

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

B E T W E E N:

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NISGA'A LISIMS GOVERNMENT**

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WII'LITSXW also known as GREGORY RUSH, HAIZIMSQUE also known
as VERNA HOWARD, on behalf of themselves and in their capacity as the
GITANYOW HEREDITARY CHIEFS and on behalf of all members of the
GITANYOW NATION**

RESPONDENTS
(continued)

FACTUM

(KITIGAN ZIBI ANISHINABEG, INTERVENER)

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

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CHIEFS, YELLOWKNIVES DENE FIRST NATION, WABUN TRIBAL
COUNCIL AND KÁTL'ODEECHE FIRST NATION**

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AND BETWEEN:

SCC Court File No. 41644

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PART I - OVERVIEW AND STATEMENT OF THE FACTS

A. Overview

1. Kitigan Zibi Anishinabeg (“**KZA**”) intervenes to provide submissions on: (1) the need for a principled approach to adding parties in Aboriginal rights and title litigation that is guided by considerations of access to justice and reconciliation; and (2) the relationship between modern treaty negotiations and Aboriginal title litigation.

2. KZA is a First Nation, and a “band” within the meaning of the *Indian Act*, whose principal reserve is near Maniwaki, Quebec, within the Ottawa River watershed. Its members are part of the Algonquin Anishinabe Nation and modern-day descendants of the historic Algonquin Anishinabeg people. KZA’s and the Algonquin Anishinabe Nation’s assertion of unceded Aboriginal title to their territory has yet to be addressed through a treaty or court determination.

3. KZA welcomes guidance from this Court as to how lower courts and parties to Aboriginal rights and title claims that face overlapping claims can work together creatively and efficiently within Canada's constitutional framework.

4. KZA submits that in Aboriginal title litigation, the discretionary decision of adding a party over the plaintiff’s objections requires: (1) very strong reasons demonstrating necessity; (2) that the proposed defendant must have a direct and precise interest in the outcome of the proceeding; and (3) that the principles of access to justice and reconciliation must function as the decisive compass guiding decision-making on this matter. These fundamental guiding principles establish a necessarily high standard aimed at increasing the manageability of already costly, complex, and time-consuming title litigation for Indigenous peoples.

5. KZA further submits that the relationship between modern treaty negotiations and rights and title litigation must be carefully managed to avoid prioritizing the interests of other Indigenous nations who are pursuing or have already successfully pursued negotiations above the fundamental principles of access to justice and reconciliation. Accordingly, it is crucial for courts to ensure that the addition of parties in such cases is reserved for truly necessary circumstances, and not only due to the mere presence of ongoing or completed treaty negotiations which may not have factored in or addressed overlapping claims.

6. KZA's submissions highlight the practical difficulties encountered by Indigenous peoples in pursuing Aboriginal rights and title litigation. KZA further emphasizes the need for this Court to offer judicial guidance to lower courts with respect to the discretionary decision of adding parties to protracted and complex Aboriginal rights and title cases. Given the substantial cost and duration involved in pursuing an Aboriginal title claim, this Court will likely have limited occasions to address these issues in the near future. As such, these appeals provide a unique and important opportunity for the Court to establish a principled approach on the matter.

B. Facts

7. KZA takes no position on the facts.

PART II - POSITION ON THE QUESTIONS IN ISSUE

8. KZA takes no position on the questions raised in these appeals.

PART III - STATEMENT OF ARGUMENT

A. A Principled Approach to the Addition of Parties

9. Aboriginal title is a highly complex area of the law. This complexity is exacerbated by factors such as overlapping claims. Nations may have traditional territories in close proximity, with historical and ongoing boundary disputes. Nations like KZA face the challenge of having their territory arbitrarily divided by a provincial boundary that their people did not create or consent to, creating a need to deal with the federal government and multiple provincial governments with respect to Aboriginal rights and title. These circumstances collectively result in a complex web of parties who may wish to take part in Aboriginal rights and title litigation, with no definitive and consistent standard yet established on the bar to be set for participation.

10. KZA's proposed principled approach requires that questions of appropriate participation in Aboriginal rights and title litigation be guided by the principles of access to justice and reconciliation. KZA submits that the discretionary decision of adding a party over the plaintiff's objections must require: (1) very strong reasons demonstrating necessity;¹ (2) that the proposed

¹ *Kwikwetlem First Nation v British Columbia (Attorney General)*, [2021 BCCA 311](#) at para. [39](#). See also *Nisga'a Nation v Malii*, [2024 BCCA 313](#) at para. [69](#).

defendant have a direct and precise interest in the outcome of the proceeding;² and (3) that the principles of access to justice and reconciliation function as the decisive compass guiding decision-making on this matter. These core guiding principles result in a necessarily high standard. This standard is in line with the guidance from *Kwikwetlem First Nation v British Columbia (Attorney General)*, 2021 BCCA 311, that “courts cannot ignore the complexity inherent in modern Aboriginal rights litigation and should not foreclose solutions that respect the rules of practice and fairness to all parties ... with due regard to proportionality, access to justice and reconciliation.”³ Without this standard set at a high bar to entry, Aboriginal title litigation will become unmanageable due to the number of parties involved exacerbating its complex, lengthy, and time-consuming nature. This is a clear barrier to the pursuit of reconciliation.

i. Access to Justice

11. Access to justice is essential to the rule of law and fundamental to our constitutional arrangements: “[t]here cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice.”⁴ Crucially, “[i]f people cannot challenge government actions in court, individuals cannot hold the state to account — the government will be, or be seen to be, above the law.”⁵ This Court has recognized that meaningful access to justice requires the minimization of unnecessary complexity and expense:

People who claim to be injured by government action should have whatever redress the legal system permits through procedures that minimize unnecessary cost and complexity. The Court's approach should be practical and pragmatic with that objective in mind. [...] Access to justice requires that the claimant be permitted to pursue its chosen remedy directly and, to the greatest extent possible, without procedural detours.⁶

² *Kwikwetlem First Nation v British Columbia (Attorney General)*, [2021 BCCA 311](#) at para. [39](#).

³ *Kwikwetlem First Nation v British Columbia (Attorney General)*, [2021 BCCA 311](#) at para. [36](#); see also *Malii v British Columbia*, [2024 BCSC 85](#) at para. [41](#).

⁴ *B.C.G.E.U. v British Columbia (Attorney General)*, [\[1988\] 2 SCR 214](#) at para. [25](#); *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, [2014 SCC 59](#) at para. [41](#).

⁵ *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, [2014 SCC 59](#) at para. [40](#).

⁶ *Canada (Attorney General) v TeleZone Inc.*, [2010 SCC 62](#) at paras. [18-19](#).

12. This Court recently held that “the honour of the Crown requires increased attention to minimizing costs and complexity when litigating s. 35 matters and courts should approach proceedings involving the Crown practically and pragmatically in order to effectively resolve these disputes.”⁷ As Karakatsanis J. pointed out in *Hryniak v Mauldin*, 2014 SCC 7 (writing for a unanimous court), protracted trials with unnecessary expense and delay “can prevent the fair and just resolution of disputes.”⁸ In the context of determining whether a trial is necessary, Karakatsanis J. determined that the appropriate question is “whether the added expense and delay [...] is necessary to a fair process and just adjudication.”⁹ This focus on necessity and reducing expense and delay is mirrored in KZA’s proposed approach: the discretionary decision of adding a party over the plaintiff’s objections must require very strong reasons demonstrating necessity, that the proposed defendant have a direct and precise interest in the outcome of the proceeding, and that the principles of access to justice and reconciliation guide the decision. If these requirements are not met, the involvement of a party would undermine the “twin constitutional imperatives of access to justice and the honour of the Crown.”¹⁰

13. Aboriginal rights and title litigation has repeatedly been recognized as problematically time-consuming, expensive, and complicated.¹¹ These claims can take many years to resolve through the courts.¹² For example, the trials in *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 and *Tsilhqot’in Nation v British Columbia*, 2014 SCC 44, each lasted over 300 days; the two parts of *Ahousaht Indian Band and Nation v Canada*¹³ took 120 and 150 days respectively;¹⁴ and most recently the trial of *Cowichan Tribes v Canada (Attorney General)*, 2025 BCSC 1490, took 513 days, with the decision rendered just over 11 years after the plaintiffs commenced

⁷ *Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, [2020 SCC 4](#) at para. [51](#).

⁸ *Hryniak v Mauldin*, [2014 SCC 7](#) at para. [24](#).

⁹ *Hryniak v Mauldin*, [2014 SCC 7](#) at para. [33](#).

¹⁰ *Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, [2020 SCC 4](#) at para. [52](#).

¹¹ See e.g. *Kwikwetlem First Nation v British Columbia (Attorney General)*, [2021 BCCA 311](#) at paras. [27-28](#), [36](#); *Malii v British Columbia*, [2024 BCCA 406](#) at paras. [95-99](#); *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para. [186](#).

¹² *Kwikwetlem First Nation v British Columbia (Attorney General)*, [2021 BCCA 311](#) at para. [27](#).

¹³ *Ahousaht Indian Band and Nation v Canada (Attorney General)*, [2009 BCSC 1494](#); *Ahousaht Indian Band and Nation v Canada (Attorney General)*, [2018 BCSC 633](#).

¹⁴ *Kwikwetlem First Nation v British Columbia (Attorney General)*, [2021 BCCA 311](#) at para. [27](#).

litigation.¹⁵ Resolving these claims generally involves substantial documentary and oral evidence, costly expert opinion testimony, and multiple pre-trial motions. As is well-recognized in the jurisprudence, proof of Aboriginal title comes with inherent challenges due to the evidentiary difficulties involved in proving the necessary historical facts, requiring the trial court to draw inferences and find facts based on various sources “across a chasm of centuries”.¹⁶

14. The more parties involved in Aboriginal rights and title litigation, the more time-consuming, expensive, and complicated it becomes. Many under-resourced Indigenous nations already face substantial challenges in pursuing Aboriginal rights and title litigation, and adding parties in such cases may have the result of effectively prohibiting these claimants from pursuing and achieving justice.

15. It is also notable that all of the lengthy trials listed above took place in the Province of British Columbia. With most large-scale s. 35 trials to date having occurred in BC, the BC courts are uniquely alive to these issues and have developed expertise in managing complex s. 35 cases that strain judicial resources. This experience led to the decisions in *Kwikwetlem* and the courts below in these appeals, where BC courts placed an increased emphasis on developing standards that prioritize the goals of access to justice and reconciliation. As summarized in the decision of the chambers judge which is subject to the Nisga’a appeal:

... the Court of Appeal has invited trial courts to find solutions to the complexity of s. 35(1) Aboriginal litigation going forward, and to seek to avoid potential attendant impediments to access to justice in s. 35(1) trials. The Court also directs courts to implement the objectives of ‘proportionality, access to justice and reconciliation’ in such litigation[.]¹⁷

16. The addition of parties to Aboriginal rights and title proceedings causes inevitable delays. Each participant adds procedural steps, requires further judicial resources, and can expand the scope of evidence. Defendants have full participation rights in the proceeding, including the right to cross-examine witnesses, object to the admissibility of evidence, and make submissions on the law and the evidence.

¹⁵ *Cowichan Tribes v Canada (Attorney General)*, [2025 BCSC 1490](#) at paras. [54](#), [67](#).

¹⁶ See e.g. *Cowichan Tribes v Canada (Attorney General)*, [2025 BCSC 1490](#) at paras. [83-86](#).

¹⁷ *Malii v British Columbia*, [2024 BCSC 85](#) at para. [41](#).

17. Delay causes practical issues for evidence preservation. Aboriginal rights and title claims necessitate proof of historical facts, which typically involves oral historical and expert opinion evidence.¹⁸ Given that many Indigenous nations traditionally pass on knowledge and history orally, reliance on the oral history and knowledge of Elders and knowledge holders is particularly important to proving Aboriginal rights and title in court.¹⁹ With each year that passes, Indigenous nations lose Elders who carry important knowledge, history, and experiences with them. Further, prominent experts in the field who have expertise on the Nation's history may retire or become unable to testify, creating difficulties in finding appropriate expert witnesses. Most importantly, delay not only lengthens long-awaited recognition of inherent rights, but also the ability to exercise and benefit from those rights. This hampers the purpose of s. 35 rights protections, which includes cultural security and continuity for the rights-holding Indigenous people.²⁰

18. On this point, it is notable that Tsawwassen First Nation (“TFN”) (a modern treaty signatory) was added as a defendant in *Cowichan Tribes* on the basis that its interests could be impacted by the outcome, yet TFN called no witnesses of its own during the trial.²¹ TFN's contribution to the trial was limited, yet the choice to add TFN as a defendant no doubt contributed to the trial's 513-day duration.²² On the Nisga'a appeal here, the chambers judge below recognized that the law has “evolved” since the decision to add TFN was made in *Cowichan Tribes v Canada (Attorney General)*, 2016 BCSC 1660, and “[w]ith the benefit of experience, the procedural law with respect to s. 35(1) litigation has been recalibrated, leading to the further development of the legal principles applicable to such joinder applications.”²³ On this point, the trial judge identified the newer *Kwikwetlem* decision as the more relevant law which has “overtaken” the *Cowichan* ruling adding TFN, noting *Kwikwetlem's* focus on access to justice and reconciliation, alongside the requirements that very strong reasons demonstrating necessity are required to add a defendant over the plaintiff's objections, and that the proposed

¹⁸ See e.g., *Cowichan Tribes v Canada (Attorney General)*, [2025 BCSC 1490](#) at paras. [83-86](#); *William et al v British Columbia et al.*, [2004 BCSC 1237](#) at para. [12](#).

¹⁹ See e.g., *Delgamuukw v British Columbia*, [\[1997\] 3 SCR 1010](#) at para. [84](#).

²⁰ *R. v Sappier; R. v Gray*, [2006 SCC 54](#) at para. [33](#).

²¹ *Cowichan Tribes v Canada (Attorney General)*, [2016 BCSC 1660](#) at para. [56](#); *Cowichan Tribes v Canada (Attorney General)*, [2025 BCSC 1490](#) at paras. [63-65](#), [204](#), [1403](#), [218-236](#).

²² *Cowichan Tribes v Canada (Attorney General)*, [2025 BCSC 1490](#) at paras. [4](#), [67](#).

²³ *Malii v British Columbia*, [2024 BCSC 85](#) at para. [37](#).

defendant must have a direct and precise interest in the outcome.²⁴ KZA submits that this line of reasoning is an effective roadmap, anchored by the principles of access to justice and reconciliation which must direct discretionary decision-making on this point.

ii. Reconciliation

19. Access to justice challenges are also an obstacle to reconciliation. A key function of section 35 is to provide the constitutional framework through which to reconcile the constitutional rights stemming from the pre-existence of Indigenous societies with the assertion of Crown sovereignty.²⁵ Without an effective mechanism to regulate and manage the inclusion of parties in Aboriginal rights and title litigation so as not to restrict access to the pursuit of these claims, the goal of reconciliation cannot be achieved.

20. To enact a genuine and meaningful commitment to reconciliation, it is imperative that courts adopt a principled approach to the addition of parties to Aboriginal rights and title litigation that sets a high standard for participation. This will safeguard the ability of Indigenous nations to have their claims heard without incurring prohibitive costs, delays, and complexity beyond those already inherent to such litigation. With the challenges in bringing forward such litigation already so substantial, courts must not increase those challenges by including additional parties where it is not absolutely necessary to do so.

21. KZA's proposed approach is in line with guidance from the courts that creative solutions are appropriate, and indeed encouraged, in managing the unique challenges inherent in Aboriginal rights and title litigation. As Satanove J. of the BC Supreme Court set out:

I think it must be recognized that just as aboriginal rights are *sui generis*, aboriginal rights litigation is also unique. It involves hundreds of years of history and sometimes unconventional techniques of fact finding. It involves lofty, often elusive concepts of law such as the fiduciary duty and honour of the Crown. We cannot simply view aboriginal claims in the same light as other civil litigation. I believe effective case management of aboriginal litigation requires an effort on behalf of all parties and the court to find a creative way to

²⁴ *Malii v British Columbia*, [2024 BCSC 85](#) at paras. [37-46](#).

²⁵ *R v Van der Peet*, [\[1996\] 2 SCR 507](#) at para. [31](#).

try the issues without invoking oppressive conduct that deters the plaintiffs or prejudices the defendants.²⁶

22. The present appeals present the Court with a unique opportunity to find a creative solution, providing much needed judicial guidance on an issue which is pervasive, prohibiting access to justice, and in turn delaying reconciliation for Indigenous peoples across the country.

B. The Relationship between Modern Treaty Negotiations and Title Litigation

23. The Nisga'a appeal raises the question of the relationship between the negotiation of modern treaties and Aboriginal title litigation. KZA urges this Court not to endorse any approach which may encourage a "race to the negotiating table", resulting in overly broad modern treaties that fail to address overlapping claims, instead deferring those issues to future Aboriginal title litigation by First Nations with claims that overlap with modern treaty rights.

24. In negotiating modern treaties, the Crown has ratified land claim agreements which recognize territorial assertions and rights over large swaths of land even where other Indigenous nations have overlapping claims.²⁷ The Nisga'a appeal is an example of the litigation consequences that can flow from such agreements. Instead of proactively resolving overlapping claims during the negotiation process, modern treaties generally have a non-derogation clause stating the treaty will not adversely affect the Aboriginal rights and title of other Indigenous nations.²⁸ This means that when Indigenous nations whose territorial claims overlap with modern treaty rights seek recognition of their Aboriginal title through litigation, they may face pressure to add the treaty nation to their Aboriginal title claim based on alleged potential impacts of the title litigation on treaty rights established through negotiation – to which they were not a party.

25. The interplay between modern treaty negotiations and title litigation creates unique challenges for Indigenous nations who choose to litigate for protection of their Aboriginal title to lands subject to rights established through modern treaties. These issues are not exclusive to the Respondents Gitanyow Hereditary Chiefs and constitute a significant access to justice issue for many Indigenous nations across the country, including KZA.

²⁶ *Hereditary Chiefs Tony Hunt et al v Attorney General of Canada et al*, [2006 BCSC 1368](#) at para. [26](#).

²⁷ See e.g., *Taku River Tlingit First Nation v Attorney General of Canada*, [2016 YKSC 7](#) at paras. [89](#) and [92\(4\)](#).

²⁸ See e.g., *Reece v Canada (Attorney General)*, [2022 BCSC 865](#) at para. [125](#).

26. There are serious impacts to access to justice and reconciliation if modern treaty negotiations that do not account for overlapping claims are allowed to delay litigation by Indigenous Nations for recognition of their Aboriginal title. KZA urges this Court not to endorse an approach which encourages a “race to the negotiating table”, where those first to negotiate land claims do so at the expense of others later seeking recognition of rights and title in court.

27. Through the treaty negotiation process, Nations can assert rights and title “without having proved them in a court of law.”²⁹ Despite this, modern treaties become constitutionally protected under s. 35(3) of the *Constitution Act, 1982*. Keeping in mind that the Crown has ratified such agreements even in the face of overlapping claims,³⁰ if these final treaties (or their in-progress negotiations) are then allowed to delay litigation through the liberal granting of party status when neighbouring Nations choose to bring their own Aboriginal rights and title claims in court, those who did not have to prove their claims in court are nonetheless given the power to stand in the way of their neighbours doing just that. This is so even where litigating nations who are navigating demanding legal tests seek no relief against their modern-treaty-holding counterparts.

28. The access to justice implications of such an approach would be immense in terms of added cost, length, and complexity to already challenging proceedings. Though negotiations are of course valuable, it is crucial to consider that many Nations pursue litigation after substantial negotiation efforts have been rejected, stalled, failed, or were otherwise insufficient to resolve the issues.³¹ For these Nations, it is through such litigation that they may finally resolve their outstanding claims, and move further along the path to reconciliation.

29. It is important to bear in mind that modern treaties are meant to provide a negotiated solution to Indigenous land claims that results in certainty about the Indigenous nation’s rights with respect to land.³² Given the nature of modern treaties, there is little rationale for including modern treaty rights-holders in overlapping Aboriginal title litigation. The treaty nation has

²⁹ *Gitanyow First Nation v Canada*, [1998 CanLII 5403](#) (BC SC) at para. 8.

³⁰ *Taku River Tlingit First Nation v Attorney General of Canada*, [2016 YKSC 7](#) at paras. 89 and 92(4).

³¹ See e.g. *Wii'litswx v British Columbia (Minister of Forests)*, [2008 BCSC 1139](#) at para. 24; *Cowichan Tribes v Canada (Attorney General)*, [2025 BCSC 1490](#) at para. 3136; *Yahey v British Columbia*, [2021 BCSC 1287](#) at para. 1820; *Nunavik Inuit v Canada (Minister of Canadian Heritage)*, [\[1998\] FCJ No 1114](#).

³² See e.g. *Nunavut Tunngavik Incorporated v Canada (Attorney General)*, [2014 NUCA 2](#) at para. 4.

chosen to negotiate, rather than litigate, its rights, which are set out in an agreement. Thus, there is little to be gained for the treaty nation in defending against an Aboriginal title claim. Instead, the negotiated settlement is imported into the litigation sphere in a way that can unnecessarily derail, delay and complicate legitimate litigation for recognition of Aboriginal title and rights.

30. Given these challenges, KZA respectfully submits that the interplay between modern treaty negotiations and title litigation must be managed in a way that does not elevate the interests of early negotiators above the fundamental principles of access to justice and reconciliation. In doing so, courts must ensure that the addition of parties in such cases is reserved for truly necessary circumstances, and not merely because of ongoing or completed treaty talks which may not have factored in or resolved overlapping claims.

31. In all considerations of party additions in the Aboriginal title context, including where the application to join comes from a group with a modern treaty completed or in progress, the threshold for participation must be set at a high level in order to respect the principles of access to justice and reconciliation. Clear guidance from this Court is required in order to resolve the existing state of affairs in this area of the law where frequent and problematic delays result from applications for participation from proposed parties asserting an overlapping claim. By establishing a principled framework on the matter, the Court will empower Indigenous groups with greater certainty and efficiency in their litigation efforts and reduce the encumbrance of avoidable delays and costs.

PARTS IV & V – COSTS AND ORDER SOUGHT

32. KZA does not seek costs and asks that no costs should be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of November, 2025.



Eamon Murphy
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Kitigan Zibi Anishinabeg



Julian Riddell

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