

OUR LAND IS OUR FUTURE

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UNION OF B.C. INDIAN CHIEFS
CHIEFS COUNCIL
JUNE 27TH TO 28TH, 2018
RICHMOND, B.C., X^WMƏӨK^WƏY^ƏM (MUSQUEAM TERRITORY)

Resolution no. 2018-27

RE: UBCIC Intervention in Gitanyow

WHEREAS the UBCIC's mandate is to work towards the implementation, exercise and recognition of our inherent Title, Rights and Treaty Rights and to protect of our Lands and Waters, through the exercise, and implementation of our own laws and jurisdiction, and the UBCIC works to promote and protect each Nation's exercise of Sovereignty within their traditional territories;

WHEREAS the British Columbia Treaty Commission (BCTC) Tripartite Treaty Process of 1993 was established without the full and informed consent of Indigenous nations within the un-ceded territories of the area now known as British Columbia;

WHEREAS the BCTC process allows Indian Act Bands to indiscriminately identify and designate lands for negotiations in a geographic area as part of their 'Statement of Intent to Negotiate a Treaty.' These 'Statement of Intent' geographic area maps often designate boundaries that extend into the un-ceded territorial land-base of neighboring Indigenous nations, and the outcome means that Indigenous peoples in BC who have never entered the BCTC process, have their un-ceded territorial lands on the treaty negotiation tables with which they are not involved;

WHEREAS the Provincial and Federal Crown accept the 'asserted claim territory' as the basis of Wildlife Areas in treaties with no regard for the adverse impact of accepting such bald unproven claims on neighbouring Indigenous Nations even though the treaty-created "Wildlife Areas" overlap on neighbouring Aboriginal title lands;

WHEREAS as a result of the Nisga'a Final Agreement (NFA), the Nass Wildlife Area overlaps 84% of the Gitanyow Lax'yip (territory). During the negotiations of the NFA and after it was signed, both provincial and federal governments assured the Gitanyow that the NFA would not affect Gitanyow Title and Rights;

WHEREAS in previous court decisions, Justice Tysoe and Justice Nielson of the British Columbia Supreme Court (2004, 2008) have affirmed that Gitanyow has a “good to strong” prima facie claim of aboriginal title and a strong prima facie claim of aboriginal rights to at least part of the Gitanyow Lax’yip, including where the Nisga’a Wildlife Area is located. BC did not appeal these findings, nor did they present any evidence to the contrary;

WHEREAS following the signing of the NFA in 1999, the Nass Moose Population decreased by approximately 65%. According to Nisga’a reports, the decline was caused by their overharvest, resulting from their allocation formula. Gitanyow aboriginal hunting rights have been impacted for more than ten years, with limited moose available. BC repeatedly denied Gitanyow’s consultation requests on the Total Allowable Harvest and Annual Management Plan for moose and other species within the Nass Wildlife Area. After several years of conservation efforts (Gitanyow self-imposed hunting restrictions), repeated requests for consultation and collaborative management with BC and Nisga’a, in 2015 Gitanyow was left with no choice but to seek legal remedy to protect Gitanyow aboriginal hunting rights;

WHEREAS the *United Nations Declaration on the Rights of Indigenous Peoples*, which the Province of BC has committed to implement, states:

Article 19: States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 28

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact;

WHEREAS the *Gamlaxyeltxw v. MFLNRO* case was originally framed as a “mandamus” action, because the Minister had not made an actual decision on the Total Allowable Harvest or Annual Management Plan for years, despite being required to do so by the treaty, and wildlife management within the Nass Wildlife Area had been abandoned almost entirely to the Nisga’a;

WHEREAS the original pleadings sought to have the Minister fulfill his decision-making responsibilities in accordance with the NFA, including the need for consultation with Gitanyow on these decisions. The pleadings were modified when the Minister resumed his decision-making responsibilities for the 2016-17 hunting season. Gitanyow sought declarations that the Crown owed Gitanyow a duty to consult on the Total Allowable Harvest and Annual Management Plan on an annual basis, and that in accordance with the definitions established by the NFA, treaty rights were equivalent to recreational hunting rights and thus that aboriginal hunting rights should take precedence;

WHEREAS in her decision of March 21, 2018 Justice Sharma dismissed Gitanyow’s petition entirely (the “Decision”). While the MFLNRO had already commenced consultation with Gitanyow on the Total Allowable Harvest, and Justice Sharma acknowledged that consultation was warranted, the Court did not grant that declaration on an ongoing basis. The Court’s reasons stated that treaty rights in that case were to take precedence over “asserted” aboriginal rights. The Decision not only gives Gitanyow no certainty regarding ongoing consultation obligations, but pushes the legal framework for the duty to consult back to pre-*Delgamuukw* and pre-*Alphonse* and *Dick* times (1996) when the BC Court of Appeal confirmed Aboriginal hunting rights existed throughout British Columbia;

WHEREAS if the Decision stands, it will affect not only generations of Gitanyow, but also other First Nations affected by modern treaty “overlaps”;

WHEREAS if treaty rights are deemed to take precedence over aboriginal rights, and various wildlife and fish stocks are not properly managed by treaty nations, this could mean de facto extinguishment of the rights of affected neighboring First Nations for new and existing modern treaties;

WHEREAS the Decision also significantly alters the scope of the duty to consult when treaty rights bump up against aboriginal rights. The non-derogation language contained in the NFA, according to this decision, offered no protection to Gitanyow rights, in spite of the Crown’s assurances. Furthermore, the Decision fails to recognize and understand that treaty lands and harvest areas are not the result of any strength of claim assessment, but only blanket assertions and negotiated settlements. The strength of claim assessment done as a part of any consultation process is crucial where ‘overlaps’ are used to undermine First Nations’ positions;

WHEREAS the Province’s approach to this case, and to maintaining the current BCTC process, is not consistent with recognition and implementation of Indigenous rights, the UN Declaration, or the Province’s 10 Draft Principles on Relations with Indigenous Peoples, as it ignores the Rights of those Indigenous Peoples not in the BCTC process; and

WHEREAS by Resolution 2016-30, the UBCIC Chiefs-in-Assembly endorsed the UBCIC Political and Legal Action Plan “Moving Beyond the BC Treaty Commission Process and into Proper Negotiations Based on Recognition and Implementation of Aboriginal Title and Rights.”

THEREFORE BE IT RESOLVED the UBCIC Chiefs Council unanimously and fully supports the Gitanyow in their appeal of *Gamlaxyeltxw v. MFLNRO*;

THEREFORE BE IT FURTHER RESOLVED the UBCIC Chiefs Council recognizes the critical importance of this case in setting a precedent that holds reconciliation with some Indigenous peoples through the BC Treaty Commission (BCTC) process can only occur at the expense of the rights of other Indigenous peoples, including potentially the de facto extinguishment of the rights of neighboring nations;

THEREFORE BE IT FURTHER RESOLVED the UBCIC Chiefs Council directs the UBCIC Executive to seek resources in order to apply for Intervenor Status in the appeal by Gitanyow;

THEREFORE BE IT FURTHER RESOLVED the UBCIC Chiefs Council directs the UBCIC Executive to coordinate support for any First Nations to collectively join the appeal as intervenors in support of the Gitanyow, subject to resources;

THEREFORE BE IT FURTHER RESOLVED the UBCIC Chiefs Council directs the UBCIC Executive to call on the Province to refute the Decision in accordance with their policy position supporting full implementation of the *United Nations Declaration on the Rights of Indigenous Peoples* and the Province's 10 Draft Principles on Relations with Indigenous Peoples; and

THEREFORE BE IT FINALLY RESOLVED the UBCIC Chiefs Council directs the UBCIC Executive to provide public support through media and other forums for the Gitanyow appeal.

Moved: Chief Don Svanvik, 'Namgis First Nation

Seconded: Chief Vivian Tom, Wet'suwet'en

Disposition: Carried

Date: June 27, 2018