹⁸ *Wii'litswx* (supra) at par. 206

Although the Director ultimately acknowledged that “the current state of silviculture liabilities on a number of the licences is in question,” he was satisfied with the Minister’s efforts to work with licensees to develop remedial plans. He assured Gitanyow that if these remedial actions were not effective, the Ministry would carry out further compliance and enforcement action, which could lead to suspension or cancellation of the replacement forest licences. There has never been cancellation of a licence by the Minister.

3. Gitanyow Land Use Plan [“LUP”]

The Director refused to incorporate the Gitanyow LUP into the Forest Licence Replacements or otherwise make the licensees subject to the LUP, saying that the LUP would first have to be given legislative status. Instead, he offered to include a statement in the cover letter to the licensees advising them of the LUP and asking them to work with the Gitanyow in preparing their operational plans, the latter being something already promised in the Gitanyow Forestry Agreement (4.5). Aside from this, the Director basically restated the Minister’s commitments in the GFA to have the Chief Forester utilize the LUP in future timber supply reviews (9.11) and to move the LUP process forward to implementation (4.1-4.4 & 6.1). In other words, the Director fully relied on the GFA to address the accommodation of Gitanyow regarding the LUP, notwithstanding that the Minister had agreed that the GFA was not an accommodation with respect to the Replacement Decision.

In this context it is no surprise that the Court found that the Director “added nothing substantial to the Crown’s pre-existing commitments in section 4 of the GFA”.¹⁹ This incorporation of the Gitanyow LUP is an issue that Justice Neilson felt she could not address because there was not a finalized LUP. However, she did find that the 15-year period for the

¹⁹ *Wii'litswx* (supra) at para. 201

licences was “a long time to rely on voluntary compliance with the LUP by the licencees”. She held:

From that perspective, it appears to me that, as in the case of recognition of the Wilps, there could have been useful discussion about whether clearer endorsement of the LUP at the strategic level would assist in promoting its use, instead of leaving that to operational measures.²⁰

4. Revenue Sharing

As for revenue sharing, the Director insisted on continuing with its population-based approach while alternative approaches were being discussed and developed at a broader level. As for economic accommodation more generally, he took the position that nothing more was required than what had previously been negotiated in the Gitanyow Forestry Agreement.

F. Crown’s Errors in Consultation and Accommodation

1. Assessment of Gitanyow Strength of Claim

The Director, in justifying his decision, appeared to base the decision on his own assessment of minimizing the strength of Gitanyow’s aboriginal rights and title and his perception of the seriousness of the potential adverse effects of the Forest Licence Replacement on Gitanyow’s rights and title. This was after there had been two judgments of the BC Supreme Court concluding that the Gitanyow have a good *prima facie* claim to title in their territory and a strong *prima facie* claim of aboriginal rights. There also had been the Ministers’ affirmation in the GFA of the strength of claim of the Gitanyow.

Notwithstanding this solid foundation of judicial recognition, the Director minimized the recognition on the theory that he could not establish the existence and geographic extent of the claim to title.²¹

²⁰ *Wii’litswx* (supra) at para. 232

²¹ *R. v. Bernard and Marshall* [2005] 2 S.C.R. 220

The Director was aware of both Mr. Justice Tysoe's finding that Gitanyow have a strong *prima facie* claim to aboriginal rights in their territory and the Crown's affirmation of his finding in the Gitanyow Forestry Agreement. Because he adopted the stance that aboriginal rights are site-specific, the Director interpreted Mr. Justice Tysoe as saying that the aboriginal rights for which Gitanyow have a strong *prima facie* claim are confined to specific, traditional use sites within Gitanyow's overall territory.

The Director acknowledged that the Forest Licence Replacements "could impact claims of aboriginal title, assuming it exists somewhere within the traditional territory." He concluded otherwise in regard to aboriginal rights, saying that the replacements would be unlikely to affect (i.e. make any difference in regard to) aboriginal rights which, because of their site-specific nature, could be "more effectively accommodated through subsequent operation decisions."

As for the seriousness of the potentially adverse effects of the Replacement Decision, the Director distinguished between effects on on-the-ground interests and other effects. In his view, the effects on Gitanyow's on-the-ground interests would be minimal and would, he assured, be addressed:

... through other processes designed to protect Gitanyow's on-the-ground interests (i.e., joint Land Use Planning, Forest Stewardship Plannings and consultation on operational decisions, such as FSP approval, through the Joint Resources Council).²²

The effects on Gitanyow's other interests in revenue sharing, Land Use Planning and forest management decision making would also, he said, be minimal since they too would be addressed through other processes (e.g. [the short-lived and now long defunct] Gitanyow-Gitxsan Forest Benefit Sharing Working Group, Timber Supply Review, and the Nass SRMP). Finally, he added, the accommodations contained in the Gitanyow Forestry Agreement served to offset or mitigate the remaining impacts.

Based on his assessment of the strength of Gitanyow's title claim as falling short of proof and thus uncertain in terms of existence and geographic extent, together with his minimization of

²² *Wii'litswx* (supra) at para. 125

the potentially adverse impacts of the replacements, the Director considered his consultation and accommodation duties of narrow compass. Accordingly, he and the Ministry never departed from the view that its initial offer of accommodation was more than sufficient in the circumstances.

2. Court's Analysis of the Failure of the Crown to Fulfill Its Consultation Obligation

It is significant how the Court addressed the conduct of the Director in this regard. Firstly, Justice Neilson points out that it was not necessary to refer to the *Bernard and Marshall* decision in his assessment. She set out the test as to the duty to consult as follows:

The primary focus of the Crown's duty to consult is the interim accommodation of asserted rights while awaiting that final determination. In *Haida*, at para. 66, the Court was clear that the consideration of the duty to consult and accommodate prior to proof of a claim does not amount to a prior determination of the case on its merits. In this context, and in the absence of some explanation, I find that Mr. Warner's comments to the effect that Gitanyow's claim had not yet been proven were statements of an obvious but irrelevant fact.²³

Justice Neilson applied the earlier Tysoe decisions. She analyzed what Justice Tysoe said with respect to both aboriginal title and aboriginal rights of the Gitksan:

Nor is it clear why Mr. Warner [the Director] was only prepared to "assume" that Gitanyow title existed somewhere in its traditional territory. Tysoe, J. equated his finding of a good *prima facie* claim of aboriginal title with a reasonable probability of establishing title. The only bar to Gitanyow's claim to aboriginal title raised in *Gitksan No. 1*, or, at this hearing, was an overlapping claim by Gitksan to some part of Gitanyow traditional territory. There is nothing to suggest that this overlapping claim played a role in the consultation between the parties here.

Moreover, while overlapping claims between First Nations may have some impact on their claims to aboriginal title, they do not preclude a successful claim for aboriginal rights. Non-exclusive occupation may establish aboriginal rights short of title:^{24 25} Mr. Warner's assessment fails to recognize this.²⁶

²³ *Wii'litswx* (supra) at para. 153

²⁴ *Gitksan* (supra) at para. 74

²⁵ *Bernard* (supra) at para. 58

²⁶ *Wii'litswx* (supra) at paras. 154 - 155

She found that the Director was aware of Mr. Justice Tysoe's finding that the Gitanyow have a good *prima facie* case for aboriginal title and a strong *prima facie* case for aboriginal rights; the Crown's affirmation of that finding in the GFA; its acknowledgment therein of the Gitanyow traditional territory; and its recognition "that historic and contemporary use and stewardship of that land and its resources by Gitanyow were integral to the maintenance of its society, governance and economy."²⁷ But despite this awareness, the Director had, she concluded:

... unreasonably minimized the strength of Gitanyow's claim by placing too much weight on the fact that its claim of aboriginal title had not been formally proven, instead of recognizing that the context for his assessment was the strength of asserted, rather than established, claims.²⁸

She noted further that the Director's assessment of their strength of claim ignored "the strength of Gitanyow's independent claim to aboriginal rights," which, unlike aboriginal title, do not rest on exclusive occupation.²⁹

The Director also "unreasonably minimized the potential impact of the FL replacements on Gitanyow's aboriginal interests" in his assessment of the seriousness of the potential impact.³⁰

3. The Court's Confirmation of the Importance of Recognition and Accommodation

Unfortunately, as the Gitanyow and other nations in British Columbia have experienced, the Crown has continued to be very reluctant to recognize and affirm aboriginal title and rights at the strategic level of planning and decision making through meaningful recognition and accommodation of first nations' prior presence. This recognition includes the need to recognize their social organization and authority within their own societies. The Supreme Court of Canada made it clear how important this was in *Haida Nation* where it stated that "[d]ecisions made during strategic planning may have potentially serious impacts on Aboriginal right [sic] and title".

²⁷ *Wii'litswx* (supra) at para. 150

²⁸ *Wii'litswx* (supra) at para. 156

²⁹ *Wii'litswx* (supra) at paras. 155-156

³⁰ *Wii'litswx* (supra) at para. 166

In *Wii'litswx*, Madam Justice Neilson carefully analyzed why it is critical to recognize and accommodate the Gitanyow interests. Because this analysis may be of assistance to other nations and to the Crown in fulfilling its consultation obligations, we have set out Madam Justice Neilson's analysis:

Turning to the assessment of the seriousness of the potential adverse effect of the FL replacements on Gitanyow's interests, objectively, the replacement of the FLs was a strategic administrative decision that represented the first step in permitting the continuing removal of a claimed resource in limited supply from Gitanyow traditional territory for the next 15 years. The potential AAC [Annual Allowable Cut] assigned to the six licences under consideration was 1,031,059 cubic metres, compared to the 86,000 cubic metres that s. 7.1 of the GFA [Gitanyow Forestry Agreement] permitted Gitanyow to harvest annually under a non-replaceable FL. The proposed replacement FLs were superimposed on a long and troubled history of over-logging and unfulfilled silviculture obligations on Gitanyow traditional territory. These activities, and Gitanyow's inability to control them, had led Gitanyow to commence two earlier proceedings against the Crown [*Gwasslam #1* and *#2*] in an effort to achieve some accommodation for the harm to Gitanyow's interests. ...

These factors, however, do not appear to have played a significant role in Mr. Warner's [the Director's] assessment of the potential adverse effects of replacing the FLs. Instead, he stated that the replacement of the FLs was unlikely to affect Gitanyow's site specific potential aboriginal rights, as they would be accommodated through later operational decisions. As noted above, he did acknowledge that the replacement FLs could affect Gitanyow's claim of aboriginal title "assuming it exists". However, he viewed the effect of his decision on Gitanyow's interests as "minimal" since these interests would be addressed through other processes....

I do not accept that these later operational steps significantly reduce the potential impact on Gitanyow's interests of the strategic decision to replace the FLs. A similar argument failed in *Haida*. At paras. 75-76, the Court noted that the TFL replacement under consideration there did not itself authorize timber harvesting, which would be controlled by future operational steps. The Court nevertheless found that the Crown had a duty to consult and perhaps accommodate with respect to the decision to replace the TFL, as decisions made during strategic planning may have potentially serious impacts on aboriginal interests.

Mr. Warner does not play a role in these future operational decisions, which are left to other MoF employees. The measures to protect aboriginal interests at the

operational level are largely discretionary, or may be supplanted by competing interests. ...

...

Moreover, while consultation at the operational level is desirable, the troubled history of logging on Gitanyow traditional territory strongly suggests that operational decisions have not been successful in minimizing the effect of logging on Gitanyow's interests in the past.

...

I find that Mr. Warner unreasonably minimized the potential impact of the FL replacements on Gitanyow's aboriginal interests.³¹

Because the Crown had underestimated the scope of its duty to consult and accommodate the Gitanyow, it was left to Madam Justice Neilson to determine its proper scope. She stated the basis for her conclusion that “the honour of the Crown required deep consultation aimed at finding a satisfactory interim solution ...”:

I am satisfied that Mr. Justice Tysoe’s assessment of the strength of Gitanyow’s claim, and the Crown’s affirmation of that finding in the GFA, gave Gitanyow a strong claim to aboriginal rights and title. As well, I find that the strategic decision to replace the FLs, and the associated likelihood of ongoing extraction of limited resources from Gitanyow traditional territory without compensation, represented a potential significant infringement of Gitanyow’s interests.³²

Besides the Crown’s affirmation of Gitanyow’s strength of claim as found by Mr. Justice Tysoe, Madam Justice Neilson’s reasons for upgrading his previous assessment of the strength of their title claim from good to strong included the observations, first, that the only bar to Gitanyow’s claim to aboriginal title raised in either *Gwasslam #1* or in the hearing before her was an overlapping claim to a portion of Gitanyow Territory and, second, that the overlapping claim played no role in the consultation regarding the Replacement Decision.³³

G. Analysis of Crown’s Fulfillment of its Duty

In *Wii’litswx*, the Gitanyow were seeking review of “the Crown’s conduct with respect to fulfillment of its duty of consult Gitanyow and to accommodate its interests in the course of

³¹ *Wii’litswx* (supra) at paras.157-158, 160-166, 163, 166 (Emphasis added)

³² *Wii’litswx* (supra) at para. 168

³³ *Wii’litswx* (supra) at para. 154

making that decision.”³⁴ They were not challenging whether he had statutory power to make such a decision but whether he had fulfilled an overarching constitutional imperative arising from Section 35 of the *Constitution Act, 1982*.

The adequacy of the Crown’s efforts to fulfill its duty to consult and accommodate, its conduct, is measured, first, by the extent of its duty and, second, by the reasonableness of its efforts overall to fulfill its duty.

How the Crown proceeds depends on how it understands its duty. Thus, the Crown has to gauge the extent of its duty in order to decide how to proceed. “The scope of the duty is,” as the Supreme Court of Canada explained in *Haida Nation*, “proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.”³⁵ When the assessment of these two factors is inextricably entwined with an assessment of the facts, the Crown’s assessments of the strength of claim and the seriousness of the potential infringement and thus of its duty to consult and accommodate are judged by their reasonableness rather than by their correctness.

In *Haida Nation*, the Supreme Court of Canada cautioned Courts that in their review of the Crown’s efforts to fulfill its duty to consult and accommodate, “[t]he focus ... is not on the outcome, but on the process of consultation and accommodation.”³⁶ The Crown has tended, in recent judicial review applications, to emphasize this passage in hopes of persuading Courts to permit the Crown the widest possible latitude in pursuing outcomes generally and fashioning accommodations particularly.

Madam Justice Neilson corrects this tendency by outlining the two stage analysis applied by the Supreme Court of Canada in the companion decision in *Taku River Tlingit*:

... There, the Court followed a two stage analysis, each stage being governed by a standard of reasonableness. First, it addressed the adequacy of the process of consultation. Second, having found it to be reasonable, it examined the end result

³⁴ *Wii’litswx* (supra) at para. 15

³⁵ *Wii’litswx* (supra) at para. 39

³⁶ *Wii’litswx* (supra) at para. 63

by considering whether that consultation had identified a duty to accommodate aboriginal concerns, and the adequacy of any resulting accommodations.

The issues that she identified for her determination were, then, the following:

- a) did the Crown correctly or reasonably assess the extent of its duty to consult and accommodate Gitanyow interests in the course of the FL [Forest Licence] replacements by:
 - i) correctly or reasonably assessing the strength of Gitanyow's claim to aboriginal title and rights; and
 - ii) correctly or reasonably assessing the potential seriousness of the impact of the FL replacements on Gitanyow's aboriginal title and rights?
- b) was the consultation process reasonable?
- c) did the Crown reasonably accommodate Gitanyow's aboriginal interests?³⁷

It should be noted that although she refers to the standard of correctness in her formulation of the first issue (above), she subsequently applied the standard of reasonableness in her review of the Crown's assessment of its duty. She did so because she found that the underlying preliminary assessment of the strength of Gitanyow's claim of aboriginal rights or title and the seriousness of the potentially adverse effects of the Forest Licence Replacements on their title and rights was premised on issues of both law and fact.³⁸

On the first issue Madam Justice Neilson found that the Director had, on the basis of his unreasonable assessment of both the strength of Gitanyow's claims and the seriousness of the potential impacts, underestimated the scope of the Crown's duty to consult and accommodate Gitanyow's interests in the course of replacing the forest licences.

H. What is Meaningful Consultation and Appropriate Accommodation?

Ultimately, its underestimation of the scope of its duty to consult and accommodate may make no difference if the Crown conducts a reasonable consultation process and provides

³⁷ *Wii'litswx* (supra) at paras. 17-18

³⁸ *Wii'litswx* (supra) at para. 143

reasonable accommodation, with reasonableness judged against the proper scope of the Crown's duty, which in this case is deep consultation.

Justice Neilson found that the Consultation Protocol set out in the Gitanyow Forestry Agreement "provided a satisfactory framework for reasonable consultation"³⁹ Hence, she concluded, the consultation process was reasonable.

Drawing from the case law, she summarized the elements and indicia of meaningful consultation as follows:

The Crown's obligation to reasonably consult is not fulfilled simply by providing a process within which to exchange and discuss information. The consultation must be meaningful. **Meaningful consultation is characterized by good faith and an attempt by both parties to understand each other's concerns, and move to address them in the context of the ultimate goal of reconciliation of the Crown's sovereignty with the aboriginal rights enshrined in s. 35 of the Constitution Act.**⁴⁰

In short, "[a]n assessment of whether consultation was meaningful inevitably leads to an examination of what accommodations were reached".⁴¹ Since the Director relied on three measures as jointly satisfying the Crown's accommodation duty, Madam Justice Neilson examined all three to determine whether they represented a reasonable accommodation of Gitanyow's title and rights in the decision to replace the forest licences. The three things on which the Director relied were: the Joint Resource Council's Recommendations, the consideration of Gitanyow's interests in subsequent operational decisions, and the accommodations agreed to under the Gitanyow Forestry Agreement."⁴²

Madam Justice Neilson found that it was not reasonable for the Crown to rely on the GFA as an accommodation for the Decision because this Decision had been exempted from the forestry decisions accommodated by the Agreement. At most, she explained, the measures

³⁹ *Wii'litswx* (supra) at para. 172

⁴⁰ *Wii'litswx* (supra) at para. 178

⁴¹ *Wii'litswx* (supra) at para. 179

⁴² *Wii'litswx* (supra) at para. 179

provided in the Agreement could be “considered in assessing the impact of later forestry decisions, such as the replacements of the forest licences, on Gitanyow’s interests.”⁴³

On the Crown’s claim that accommodations provided in subsequent operational decisions would substitute for accommodations at the strategic level of forest licence replacements, she reiterated that although consultation at the operational level is desirable, she was “not satisfied that reliance on future discretionary decisions, over which Mr. Warner has no control can be viewed as reasonable accommodation for the decision to replace the FLs.”⁴⁴ She went on to elaborate on the importance of consultation and accommodation at the strategic level in the process of reconciliation as follows:

The Supreme Court of Canada in *Haida* and *Taku* has made it clear that meaningful consultation and accommodation at the **strategic level** has an important role to play in achieving the ultimate constitutional goal of reconciliation, and should not be supplanted by delegation to operational levels.⁴⁵

1. Joint Resource Council’s Rule in Accommodation

The Gitanyow Forestry Agreement set forth the purpose for which British Columbia and Gitanyow agreed to establish the Joint Resource Council [“JRC”]⁴⁶.

The Terms of Reference provided that British Columbia and Gitanyow would each appoint two members to the JRC.

In early February 2007, the JRC began to draft recommendations to submit to the Director prior to his then upcoming decision on the replacement licences. Although the “final” draft was still undergoing internal evaluation by the Gitanyow Hereditary Chiefs, a copy was provided to the Director roughly a week before he made his decision on February 28, 2007.

⁴³ *Wii’litswx* (supra) at para. 184

⁴⁴ *Wii’litswx* (supra) at para. 186

⁴⁵ *Wii’litswx* (supra) at para. 186 (Emphasis added)

⁴⁶ Section 6.1 of the Gitanyow Forestry Agreement states the purpose as follows: **Error! Main Document Only.**(a) cooperative planning to address Gitanyow’s Aboriginal Interests at the appropriate level of Crown land use planning; (b) consultative processes and provision of a forum for identifying and resolving issues of strategic importance to Gitanyow and British Columbia early in the forest planning cycle; and (c) completion and administration of the Gitanyow Kispiox-Cranberry Landscape Unit Plan and the Gitanyow Nass Strategic Resource Management Plan.

The Director “relied heavily on these [JRC Recommendations] as measures of accommodation.” He viewed them as “appropriate responses to the interests raised by Gitanyow through the consultation process.”⁴⁷ He viewed them further, despite the fact that Gitanyow had not committed to them, as enjoying the support of the Gitanyow members of the JRC and as representing “at least some middle ground”.⁴⁸

Madam Justice Neilson concluded that the Director’s account “overstates the extent of Gitanyow’s support for the JRC Recommendations”⁴⁹ and that in fact correspondence between Gitanyow and the Director “left no doubt that Gitanyow did not view the JRC Recommendations as satisfactory accommodation.”⁵⁰ This “disagreement over the import of the JRC Recommendations,” meant that “they could not be properly viewed by the Crown as a “middle ground”...”⁵¹

Counting decisively against the Crown’s contention that the JRC Recommendations represented a “middle ground” between its and Gitanyow’s respective accommodation desiderata, Madam Justice Neilson found that the accommodation purportedly provided by them “was essentially the same as that offered in the MoF’s initial proposal of August 28, 2006...”⁵² She based her finding on a review of the accommodation recommended by the JRC with respect to each of Gitanyow’s concerns: recognition, incorporation of the LUP in the forest licences, silviculture liabilities, revenue sharing, and the right to harvest wood for domestic purposes.

The JRC made three Recommendations for accommodating Gitanyow’s request for recognition of their aboriginal title, rights, and Wilp system and territories:

- i. to include a WHEREAS clause in the preamble of the licence documents acknowledging Mr. Justice Tysoe’s findings on the strength of Gitanyow’s title and rights claims;

⁴⁷ *Wii’litswx* (supra) at para. 187

⁴⁸ *Wii’litswx* (supra) at para. 133

⁴⁹ *Wii’litswx* (supra) at para. 186

⁵⁰ *Wii’litswx* (supra) at para. 190

⁵¹ *Wii’litswx* (supra) at para. 192

⁵² *Wii’litswx* (supra) at para. 193

- ii. to have Ministry representatives advise licencees of Wilp boundaries in the course of operational planning; and
- iii. to support the JRC as a continuing forum for consultation.

In his Replacement Decision, the Director adopted these three Recommendations. The first two Recommendations were simply reiterations of proposals set forth in his initial accommodation offer on August 28, 2006. The third merely affirmed the terms of the GFA that established the JRC and the Consultation Protocol. The Court found that, “there was no change in the Crown’s position with respect to accommodating Gitanyow’s concern regarding recognition”.⁵³

Although the Director adopted six JRC Recommendations touching on land use planning, they added “nothing substantial to the Crown’s pre-existing commitments in s. 4 of the GFA, and the proposals set out in Mr. Warner’s letter of August 28, 2006”.⁵⁴

The Director adopted two of the JRC’s three Recommendations concerning silviculture liabilities. The two adopted provided no accommodation beyond initiatives previously established in the Gitanyow Forestry Agreement.

As for revenue sharing, the Director rejected Gitanyow’s proposals for alternative, volume-based revenue sharing, taking the position that the economic accommodation negotiated in the Gitanyow Forestry Agreement was sufficient. Ultimately though, as Madam Justice Neilson concluded, the consultation “produced no economic accommodation for Gitanyow beyond the payments previously negotiated in the GFA.”⁵⁵

The one exception to the general finding that the accommodation provided by the JRC Recommendations and adopted by the Director “was essentially the same as that offered in the MoF’s initial proposal of August 28, 2006” is the JRC’s Recommendations regarding the right to harvest wood for domestic purposes, to which the Director gave qualified support. The right was

⁵³ *Wii’litswx* (supra) at para. 198

⁵⁴ *Wii’litswx* (supra) at para. 201

⁵⁵ *Wii’litswx* (supra) at para. 213

affirmed by the Supreme Court of Canada in *R. v. Sappier*,⁵⁶ with the decision being released on December 7, 2006, more than three months after the Crown made its initial accommodation proposal. Consultation continued on this issue after the Replacement Decision.

Madam Justice Neilson's findings on accommodations were:

To summarize, apart from the measures related to the *Sappier* decision, at the end of the extensive consultation between the parties, it remained the Crown's view that the proposal set out in Mr. Warner's letter of August 28, 2006 represented reasonable accommodation of Gitanyow's interests in the FL Replacement Decision. That proposal was comprised chiefly of the measures previously agreed to in the GFA, as well as the WHEREAS clause, and an offer to provide direction to the licensees about the Wilp boundaries and the LUP in the course of operational planning.⁵⁷

2. Was the Accommodation Proposed by the Director Reasonable Accommodation?

Having made these findings as to what actually occurred, Madame Justice Neilson had to determine whether or not there was reasonable accommodation. More precisely, she had to "look at the overall offer of accommodation, and weigh it against the potential impact of the infringement on the asserted interests, having regard to the strength of the aboriginal claims."⁵⁸ However, since the parties had "approached the [consultation] process in this case on the basis that they were dealing with five discrete concerns," she set about first examining "the adequacy of the accommodation provided for each of those, before considering the whole."⁵⁹

3. Recognition of Wilp System

In regard to the Wilp system, which the Crown had refused to recognize and incorporate in the Forest Licence Replacements, she made the following finding:

...I am satisfied on the material before me that the Wilp are an integral and defining feature of Gitanyow society. As such, the Wilp system and the related

⁵⁶ [2006] 2 S.C.R. 686

⁵⁷ *Wii'litswx* (supra) at para. 219

⁵⁸ *Wii'litswx* (supra) at para. 221

⁵⁹ *Wii'litswx* (supra) at para. 221

aboriginal rights attract the protection of s. 35 of the *Constitution Act*, and the honour of the Crown required that they be reconciled with Crown sovereignty by being reasonably accommodated.⁶⁰ (emphasis added)

She then articulated the basis for Gitanyow's concern over the continuing lack of recognition of their Wilp system:

The replacement of the FLs clearly had the potential to detrimentally affect Gitanyow's aboriginal rights. In particular, the harvesting of timber from Gitanyow traditional territory without reference to Wilp boundaries could result in the effective destruction of individual Wilps in terms of both territorial and social considerations. Gitanyow accordingly sought to have recognition of not only its aboriginal rights and title in the replacement FLs, but also acknowledgement of the Wilp territories to ensure balanced forest planning.⁶¹

Despite the fact that it did not dispute the significance or centrality of the Wilps for Gitanyow, the Crown's position regarding the recognition of Gitanyow aboriginal title, rights, and the Wilps remained unchanged throughout the consultation.

Regarding recognition of the Wilp system, Madame Justice Neilson concluded:

I conclude that the WHERAS clause, and advising licensees of the Wilp boundaries at the operational level, did not represent reasonable accommodation reached through meaningful consultation with respect to Gitanyow's concern that the Wilp system be recognized at a strategic level in replacing the FLs.⁶²

4. Joint Land Use Planning Accommodation

In regard to Gitanyow's concern that the LUP be given effect in relation to the forest licence replacements, Madam Justice Neilson was unable to say whether there had been adequate consultation and accommodation. She acknowledged at the outset that the joint planning process had advanced considerably since it was a focus of contention in *Gwasslam #2*.⁶³ But she also agreed that "15 years is a long time to rely on voluntary compliance with the LUP by the

⁶⁰ *Wii'litswx* (supra) at para. 222

⁶¹ *Wii'litswx* (supra) at para. 223

⁶² *Wii'litswx* (supra) at para. 228

⁶³ *Wii'litswx* (supra) at para. 229

licensees⁶⁴”. Thus, she thought that at the least “there could have been useful discussion about whether clearer endorsement of the LUP at the strategic level would assist promoting its use, instead of leaving that to operational measures”.⁶⁵ However, because the Crown had demonstrated a commitment to working with Gitanyow in seeing the land use planning process through to completion, and because neither the process for giving the LUP statutory force nor the manner in which a developing plan might be incorporated into the forest licence replacements was clear to her, she was not prepared to find that this concern was insufficiently accommodated.

5. Silviculture Accommodation

The following excerpts from her judgment relate the basis for Gitanyow’s concern over silviculture liabilities, and explain why the Crown’s “accommodation” fell short:

Turning to Gitanyow's concerns with respect to silviculture, these concerns were longstanding, and arose primarily from the Crown's historical tolerance of destruction of a limited resource on Gitanyow traditional territory by earlier licensees. The proposed Replacement Decision involved offering FLs to some of those same licensees. Others were inheriting problems caused by their predecessors. ...

Despite that history, Mr. Warner's explanations of the outstanding liabilities in both his letter of August 28, 2006, and his decision, were sparse. He identified ongoing problems and uncertain solutions, but provided no details of these. In his letter of August 28, 2006, Mr. Warner took the view that compliance and enforcement measures in the legislation provided the necessary safeguards to ensure that silviculture obligations were met. ...

...
I agree with Gitanyow that the Crown's position with respect to silviculture liabilities associated with the replacement FLs essentially amounted to "trust us". The honour of the Crown, and the importance of the sustainability of the resource to Gitanyow, clearly required more. Meaningful consultation should have included discussion of a process by which Gitanyow would regularly receive information regarding the performance of silviculture obligations on its traditional territory, and assurances from the Crown that silviculture obligations under the replaced FLs will be strictly enforced.⁶⁶ (emphasis added)

⁶⁴ *Wii'litswx* (supra) at para. 232

⁶⁵ *Wii'litswx* (supra) at para. 232

⁶⁶ *Wii'litswx* (supra) at paras 234-5, 238

6. Economic Accommodation

In regard to economic accommodation, including revenue sharing, Madame Justice Neilson found that the Crown has an ongoing “obligation to consult and attempt to reach economic accommodation with respect to forestry decisions generally”.⁶⁷ She declined, however, to find that the Crown’s economic accommodation efforts in relation to the decision to replace the forest licences were inadequate:

Although she noted that it is regrettable that the broader level development of revenue sharing alternatives appeared “to be moving at such a slow pace,” she was satisfied that “*in the interim* the Crown was meeting its ongoing consultation and accommodation obligations to Gitanyow through periodic payments, like those negotiated in the Gitanyow Forestry Agreement, and advancing the process of developing alternative means of accommodating the economic aspects of aboriginal interests.”⁶⁸

Obviously, the Crown’s ongoing obligations include an ongoing duty to bring these developments to bear in its consultations with Gitanyow and to advance the process of accommodating and thereby reconciling the economic aspects of their aboriginal interests.⁶⁹

7. Sappier Obligations for Provision of Wood for Domestic Purposes (Sappier)

As for Gitanyow’s interests in the harvest of wood for domestic use, Madame Justice Neilson held that the Crown, by virtue of reaching agreement with the Gitanyow subsequent to the forest licence Replacement Decision, had reasonably consulted and accommodated their interests.

⁶⁷ *Wii’litswx* (supra) at para. 240

⁶⁸ *Wii’litswx* (supra) at para 239

⁶⁹ It is of interest to note that there were very serious concerns raised by the First Nations Leadership Council and the Aboriginal Forestry Council as a result of the comments made by the Court that she had been assured that the process was being addressed at a province wide level. In fact, as a subsequent Affidavit which was provided to the Court (although not filed) demonstrated there has been no real movement on addressing the economic aspects of the Aboriginal Forestry interests through these provincial bodies prior to the time of Madame Justice Neilson’s decision.

It is of interest that this was the only area in which the Director changes position. It is no surprise because the change of position arose directly as a result of a Supreme Court of Canada decision confirming that there was an aboriginal right to forest resources for domestic purposes at least.

I. Judicial Analysis of Proposed Accommodations

Madame Justice Neilson's ultimate findings and conclusion are best presented in her own words:

Was the overall offer of accommodation with respect to replacement of the FLs reasonable? I have concluded that it was not.

Gitanyow had a strong claim to aboriginal rights and title, and the decision to replace the FLs presented serious potential adverse effects on Gitanyow's interests. The scope of the Crown's duty to consult and reach appropriate interim accommodation was accordingly broad. While the Crown had no duty to agree to Gitanyow's proposed measures, the strength of Gitanyow's position suggested that if the Crown did not make reasonable concessions, it is open to infer that it did not conduct meaningful consultation: *Gitxsan No. 2* [i.e. *Gwasslam #2*], para. 50.

Apart from the concessions made with respect to Gitanyow's rights under Sappier, there was essentially no change in the Crown's position between Mr. Warner's proposal of August 28, 2006 and his decision of March 8, 2007.

In my view, that was due primarily to two things. **First, the Crown failed to make a proper preliminary assessment of the scope and extent of its duty to consult and accommodate.** There is nothing to indicate that it attempted to make that assessment at the outset of the consultation, so that it could inform the process. Further, Mr. Warner's assessment at the end of the process unreasonably minimized both the strength of Gitanyow's claim and the potential adverse impact of the FL Replacement Decision on its interests. **The inevitable conclusion is that this led the Crown to underestimate its obligation to understand and address Gitanyow's concerns in the course of the consultation about the FL Replacement Decision.**

Second, the Crown chose to rely on inappropriate measures as accommodation. In particular, it misapprehended the import of the GFA, erroneously viewing it as encompassing accommodation for the decision to replace the FLs. **As a result, the Crown conducted the consultation process under the mistaken impression that adequate accommodation for the decision to replace the FLs was already in place.** The result was the

premature foreclosure of meaningful discussion of Gitanyow's concerns related to that decision.

The clearest example of this lies in the Crown's failure to recognize that the honour of the Crown and s. 35 of the Constitution Act imposed a constitutional duty to meaningfully consult and reach accommodation with respect to the recognition of the Wilps and Wilp boundaries in the strategic decision to replace the FLs. Dismissing such recognition as impractical, without discussion or explanation, fell well below the Crown's obligation to recognize and acknowledge the distinctive features of Gitanyow's aboriginal society, and reconcile those with Crown sovereignty.

The Crown's treatment of Gitanyow's silviculture concerns demonstrates a similar failure to understand the scope of what was required by the honour of the Crown. **The goal of reconciliation necessarily imports recognition of aboriginal rights to limited resources on claimed territory, and the importance of sustaining those resources while claims are pending. If they are destroyed, there is nothing left to reconcile.**

While I appreciate that the Crown's efforts to accommodate other Gitanyow concerns were adequate, on the whole, **I find that the two fundamental errors I have described, and the failure to uphold the honour of the Crown in dealing with recognition and silviculture, lead to a conclusion that the Crown failed to fulfill its duty to meaningfully consult and adequately accommodate Gitanyow's aboriginal interests in the course of the decision to replace the FLs.**⁷⁰ (emphasis added)

J. Conclusion of *Wii'litswx*

There are certainly very significant implications of the *Wii'litswx* decision on the Crown's relations with both the Gitanyow and other nations.

It is an advantage to the Gitanyow that they find themselves in this relatively unique position as the Crown may be able to address the Gitanyow's concerns at a higher level without dealing with a "province wide" policy.

With respect to other aboriginal nations across Canada, the Wilp system which has been recognized and which the Court acknowledged must be recognized is the Gitanyow's form of aboriginal governance. This case raises the critical relevance of inherent self government that

⁷⁰ *Wii'litswx* (supra) at paras 242-248

aboriginal nations throughout British Columbia have in different forms as an element of recognition. By finding that the right of self government as an integral part of Gitanyow and, thus, an aboriginal protected right under Section 35, there is an involvement in management and decision making which is not limited to the traditional concept of the aboriginal use of resources. Because the Wilp system is collective and the Gitanyow are made up of the eight Wilp the effect is that the exercise of their rights as Gitanyow expands throughout the territory. Justice Neilson in her ruling acknowledged the nature of the Wilp system and its importance to be recognized when dealing with consultation and accommodation with the Gitanyow.

There are further implications as the traditional self government of the Gitanyow is based on their laws (Ayookxw). In *Casimel v ICBC*,⁷¹ Justice Lambert of the Court of Appeal recognized the traditional aboriginal laws relating to adoption. This is binding law in British Columbia. The reliance on the traditional laws of the Gitanyow with respect to their Land Use Planning may well be a further critical step for the Gitanyow in advancing the recognition of their constitutionally protected aboriginal right of self government.

This preliminary recognition of a strong case of aboriginal title is certainly not final proof of aboriginal title. However, under the *Haida* test and the requirement of deep consultation and accommodation and the findings of the strong case of aboriginal title for the Gitanyow, the Crown and the Ministers of the Crown would be reckless if they operated on the basis that they do not have to treat the Gitanyow and the Gitanyow's aboriginal rights and title seriously when making decisions which will impact the lands and resources encompassed within the traditional Gitanyow Territory.

⁷¹ *Casimel v. ICBC* [1994] 2 C.N.L.R. 22