IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Wii'litswx v. British Columbia (Minister of Forests),*** 2008 BCSC 1139

Date: 20080822
Docket: S076420
Registry: Vancouver

Between:

Wii'litswx, also known as Morris Derrick, Luuxhon, also known as Don Russell, Gwass Hlaam, also known as George Phillip Daniels, Malii, also known as Glen Williams, Haizimsque, also known as Edger Good, Watakhayetsxw, also known as Agatha Bright, on behalf of themselves and in their capacity as the Gitanyow Hereditary Chiefs and on behalf of all Gitanyow persons

Petitioners

And:

Her Majesty the Queen in Right of the Province of British Columbia as represented by the Minister of Forests, the Ministers of Forests and W.I. (Bill) Warner

Respondents

Before: The Honourable Madam Justice Neilson

Reasons for Judgment

Counsel for the Petitioners	Peter R. Grant, Jeff Huberman & Michael L. Ross
Counsel for the Respondents	Paul J. Pearlman, Q.C. & Erin K. Christie
Date and Place of Hearing:	January 14-18, 2008 Vancouver, B.C.

INTRODUCTION

[1] The petitioners are the Hereditary Chiefs of the Gitanyow Nation ("Gitanyow"). They bring this petition on behalf of Gitanyow for judicial review of the decision of the respondent Mr. W.I. (Bill) Warner,

Regional Director of the respondent Minister of Forests ("MoF"), approving six forest licence ("FL") replacements pursuant to s. 15 of the ***Forest Act***, R.S.B.C. 1996, c. 157, which cover portions of Gitanyow traditional territory. The petitioners allege that, in the course of making that decision, the respondent Crown failed to adequately perform its duty to consult with Gitanyow and accommodate its aboriginal interests, as mandated by the Supreme Court of Canada in ***Haida Nation v. British Columbia (Minister of Forests)***, 2004 SCC 73, [2004] 3 S.C.R. 511 [***Haida***], and ***Taku River Tlingit First Nation v. British Columbia***, 2004 SCC 74, [2004] 3 S.C.R. 550 [***Taku***]. They accordingly seek relief in the nature of *certiorari*, *mandamus*, and prohibition, as well as related declaratory relief.

[2] The Crown acknowledges that it had a constitutional duty to meaningfully consult with Gitanyow in good faith, and to seek to accommodate its asserted aboriginal rights and title, in the course of the decision to replace the FLs. The Crown says that Mr. Warner and the MoF, on its behalf, engaged in a reasonable process of consultation, and provided interim accommodations appropriate to Gitanyow's interests. They argue that the petition should accordingly be dismissed.

[3] There is no dispute between the parties as to the applicable law, and little disagreement about the facts. The sole issue is the adequacy of the consultation and the accommodations reached in the course of the Crown's decision to replace the FLs.

THE APPLICABLE LAW AND THE ISSUES IN THIS CASE

[4] The law governing the Crown's duty to consult and accommodate, and the standard for judicial review of that duty, define the issues in this case.

The Duty to Consult and Accommodate

[5] In ***Haida***, at para. 25, Chief Justice McLachlin summarized the historical foundation for this duty:

> 25 Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.

[6] Section 35 of the ***Constitution Act*** recognizes and affirms the constitutional character of aboriginal rights. In ***R. v. Vanderpeet***, [1996] 2 S.C.R. 507 at para. 31, 23 B.C.L.R. (3d) 1 [***Vanderpeet***] , Chief Justice Lamer described the import of s. 35:

> 31 More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.

[7] 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). The Court expressed similar views in ***Mitchell v. Minister of National Revenue***, 2001 SCC 33 at para. 12, [2001] 1 S.C.R. 911:

> Since s. 35(1) is aimed at reconciling the prior occupation of North America by aboriginal societies with the Crown's assertion of sovereignty, the test for establishing an aboriginal right focuses on identifying the integral, defining features of those societies.

[8] The duty to engage in meaningful consultation arises when the Crown has knowledge, real or constructive, of the potential existence of aboriginal rights or aboriginal title, and contemplates conduct that may adversely affect them. The scope of the duty to consult and accommodate is proportionate to a preliminary assessment of the strength of the case for the existence of the rights or title, and the seriousness of the potentially adverse effect upon those rights or title. Exactly what the honour of the Crown may require falls within a spectrum defined by that assessment. Where the potential claims to aboriginal rights and title have not yet been proven, the honour of the Crown nevertheless requires it to respect these interests and, depending on the circumstances, to consult and reasonably accommodate them pending resolution of the claim. Each case must be approached individually and flexibly, with the focal question being what is required to maintain the honour of the Crown and to effect reconciliation with respect to the interests at stake (***Haida***, at paras. 35, 38-39, 43-45).

[9] Good faith on both sides is required. There is no duty to agree. The process does not give aboriginal groups a veto over what can be done with the land pending final proof of their claim. The Crown may continue to manage the resource in question pending claims resolution, but within the bounds of maintaining the honour of the Crown. The commitment is to a meaningful and reasonable process of consultation (***Haida***, at paras. 27, 42, and 48).

[10] Meaningful consultation may reveal a duty to accommodate aboriginal interests through an amendment to Crown policy or practice, in an attempt to resolve conflicting interests and move toward the ultimate goal of reconciliation. Where the aboriginal claim is strong and the potential adverse consequences of government action are significant to the claimed right or title, the honour of the Crown may require accommodation to avoid irreparable harm or to minimize the infringement, pending final resolution of the claims. Inherent in this process is a need to reasonably balance aboriginal concerns over the potential impact of the decision with other societal interests (***Haida***, at paras. 47, 49-50). Responsiveness is a key requirement of both consultation and accommodation (***Taku***, at para. 25).

The Standard of Review

[11] In ***Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)***, 2005 BCSC 697 at para. 94, 33 Admin L.R. (4th) 123 [***Huu-Ay-Aht First Nation***], Madam Justice Dillon described the court's role in a judicial review of the Crown's duty to consult and accommodate:

> 94 *Haida* … and *Taku River* … established that the principle of the honour of the Crown requires the Crown to consult and, if necessary, accommodate Aboriginal peoples prior to proof of asserted Aboriginal rights and title. This is a corollary of s. 35 of the *Constitution Act, 1982*, in which reconciliation of Aboriginal and Crown sovereignty implies a continuing process of negotiation which is different from the administrative duty of fairness that is triggered by an administrative decision that affects rights, privileges, or interests (*Haida* at paras. 28-32). The obligation is a free standing enforceable legal and equitable duty (*Haida Nation v. British Columbia (Minister of Forests*) (2002), 99 B.C.L.R. (3d) 209 at para. 55, 2002 BCCA 147 [*Haida Nation* (2002)]; *Squamish Indian*

> *Band v. British Columbia (Minister of Sustainable Resource Management*) (2004), 34 B.C.L.R. (4th) 280, 2004 BCSC 1320 at para. 73 [*Squamish*]). The courts may review government conduct to determine whether the Crown has discharged its duty to consult and accommodate pending claims resolution (*Haida* at para. 60). In its review, the court should not give narrow or technical construction to the duty, but must give full effect to the Crown's honour to promote the reconciliation process (*Taku* at para. 24). It is not a question, therefore, of review of a decision but whether a constitutional duty has been fulfilled (*Gitxsan* [*infra*, at para. 65]…).

[12] In ***Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)***, 2005 BCCA 128 at paras. 17-19, 37 B.C.L.R. (4th) 309, Southin J.A. expressed a similar view, observing that claims alleging that the Crown has failed to consult and accommodate aboriginal interests are "upstream" of the statutes under which ministerial powers are exercised, and address not the lawful exercise of powers conferred by statute, but an overarching constitutional imperative.

[13] Thus, in this case, it is not Mr. Warner's decision to replace the FLs that is the subject of judicial review. It is the Crown's conduct with respect to fulfillment of its duty to consult Gitanyow and to accommodate its interests in the course of making that decision.

[14] In ***Haida***, at paras. 60-63, the Court discussed the applicable standard of review where the challenge to government conduct is based on allegations that it failed to discharge its duty to consult and accommodate pending claims resolution, and provided the following guidelines.

[15] The existence or extent of the duty to consult or accommodate is a question of law, in the sense that it defines a legal duty. As set out above, it is based on the Crown's assessments of the strength of the claim, and the potential seriousness of the impact of the infringement. Those assessments are questions of law to be judged on the standard of correctness. However, in that they are typically premised on an assessment of the facts, a degree of deference to the findings of fact of the decision maker may be appropriate. Thus, to the extent that this issue is one of pure law and can be isolated from issues of fact, the standard of review is correctness. However, where the two are inextricably entwined, the standard of review will likely be reasonableness.

[16] The adequacy of the consultation process is governed by a standard of reasonableness. There is some inconsistency in the authorities, however, as to the proper focus of that analysis. In ***Haida***, at para. 63, the Court indicated that the focus should not be on the outcome, but on the process of consultation and accommodation. However, in ***Gitxsan First Nation v. British Columbia (Minister of Forests)***, 2004 BCSC 1734 at para. 63, 38 B.C.L.R. (4th) 57 [***Gitxsan No. 2***] Tysoe J., in applying the principles from ***Haida*** and ***Taku***, took what appears to be an opposing view, holding that the focus must be on the overall result:

> 63 In assessing the adequacy of the Crown's efforts to fulfil its duty to consult and accommodate, the court will usually look at the overall offer of accommodation made by the Crown and weigh it against the potential impact of the infringement on the asserted Aboriginal interests having regard to the strength of those asserted interests. The court will not normally focus on one aspect of the negotiations because the process of give and take requires giving in some areas and taking in other areas. It is the overall result which must be assessed.

[17] In my view, this apparent conflict is reconciled by the approach set out at paras. 39-44 of ***Taku***. 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 by considering whether that consultation had identified a duty to accommodate aboriginal concerns, and the adequacy of any resulting accommodations.

The issues in this case

[18] Based on the legal principles set out above, the following issues must be determined here:

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 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?

[19] I will set out the background of the parties and the chronology of their dealings in the course of the FL replacement decisions before returning to these issues.

THE PARTIES – BACKGROUND, STATUTORY CONTEXT, AND EARLIER LITIGATION

Gitanyow

[20] The Gitanyow people are "Indians" within the meaning of s. 91(24) of the ***Constitution Act, 1867***, and are aboriginal people of Canada within the meaning of s. 35 of the ***Constitution Act***. Gitanyow asserts aboriginal rights, title, and governance to approximately 6,500 square miles of territory in north-western British Columbia on the basis that it has traditionally owned, occupied, and used that territory.

[21] 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.

[22] 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.

[23] 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.

[24] Gitanyow was accepted into the Federal Treaty Negotiation Process in 1980. It has participated in the British Columbia Treaty Process since 1994, but since 1996 the process has been stalled at stage four, which is the negotiation of an agreement in principle.

[25] 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.

[26] 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.

The Legislative Framework and the Crown

[27] When the present dispute between the parties arose, the forest industry in British Columbia was governed by the ***Forest Act***, R.S.B.C. 1996, c. 31 and the ***Forest and Range Practices Act***, S.B.C. 2003, c. 53 ("***FRPA***"). The former dealt with forest use and administration, including licence issue and replacement. The latter dealt with operational aspects of the industry, including logging practices, planning and protection. Both were initially administered by the MoF and, since March 30, 2006, by the Ministry of Forests and Range. Since the named respondent in this proceeding is the Minister of Forests, I have referred to both Ministries collectively as the MoF throughout these reasons.

[28] The ***Forest Regions and Districts Regulation***, B.C. Reg. 123/2003, enacted under the ***Forest Act***, divides the province geographically into three forest regions. Gitanyow traditional territory is located in the Northern Interior Forest Region, which is managed by the respondent, Mr. Warner, as the Regional Director. Each region is in turn divided into a number of forest districts. Gitanyow traditional territory lies in the Skeena Stikine District, which is managed by a District Manager.

[29] The forest resources in each district are in turn divided into timber supply areas ("TSAs") under s. 7 of the ***Forest Act***, and tree farm licence areas ("TFLAs") under s. 35 of that ***Act***. Gitanyow traditional territory, and the FLs that are the focus of this case, are situated within the Cranberry/Kispiox and Nass TSAs.

[30] The difference between a TSA and a TFLA is exclusivity of harvest. A holder of a tree farm licence ("TFL") has the exclusive right to harvest timber from the associated TFLA in accordance with the annual allowable cut ("AAC") attached to the licence. Holders of other AAC-based licences, including FLs, must share the total AAC for the TSA identified in their licences. The AAC is set by the Chief Forester at least every five years through a process called the timber supply review ("TSR"),

pursuant to s. 8 of the ***Forest Act***. In the case of FLs, the District Manager apportions the AAC for the TSA among the licensees.

[31] An FL is a contract between a licensee and the Crown that gives the licensee the right to harvest timber from and build roads in public forests over a specified term, in exchange for meeting the Crown's forest management objectives and paying stumpage fees. Its terms are largely dictated by s. 14 of the ***Forest Act***. An FL is issued for a specific TSA or TFLA for up to 20 years, and must specify an AAC.

[32] Section 15 of the ***Forest Act*** provides a procedure for offering replacement FLs to licensees for a term of 15 years. Sections 15(1.1) and (1.2) impose a time frame for the replacement process. In years four through eight of a licence, a replacement offer may be made during the first six months of each licence year after first giving at least six months' notice of intent. If no replacement offer has been made during the first eight years of an FL, it must be made in the first half of the ninth licence year.

[33] Mr. Warner was the MoF employee in charge of FL replacements in the Northern Interior Forest The focus of this case is the process of consultation and accommodation that preceded his decision of F 28, 2007 to replace six FLs that overlapped Gitanyow traditional territory. The licensees, licence numbe location, and deadlines for replacement under s. 15(1.1) of the ***Forest Act*** were:

Licence date	Forest Licence Number	Licensee	Timber Supply Area	Deadline for Offer under s. 15(1.1)	Effective Date of the Replaced FL
Sept. 1,1998	A16831	Gitxsan Forest Enterprises	Kispiox	February 28, 2007	September 1, 2007
Sept. 1, 1998	A16832	Bell Pole Canada Inc.	Kispiox	February 28, 2007	September 1, 2007
Nov. 30, 1999	A16833	Kitwanga Mills Ltd.	Kispiox	May 31, 2007	December 1, 2007
Nov. 15, 2000	A16882	West Fraser Mills Ltd.	Nass	May 14, 2007	November 15, 2007
Nov. 15, 2000	A16884	Canada Resurgence Developments Ltd.	Nass	May 14, 2007	November 15, 2007
Oct. 1, 1998	A16886	Sim Gam Forest Corporation	Nass	March 31, 2007	October 1, 2007

[34] FL A16831, held by Gitxsan Forest Enterprises Inc., became the subject of another proceeding and will not be considered further here. A seventh FL that overlapped Gitanyow traditional territory was surrendered and not offered for a replacement.

[35] While an FL gives the licensee a right to harvest an annual volume of timber in accordance with its allocated portion of the AAC for its TSA, the licensee cannot log until it has complied with two operational requirements overseen by the District Manager. First, the licensee must prepare and receive approval for a forest stewardship plan ("FSP") under s. 3 of the ***FRPA***. The FSP specifies how the licensee will meet various objectives established by the government under the ***FRPA*** and the ***Forest Planning and Practices Regulations***, B.C. 14/2004 ("***FPPR***"). Sections 4 and 10 of the ***FPPR*** include guidelines to be used in evaluating objectives related to aboriginal rights. I will return to those later in these Reasons. Second, once the FSP has been approved, the licensee must apply to the District Manager to be issued cutting permits. These specify the exact area and volume of permitted harvest.

[36] A licensee must also meet silviculture obligations in accord with the requirements of the ***FRPA***, applicable regulations, and its approved FSP. Failure to do so may result in a variety of sanctions,

including substantial fines, criminal penalties, and/or a suspension of harvesting rights. Moreover, under s. 15(2) of the ***Forest Act***, if a licensee fails to perform these obligations, the MoF may decline to offer a replacement FL until the obligations are performed, or may offer an FL replacement with special conditions.

Litigation History between the Parties

[37] In the years preceding these FL replacements, logging on Gitanyow traditional territory had a troubled history. There were numerous changes and difficulties among the companies that held the FLs. In the last 15 years, five companies had held the principal FLs, and each had encountered financial difficulties, resulting in receivership or dependency on government assistance. As a result, some licensees overharvested timber and failed to fulfill their silviculture obligations. These events led to litigation between the parties on two previous occasions, in 2002 and 2004.

[38] In 2002, Gitanyow and two other First Nations with traditional territories in the northwest of this province brought a judicial review application challenging the decision of the MoF to consent to the change of control of Skeena Cellulose Inc. ("Skeena"), a forest company that held TFLs and FLs covering lands over which the petitioners asserted aboriginal title and aboriginal rights. The change of control was brought about by Skeena's financial difficulties. The petitioners alleged that the Crown had failed to conduct meaningful consultation, or attempt to accommodate their concerns. The petition was heard by Tysoe J. whose reasons are found at ***Gitxsan First Nation v. British Columbia (Minister of Forests)***, 2002 BCSC 1701, 10 B.C.L.R. (4th) 126 ["***Gitxsan No. 1***"].

[39] At paras. 49-53, Tysoe J. assessed the evidence put forward by Gitanyow in support of its claim of aboriginal title and rights, which appears to have been essentially the same material as that before me. At paras. 69-75, he provided what he described as a "preliminary general assessment" of the strength of the petitioners' claims on the affidavits before him, but made it clear that a final determination of their claims for aboriginal title and rights should be left for trial. In that context, he found that Gitanyow had a good *prima facie* claim of aboriginal title, which he equated with reasonable probability, and a strong *prima facie* claim of aboriginal rights, which he equated with substantial probability, with respect to at least part of the areas claimed by it that fell within the land covered by Skeena's TFLs and FLs. His limitation to "at least part of the areas claimed" was based solely on the fact that there were overlapping claims among the petitioners to parts of the same territories.

[40] ***Gitxsan No. 1*** preceded the decisions of the Supreme Court of Canada in ***Haida*** and ***Taku***. Relying primarily on the decisions of the B.C. Court of Appeal in those cases, Tysoe J. found at paras. 86 and 87 that each of the petitioning First Nations had established a *prima facie* infringement of aboriginal title or rights giving rise to a duty on the MoF to consult them before agreeing to the change of control of Skeena, and that the MoF had failed to engage in meaningful consultation, or attempt to accommodate the First Nations' concerns. While he declined to set aside the MoF's decision, he granted declaratory relief with respect to the failure to consult, to allow the parties to undertake a proper process of consultation and accommodation, with liberty to bring the matter back before the court for further directions or declarations.

[41] The Crown says that since ***Gitxsan No. 1*** it has recognized its duty to consult with Gitanyow and reach appropriate accommodation with respect to forest operations conducted in Gitanyow traditional territory. Gitanyow, however, was not satisfied with the level of consultation and accommodation from the Crown and, in 2004, brought a second application before Mr. Justice Tysoe, again seeking to quash the decision that permitted a change in control of Skeena Cellulose Inc.: ***Gitxsan No. 2***.

[42] Tysoe J. reviewed the course of dealings between the parties since his first decision, including their negotiations, related legislative initiatives, and an unsuccessful attempt to negotiate a five-year Forest and Range Agreement under the ***FRPA***. Such agreements are typically intended to provide interim economic and other accommodation while treaty negotiations are ongoing, in exchange for the First Nation's agreement that the Crown had fulfilled its duty to consult and seek interim accommodation for the term of the agreement. He outlined four major areas of disagreement between

the parties: revenue sharing, consultation in advance, forest tenure, and joint planning.

[43] With respect to revenue sharing, Mr. Justice Tysoe observed that under the proposed Forest and Range Agreement, the Crown was offering an economic benefit based on $500 a year for each Gitanyow person registered with the Department of Indian and Northern Affairs. This would provide an annual payment of $340,000 to Gitanyow. Gitanyow took the position that economic accommodation should instead be based on volume of timber harvested from the Gitanyow traditional territory, or Wilp membership, as in treaty negotiations.

[44] With respect to joint planning, Mr. Justice Tysoe noted that Gitanyow wanted to be involved in joint planning of strategic higher level decisions. While the Crown expressed interest in this, and there was a draft Memorandum of Understanding that gave some suggestion that joint preparation of a sustainable resource management plan ("SRMP") might be undertaken, the Crown said it presently had no funds to support a planning initiative in Gitanyow traditional territory. It did, however, invite Gitanyow to participate in a less formal joint planning exercise in the Cranberry/Kispiox TSA. Gitanyow rejected this as not meaningful.

[45] Tysoe J. also noted particular problems with respect to the failure of Buffalo Head Resources Ltd., originally a subsidiary of Skeena, to honour its silviculture obligations. Buffalo Head and its successors hold FL A16884, one of the FLs replaced by Mr. Warner and at issue in this case.

[46] Tysoe J. examined these circumstances in the context of the recent decisions of the Supreme Court of Canada in ***Haida*** and ***Taku***. At para. 57, he offered several non-binding observations to assist the parties if they chose to continue negotiation of a Forest and Range Agreement. At para. 65, he concluded that although significant progress had been made since his earlier decision, the Crown had not yet fulfilled its duty of consultation and accommodation. He again declined to quash or set aside the MoF's consent to the change of control of Skeena, however, as the Crown had demonstrated a willingness to consult with Gitanyow and accommodate their interests. He granted further declaratory relief that confirmed that the Crown had not yet provided meaningful and adequate consultation and accommodation, with liberty to apply to the court with respect to further questions or relief.

CHRONOLOGY OF CONSULTATION OVER THE REPLACEMENT FOREST LICENCES

[47] After the decision in ***Gitxsan No. 2***, negotiations continued between Gitanyow and MoF representatives in an attempt to reach some form of a forestry accommodation agreement. Gitanyow's chief negotiator in these discussions was the petitioner Malii, who is the Hereditary Chief of Malii Wilp, and is also known as Glen Williams.

[48] These discussions centred on four main concerns put forward by Gitanyow: recognition of Gitanyow aboriginal rights and title; sustainability of forest resources within Gitanyow traditional territory, including reforestation and silviculture; implementation of joint land use planning; and economic accommodation through revenue sharing or other means. While negotiations continued, the Crown undertook several new initiatives in an effort to respond to these concerns.

[49] First, the joint land use planning initiative progressed. In late 2004, the MoF invited Gitanyow to participate in a joint landscape level planning exercise in the Cranberry/Kispiox TSA as a means of accommodating its interests through joint resource planning for its traditional territory. The stated goal was to integrate Gitanyow cultural heritage values and traditional uses with other values on the lands, and use that information in planning for future timber harvesting.

[50] 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.

[51] This draft LUP considered the individual Wilp territories to be planning sub-units. 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.

[52] The draft LUP also promoted the creation of a joint resources council, comprising representatives from Gitanyow and the provincial ministries, to administer and implement the plan once it was completed. The MoF and Gitanyow agreed to the creation of such a council and commenced negotiations over its mandate and terms in mid 2005.

[53] As the development of the LUP progressed, Gitanyow indicated that it wished to expand the joint planning initiative to cover all of its traditional territories. As a result, the MoF encouraged the Integrated Land Management Bureau ("ILMB") of the Ministry of Agriculture and Lands ("MoAL") to undertake development of an SRMP for the Nass TSA.

[54] In late 2005, the draft LUP was reviewed with licensees in the Cranberry/Kispiox TSA. Since then, the licensees and the District Manager of the Skeena Stikine Forest District have been using the LUP on a voluntary basis in their planning processes, and in the development of FSPs.

[55] As the planning process has evolved, the MoF and Gitanyow have endorsed a long-term plan to use the LUP as a foundation for the development of an SRMP for the Cranberry/Kispiox TSA by integrating values and interests beyond the MoF's mandate, and undertaking broader consultation and review under the guidance of the ILMB. The intention is that ultimately, the SRMPs for both the Cranberry/Kispiox and the Nass TSAs will be given legislative force. The process for that is obscure, as neither party provided material that adequately explained the legislative underpinning for these land use planning processes. Nevertheless, the implementation of this plan, and the enforcement of the LUP objectives in the meantime, has been a continuing theme in the consultations between Gitanyow and the MoF.

[56] In the spring of 2005, the MoF established the Northwest Forest Restoration and Enhancement Program ("NWFREP") to respond to both Gitanyow and Gitxsan reforestation and silviculture concerns in their traditional territories. Its aim was to identify and address areas harvested prior to 1987 that were not free-growing, to deal with forest restoration and forest enhancement priorities, and to provide aboriginal employment opportunities in the forest industry. The MoF made an initial commitment to Gitanyow under the NWFREP for $1 million over four years.

[57] There were also broader initiatives that had the potential to advance Gitanyow's aboriginal interests. In March 2005, the governments of British Columbia and Canada began discussions with First Nations leaders that culminated in a document entitled "The New Relationship". Among other things, this document affirmed a "new government-to-government relationship based on respect, recognition and accommodation of aboriginal title and rights, and a commitment to reconciliation of Aboriginal and Crown titles and jurisdictions." The New Relationship was affirmed by the Transformative Change Accord reached by the governments of British Columbia and Canada and the Leadership Council representing the First Nations of British Columbia at the Kelowna Accord on November 25, 2005.

[58] On September 29, 2005, Mr. Warner raised the pending replacement of the FLs on Gitanyow traditional territory with Gitanyow for the first time. He wrote to Mr. Williams advising that while negotiations toward an interim Gitanyow forestry agreement continued, the MoF wished to complete the consultation process for the pending FL replacements by November 30, 2005, in a manner consistent with ***Haida*** and ***Taku***. Mr. Warner's letter listed the FLs in Gitanyow's "asserted traditional territory", and explained the process and effect of replacing them. It indicated that the replacement term for each licence would be 15 years, and advised Gitanyow that once an FL was replaced, their next opportunity

for consultation would be at the operational level when the licensee's FSPs were considered for approval or amendment. The letter invited input with respect to aboriginal interests and concerns in writing or through meetings.

[59] On November 25, 2005, Mr. Williams responded to Mr. Warner's letter. He acknowledged the MoF's intention to conduct consultation, and reiterated the findings of Mr. Justice Tysoe with respect to the strength of Gitanyow's claims to aboriginal rights and title. He identified the licences that overlapped Gitanyow Wilp territories, and Gitanyow's cultural, heritage and economic interests. He described the impact of the FL replacements on Gitanyow's aboriginal interests, including heavy logging, remediation that had not kept pace with timber extraction, and lack of Gitanyow control over how much of each licensee's AAC was extracted from its traditional territories. Mr. Williams expressed the view that the strength of Gitanyow's claim and the seriousness of the potential impact mandated that Gitanyow be included in the FL replacement decision, and in setting the conditions of the replacement FLs. He indicated concern about the extended replacement period, and the need to protect Gitanyow's aboriginal rights and title in the Gitanyow Wilp territories when making the FL replacement decision. Mr. Williams then set out a number of ongoing but unfinished initiatives, including the LUP and the establishment of a joint resources council, which he said represented Gitanyow's attempt to build a proper framework for consultation and accommodation. He complained that despite these initiatives, the MoF continued to "run rough-shod" over Gitanyow rights and title. He stated that while Gitanyow was prepared to meet and discuss the matter further, it wanted the replacement decision to be postponed until the LUP process was complete and a joint resource committee was in place.

[60] In response, the MoF extended the deadline for consultation with respect to the replacements of the FLs. On January 9, 2006, Mr. Warner wrote to Mr. Williams, affirming that Gitanyow had significant interests with respect to the FL replacements and that these needed to be addressed through further discussion. He agreed to convene a special meeting of what he referred to as the "joint forestry council", to share information with respect to forest tenures within Gitanyow territory, and to gain a clear understanding of its concerns and proposals. He also indicated that further discussion should take place to determine how the LUP may or may not relate to the FL replacements. While he acknowledged that there was some flexibility in the timing of the replacements, it was clear that he wished to get on with the process.

[61] On February 21, 2006, the Gitanyow Joint Resources Council ("JRC") met for the first time. Representatives of Gitanyow and the MoF attended and discussed the FL replacements. Gitanyow identified four interests that needed to be addressed in that process:

(1) acknowledgement of Wilp territories affected and recognition of aboriginal rights and title;

(2) outstanding silviculture obligations;

(3) acknowledgement of the LUP that was being developed; and

(4) an economic component.

[62] Discussion covered suggestions to address these issues by adding clauses to the licence document, particularly in the "WHEREAS" preamble, or to a cover letter issued with the replacement FL offer. Inclusion of a silviculture deposit as a condition of the FL was also raised as a possibility. It was agreed that Linda Robertson, the Regional Aboriginal Affairs Manager for the Northern Interior Forest Region, would draft clauses to be included in the FL for discussion, and that Mr. Williams would provide a summary of issues that Gitanyow wished to have addressed.

[63] On February 24, 2006, Mr. Warner issued the Notices of Intent to offer replacements of the FLs required under s. 15(1.1) of the ***Forest Act***. These were not copied to Gitanyow. This meant that the FL replacement offers could be made to the licensees after August 24, 2006 pursuant to s. 15(1.1) of the ***Forest Act***. The final deadline for replacements under s. 15(1.2) was 9.5 years after the date the FL was issued, which ranged from February 28, 2008 to April 15, 2010.

[64] On March 10, 2006, the JRC met again. They discussed a replacement schedule that suggested consultation should be complete by September. Ms. Robertson produced a proposed recognition clause for inclusion in the FLs that referenced Gitanyow's aboriginal rights and title in a manner consistent with Mr. Justice Tysoe's judgment in ***Gitxsan No. 1***. Mr. Williams indicated that this would be a significant start. Ms. Robertson advised that the MoF was unable to put Wilp recognition in the FLs. She offered no explanation for this, but suggested that recognition could be achieved if the MoF committed to send the licensees a letter during the preparation of their FSPs that advised them of the Wilp territories that overlapped their licence areas. The MoF representatives also cautioned that the FL replacement process may not have sufficient flexibility to address all of Gitanyow's concerns, such as silviculture obligations and economic benefits. Mr. Williams expressed Gitanyow's concern over the uncertainty of who would be responsible for the outstanding silviculture obligations, and Ms. Robertson suggested that this issue be flagged for the FL replacement consultation process. Further discussion took place with respect to the ongoing LUP/SRMP process, and using it to incorporate Gitanyow's interests in FSPs.

[65] On March 14, 2006, Gitanyow received funds of $145,000 through the ILMB to finance its ongoing participation in the development of the Nass SRMP.

[66] In mid-2006, the NWFREP committed a further $1 million over the next four years for reforestation and silviculture projects in the Nass TSA in response to Gitanyow's concerns about reforestation in that area.

[67] In August 2006, the MoF and Gitanyow successfully concluded negotiation of the Gitanyow Forestry Agreement (the "GFA"), a forestry accommodation agreement with a five year term. Its preamble reads:

> **Whereas:**
>
> A. British Columbia and Gitanyow have interests in forestry and economic development with the Traditional Territory.
>
> B. British Columbia acknowledges that Justice Tysoe of British Columbia Supreme Court has held that British Columbia has a duty to consult with Gitanyow and to seek to accommodate their interests within the Traditional Territory.
>
> C. The Parties wish to address the outstanding obligations of British Columbia to consult and accommodate Gitanyow interests as required by Justice Tysoe in Yal et al v. Minister of Forests, Skeena Cellulose Inc. and NWBC Timber and Pulp Ltd. 2002 BCSC 1701 [***Gitxsan No. 1***] and Gitanyow First Nation v. British Columbia (Minister of Forests) 2004 BCSC 1734 [***Gitxsan No. 1***] and Gitanyow acknowledges that British Columbia has done so.
>
> D. Gitanyow has a relationship to the land that is important to its culture and the maintenance of its community, governance and economy.
>
> E. Gitanyow has Aboriginal Interests within the Traditional Territory.
>
> F. British Columbia and the First Nations Leadership Council, representing the Assembly of First Nations - BC Region, First Nations Summit and the Union of BC Indian Chiefs (the "Leadership Council") have entered into a New Relationship in which they are committed to reconciliation of Aboriginal and Crown titles and jurisdiction and have agreed to implement a government-to-government relationship based on respect, recognition and accommodation of Aboriginal title and rights.
>
> G. This Agreement is in the spirit and vision of the New Relationship.
>
> H. Work is underway regarding the implementation of the New Relationship and this Agreement may need to be amended in the future to reflect the outcomes of that work.
>
> I. References in this Agreement to Crown lands are without prejudice to Gitanyow's

Aboriginal title and/or rights claims over those lands.

J. British Columbia intends to consult and to seek an Interim Accommodation with Gitanyow on forest and/or range resource development activities proposed within the Traditional Territory that may lead to the infringement of Gitanyow's Aboriginal Interests.

K. Gitanyow intend to participate in any consultation with British Columbia or a Licensee in relation to forest and/or range resource development activities proposed within the Traditional Territory that may lead to an infringement of Gitanyow's Aboriginal Interests.

L. British Columbia and Gitanyow wish to resolve issues relating to forest resource development where possible through negotiation as opposed to litigation.

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

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.

[69] Section 2 sets out definitions. The following have relevance here:

2.1.5 "Gitanyow " means the eight Gitanyow Houses collectively referred to as the Huwilp being Gitanyow houses of Gwass Hlaam, Gamlaxyeltxw, Malii, Gwinuu, Luux Hon, Haitsimsxw, Wataxhyetsxw and Wii Litsxw.

2.1.6 "Interim Accommodation" means an accommodation, including an Interim Economic Accommodation, provided in this Agreement intended to further the reconciliation of Gitanyow's Aboriginal Interests with those of British Columbia in the interim prior to the reconciliation of these respective interests in a treaty. Any monetary payments made under this Agreement, including the accommodations provided in sections 4 through 8 reflect the present budget limitations of the Minister of the Forests and Range. It is acknowledged that other accommodations, including economic accommodations, may be jointly developed by the Parties during the term of this Agreement.

2.1.7 "Interim Economic Accommodation" means an Interim Accommodation of the economic component only of Gitanyow's Aboriginal Interests.

…

2.1.9 "Operational Decision " means a decision that is made by a person with respect

to the statutory approval of an Operational Plan that has a potential effect in the Traditional Territory.

2.1.10 "Operation Plan" means a Forest Development Plan, Woodlot Licence Plan, Forest Stewardship Plan, Range Use Plan or a Range Stewardship Plan that has a potential effect in the Traditional Territory.

…

2.1.13 "Traditional Territory" means Gitanyow Traditional Territory as shown on the map attached to this Agreement as Appendix A.

[70] The purposes of the GFA are set out in Section 3.1:

(a) implement the order of the British Columbia Supreme Court as set out in the judgement of Tysoe, J. in Yal et al v. Minister of Forests Skeena Cellulose Inc. and NWBC Timber and Pulp Ltd. 2002 BCSC 1701;

(b) set out measures to address Gitanyow's Aboriginal Interests in the context of forestry decisions that are made during the term of this Agreement and the forest development that occurs as a result of those decisions within the Traditional Territory during the term of this Agreement;

(c) create viable economic opportunities and to assist in the improvement of social conditions of Gitanyow through economic diversification;

(d) address consultation and provide Interim Accommodations related to forest resources development; and

(e) provide a period of stability to forest and range resource development on Crown lands within the Traditional Territory during the term of this Agreement, while longer term interests are addressed through other agreements or processes.

[71] Section 4 deals with "Forest Planning", and sets out a commitment by the parties to collaborate in implementing the LUP in the Cranberry/Kispiox TSA as a basis for developing integrated management objectives for the area, and to then work with the ILMB to merge those objectives with the Nass SRMP, with the ultimate aim of enabling the SRMP objectives through legislation once the parties have reached a consensus on them. It states that, as an interim step, the Crown and Gitanyow agree to encourage licensees to develop operational plans consistent with the "joint landscape level plans", which encompass the LUP and SRMP. Finally, it confirms that the Crown has provided funding of $237,500 to date for these endeavours.

[72] Section 5 deals with "Forest Restoration", and includes an acknowledgement by the Crown that it is important for Gitanyow to participate in reforestation and enhancement within its traditional territory. It affirms the two $1 million commitments made earlier by the NWFREP for these purposes, as well as provision of $50,000 for 2005 – 2007, and $25,000 for 2008, to support Gitanyow's participation in planning and implementation of the NWFREP activities. It also requires the Crown to provide Gitanyow, through the JRC, with updates and reports on the progress of Timber Baron in meeting its backlog of silviculture obligations. Timber Baron was the successor to Buffalo Head, the holder of FL No. A16884, whose silviculture delinquency was the subject of comment by Tysoe J. in ***Gitxsan No. 2***.

[73] Section 6 establishes the JRC, and acknowledges that the Crown has provided $10,000 to support its establishment in 2006-2007. Section 6.1 sets out its purposes:

British Columbia and Gitanyow agree to establish and operate a Joint Resources Council for the purpose of facilitating:

> (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,
>
> as per the Joint Resources Council terms of reference attached to this Agreement as Appendix C.

[74] Appendix C stipulates that Gitanyow and the Crown will each appoint two members to the JRC, and that staff members from both parties may serve in an *ex officio* capacity to provide support or serve on sub-committees as required. Appendix C includes this further statement of purpose:

> To implement a joint process that ensures the meaningful, effective and efficient consultation and accommodation of Gitanyow's Aboriginal Interests that are impacted, or have the potential to be impacted, by forest and/or range resource development activities within the Traditional Territory.
>
> The Gitanyow Joint Resources Council (GJRC) will achieve this by:
>
> (a) facilitating cooperative planning to address Gitanyow's Aboriginal Interests at the appropriate level of Crown land use planning; and
>
> (b) facilitating consultation processes and providing a forum for identifying issues of strategic importance to Gitanyow early in the forest planning cycle.

[75] Among the JRC's responsibilities listed in Appendix C is to "Coordinate the communication, information sharing and consultation processes with respect to [MoF] proposed Administrative Decisions and activities that have potential to impact Gitanyow's Aboriginal Interests". The FL replacements are defined as "Administrative Decisions" under the GFA.

[76] Section 7 deals with economic opportunities. Section 7.1 grants Gitanyow the right to apply for a five year non-replaceable forest licence in the Traditional Territories for up to 430,000 cubic meters over five years, and grants $35,000 for capacity development in connection with this licence.

[77] Section 7.2 provides for an interim annual payment to Gitanyow of $357,000 throughout the term of the Agreement. It also sets out a commitment by the Crown, through the MoF and the Ministry of Aboriginal Relations and Reconciliation ("MARR"), to establish a working group in which Gitanyow and other First Nations may participate, to examine alternative benefit and revenue sharing options.

[78] Section 8 provides for capacity funding of $275,000 upon execution of the GFA to support Gitanyow's ongoing participation in the JRC and the LUP and SRMP initiatives for 2006/07, as well as a process to establish a budget for similar expenses during each year of the GFA.

[79] Section 9 deals with "Consultation and Accommodation Respecting Administrative and Operational Decisions and Plans". It sets out a specific commitment to consult and seek workable accommodations of Gitanyow's aboriginal interests with respect to these decisions and plans through participation in "strategic level planning and policy development processes". Section 9.3 states:

> Subject to section 9.4, Gitanyow is entitled to full consultation with respect to all potential infringements of their Aboriginal Interests arising from any Operational Decision, Administrative Decision or Operational Plan affecting Gitanyow's Aboriginal Interests, regardless of benefits provided under this Agreement.

[80] In Section 9.4, Gitanyow affirms that in consideration of the accommodation outlined in Section 7 of the GFA, it agrees that the Crown has fulfilled its duties to consult and seek workable interim accommodation with Gitanyow with respect to five specific MoF decisions. Importantly, these do not include the FL replacement decisions.

[81] Other parts of Section 9 relevant to this proceeding are these:

> 9.5 During the term of this Agreement, and subject to the terms and intent of this Agreement being met and adherence by British Columbia, Gitanyow agrees that British Columbia has provided an Interim Economic Accommodation of Gitanyow's Aboriginal Interests and other Interim Accommodations serving to further the reconciliation of Gitanyow's Aboriginal Interests with respect to forest activity within the Traditional Territory with those of British Columbia.
>
> 9.6 British Columbia acknowledges that any timber opportunities and funding provided through this Agreement are an Interim Accommodation and that broader processes are underway that will assist in determining the appropriate accommodation in respect of impacts of Gitanyow's Aboriginal Interests as a result of forestry activities occurring within the Traditional Territory.
>
> 9.7 Nothing in this Agreement restricts the ability of Gitanyow to seek additional accommodation for impacts on its Aboriginal Interests within the Traditional Territory from forest resource development during the term of this Agreement.
>
> 9.8 The Parties agree to consult in accordance with the Consultation Protocol attached to this Agreement as Appendix B.

[82] The Consultation Protocol states that Mr. Justice Tysoe's findings of a good *prima facie* claim of aboriginal title and a strong *prima facie* claim of aboriginal rights to at least part of the areas of the traditional territory will be used as a starting point in determining the level of consultation required. It states that consultation is to take place through the JRC and that is will involve a four-step process:

> Step 1: Information Sharing – the Crown is to advise Gitanyow in writing of the decision required and the response period, provide Gitanyow with all relevant and reasonably available information necessary to enable assessment of the impact of the proposed activity on Gitanyow interests, offer meetings with appropriate personnel to explain this information, and provide all relevant information requested by Gitanyow which is reasonably required for adequate consultation and accommodation;
>
> Step 2: Identification of Gitanyow Interests – Gitanyow are to provide all reasonably available information that identifies the potential impact of the proposed plan or decision on Gitanyow aboriginal interests within 60 days;
>
> Step 3: Further Consultation – Either party may request further consultations to address Gitanyow aboriginal interests and measures for accommodating those;
>
> Step 4: Decision – The statutory decision maker is required to do the following: identify Gitanyow aboriginal Interests in relation to the contemplated decision; make a determination of whether the contemplated action potentially adversely affects Gitanyow's aboriginal interests as those have been expressed by the B.C. Supreme Court; if there are potential adverse affects, determine how serious they are and what accommodation, if any, is appropriate; set out any recommendations provided by the JRC or Gitanyow for mitigation of the potentially adverse impacts, and the reasons why any such recommendations have been rejected; and inform Gitanyow in writing of the decision, setting out how aboriginal interests were addressed, any accommodation or mitigation measures taken, or reasons for not fully accommodating Gitanyow aboriginal interests.

[83] Section 10 provides a process for resolution of disputes between the Crown and Gitanyow over

interpretation of the GFA.

[84] Sections 16.3 and 16.4 acknowledge that the specific nature, scope or extent of Gitanyow's aboriginal interests have not yet been determined:

> 16.3 This Agreement will not limit the positions that a Party may take in future negotiations or court actions.
>
> 16.4 British Columbia acknowledges and enters into this Agreement on the basis that Gitanyow has Aboriginal Interests within their Traditional Territory and further that the specific nature, scope or geographic extent of Gitanyow's Aboriginal Interests have not yet been determined. Broader processes engaged in to bring about reconciliation will result in a common understanding of the nature, scope and geographic extent of Gitanyow's Aboriginal Interests.

[85] Section 17 endorses the New Relationship and the ability of the parties, at the request of Gitanyow, to negotiate additional interim agreements in relation to forestry and range matters that give effect to the New Relationship. The parties acknowledge that there are broader processes underway with respect to the New Relationship that may assist in such negotiations.

[86] On August 28, 2006, Mr. Warner wrote to Mr. Williams with respect to the ongoing consultation process regarding the FL replacement decision. This letter set out the four concerns consistently identified by Gitanyow, and the manner in which the MoF proposed to address them.

[87] With respect to recognition, Mr. Warner acknowledged that Gitanyow wanted recognition of its aboriginal rights and title, as well as its traditional system of governance, in particular the Wilp system and territories. He proposed to address this by including what I will refer to as the "WHEREAS clause" in the preamble to each replacement FL, which read:

> WHEREAS
>
> The Government of British Columbia acknowledges that Justice Tysoe of the British Columbia Supreme Court has found that the Gitanyow and Gitxsan each have a good prima facie claim of aboriginal title and a strong prima facie claim of aboriginal rights to at least part of the areas included within the lands covered by the Forest Licence.

Mr. Warner then stated that "for practical reasons" the MoF was unable to include acknowledgement of the Wilp territories in the replacement FL itself, but would commit to advising the licensees about the Wilp territory boundaries for their use and information during preparation of their FSPs. No explanation as to why the acknowledgment was not practical was provided.

[88] With respect to the LUP process, Mr. Warner acknowledged that Gitanyow sought assurances that the FLs would be subject to the plan that was being developed, and that this planning process had been undertaken as a key means for accommodating Gitanyow's interests. He affirmed that the MoF remained committed to completing the LUP to be used as "an information base for operational planning undertaken by licensees and to assist in the consultation process for those operational plans". However, he stated that the LUP objectives and strategies could not be empowered through legislation until consensus had been reached among government agencies, Gitanyow, and licensees. Mr. Warner stated that until that point, licensees may choose to voluntarily comply with the LUP, and it would be used by the MoF in the consultation process with the licensees regarding their operational plans. He also advised that upon issuing an FL replacement, he would consider including a statement in the cover letter to the licensees stating that a LUP was being developed in that part of the TSA that overlaps Gitanyow territory, and that this would be considered by the statutory decision maker in making operational decisions under the FL.

[89] With respect to outstanding silviculture obligations, Mr. Warner acknowledged Gitanyow's wish to have some means in the FL replacement process to address the failure of licensees to fulfill their silviculture obligations. He expressed the view that compliance and enforcement procedures under the ***Forest Act*** provided the necessary means to ensure that these obligations were met. Mr. Warner advised that Timber Baron, the holder of FL A16884, was the only licensee presently in breach of its

obligations, and that enforcement action had been taken against it. He maintained that while that process unfolded, he was not in a position to deal with the issue through the FL replacement process. Mr. Warner also pointed out that the funding provided under the NWFREP was intended to address the historic backlog silviculture obligations, including those related to Orenda, whose FL had been surrendered. Although this FL is not a subject of these proceedings, Orenda's outstanding silviculture obligations formed part of the factual matrix in the consultation between the parties.

[90] With respect to economic accommodation, Mr. Warner took the position that the GFA provided appropriate interim economic accommodation of Gitanyow's interests with respect to forest activities during its five year term.

[91] Mr. Warner concluded his letter with this statement:

> In my view, these measures, in addition to the specific accommodation measures I have offered here in respect to the replacement of the seven Forest Licences, are sufficient for meeting the ministry's legal obligations in respect to the replacement of the Forest Licences within Gitanyow territories. Further consultation with Gitanyow with respect to actual forest operations under these Forest Licences will occur through the JRC in accordance with the terms of the Agreement.

He indicated that he intended to issue the FL replacements by October 15, 2006.

[92] On September 18, 2006, Mr. Williams replied to Mr. Warner, advising that Gitanyow disputed both the MoF's assumption that consultation had been completed, and its view that the accommodation proposed in his letter of August 28, 2006 represented an adequate fulfillment of the Crown's obligations.

[93] First, Mr. Williams requested that all relevant information on the terms and conditions of the proposed FL replacements, in particular the location and volume of timber to be taken under each, be provided to Gitanyow so that the impact on its aboriginal interests could be properly assessed. Second, he stated that the FL replacement decision was specifically excluded from the GFA as the process of consultation and accommodation was still ongoing when the GFA had been concluded. He acknowledged the consultation protocol established by the GFA, but pointed out that the JRC had not met since March to complete the consultation and agree on appropriate accommodation and protection of Gitanyow's aboriginal interests in the context of the FL replacements.

[94] With respect to recognition, Mr. Williams advised that the proposed WHEREAS clause in the preamble of the FL replacements was not a sufficient accommodation of Gitanyow's interests. Moreover, Mr. Warner's explanation that it was impractical to go further in recognizing the Wilp system was inadequate. He reiterated that Gitanyow required recognition of the Wilp in the body of the replacement FLs, including a map and description of the Wilp territories.

[95] With respect to the LUP, Mr. Williams advised that Gitanyow was confident that the necessary consensus would be reached to enable the LUP through legislation. In the interim, Gitanyow expected the licensees to comply with the LUP. He acknowledged that the licensees were presently using the LUP to develop their FSPs, but said that compliance was not a matter to be left to voluntary participation, and a statement and a cover letter delivered with each replacement FL were insufficient. Compliance with the LUP had to be built into the replacement FLs to ensure that Gitanyow's aboriginal interests would be accommodated. If that was not possible, he again requested that the FL replacements be postponed until the LUP had been given legislative force.

[96] With respect to outstanding silviculture obligations, Mr. Williams advised that the Crown's position, and its reliance on compliance and enforcement measures, was unacceptable. He said that Gitanyow had insufficient information on the current status of licensees' outstanding obligations, and the cost of those outstanding in Orenda's areas alone far exceeded the funds committed under the NWFREP for reforestation.

[97] With respect to economic accommodation, Mr. Williams again pointed out that the GFA did not cover economic accommodation for the FL replacements, and that Gitanyow was entitled to full consultation and accommodation with respect to that decision.

[98] He concluded by pointing out that Step 1 and Step 2 of the Consultation Protocol established by the GFA were still incomplete. He stated that Gitanyow required further information, and the MoF did not yet have a clear understanding of Gitanyow's aboriginal interests that would be impacted by the decision to replace the FLs. He reiterated that Gitanyow required completion of the consultation and accommodation process before the FLs were replaced, including convening a meeting of the JRC to review the issues and options for accommodation, and provision of the information he had requested. He advised that Gitanyow would prepare a draft accommodation agreement with respect to the FL replacements for the JRC's review.

[99] On October 4, 2006, the JRC met and reviewed Mr. Williams' letter of September 18, 2006, and the issues related to the FL replacements. Gitanyow expressed concerns about the volume of timber being harvested in its traditional territory and the long-term sustainability of the forests. The MoF representatives replied that the FL replacement process did not determine the AAC, and the JRC could conduct an analysis of the planned harvest volume during the TSR process. As well, they noted that Gitanyow land use planning concerns would be considered by the licensees and the MoF during the FSP approval process. There was also discussion about silviculture liabilities, identification of Gitanyow's traditional use sites, and development of a cedar management strategy to determine if there was a sufficient supply for traditional use.

[100] At this meeting, Mr. Williams tabled a draft Forest Licence Replacement Accommodation Agreement (the "Accommodation Agreement"). Section 1 of this stated that the intent of the Accommodation Agreement was to address shared decision-making regarding land and resources, and their protection, and to address "the legal obligation of the economic component of Gitanyow aboriginal title on an interim basis". It stipulated that each of the replacement FLs shall identify and provide a map of the Wilp territories overlapped by the FL. It required the Crown to inform Gitanyow of any notices of intent to dispose of the FLs covered by the Accommodation Agreement, and any amendments to the FLs. It contemplated that, as an accommodation of the economic component of Gitanyow rights, Gitanyow would receive 50 percent of all stumpage fees for volume of timber harvested under the FL replacements within Gitanyow traditional territory, and 50 percent of the annual rent paid by the licensees based on a pro-rated portion of the AAC coming from Gitanyow traditional territory. It envisaged the establishment of a Gitanyow/BC Revenue Sharing Working Group to address past infringements of Gitanyow interests. It also required the Regional Manager to give notice to the licensees that they may only submit applications for cutting permits for areas in Gitanyow traditional territory that meet the requirements of the draft LUP and SRMP.

[101] On November 9, 2006, the JRC met again to discuss issues related to the FL replacements. The MoF representatives provided accurate AAC numbers and a draft of the proposed replacement FL. Timelines were discussed, in particular, the fact that two of the FLs had a replacement deadline of February 28, 2007 pursuant to ss. 15(1.1) of the ***Forest Act***. Gitanyow again raised concerns regarding the volume to be logged, sustainability, and outstanding silviculture obligations. With respect to economic accommodation and revenue sharing, the MoF representatives advised that there was "no appetite within government to revenue share nation by nation, licence by licence", but a meeting could be scheduled with Gitanyow to discuss potential models on a without prejudice basis. With respect to consultation at the stage of FSP approval, Gitanyow expressed concern that the Crown's obligation to consult should not be off-loaded onto the licensees.

[102] After this JRC meeting, on November 28, 2006, representatives of the MoF, MARR, and Gitanyow met to develop draft terms of reference for what became the Forest Benefit Sharing Working Group ("FBSWG"). The FBSWG fulfilled the Crown's commitment under Section 7.2.7 of the GFA to establish a working group to examine alternate benefit and revenue sharing options in which Gitanyow and other First Nations could participate.

[103] On November 16, 2006, Mr. Warner responded to Mr. Williams' letter of September 18, 2006. He provided current information with respect to the FL holders and the AAC under each of the FLs up for replacement. He described the process, and set out the legislated schedule for replacement, which indicated that the decision for two of the FLs had a deadline of February 28, 2007. Mr. Warner acknowledged Gitanyow's concern that the proposed WHEREAS clause and the cover letter would be insufficient to compel the licensees to acknowledge Gitanyow's aboriginal interests, but pointed out that

the duty of consultation and accommodation rested with the Crown and not the licensees, and reiterated that the LUP would be considered by the MoF when the statutory decision-makers considered the approval of operational plans required under each FL. He suggested that his proposal would facilitate a greater level of voluntary compliance by the licensees. The letter reviewed the status of outstanding silviculture obligations of the licensees, and advised that the MoF staff would try to provide an estimate of timber volume under each licence that may be attributed to Gitanyow traditional territory in response to Gitanyow's concern that a sustainable level of cut be ensured. Mr. Warner closed by stating that it remained his view that the accommodation measures outlined in his letter of August 28, 2006 met the Crown's legal obligations toward Gitanyow, but that he was prepared to postpone his decision to offer replacement licences until early 2007 to allow for further JRC consultation due to the concerns raised by Gitanyow. He requested that the JRC complete consultation with respect to the FL replacements by January 31, 2007, so that replacement offers could be made by the legislated deadline of February 28, 2007.

[104] The JRC met again on December 15, 2006, and Mr. Williams raised the recent decision in ***R. v. Sappier***; ***R. v. Gray***, 2006 SCC 54, [2006] 2 S.C.R. 686 [***Sappier***], which established an aboriginal right to harvest wood on Crown lands for domestic uses. There was further discussion of economic accommodation with respect to the FL replacements. The MoF representatives indicated that this must be coordinated with work being done by the New Relationship Leadership Council, and that the MoF would respond directly to these issues. Gitanyow acknowledged that the MoF had provided the timber harvesting land base information requested. Ian Smith, the B.C. Timber Sales Planning Officer, gave a presentation on the FSP planning process in Gitanyow's traditional territories, including the role of the LUP and opportunities for Gitanyow involvement. The deadline of January 31, 2007 for completion of the consultation process was noted.

[105] On January 11, 2007, the first and only meeting of the FBSWG took place, attended by representatives of Gitanyow and other First Nations, the MoF, and the MARR. The First Nations' representatives questioned how revenue sharing might work at the forest district level, instead of a province-wide model, and the MARR representative agreed to provide some revenue and cost data analysis on this.

[106] On January 24, 2007, Mr. Warner wrote to Mr. Williams indicating that he wished to conclude consultation on the FL replacements. His letter listed five issues that Gitanyow had identified for consideration in the FL replacement process:

1) Recognition of Gitanyow aboriginal rights and title and acknowledgement of Wilp territories;

2) Licensee compliance with LUP;

3) Means to address outstanding silviculture obligations;

4) Economic accommodation; and

5) Achieving a sustainable level of cut within Gitanyow Traditional Territory.

[107] Mr. Warner referred to the proposals to address these issues that he had outlined in his letter of August 28, 2006, and Gitanyow's responses, and stated that he would take the latter into consideration. He said, however, that Gitanyow's proposal in the Accommodation Agreement for a 50 percent share of revenue was outside the scope of the FL replacement decision, and advised that the government was attempting to address revenue sharing more broadly through the New Relationship and initiatives such as the FBSWG. He stated that he anticipated one more JRC meeting to review Gitanyow's interests and whether any further "mitigation measures" were possible, and encouraged the JRC to examine how to address Gitanyow's interests in subsequent forest management decisions related to the FLs. He affirmed his expectation that he would have all relevant information by early February in order to make a decision before the deadline of February 28, 2007.

[108] On January 29, 2007, the JRC met again to consider the FL replacements. Three Gitanyow representatives were present, including Mr. Williams. Each of Gitanyow's interests was identified, and

the proposed accommodations reviewed. Mr. Williams raised a number of concerns as to the sufficiency of the accommodations. The minutes of this meeting record that in the course of this discussion, however, he indicated that while Gitanyow had earlier wanted their house and clan system recognized in the licences, this was of less concern now as the licensees had been respecting the LUP. With respect to sustainability of harvesting, Ms. Robertson indicated that this could best be addressed through the TSR. Jane Lloyd-Smith, the Regional Staff Manager for the Northern Interior Forest Region, acknowledged that there was presently an over-allocation of volume in Gitanyow traditional territory, but reiterated that this could be addressed through the TSR. It was agreed that Ms. Robertson and Ms. Lloyd-Smith would develop a draft submission for Mr. Warner's consideration of the commitments that were needed to proceed with replacement of the FLs, the measures offered to date, and other proposed measures, and that they would meet with Mr. Williams, as the Gitanyow representative, on February 8, 2007, to review this.

[109] On February 8, 2007, Mr. Williams, Ms. Robertson, and Ms. Lloyd-Smith met to develop the submission to Mr. Warner. That meeting produced a draft of "JRC Recommendations" that was circulated to JRC members and discussed further among Mr. Williams, Ms. Robertson and Ms. Lloyd-Smith following the meeting. This led to a further draft being prepared, circulated, and discussed in a conference call between Mr. Williams and the MoF representatives on February 16, 2007. The MoF says that during that call they discussed a final list of JRC Recommendations. These were sent to Mr. Warner on February 19, 2007 for his consideration in making the FL replacement decisions. However, they included a note stating that they were still undergoing internal review by Gitanyow.

[110] The JRC Recommendations were organized under four headings: Recognition, Sustainability/Land Use Planning, Forest Restoration, and Economic Interests. In summary, they provided the following.

[111] With respect to recognition, they noted that Gitanyow sought formal recognition of its aboriginal rights and title and acknowledgement of the Wilp system and boundaries. They recommended the inclusion of the WHEREAS clause in the FLs, and an instruction to forest districts to communicate Wilp territory boundaries to licensees before operational plans were prepared. They also supported the JRC as an effective forum for consultation and input into the decision-making processes.

[112] Under the heading Sustainability/Land Use Planning, the JRC Recommendations recognized the common interest of the MoF and Gitanyow in ensuring sustainable forest management, and stated that the joint planning processes, such as the LUP, were a powerful tool for addressing those common interests. They observed that the completed LUP had been well received and respected by the licensees and created a more efficient consultation process at the operational level. They viewed the next step as incorporating the LUP into the TSR for the TSAs within Gitanyow traditional territory, but acknowledged that achieving an agreement on a sustainable harvest for the long term would be a multi-year process. They recommended that the MoF continue to provide staff and resources necessary to support ongoing joint planning, and to work with the ILMB in this process. They supported inclusion of a statement in the FL replacement offer letters to licensees advising them of the LUP, and encouraging them to consider it and work with Gitanyow in preparing operational plans. They recommended that the MoF continue to respect and use the LUP in evaluating operational plans and facilitating consultation at that level. They also included a strategy for moving the joint land use planning process ahead by merging the LUP and SRMP processes, and having both declared higher level plans with legislated objectives for forestry practices within five years. They also recommended that the planning objectives be incorporated in future TSRs.

[113] With respect to forest restoration, the JRC Recommendations advocated that Gitanyow receive a written explanation of how Mr. Warner considered silviculture liabilities in his FL replacement decisions, including an update on their current status. They also recommended that he consider seeking silviculture deposits from the licensees, and that the MoF continue to support and fund the NWFREP. They acknowledged the need to protect Gitanyow's right to harvest wood for domestic use, as defined in ***Sappier***, and recommended that the MoF support and expand an ongoing JRC project to identify Gitanyow cedar needs to include the ***Sappier*** issue.

[114] With respect to economic interests, the JRC Recommendations acknowledged that Gitanyow

was interested in a model of revenue sharing that was tied to the harvested resources rather than population, and recommended that this be explored through the continuing work of the FBSWG.

[115] On February 20, 2007, MoF staff prepared a briefing note for Mr. Warner for his consideration in making the FL replacement decision. This included a copy of the JRC Recommendations. It reviewed the consultation process with Gitanyow, describing it as "protracted and intense". It offered the view that the opportunities provided to Gitanyow to identify its interests and any infringement of them had been sufficient, and further consultation was unnecessary. It set out two options. The first was to offer replacement FLs for all licences, although only two had a deadline of February 28, 2007 under s. 15(1.1) of the ***Forest Act***. The discussion of this option stated that consultation with Gitanyow had been exhaustive, and there were no further gains to be made by delaying the decisions on the basis of Gitanyow's interests, despite its continuing expression of concern. It acknowledged that Gitanyow may challenge the decision as a result. The second option suggested delaying the offer to replace the FLs falling within Gitanyow traditional territories for a year, placing them under the time frame in s. 15(1.2) of the ***Forest Act***, but the writer did not endorse this, stating:

> We have done everything in our power to address Gitanyow's concerns around the replacement of these licences, but the outstanding issues are beyond the scope of this process and need to be resolved through government to government negotiations. Delaying a decision further will not change this situation and will potentially lead us down a path that is at odds with the processes and policies being developed through "New Relationship."

[116] On February 21, 2007, Mr. Williams wrote to Ms. Robertson taking issue with her description of the JRC Recommendations as "final". He reminded her that he had advised the JRC that he must bring them to the Hereditary Chiefs for their review and decision, and that this meeting could not take place until February 26, 2007 at the earliest. He expressed concern that the rush to complete consultation was compromising Gitanyow's interests, and observed that the recommendations with respect to recognition of Gitanyow's rights and title had not changed since August 2006 and remained inadequate. He reiterated Gitanyow's concern about over-harvesting, particularly in view of its constitutional rights to domestic wood as confirmed in ***Sappier***.

[117] Mr. Williams noted that Gitanyow had received no response to the draft Accommodation Agreement. He enclosed a revised draft of that document as indicative of Gitanyow's position, as well as a report on forest revenue historically generated from Gitanyow traditional territory, for consideration by Mr. Warner. He reiterated Gitanyow's view that the FL replacements presented a significant infringement of Gitanyow rights and title, and asked that the MoF not proceed with the FL replacement decision until the consultation process had been completed.

[118] The revised draft Accommodation Agreement added several new terms. Paragraph 7 stipulated a payment of over $19 million to Gitanyow, representing 51 percent of stumpage fees collected between December 31, 1995 and January 1, 2005 from timber cut in Gitanyow traditional territory. Paragraph 12 introduced a format for Gitanyow participation in applications for cutting permits on Gitanyow traditional territory.

[119] Ms. Robertson forwarded the material from Mr. Williams to Mr. Warner on February 21, 2007. She advised him that the MoF staff had made it clear to Gitanyow that the development of the JRC Recommendations represented the final stage of the consultation process, but that Gitanyow was taking the position that they were only at step two of the GFA Consultation Protocol. It was her view that the accommodation measures put forward by Gitanyow went well beyond the MoF's current mandates. She nevertheless suggested a third option to those in the Briefing Note: to delay the replacement of the two FLs with a February 28, 2007 replacement deadline and deal with them under s. 15(1.2) instead, as this would provide more time for Mr. Warner to fully consider the JRC Recommendations and the late submission by Gitanyow.

[120] On February 26, 2007, Mr. Warner wrote to Mr. Williams reminding him that his earlier correspondence had indicated that any final submissions should be provided by early February, and acknowledging receipt of his memorandum of February 21, 2007 and the draft Accommodation

Agreement. He stated that he considered that they were now at step four of the GFA Consultation Protocol, and that he intended to proceed with his deliberations based on all information received to date.

[121] On February 27, 2007, Mr. Williams wrote to Mr. Warner in reply. He stated that the JRC meetings had failed to resolve substantial concerns with respect to significant infringements of Gitanyow's aboriginal rights, and the accommodation offered was inadequate. He set out five topics that had to be addressed if adequate accommodation was to be provided:

> 1. Recognition and scope of Gitanyow Aboriginal Rights and Title, including the *inescapable* economic component of our title, and an allocation of timber that respects the rights to harvest timber for domestic use as per the *Sappier* decision;
> 2. Assurances that licensees will fulfil their legal obligations with respect to reforestation on Gitanyow territories, instead of the *'cut and run'* practices of the past;
> 3. Sustainable and planned timber harvesting on Gitanyow territories;
> 4. A commitment that the joint land use plans will be used when planning harvesting activities on our territories; and
> 5. Administrative issues with respect to any timber harvesting on Gitanyow territories.
>
> [italics in original]

Mr. Williams then stated that it was Gitanyow's view that they had not yet completed steps two and three of the Consultation Protocol. He invited a further meeting to address these issues.

[122] On February 28, 2007, Mr. Warner decided to replace the FLs. On the same day, he sent an offer of replacement with a cover letter to each licensee. The letter included this statement:

> It should be noted that paragraph F in the "Where As" section of the document was included in response to input received during First Nations consultation regarding forest licence replacement in the Nass and Kispiox Timber Supply Areas (TSA).

[123] The cover letters to the licensees holding FLs in the Cranberry/Kispiox TSA also included this statement:

> In addition, during consultation with Gitanyow regarding the replacement of this licence, Gitanyow expressed a concern that licensees needed to be made aware that a land use plan (LUP) has been developed with Gitanyow covering those portions of the Kispiox and Cranberry TSAs lying within the Gitanyow traditional territory. It is recommended that you work with Gitanyow and consider the guidance within the LUP when preparing operational plans falling within Gitanyow traditional territories.

[124] Mr. Warner wrote to Mr. Williams on March 8, 2007 to explain the rationale for his decision, as was required by the GFA Consultation Protocol. He set out the material he has considered, including the JRC Recommendations, the recent Gitanyow submission, and the most recent draft Accommodation Agreement. He indicated that consultation had been conducted through the JRC in accordance with the Consultation Protocol, and stated that he was satisfied that this process had provided ample opportunity for Gitanyow to identify any interests impacted by the decision, and that further consultation was not necessary.

[125] He then set out his assessment of the nature and scope of Gitanyow's aboriginal interests in relation to the FL replacement decision, and of the adverse impact of the replacements on Gitanyow's aboriginal interests. I set this out in full:

> *What is the nature and scope of Gitanyow aboriginal interests in relation to FL replacement*

decision?

- Justice Tysoe's finding 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.
- Skii Km Lax Ha Preliminary Ethnohistorical Assessment indicates Gitanyow claim is likely stronger than that of Skii Km Lax Ha in the portion of Gitanyow traditional territory within the Nass TSA.
- Gitanyow assert title over the whole of the traditional territory and describe which of their eight house territories overlap with each FL.
- While it is likely that Gitanyow aboriginal title exists, it is unclear where within the traditional territory, particularly when considered in light of the recent judgment of the Supreme Court of Canada in *Bernard and Marshall*.
- Gitanyow's interests expressed through the consultation process apply to all of the seven Forest Licences. In my view, they can be grouped into four themes: recognition, land use planning/sustainability; forest restoration; and economic interests.

Does the replacement of seven FLs within Gitanyow's traditional territory adversely affect Gitanyow Aboriginal Interests?

- Unlikely to affect potential aboriginal rights which are site specific and can be more effectively accommodated through subsequent operational decisions that will occur under each FL. [For example, under the *Forest and Range Practices Act*, a licensee is required to prepare a Forest Stewardship Plan (FSP) which includes proposed results and strategies "to conserve, or if necessary, protect, cultural heritage resources that are the focus of a traditional use by an aboriginal people that are of continuing importance to that people." Examples of cultural heritage resources could include, culturally modified trees, non-timber resources such as medicinal plants, traditional use sites such as fishing sites. Consultation that occurs at the operational level could result in spatial or temporal changes or adoption of different forest practices to address specific cultural heritage resources or aboriginal interests. It would be useful to give an example or two here of how that might be done.]
- Replacing the FLs could impact claims of aboriginal title, assuming it exists somewhere within the traditional territory.

How serious are the adverse effects?

- Effects on Gitanyow's on-the-ground interests are minimal and will be addressed through other processes designed to protect Gitanyow's on-the-ground interests (ie., joint land use planning, Forest Stewardship Plannings and consultation on operational decisions, such as FSP approval, through the Joint Resources Council). [**You may also wish to refer here to consultations through the Joint Resources Council process.**]
- Gitanyow's interests in revenue sharing, land use planning and forest management decision making are being addressed through other processes (eg., Gitanyow-Gitxsan Forest Benefit Sharing Working Group, Timber Supply Review, Nass SRMP,) so the impact of the forest licence replacements is minimal in that regard.
- A full suite of accommodations have already been agreed to under the Gitanyow Forestry Accommodation Agreement which serves to minimize or accommodate the impact of the FL replacements. These accommodations include: language recognizing the nature of Gitanyow's aboriginal interests; commitments to engage in joint forest management planning initiatives; commitment of over $1 million for reforestation/enhancement activities within Gitanyow traditional territory; establishment of a Joint Forestry Council to facilitate joint planning efforts and consultation; capacity funding to participate in Joint Forestry Council; a consultation protocol; $1.78 million in revenue over 5 years; and a forest tenure offer of 430 000m^3 over five years. [**Refer here to the particular accommodations to which you are**

referring.]

What accommodations may be appropriate?

- Establishment of the Joint Resource Council and Consultation Protocol under the Forestry Accommodation Agreement are important tools for accommodating Gitanyow's interests in having a say in decision making with respect to forestry.
- The recommendations put forward by the JRC in respect to the FL replacements are addressed below.

[italics and bold emphasis in the original]

He then proceeded through the JRC Recommendations.

[126] He supported each of the JRC Recommendations related to the issue of recognition.

[127] He also supported those related to sustainability/land use planning. He acknowledged that mentioning the LUP in the cover letter to licensees fell short of Gitanyow's position that compliance with the LUP should be a requirement of the FL itself, but stated that inclusion in the letter was sufficient as the LUP had not been enabled through legislation. He supported the JRC strategy to have the LUP designated as a higher level plan and included in future TSRs, but cautioned that he was not the decision maker responsible for the TSRs and the determination of the AAC. He did indicate that he would advise the Chief Forester of the JRC strategy.

[128] With respect to forest restoration and silviculture obligations, in response to the JRC Recommendation that he provide an explanation of how he considered silviculture liabilities in his decision, he indicated that the current state of silviculture liabilities on a number of the licences was in question, that the forest districts had been working with licensees to remedy this, and that he was satisfied with their efforts to engage licensees in developing plans to remedy their specific situations. He said that if these remedial actions were not effective, further compliance and enforcement actions would be carried out that could ultimately result in the suspension and cancellation of these FLs. He noted the JRC Recommendation to require silviculture deposits from licensees, but said that this could not be carried out as it would require legislative amendments. He indicated that he would refer this to the MoF executive for consideration. He otherwise supported the JRC Recommendations. With respect to domestic use of wood, he indicated that the MoF intended to accommodate Gitanyow's aboriginal right to harvest wood for domestic purposes in accordance with the ***Sappier*** decision.

[129] Finally, with respect to economic interests, Mr. Warner stated that he supported the JRC Recommendation to continue to work through the FBSWG to identify alternative models for sharing forest benefits, but acknowledged that this fell well short of Gitanyow's position.

[130] Mr. Warner then indicated that although the most recent Gitanyow submissions from Mr. Williams were received very late in the consultation process, he had reviewed them. He offered the view that the revenue sharing provisions in the draft Accommodation Agreement raised issues that were a key component of the negotiations leading to the GFA, and reiterated that any changes to the Crown's approach to revenue sharing would have to be addressed at a province-wide level. He said that in the meantime the FBSWG established under the GFA was a compromise to which Gitanyow agreed.

[131] Mr. Warner concluded by reiterating his view that the accommodation measures already provided through the GFA, and those agreed to in this letter, were more than sufficient to meet the MoF's legal obligations to Gitanyow with respect to the FL replacement decision.

[132] On March 21, 2007, Mr. Williams sent a lengthy letter to Mr. Warner expressing Gitanyow's disappointment with his decision to replace the FLs, and stating that the MoF had failed to address its legal obligation of consultation and accommodation with respect to Gitanyow. The letter took issue with Mr. Warner's assessment of both the strength of Gitanyow's claim, and the adverse impact of his decision on Gitanyow's aboriginal interests. Mr. Williams observed that the JRC decision-making was to be done by consensus, but said that Mr. Warner had relied on JRC Recommendations that were not approved by Gitanyow. Mr. Williams then provided a critique of Mr. Warner's written decision, setting

out many of the points that have been made in argument at this hearing, and with which I deal later in these Reasons. He invoked the dispute resolution process under Section 10 of the GFA, and proposed a meeting to address Gitanyow's interests that were not sufficiently addressed in making the decision to replace the FLs.

[133] The parties disagreed as to whether the GFA dispute resolution process applied in these circumstances, but on April 12, 2007 Mr. Warner wrote to Mr. Williams and agreed to schedule a meeting for April 20, 2007. He stated that it had not been his intent to minimize Gitanyow's aboriginal rights and title in making his decision, and affirmed the findings of Mr. Justice Tysoe as well as the acknowledgements of aboriginal interests in the GFA. He stated that he had understood that the JRC Recommendations had the support of the Gitanyow members of the JRC, although he knew that Gitanyow was unable to commit to the JRC Recommendations until Mr. Williams had had an opportunity to review them with the Hereditary Chiefs. He further stated:

> Many of the recommendations of the JRC were proposed earlier in the consultation process in response to proposals initially put forward by Gitanyow. They have been the subject of discussions through the JRC throughout the fall and correspondence with myself. My understanding was and is that the JRC recommendations dated February 19th were developed collaboratively among all JRC members, and that they had the support of the Gitanyow members, although you were unable to commit to those recommendations until you had an opportunity to review them with the Gitanyow hereditary chiefs.
>
> …
>
> As I have explained previously, I was under no misconception as to what the JRC recommendations represented when I accepted them as part of my rationale. The fact was that they, along with the previous submissions I had received directly from Gitanyow, were the best information I had and was required to consider under the terms of the Gitanyow Forestry Agreement. I was fully aware and acknowledged that the recommendations fell short of Gitanyow's requests for accommodations in some regards. However, I had hoped that the good faith discussions that had occurred through the JRC process had resulted in the finding at least some middle ground.

[134] On April 20, 2007, Mr. Robert Friesen, the Assistant Deputy Minister of the MoF, Mr. Warner, and other MoF representatives met with Mr. Williams and other Gitanyow representatives in Victoria. Gitanyow reiterated their concerns related to the replacement of the FLs. Mr. Friesen indicated that the MoF was not in a position to reverse Mr. Warner's decision on the licence replacements, but told Gitanyow that the MoF required some time to address each of the issues they had raised.

[135] On May 7, 2007, Mr. Williams wrote to Mr. Robb of the MARR, seeking data that had been promised to Gitanyow at the only meeting of the FBSWG on January 24, 2007. Mr. Robb responded on May 29, 2007 by sending information, but indicated that this work was still in progress. He also advised that there had been no further meetings of the FBSWG, and its work had been overtaken by a new committee, the Aboriginal Forest Strategy Working Group ("AFSWG"), formed in cooperation with the First Nations Forest Council. The material filed in this proceeding indicates that the AFSWG has focused on ways and means of improving the viability of forest tenures issued to First Nations, and on addressing the implementation of the ***Sappier*** decision as priorities. A sub-working group on tenure viability has identified revenue sharing as an issue that will require work and consideration by the AFSWG.

[136] The parties continued to discuss areas of contention. As the formal FL documents were prepared, Gitanyow reiterated its request that they include a reference to Mr. Justice Tysoe's findings in the body of the licence as well as in the preamble. Gitanyow also noted that only the licensees in the Cranberry/Kispiox TSA had received a cover letter advising them of the LUP and its role in the preparation of operational plans. They asked that a similar letter be sent to licensees in the Nass TSA. The MoF replied that they would have considered and addressed these requests if they had been timely, but they had come too late and they had a statutory obligation to proceed.

[137] Ultimately, the licensees received replacement FLs for 15-year terms, commencing September 1, 2007. The preamble in each FL document included the WHEREAS clause. The total AAC allocated under the six replacement licences was 1,031,059 cubic metres. Paragraph 5.00 of the FL document dealt with applications for cutting permits. Paragraph 5.01 indicated that an approved FSP was a precondition to obtaining a cutting permit. Other parts of Paragraph 5 dealt with the role of aboriginal interests in the process:

> 5.06 The District Manager may consult aboriginal group(s) who may be exercising or claiming to hold an aboriginal interest(s) or proven aboriginal right(s), including aboriginal title, or treaty right(s) if in the opinion of the District Manager, issuance of the cutting permit or an amendment to a cutting permit as submitted and/or operations under the cutting permit may result in:
>
> (a) an impact to an aboriginal interest(s) that may require consideration of accommodation, or
>
> (b) an infringement of a proven aboriginal right(s), including aboriginal title, or treaty right(s) that may require justification.
>
> 5.07 The District Manager may impose conditions in a cutting permit to address an aboriginal interest(s), or proven aboriginal right, including aboriginal title, or a treaty right(s) if in the opinion of the District Manager, issuance of the cutting permit as submitted would result in:
>
> (a) an impact to an aboriginal interest(s) that would require consideration of accommodation, or
>
> (b) an infringement of a proven aboriginal right(s), including aboriginal title, or treaty right(s) that would require justification.
>
> 5.08 The District Manager may refuse to issue a cutting permit or to amend a cutting permit if in the opinion of the District Manager issuance of the cutting permit or an amendment to a cutting permit would result in:
>
> (a) an impact to an aboriginal interest(s) or treaty right(s) that could not be reasonably accommodated, or
>
> (b) an impact to a proven aboriginal right(s), including aboriginal title, or a treaty right(s) that could not be justified.
>
> 5.09 If the District Manager:
>
> (a) determines that a cutting permit may not be issued because the requirements of paragraph 5.05 have not been met;
>
> (b) is carrying out consultations under paragraph 5.06; or
>
> (c) refuses to issue a cutting permit under paragraph 5.08;
>
> the District Manager will notify the Licensee within 45 days of the date on which the application for the cutting permit, or an amendment to the cutting permit, was received.

[138] There was further correspondence between the parties, and a meeting on July 20, 2007. Their positions did not change substantially. The parties did, however, negotiate a Contribution Agreement under which the MoF made a funding commitment of $200,000 to Gitanyow to facilitate planning initiatives and further consultation through the JRC, and to implement the ***Sappier*** decision through a pilot project. The JRC efforts were to specifically address Gitanyow's sustainability interests and participation in the FSP process.

[139] Gitanyow and the MoF continue to participate in several ongoing initiatives. The JRC continues as a forum to develop additional means for Gitanyow input into issues of concern. The NWFREP

remains active with respect to silviculture issues. The MoF continues to support the SRMP/LUP planning exercises. The Crown continues to provide capacity funding to assist Gitanyow's participation in these initiatives.

[140] Gitanyow has also been invited to give input to operational decisions. For example, on September 10, 2007, Mr. Williams met with the Chief Forester to provide information on Gitanyow's values and interests for consideration in determination of the AAC for the Kispiox TSA.

ANALYSIS

[141] The respondents concede that the FL replacement decision created a duty to meaningfully consult with Gitanyow in good faith, and to reasonably accommodate its concerns and interests in accord with the principles established in ***Haida*** and ***Taku***. The Crown clearly had knowledge of Gitanyow's claim to aboriginal title and rights over land in the Cranberry/Kispiox and Nass TSAs, and it was common ground that removal of timber from that land could adversely affect Gitanyow's interests. Consultation did take place between the parties. The issue is whether that consultation process was reasonable, and whether any resulting accommodation was adequate.

[142] The Crown says that it carried out a reasonable and extensive process of consultation and accommodation that complied with the guidelines established in ***Haida***. It points to the LUP and the SRMP initiatives, the GFA, the creation of the JRC and the Consultation Protocol, establishment of the NWFREP and FBSWG, and the significant funding that the Crown has provided for these initiatives, and for facilitating Gitanyow's participation in them. It says that a number of these are multi-year programs that will provide ongoing consultation and joint planning processes as vehicles for future accommodation. The Crown maintains that these represent a reasonable outcome of a genuine and protracted effort on its part to harmonize conflicting interests, find workable compromises, and advance the process of reconciliation. It says that when the parties were unable to reach agreement on all aspects of accommodation, having made good faith efforts to address Gitanyow's interests, Mr. Warner was entitled to decide to replace the FLs in accord with the Crown's right to manage forest resources.

[143] The steps to be followed in determining the validity of the Crown's position are set out at paras. [15] to [19] of these Reasons. The starting point is an examination of whether the Crown properly assessed the scope of its duty to consult and accommodate. This is dependent on a preliminary assessment of the strength of the claim of aboriginal rights or title, and the seriousness of the potential adverse effect on those interests that may arise from the contemplated government action. In this case, I find that assessment was premised on issues of both law and fact. The standard for review is accordingly reasonableness.

[144] The next step involves an assessment of whether the process of consultation was reasonable. In my view, this issue has two aspects. The first is procedural adequacy.

[145] The second is more subtle, and involves an examination of whether the consultation was meaningful, in the sense that the Crown made genuine efforts to understand Gitanyow's position, and to attempt to address it, with the ultimate goal of reconciliation in mind. Meaningful consultation is thus necessarily linked to an assessment of whether interim accommodation was required, and if so, whether it was provided. This is judged by a standard of reasonableness.

[146] My analysis will follow those steps.

Did the Crown reasonably assess the scope of its duty to consult and accommodate?

[147] The Crown's preliminary assessment of the strength of the claim and the potential adverse effect of government action on aboriginal interests must be made at the outset of the proposed consultation, if it is to inform the scope and extent of that process. In this case, there is nothing to indicate that the Crown made such an assessment before embarking on the consultation with Gitanyow with respect to the FL replacements.

[148] In his initial letter of September 29, 2005 to Mr. Williams, Mr. Warner did invite Gitanyow to advise on the scope and nature of its aboriginal interests, and how the FL replacements might affect them. In his response of November 25, 2005, Mr. Williams provided a detailed account of Gitanyow's interests and concerns surrounding the FL replacements, and their anticipated negative impact. In his reply of January 9, 2006, Mr. Warner acknowledged that Gitanyow had "significant interests" with respect to the FL replacements, and that there should be further consultation about this decision. There is no indication, however, that he addressed the nature of Gitanyow's interests and the potential adverse impact of the FL replacements in a manner that produced a considered determination of the scope of the Crown's duty to consult and accommodate at the outset of that process.

[149] Instead, the only assessment of these factors appears at the end of the process in Mr. Warner's written decision of March 8, 2007. That assessment is set out at para. [125] of these Reasons. Perhaps because it was expressed at the end of the process, Mr. Warner's assessment was intertwined with what he viewed as the accommodations that had been provided. As a result, it is difficult to extract what his initial assessment of these factors was, and how that informed his determination of the required scope of consultation and accommodation. I proceed on the basis that it is reasonable to infer that Mr. Warner's views at the outset of the consultation with respect to the scope of Gitanyow's claim, and the potential adverse impact of his decision on Gitanyow's interests, were the same as those he expressed on March 8, 2007.

[150] With respect to the strength of Gitanyow's claim, Mr. Warner was clearly aware of Mr. Justice Tysoe's finding that Gitanyow had a good *prima facie* claim of aboriginal title and a strong *prima facie* claim of aboriginal rights to at least part of its traditional territory. Although he did not specifically refer to it in his decision, I find that he was also aware of the Crown's affirmation of that finding in the GFA, and the recognition in s. 1.3 and Appendix A of that agreement that Gitanyow traditional territory was identifiable and mapped, and 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.

[151] In his letter of March 8, 2007, however, while Mr. Warner acknowledged that it was "likely" that Gitanyow aboriginal title exists, he stated that it was unclear where it lies "in light of the recent judgment of the Supreme Court of Canada in *Bernard and Marshall* ". Later, he stated that the replacement FLs could impact Gitanyow's claim of aboriginal title "assuming it exists somewhere within the traditional territory".

[152] The judgment to which he refers is ***Regina v. Bernard***, 2005 SCC 43, [2005] 2 S.C.R. 220 [***Bernard***], a case in which the Court provided guidance on the standard of proof in establishing aboriginal title. It found that in the context of alleged unlawful commercial logging by First Nations, the claimants must establish that they had enjoyed exclusive occupation of the lands in question.

[153] It is unclear why Mr. Warner found it necessary to refer to that decision in his assessment. All parties understood that Mr. Justice Tysoe had provided only a "preliminary general assessment" of the strength of Gitanyow's claims, and that a final determination had to be left for a trial or treaty negotiations. 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.

[154] Nor is it clear why Mr. Warner 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 ***Gitxsan No. 1***, or at this hearing, was an overlapping claim by Gitxsan 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.

[155] 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: ***Gitxsan No. 1***, at para. 74; ***Bernard***, at para.

58. Mr. Warner's assessment fails to recognize this.

[156] I conclude that Mr. Warner 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. Nor did his assessment acknowledge the strength of Gitanyow's independent claim to aboriginal rights.

[157] 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 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 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 in an effort to achieve some accommodation for the harm to Gitanyow's interests. On November 25, 2005, early in the FL replacement discussions, Mr. Williams had written to Mr. Warner outlining many of these concerns.

[158] These factors, however, do not appear to have played a significant role in Mr. Warner'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, including the LUP, consultation on the FSPs and other operational decisions, the JRC, the FBSWG, the NFWRP, and the "full suite of accommodations" agreed to under the GFA.

[159] The Crown argues that this was a reasonable view, as the decision to replace the FLs did not give the licensees a right to cut timber. It says that operational decisions made later in the process, such as the approval of FSPs and cutting permits, will have a more significant impact on how much timber will be cut.

[160] 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.

[161] 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. For example, the process of preparing and approving an FSP engages a complex legislative interaction between the ***FRPA***, ***FPPR***, the ***Land Act***, R.S.B.C. 1996, c. 245, the ***Land Use Objectives Regulation***, BC Reg. 357/2005, and the ***Government Actions Regulation***, BC Reg. 582/2004. While ss. 4 and 10 of the ***FPPR*** require consideration of conserving or protecting cultural heritage resources that are the focus of a traditional use by an aboriginal people and of continuing importance, the balance of the legislation provides no guidance with respect to the weight to be given to these interests in the context of competing legislative objectives. Effectively, the process engages a balancing of societal interests as described in ***Haida***, with no certainty that Gitanyow's interests will be paramount.

[162] Paragraph 5 of the FL document, which deals with consideration of aboriginal interests by the District Manager in applications for cutting permits, is also discretionary.

[163] 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.

[164] With respect to the other initiatives relied on by Mr. Warner, while I find it was reasonable to consider these in assessing the impact of his decision to replace the FLs in March 2007, it is necessary to observe that a number of them, notably the accommodations provided by the GFA, did not exist in September 2005 when the consultation process began, and when Mr. Warner should have made his preliminary assessment of the potential adverse impact of his decision to replace the FLs on Gitanyow's interests. His reliance on them *ex post facto* does not assist the Crown in establishing what its assessment of the scope of its duty to consult was at the outset of the process.

[165] Moreover, while I do not wish to minimize the efforts made by the Crown in establishing initiatives such as the GFA, the JRC, the LUP/SRMP process, and the NWFREP, it is not clear that these necessarily lessened the impact of the replacement FL decision on Gitanyow. While the GFA provided a framework for consultation, it did not directly address that decision. Compliance with the LUP by licensees was voluntary. The NWFREP was directed primarily at past silviculture delinquency, rather than at measures to ensure future compliance by the replacement licensees.

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

[167] In summary, to the extent that it is possible to discern the Crown's preliminary assessment of the strength of Gitanyow's claim and the potential adverse effect of the FL replacement decision on Gitanyow's interests from Mr. Warner's *ex post facto* assessment in his letter of March 8, 2007, I conclude that this assessment was unreasonable. I find that the result was an underestimation of the extent and scope of the Crown's duty to consult and accommodate Gitanyow's interests in the course of the FL replacements.

[168] 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.

[169] Those findings lead me to conclude that the honour of the Crown required it to conduct what the Court at para. 44 of ***Haida*** described as "deep consultation aimed at finding a satisfactory interim solution" to avoid irreparable harm and to minimize the impact of the decision to replace the FLs on Gitanyow's interests until its claims were finally resolved. I proceed to consider whether the Crown met that obligation through reasonable consultation and accommodation, despite its failure to properly assess the scope of its duty.

Was the consultation process reasonable?

[170] The Crown is obliged to conduct consultation that is both procedurally and substantively adequate. The standard for judging both aspects of the consultation is reasonableness. This section examines procedural adequacy.

[171] In ***Haida***, at para. 44, the Court observed that while the precise requirements of consultation will vary from case to case, "deep consultation" may involve the opportunity to make submissions, formally participate in the decision- making process, and receive written reasons from the decision-maker that demonstrates that aboriginal concerns were considered, and advises what impact they had on the decision.

[172] There is no question that since the decision in ***Gitxsan No. 2,*** the Crown and Gitanyow have established an impressive format for consultation in an effort to address Gitanyow's forestry interests. From a procedural perspective, I find that the four-step Consultation Protocol set out in the GFA provided a satisfactory framework for reasonable consultation that complied with the guidelines in

Haida. I am also satisfied that both parties made a good faith effort to conduct their discussions within that framework.

[173] Step one dealt with information sharing. I am satisfied that there was an extensive exchange of information between the parties, both through correspondence and meetings of the JRC. The sufficiency of the information provided is dealt with in the next section.

[174] Step two dealt with identification of Gitanyow's interests, and required the Hereditary Chiefs to provide information that showed the potential impact of the government's decision on Gitanyow's aboriginal interests. I find that this was satisfactorily carried out. From the outset, the Crown and Gitanyow proceeded on the basis that Gitanyow had four primary concerns: recognition of Gitanyow's aboriginal rights and title, and of the Wilp as integral to those interests; integration of the LUP in the replacement FLs; assurance that outstanding and future silviculture obligations would be performed by the Crown or the licensees; and economic accommodation through revenue sharing. Later in the process, the parties added Gitanyow's interest in harvesting wood for domestic use, in response to the Court's decision in ***Sappier*** in December 2006.

[175] Step three involved consultation to address the interests identified in step two, and potential measures for accommodating those. I am satisfied that the parties consulted extensively from a procedural perspective. There were many written exchanges, as well as meetings of the JRC, the NWFREP, the FBSWG, and in the course of the LUP/SRMP process. The substance of those communications is addressed in the next section.

[176] Step four was the decision. The Consultation Protocol provided a list of points that the statutory decision maker should cover in writing his decision and providing it to Gitanyow. I find that Mr. Warner wrote his letter of March 8, 2007 with these guidelines in mind.

[177] I am satisfied that the consultation was conducted within a reasonable procedural framework.

Did meaningful consultation produce reasonable accommodation?

[178] 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***. The Crown is not under a duty to reach an agreement, and must balance aboriginal interests against other societal interests. Nevertheless, where there is a strong aboriginal claim that may be significantly and adversely affected by the proposed Crown action, meaningful consultation may require the Crown to modify its proposed course to avoid or minimize infringement of aboriginal interests pending their final resolution. Ultimately, the adequacy of the Crown's approach will be judged by whether its actions, viewed as a whole, provided reasonable interim accommodation for the asserted aboriginal interests, given the context of balance and compromise that is required: ***Haida***, at paras. 41-42, 45-50; ***Gitxsan No. 2***, at para. 50; ***Huu-Ay-Aht First Nation***, at para. 95; ***Taku***, at para. 29; ***Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)***, 2005 SCC 69 at para. 54, [2005] 3 S.C.R. 388.

[179] An assessment of whether consultation was meaningful inevitably leads to an examination of what accommodations were reached. I therefore find it useful to begin by discussing the measures on which Mr. Warner relied as accommodation of Gitanyow's interests. His letter of March 8, 2007 indicated that he relied on three things as providing adequate accommodation to Gitanyow in relation to his decision to replace the FLs: the JRC Recommendations, consideration of Gitanyow's interests in subsequent operational decisions, and the "full suite of accommodations" agreed to under the GFA. The latter included interim economic accommodation, the JRC, the FBSWG, the NWFREP, the LUP/SRMP process, and the funding to support those initiatives.

[180] I am not satisfied that any of those represented reasonable accommodation of Gitanyow's interests in the decision to replace the FLs for the following reasons.

[181] Dealing first with the GFA, the Crown argues that s. 9.5 of that agreement is clear that it was intended to cover economic and other interim accommodation for Gitanyow with respect to all forest activity in its traditional territory for the next five years. It says that includes the decision to replace the FLs, and the GFA must therefore be interpreted as having provided reasonable accommodation for that decision.

[182] I am unable to agree. I find that Paragraph C of the preamble and s. 9.4 of the GFA are clear that the interim accommodation provided by that agreement is related to the five specific forestry decisions listed in s. 9.4 that arose from the proceedings in ***Gitxsan No. 1*** and ***Gitxsan No. 2***. Section 9.4 makes no mention of the decision to replace the FLs.

[183] Moreover, the definition of "Interim Accommodation" in s. 2.1.6, as well as ss. 9.3 and 9.7 of the GFA, clearly give Gitanyow the right to seek additional accommodation for forest resource development that impacts its aboriginal interests in its traditional territories during the term of the GFA. As well, paragraphs J, K and L of the preamble, as well as s. 9.8 and Appendix B, all envision further consultation between the Crown and Gitanyow with respect to future forestry decisions during the term of the GFA.

[184] I accept that the measures provided in the GFA can be considered in assessing the impact of later forestry decisions, such as the replacement of the FLs, on Gitanyow's interests. I have also found that the GFA provides a useful framework for future consultation about such decisions. I do not agree, however, that the GFA, read as a whole, provided accommodation to Gitanyow for the replacement of the FLs. Consultation surrounding that decision was ongoing when the GFA was executed, and its terms clearly left it open to Gitanyow to seek further accommodation with respect to future forestry decisions that were not listed in s. 9.4.

[185] I conclude that it was not reasonable for the Crown to rely on the GFA as accommodation for the decision to replace the FLs.

[186] Mr. Warner also relied on subsequent operational decisions to accommodate Gitanyow's interests with respect to logging activities on its traditional territory. I earlier dealt with the role of such decisions in assessing the potential impact of the replacement of the FLs, and the scope of the duty to consult. Many of the same considerations apply in the context of accommodation. While consultation at the operational level is desirable, I am 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. That decision was the first step, and the only strategic step, in the process that would ultimately permit logging on Gitanyow traditional territory. 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.

[187] Turning to the JRC Recommendations, Mr. Warner relied heavily on these as measures of accommodation. He referred to them as "…recommendations regarding ways and means to seek to mitigate any impact … on Gitanyow's aboriginal interests", and stated that he viewed them as "appropriate responses to the interests raised by Gitanyow through the consultation process".

[188] Later, in his letter of April 12, 2007 to Mr. Williams, Mr. Warner expanded on his understanding of the JRC Recommendations, saying that he believed they were developed collaboratively among the JRC members, and that they had the support of Gitanyow's representatives, although Gitanyow could not commit to them until they had been reviewed by the Hereditary Chiefs. He described them as the best information he had, although he recognized that they fell short of Gitanyow's requests for accommodation in some respects. He nevertheless expressed the hope that the JRC discussions had resulted in finding at least some middle ground.

[189] I find that this overstates the extent of Gitanyow's support for the JRC Recommendations. Mr. Williams was the main Gitanyow representative who participated in their development. The extent to which he endorsed them is obscure. His otherwise comprehensive affidavit is silent as to his role in their preparation. Ms. Lloyd-Robertson, the MoF representative, says that the JRC Recommendations were "thoroughly discussed" with Gitanyow's representatives, but does not say that Gitanyow

supported them.

[190] Whether or not Mr. Williams, or other Gitanyow representatives on the JRC, endorsed the JRC Recommendations, it was clear that the draft of the Recommendations sent to Mr. Warner on February 19, 2007 was still undergoing internal review by Gitanyow. Moreover, Mr. Williams' correspondence of February 21, 2007 and February 27, 2007, with the accompanying revised draft of the Accommodation Agreement, left no doubt that Gitanyow did not view the JRC Recommendations as satisfactory accommodation.

[191] The Crown's deadline of February 28, 2007 under s. 15(1.1) of the ***Forest Act*** was imminent, and Mr. Warner had two options. The first was to proceed with his decision on the information available. The second was to postpone his decision and proceed with the FL replacements later under s. 15(1.2) of the ***Forest Act*** to permit further consultation. This would have allowed him to clarify Gitanyow's position with respect to the JRC Recommendations, and to address the issues raised in Mr. Williams' most recent correspondence, including the draft Accommodation Agreement.

[192] Mr. Warner chose the first option, apparently because it was the Crown's view that positions were entrenched and nothing would be accomplished by further delay. He was entitled to do so. Consultation had been protracted, and he had given clear deadlines to Gitanyow. However, given the disagreement over the import of the JRC Recommendations, I find that they could not properly be viewed by the Crown as a "middle ground" endorsed by Gitanyow. At the least, it appears that there was a fundamental disagreement between the parties as to process: could the JRC Recommendations be treated as a final product of collaborative consultation, or was ratification by Gitanyow Hereditary Chiefs, and consideration of Gitanyow's objections to them required? I find that those outstanding issues limited Mr. Warner's ability to rely on the JRC Recommendations as a basis for accommodation arising from meaningful consultation.

[193] Further, a review of the JRC Recommendations reveals that the accommodation that they purported to provide was essentially the same as that offered in the MoF's initial proposal of August 28, 2006, and depended heavily on the measures in the GFA. It is accordingly difficult to accept that Gitanyow's representatives on the JRC would endorse the JRC Recommendations, given that throughout the consultation Gitanyow had taken the position that the proposal of August 28, 2006 and the GFA did not represent adequate accommodation.

[194] A review of the accommodation recommended with respect to each of Gitanyow's concerns demonstrates that, despite the extensive consultation between the parties, the Crown had not modified its position to accommodate Gitanyow's interests.

[195] The first concern was recognition. Gitanyow sought to have recognition of not only its aboriginal rights and title, but also of the Wilp system and territories, to ensure balanced forest planning.

[196] In his decision of March 8, 2007, Mr. Warner dealt with recognition by adopting three JRC Recommendations. The first was to include the WHEREAS clause in the preamble of the licence documents. The second was to have MoF representatives advise licensees of the Wilp territory boundaries in the course of operational planning. These two Recommendations reiterated proposals made by Mr. Warner in his letter of August 28, 2006.

[197] The third was to support the JRC as a continuing forum for consultation. This endorsement of the JRC simply affirmed the terms of the GFA that established the JRC and the Consultation Protocol.

[198] I find that there was no change in the Crown's position with respect to accommodating Gitanyow's concern regarding recognition.

[199] Gitanyow's second concern was incorporation of the LUP in the FL documents. It initially took the position that the FL replacement decision should be postponed until this planning process was complete. When the MoF rejected that, it sought assurance that the FL documents would be "subject to" the LUP.

[200] Mr. Warner's decision of March 8, 2007 adopted six JRC Recommendations with respect to sustainability/land use planning. Three of these essentially recommended continued support for the

implementation of the joint planning process set out in s. 4 of the GFA. Two dealt with the use of the LUP in preparing operational plans. One of those recommended including a statement in the FL replacement offer letter to licensees that would advise them of the LUP for the Cranberry/Kispiox TSA and encourage them to work with Gitanyow. Mr. Warner acknowledged that this fell short of Gitanyow's expectation that the plan should be a requirement within the FL document itself, but stated that inclusion of the LUP in the licence was not appropriate as it had not been enabled through relevant legislation. The sixth JRC Recommendation affirmed the use of the JRC as a vehicle to implement the LUP process and to develop strategy for ensuring sustainability of forest resources within Gitanyow traditional territory.

[201] While the LUP/SRMP process had evolved since August 2006, I find that the adoption of those six JRC Recommendations 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.

[202] The third concern was silviculture liabilities. This concern was set against the backdrop of long-term problems with earlier licensees who had defaulted on reforestation obligations in Gitanyow traditional territory. It was the subject of comment in ***Gitxsan No. 1*** and ***Gitxsan No. 2***, and remained a problem throughout the consultation leading to the replacement of the FLs.

[203] Mr. Warner attached reports with respect to the silviculture liabilities of each replacement licensee to his decision of March 8, 2007, and considered three JRC Recommendations with respect to silviculture. The first required him to provide a written explanation to Gitanyow as to how he had considered silviculture liabilities in his decision to replace the FLs. In response, Mr. Warner acknowledged that "the current state of silviculture liabilities on a number of the licences is in question". However, he said that he was satisfied with the efforts of the forest districts that were working with the licensees to develop remedial action plans. He provided no details of those plans, but stated that if they were not effective, further compliance and enforcement action would be carried out, and could lead to suspension or cancellation of the replacement FLs.

[204] The second JRC Recommendation was to seek silviculture deposits from the licensees. Mr. Warner rejected this, indicating that it could not be done because it would require amendments to the current legislation. He acknowledged that such a practice might assist in alleviating the situation, however, and said that he would refer it to the ministry executive for consideration.

[205] Mr. Warner adopted the third JRC Recommendation, which simply endorsed continued support for the NWFREP.

[206] I find that the Crown did not provide any accommodation with respect to Gitanyow's silviculture concerns beyond the initiatives previously established in s. 5 of the GFA with respect to the NWFREP, and described in Mr. Warner's proposal of August 28, 2006.

[207] Gitanyow's fourth concern was revenue sharing. This was a major and long-standing point of contention between the parties, and it is necessary to provide some background. Gitanyow relied on the views of the Court in ***Delgamuukw v. British Columbia***, [1997] 3 S.C.R. 1010 at para. 169, 220 N.R. 161, which acknowledged that aboriginal title has "an inescapably economic aspect", and that the honour of the Crown will ordinarily require fair compensation when aboriginal title is infringed. Gitanyow argued that a revenue sharing scheme was an essential component of interim accommodation where limited resources were being extracted from its traditional territory, particularly since the Crown's position in treaty negotiations was that treaty terms would be forward looking, and were unlikely to provide compensation for past losses.

[208] While the Crown recognized an economic component in accommodating aboriginal interests, it consistently took the position that this was best addressed on a broader province-wide level, through initiatives such as the New Relationship or the FBSWG. It was not prepared to consider revenue sharing in the forestry context on an individualized licence-by-licence basis. At the time of these events, it appears that the Crown's policy was to provide interim economic accommodation of aboriginal interests in forestry through a population-based approach, generally by negotiating interim accommodation agreements with First Nations: ***Huu-Ay-Aht First Nation***; ***Gitxsan No. 2***, at paras. 24-27, 57.

[209] In ***Gitxsan No. 2***, and subsequently, Gitanyow had taken the position that revenue sharing should more properly be based on the volume of timber harvested from its traditional territory. Nevertheless, Gitanyow did agree to the interim economic accommodation set out in s. 7.2 of the GFA, which appears to be based on a *per capita* formula, and resulted in annual payments to it of $357,000. Section 7.2.6 indicated that this would be recalculated if other mutually acceptable processes were adopted, and s. 7.2.7 led to the establishment of FBSWG in late 2006 to examine alternative benefit and revenue sharing options. The definitions of Interim Accommodation and Interim Economic Accommodation in s. 2 of the GFA made it clear that the payments agreed to in that agreement reflected the present budget limitations of the MoF, although they acknowledged that other economic accommodations may be jointly developed by the parties.

[210] In his letter of August 28, 2006, Mr. Warner expressed the view that the interim economic accommodation provided by the GFA was sufficient financial accommodation for Gitanyow's interests with respect to forest activity during the term of the agreement, including the decision to replace the FLs.

[211] Gitanyow disagreed, and revenue sharing thus continued to be a topic in the consultation over the FL replacements. Gitanyow put forward its position in its two draft accommodation agreements. The first, presented in October 2006, stipulated payment to Gitanyow of 50 percent of stumpage fees and annual rent received from forest activities on Gitanyow traditional territory under the replacement FLs. The second, presented by Mr. Williams late in the day with his memorandum of February 21, 2007, added a claim for $19 million, representing 51 percent of stumpage fees collected from timber cut in Gitanyow traditional territory between December 31, 1995 and January 1, 2005.

[212] Mr. Warner addressed revenue sharing in his decision of March 8, 2007 by adopting the JRC Recommendation that the parties continue to work through the FBSWG to identify alternative models for sharing forest benefits. He acknowledged that this fell far short of Gitanyow's expectations. It was his view that the accommodation measures set out in Gitanyow's draft Accommodation Agreements raised revenue sharing issues that had been a key component in negotiating the GFA. He reiterated the MoF's position that any fundamental changes to revenue sharing with First Nations needed to be addressed at a province-wide level.

[213] Consultation thus produced no economic accommodation for Gitanyow beyond the payments previously negotiated in the GFA.

[214] The fifth and final Gitanyow concern was the right to harvest wood for domestic purposes. This arose late in the consultation, following the decision in ***Sappier*** in December 2006.

[215] The JRC was quick to recognize the potential impact of that decision on Gitanyow's rights. There was already a JRC project in progress to identify Gitanyow's cedar needs for cultural purposes, and JRC discussions in December and January led to a consensus to expand this to include other species and domestic use of wood, in view of the ***Sappier*** decision.

[216] In his decision of March 8, 2007, Mr. Warner considered two JRC Recommendations with respect to the domestic use of wood. The first was to support completion of the cedar project and expand it to include the ***Sappier*** considerations. Mr. Warner gave this qualified support, indicating that while he supported quantifying Gitanyow's domestic needs for wood, the cedar project should be completed and evaluated before it was expanded. The second JRC Recommendation asked for assurance that replacing the FLs would not "trump" Gitanyow's right to wood for domestic use. Mr. Warner declined to give a clear assurance, but stated that the Court's decision would be respected, and that Gitanyow's right to domestic wood would be addressed collaboratively through the JRC.

[217] Consultation continued on this topic after the replacement decision, and on July 30, 2007, Gitanyow agreed to the terms of the Contribution Agreement, which included a pilot project identifying Gitanyow's need with respect to the domestic use of timber as identified in ***Sappier***.

[218] Thus the Crown did provide accommodation beyond its initial proposal on the issue of harvesting domestic wood.

[219] 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.

[220] Did that represent reasonable accommodation attained through meaningful consultation? The Crown correctly points out that the honour of the Crown did not require it to agree to the accommodations sought by Gitanyow. The test is reasonableness, not whether more could have been done. Nevertheless, the Crown must demonstrate that, in balancing the competing interests at work in the decision to replace the FLs, it listened to Gitanyow's concerns with an open mind, and made a good faith effort to understand and address them, with a view to minimizing the adverse effect of that decision on Gitanyow's interests and providing reasonable interim accommodation.

[221] In considering that question, I must look at the overall offer of accommodation, and weigh it against the potential impact of the infringement on the asserted aboriginal interests, having regard to the strength of the aboriginal claims: ***Gitxsan No. 2***, at para. 63. I have earlier expressed my view that Gitanyow's claims are strong, and that the potential impact of the decision to replace the FLs on their interests is significant. While it is necessary to assess the overall position of the Crown with that in mind, both parties approached the process in this case on the basis that they were dealing with five discrete concerns. I accordingly intend to examine the adequacy of the accommodation provided for each of those, before considering the whole.

[222] With respect to recognition of the Wilp system and boundaries, I find that the adoption of three JRC Recommendations by the Crown did not provide reasonable accommodation of this concern. I am satisfied on the material before me that the Wilp are an integral and defining feature of Gitanyow's society. As such, the Wilp system and the related 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.

[223] 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.

[224] The Crown did not dispute the significance of the Huwilp in Gitanyow history and culture. This was affirmed in the GFA, which defines "Gitanyow" by reference to the eight Wilps, and attaches a map of Gitanyow traditional territory comprised of the Wilp areas. As well, the LUP has mapped the territory of each Wilp, and related cultural sites. Section 1.3 of the GFA recognizes that the historic and contemporary use of land and resources by the Huwilp is integral to the maintenance of Gitanyow society, governance and economy within the traditional territory. Mr. Friesen reaffirmed this after the FL replacement decision in his letter of July 30, 2007.

[225] However, the Crown's position with respect to recognition of Gitanyow aboriginal rights and title, and the Huwilp, remained unchanged throughout the consultation. Mr. Warner, in his letter of August 28, 2006, offered the WHEREAS clause in the licence document, and a statement about Wilp boundaries, to the licensees during the preparation of their FSPs. He also stated that the MoF was unable to acknowledge the Wilp territories in the FL document "for practical reasons". Despite Gitanyow's request for further discussion on that point, that statement was never explained.

[226] Nor did Mr. Warner explain the impracticality of Gitanyow's position in his affidavit filed in this proceeding. During argument, counsel for the Crown postulated several explanations. First, he said that it may have been that acknowledgement of the Huwilp would not fit within the largely statutory terms of the FLs, which are dictated by s. 14 of the ***Forest Act***. Second, he said that the Crown may have been concerned about the precedential value of including reference to Wilp boundaries in the FL documents, since other First Nations also have house-based systems of governance. Finally, he suggested that adding a term or a map to the licence with respect to Wilp boundaries would have no

practical value, and it was better left to the District Managers to deal with these at the operational level on the theory that persuasion rather than imposition would more effectively introduce the Wilps' concerns to the licensees.

[227] There is nothing in the affidavit material to confirm that these arguments accurately represented the views of the Crown at the time. Even if they did, these are matters that should have been raised in the course of consultation, so they could be fully understood and addressed in the interests of reaching reasonable interim accommodation.

[228] I conclude that the WHEREAS 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.

[229] The next issue is whether there was adequate consultation and accommodation with respect to Gitanyow's concern that the LUP be recognized in the replacement FLs. I acknowledge at the outset that this joint planning process has come a long way since it was a focus of contention in ***Gitxsan No. 2***. The Crown has given significant funding to it, and is clearly engaged and committed to working with Gitanyow in seeing it through to completion.

[230] The parties did not explain the framework or legislative underpinning of the LUP/SRMP process in any detail. Nor did my own research reveal the process by which the LUP could ultimately obtain statutory force. I accordingly find it difficult to assess the reasonableness of the Crown's position that the LUP should not be recognized in the replacement FLs until it had legislative status.

[231] As well, it is evident that this joint planning process is evolutionary and long-term, and it is not clear to me in what form Gitanyow proposes that the LUP could be incorporated into the FL document. The only plan before me is a draft LUP dated Summer 2005, which is 133 pages with many interlineations. It is evident that the joint planning process has progressed since 2005. I find it difficult to understand how a developing plan could usefully be incorporated into the replacement FLs.

[232] On the other hand, 15 years is a long time to rely on voluntary compliance with the LUP by the licensees. 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.

[233] Given the uncertainties surrounding this issue, and the Crown's commitment to the ongoing process, I am not prepared to find that this is a concern that was insufficiently accommodated.

[234] 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. In ***Gitxsan No. 2***, Mr. Justice Tysoe found that the Crown had failed to adequately address the unfulfilled silviculture obligations of Buffalo Head, the predecessor to Timber Baron, on FL A16884, one of the replaced FLs. He concluded that the Crown had not yet fulfilled its duty of consultation and accommodation with respect to this. The Crown ultimately fulfilled that obligation by agreeing to s. 5.7 of the GFA, which provided that Gitanyow would receive reports through the JRC on Timber Baron's progress in meeting its backlog of silviculture obligations.

[235] 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. He noted that the MoF had taken enforcement action against Timber Baron, and said that this legal process precluded him from dealing with the issue through the FL replacement process. He provided no details of what measures were being taken. Nor did he explain how they precluded consultation about ongoing silviculture obligations with respect to FL A16884 during the replacement process. In March, 2007, his letter and the silviculture reports attached to it suggested that the situation had deteriorated since August 2006, but provided few details of the

proposed solutions.

[236] The Crown's position was that silviculture liabilities would be adequately dealt with by the NWFREP. I appreciate that significant funds were committed to that programme. However, it appears that its focus has been on silviculture backlog that precedes 1987, and on areas logged previously by Orenda. I am not satisfied that those initiatives, directed to historical defaults, adequately addressed securing performance of silviculture obligations under the replacement FLs.

[237] Given the mutual interest of the parties in ensuring that silviculture obligations were honoured in the future and past liabilities remediated, the Crown's historical reluctance to enforce these obligations, and the lessons learned from ***Gitxsan No. 2***, it is difficult to understand why the Crown was not more forthcoming in discussing the outstanding and future liabilities and solutions with Gitanyow. The legislation apparently provides many possible remedies, including ss. 15(2)(c) and (d) of the ***Forest Act***, which permitted the Crown to decline to offer a replacement FL until a licensee's obligations were performed, or to offer an FL replacement with special conditions related to outstanding obligations, but these options were never discussed. Nor did Mr. Warner explain his view that licensees could not be asked for silviculture deposits without legislative changes. The findings of Tysoe J. in ***Gitxsan No. 2*** resulted in s. 5.7 in the GFA, which required the Crown to provide silviculture reports to Gitanyow with respect to Timber Baron. Section 13 of Gitanyow's revised draft Accommodation Agreement similarly proposed annual reporting to Gitanyow about licensees' performance of their obligations on Gitanyow traditional territory, including those related to silviculture. Yet the prospect of regular reporting by the replacement licensees was not discussed.

[238] 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.

[239] Turning to Gitanyow's interest in revenue sharing, the economic component of aboriginal interests is clearly a significant issue, with wide-ranging repercussions for all citizens of British Columbia. In my view, in the course of balancing Gitanyow's interests against other societal interests, the Crown may be justifiably wary of dealing with revenue sharing on an individualized basis. For example, I do not find it unreasonable for the Crown to decline to consider Gitanyow's claim for substantial sums as its share of past and future logging revenue until the ramifications of such an approach can be considered at a broader level. I am satisfied that, in the interim, the periodic payments made by the Crown to support ongoing initiatives, and the development of a consultation framework to consider alternative means of accommodating the economic aspects of aboriginal interests, suggest good faith ongoing consultation and accommodation on the part of the Crown to advance this process. It is regrettable that this initiative appears to be moving at such a slow pace, but at present it apparently has the blessing of both the Crown and the First Nations Forest Council.

[240] I conclude that the Crown's obligation to consult and attempt to reach economic accommodation with respect to forestry decisions generally is ongoing. I decline to find that its efforts in this area related to the decision to replace the FLs were inadequate.

[241] I have already found that the Crown reasonably consulted and accommodated Gitanyow's interests in the harvest of wood for domestic use.

Conclusion

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

[243] 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***, para. 50.

[244] 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.

[245] 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.

[246] 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.

[247] 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.

[248] 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.

[249] 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.

RELIEF SOUGHT

[250] Gitanyow seek the following relief:

1. Declaratory Relief

A. A Declaration that the Respondent, W.I. (Bill) Warner, Regional Executive Director, Northern Interior Forest Region, ["Director"], had a legal duty to meaningfully consult with the Gitanyow Petitioners in good faith and to seek to accommodate Gitanyow aboriginal rights and title with the objectives of the Crown to replace seven Forest Licences which would authorize third parties to log within Gitanyow Territory for a term of fifteen years commencing at the time of the replacement ['Forest Licence Replacements"];

B. A Declaration that the Director, when he approved the Forest Licence Renewals, acted contrary

to the honour of the Crown in right of British Columbia ["the Crown"] in its dealings with the Gitanyow;

C. A Declaration that the Director approved the Forest Licence Renewals in March, 2007 ["Decision"] without fulfilling his constitutional duty to meaningfully consult with the Gitanyow;

D. A Declaration that the Decision potentially adversely affected the aboriginal title and aboriginal rights of the Gitanyow with respect to the Gitanyow Territory and resources;

E. A Declaration that Gitanyow possess a strong *prima facie* case for their claim that their Wilp system is integral to the Gitanyow way of life.

F. A Declaration that Gitanyow are entitled to have their Wilp System effectively recognized through meaningful consultation as part of the reconciliation of Gitanyow pre-existing sovereignty with Crown sovereignty.

G. A Declaration that Gitanyow are entitled to have their Wilp System effectively and meaningfully accommodated in the interim prior to the reconciliation of Gitanyow pre-existing sovereignty with Crown sovereignty.

H. A Declaration that the Director has failed to effectively recognize the Gitanyow Wilp System prior to making the Decision and has thereby failed to meaningfully consult with the Gitanyow.

I. A Declaration that the Director has failed to effectively and meaningfully accommodate the Gitanyow Wilp System prior to making the Decision.

J. A Declaration that Gitanyow's strong *prima facie* case for aboriginal rights and good *prima facie* case for aboriginal title entitles it to have those rights and title effectively and meaningfully recognized and affirmed in the interim prior to the reconciliation of Gitanyow pre-existing sovereignty with the Crown's sovereignty.

K. A Declaration that Gitanyow are entitled to have the Wilp System meaningfully recognized and given meaningful effect in the Approval Decision.

L. A Declaration that effective and meaningful recognition and affirmation of Gitanyow's rights and title in the consultation process includes the recognition of the right of the Gitanyow:

   a. to renew and carry on their relationship to the land through the Wilp System;

   b. to participate through Joint Planning with the Minister and the Crown in deciding how the lands and resources within their Territory will be used; and

   c. to share in the wealth generated from the resources on Gitanyow Territory.

M. A Declaration that Gitanyow are entitled to a fair share in the revenue generated by the exploitation of forest resources on Gitanyow Territory in the interim.

N. A Declaration that Gitanyow are entitled to share in the decision making in regard to the management and exploitation of forest resources within their territory, including at the strategic planning level as an interim step in the right of the Gitanyow to determine to which uses their Territory should be put.

O. A Declaration that Gitanyow are entitled to have the results of their shared strategic planning given meaningful effect, including meaningful effect in the Forest Licence Replacements.

2. *Certiorari Mandamus* and Prohibition

P. Relief in the nature of *certiorari* to quash the Decision to the extent that the Decision is with respect to forest resources within the Gitanyow Territory.

Q. Relief in the nature of *mandamus* to direct the Director to meaningfully consult and seek accommodations with the Gitanyow;

R. Relief in the nature of *mandamus* directing the Director to take into account through meaningful

consultation the following factors:

i. the good *prima facie* case of the Gitanyow to aboriginal title in the Gitanyow Territory, including the areas covered by the Forest Licence Forest Licence Replacements;

ii. the strong *prima facie* case of the Gitanyow to aboriginal rights to the resources, including forest resources within Gitanyow Territory, including the areas covered by the Forest Licence Replacements; and

iii. the Gitanyow system of the exercise of their aboriginal rights and aboriginal title through the management of the lands and resources by the Wilp System.

S. Relief in the nature of *prohibition* prohibiting the Director from further implementing the Approval Decision with respect to any forest resources within Gitanyow Territory until he has fulfilled his constitutional obligation to effectively and meaningfully consult and accommodate Gitanyow aboriginal rights and title.

[251] I am not prepared to grant the relief sought without further submissions from the parties for the following reasons.

[252] First, it is not clear to me that the orders sought for *certiorari* and prohibition could be granted without infringing an agreement reached between Gitanyow and the licensees, and affecting the rights of third parties who played no part in this proceeding. The licensees were served with the petition, but did not participate in the hearing as the petitioners agreed they would not seek an order to quash the replacement FLs themselves, or to amend their terms, or to direct the licensees to participate in any future consultation.

[253] Gitanyow initially argued that if I quashed the decision to replace the FLs, the licences will nevertheless remain in place as they represent a contract between the Crown and the licensees that would not be affected by my order.

[254] In its reply argument, however, Gitanyow described a somewhat different scenario flowing from an order for *certiorari*:

> The parties would all be back in the position they were in as though no decision had been made. The Director would be required to address the consultation properly and seek proper accommodation prior to making those decisions. The licensees would be able to operate on their existing licences which they had in place prior to these forest licence replacements. In short, if the licence replacement decision had not taken place, there would not be forest licence replacements and the former licences would remain in force.

[255] In my view, this flies in the face of the agreement that Gitanyow would not seek an order amending the terms of the licences.

[256] The Crown points out additional uncertainties arising from Gitanyow's position. Section 15(6) of the ***Forest Act*** states that once the offer to replace a forest licence is accepted, the forest licence formerly in force "expires" on the commencement of the replacement licence. It is therefore unclear that the licensees could revert to operating under their former licences. Further, four of the six licences that preceded the replacement FLs passed their ninth anniversary in the fall of 2007. Those licensees would therefore lose the opportunity to obtain a replacement FL by virtue of the timelines in s. 15 if, as Gitanyow claims, an order for *certiorari* would place the parties in their pre-decision positions.

[257] While the impact of the relief sought by Gitanyow on the licensees was raised at the hearing, neither party addressed it to my satisfaction. If Gitanyow intends to pursue its claim for *certiorari* and prohibition, I wish to have further submissions that clarify the impact of such orders on the replacement FLs in view of the agreement made by Gitanyow with the licensees.

[258] With respect to Gitanyow's claim for *mandamus*, I wish to have submissions on what such relief would add to the Crown's constitutional duty to consult and accommodate.

[259] Finally, Gitanyow seeks extensive declaratory relief. I would find it helpful to have submissions that are directed to that relief in the context of the findings that I have made.

[260] I wish to make it clear that my request for further submissions on the relief sought is not an invitation to raise new issues. Counsel may schedule an appropriate time with the Registry for those submissions.

"K. Neilson J."