

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Gitxsan Treaty Society*,  
2013 BCSC 974

Date: 20130531  
Docket: S120466  
Registry: Vancouver

**RE: Section 85 of the *Society Act***

**Gitxsan Treaty Society**

Petitioner

Before: The Honourable Mr. Justice McEwan

## **Reasons for Judgment**

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Place and Date of Trial/Hearing:

Smithers, B.C.  
September 26 and 27, 2012

Place and Date of Judgment:

Smithers, B.C.  
May 31, 2013

I

[1] The Gitxsan Treaty Society (“GTS”) applies, pursuant to s. 85 of the *Society Act*, R.S.B.C. 1995, c. 433 [the “*Act*”], for approval of a list of 37 new members so that it may convene an extraordinary general meeting to decide on the constitution of its Board of Directors. In doing so it seeks to cure a defect in the current GTS bylaws relating to the process for appointing directors. The bylaws presently recognize four Gitxsan Pdeek or Clans as having the authority to appoint the directors of the society. The *Act* mandates that a society’s *members* must elect its directors.

[2] Section 85 of the *Act* provides a mechanism to remedy such defects:

Court may remedy irregularities

85 (1) Despite anything in this Act, if an omission, defect, error or irregularity occurs in the conduct of the affairs of a society by which

- (a) a breach of this Act occurs,
- (b) there is default in compliance with the constitution or bylaws of the society, or
- (c) proceedings at, or in connection with, a general meeting, a meeting of the directors of the society or an assembly purporting to be such a meeting are rendered ineffective,

the court may

- (d) either of its own motion or on the application of an interested person, make an order
  - (i) to rectify or cause to be rectified or to negate or modify or cause to be modified the consequences in law of the omission, defect, error or irregularity, or
  - (ii) to validate an act, matter or thing rendered or alleged to have been rendered invalid by or as a result of the omission, defect, error or irregularity, and
- (e) give the ancillary or consequential directions it considers necessary.

(2) The court must, before making an order, consider the effect of it on the society and its directors, officers, members and creditors.

(3) An order made under subsection (1) does not prejudice the rights of a third party who has acquired those rights for valuable consideration without notice of the omission, defect, error or irregularity cured by the order.

[3] This application responds to directions given in a ruling released March 27, 2012, and indexed as *Gitxsan Treaty Society*, 2012 BCSC 452. In the course of that ruling I noted that the issue of the defect in the GTS's bylaws came to light in another proceeding in which the GTS is a participant. I reproduce paras. 5 - 8:

[5] The petition arises in the context of another proceeding in which the Gitxsan Treaty Society is a defendant. That is an action brought out of the Smithers registry of the Supreme Court of British Columbia under #15150 between the following persons and entities as plaintiffs:

Spookw also known as Geri McDougall on behalf of herself and other Gitxsan Chiefs and members, Baskyalaxha also known as William Blackwater Sr., Suu Dii also known as Yvonne Lattie, Luutkudziwuus also known as Charlie Wright, Xsimwits, Inn also known as Lester Moore, Moolxhan also known as Noola, and as Norman Moore, Gitanmaax Indian Band, Glen Vowell Indian Band, Gitwangak Indian Band, Kispiox Indian Band, and Gitksan Local Services Society

[the "Spookw plaintiffs"]

and, the following as defendants:

Gitxsan Treaty Society, British Columbia Treaty Commission, Her Majesty the Queen in Right of the Province of British Columbia and the Attorney General of Canada

[6] That action seeks, among other things, the winding up of the GTS.

[7] In the course of that proceeding the GTS along with the defendants, British Columbia and the Attorney General of Canada, brought applications to strike out the claim on the basis that the plaintiffs had no standing because they were not members of the society.

[8] In the course of submissions on the first of those applications, brought by the GTS, it became evident that the board of directors of the GTS was not properly constituted because it is not elected by the members. All of the applications to strike the plaintiffs in that proceeding were adjourned pending the opportunity now taken in this petition to seek the assistance of the Court to bring the GTS into compliance with the *Act*. The GTS submits that the purpose of the petition is narrow, and goes no further than to ask the Court to approve a process to confirm the appointment of GTS directors. The GTS submits that the petition is not concerned with wider questions of the mandate of the GTS to represent the Gitxsan Nation in Treaty or other negotiations with the Crown. The GTS acknowledges that the plaintiffs in the Spookw action have raised these issues, but it submits that this petition is not an opportunity to address that litigation. It also submits that it is not the forum for discussion of the Enbridge Pipeline controversy or the personal issues that have been raised by some of the Spookw plaintiffs.

[4] The relationship of this petition to the *Spookw* action, as I will call it, is in issue. The *Spookw* plaintiffs seek standing in the matter and take the position that the GTS's proposal for amending its bylaws and restoring itself as a duly constituted society should be rejected.

## II

[5] On March 27, 2012, in addressing the first proposal the GTS made under s. 85, I made certain suggestions about process. I reproduce the conclusion of that ruling, inasmuch as it informs the issues presently submitted to the court:

[34] I think it important to emphasize how strongly the GTS, in the course of its submissions, urged the Court bear in mind the limits of a s. 85 petition. There is no question that the enquiry is narrow and does not engage the merits of the larger issues raised in the *Spookw* litigation and in the other matters that have arisen in connection with the closure of the office and the purported Enbridge dealings.

[35] Ordinarily a society that brings a petition under s. 85 is seeking to cure a defect that concerns an identifiable class of member or potential members of the society. In the particular circumstances of this case the context is much larger, and the implications of ordering the remedy sought by the GTS would be for the Court to endorse the views of one side in a larger dispute which remains before the Court.

[36] The *Spookw* plaintiffs submit that the breaches they have identified are not mere irregularities. Because the Court cannot, under s. 85, amend or impose bylaws on the society the *Spookw* plaintiffs submit that the remedy proposed by the GTS is unavailable. They submit that the effect of the remedies sought by the petitioner is to seek Court imposed bylaws about who would be entitled to membership and how directors are elected. They submit that the Court should dismiss the petition and direct the registrar to consider the petitioner's registration under paragraphs 91(a) and (b) of the *Act* to make interim directions regarding the interim management of the society's operations until the proceeding is decided. For reasons I do not consider it necessary to address, I do not consider s. 91(a) and (b) pertinent in this case.

[37] I have reviewed the voluminous material tendered by both sides in this matter. I have concluded that although the question on a s. 85 petition is narrow and evidence going to the controversy raised in the *Spookw* action is not directly relevant to the question to be decided, it is impossible for the Court to ignore the context, which includes a controversy that engages a large segment of the Gitxsan community and involves serious divisions between factions on two or more sides of the question as to whether the GTS is a legitimate representative of the Gitxsan people it purports to support in the Treaty process. The GTS proposal requires the Court to accept a view of the appropriate model of governance of the Gitxsan that is highly controversial. The effect of accepting it would be to appear to legitimize the

current leadership of the society in the context of the ongoing Spookw litigation. In that litigation the GTS would then presumably renew its application to strike the Spookw litigation on the basis that they have no standing.

[38] Refusal to do anything, on the other hand, leaves all of the parties in an untenable situation.

[39] The respondents, Treaty Commission, the Province of British Columbia and Canada have all cautioned that the Court must bear their interests in mind. It seems to me that there is only one way out of this difficult situation for all parties. It may be that no one will be happy with my directions, but I do not see the remedy to lie either with the proposal of the GTS, which would effectively create at least the appearance of the Court endorsing something close to the status quo, or with the proposal of the Spookw plaintiffs, which would leave all of the interests involved in a state of paralysis.

[40] The appropriate way for the parties to address these controversies is through a process that permits all the Gitxsan an opportunity to be heard if they wish to be heard. I think it inappropriate that the Court be invited to select a particular group or class to be members of a society that purports to represent a whole people. On the other hand, I consider it important that the GTS continue, provided the membership is opened to all who wish to participate. Whether the Gitxsan wish to participate in the process, or to decline to do so, or to conduct an examination of what has been done so far on their behalf, or to change direction, can only reasonably take place in a forum where the definitive expression of those views may be heard and acted upon through a transparent process of election or appointment that has the confidence of the people as a whole, or of those who express enough interest to participate.

[41] Refusal to participate in an open process might well give rise to questions of standing on the part of those who choose to continue to complain from outside.

[42] In my view the issues in the Spookw litigation are affected by the governance model adopted by the GTS. The question of standing would largely be addressed by a transparent membership process. Those who are unhappy with the current model would have an opportunity to effect the kind of changes they seek including the commissioning of audits of the governance of the society of the GTS to date, if they were able to persuade enough members and directors of their views. Continuance of the GTS is also the best means to protect the interests of the Treaty Commission and the Government respondents as well.

[43] In the result I will not order the relief sought by the GTS, nor will I endorse the result favoured by the Spookw plaintiffs. Rather, I adjourn this petition on the basis that I expect a better model for open participation and membership to be developed. I think I have indicated that an indirect model might work as long as there is a transparent process informing the appointment of members that gives all who wish to participate an opportunity to do so. I say no more beyond that. I would encourage such dialogue as is possible. The controversies that have arisen would be far better dealt with in one forum where the whole community is engaged in the exercise of

persuasion on an ongoing, accountable basis. I make no order for costs at the present time.

[6] The allusion to the closure of the GTS office was to a blockade by a number of people disenchanted with the GTS that persisted for several months in the face of an injunction issued by Davies J., in part owing to an inappropriate exercise of what the police choose to call “operational discretion”. The blockade came down while this Court was in the midst of a lengthy and time wasteful exercise in preparing a ruling on a motion that called into question the lawfulness of the police inaction.

[7] The proposal the GTS presently places before the court is its attempt to comply with the direction I gave in paras. 40 - 43 of the passage reproduced in para. 5 above.

### III

[8] The GTS submits that it requires the court’s assistance to resolve the defect in its bylaws because it cannot act on its own due to the nature of the defect. It has only nine known members and cannot meet the quorum requirement of ten in order to hold an extraordinary general meeting to amend the bylaws.

[9] The GTS continues to forcefully maintain that its responsibility in the circumstances is to propose a workable “fix” to the problem. It maintains that while the court, in its view, had no jurisdiction to impose a requirement for an “open” process, its present proposal is a good faith attempt to meet that imposition in a manner that remains consonant with the Gitxsan model of governance. The GTS maintains that there is no basis in law to require the “democratization” of a provincially incorporated society based on one person-one vote.

### IV

[10] It may be useful to step back briefly to set the context in which this issue arose.

[11] In 1992, the British Columbia Treaty Commission (the “BCTC”) was established, by way of an agreement (the “BCTC Agreement”), to which the governments of Canada and British Columbia, and a body called the First Nations Summit were parties. The BCTC is independent of the parties, and in its representations to this court it has described its role in these proceedings as that of the “keeper” of the treaty process. The BCTC takes no position on the section 85 issue, but appeared in court to offer assistance, and on that basis its observations were received.

[12] The BCTC suggested that while the GTS submission is that the application is about the GTS alone, and not about the government of the Gitxsan Nation, “[the GTS] aspires to serve the government of the Gitxsan Nation”, and that “as such one could say that while this application cannot *adjudicate* matters of Gitxsan self-government *per se*, to some degree the nature of self government is *implicated* in this application.”

[13] The BCTC helpfully described the process leading to the formation of the GTS. It noted that the BCTC Agreement defines a first nation as:

an aboriginal governing body, however organized and established by aboriginal people within their traditional territory in British Columbia, which has been mandated by its constituents to enter into treaty negotiations on their behalf with Canada and British Columbia.

[14] The BCTC’s “Policies and Procedures” provide:

The organization and establishment of a governing body for treaty negotiations is a decision to be made by the aboriginal people it represents, namely the constituents of the First Nation.

[15] The BCTC submits that the definition of a first nation is fundamental to the resolution of the GTS application. It suggested that inasmuch as all parties agree that the governing body of the Gitxsan is the Hereditary Chiefs, the Simgiigyet, and that the nation is structured along matrilineal lines in autonomous houses, or Huwilp, it respects these organizational principles and urges the court to do so in relation to this application.

[16] When the Gitxsan Nation entered the treaty process in 1994 by filing a statement of intent, it indicated that it received its mandate by “consensus”. The BCTC submits that the Hereditary Chiefs are the negotiating body that entered the B.C. Treaty process.

[17] The GTS was incorporated to satisfy the requirement of the Government of Canada that funding be administered through a body with the legal capacity to contract, whether it be the First Nation itself or an entity created by the First Nation for the purpose. The Hereditary Chiefs incorporated the GTS to receive and disburse negotiation support funding within the B.C. Treaty process.

[18] The BCTC submits that it is important to recognize that the GTS and the Gitxsan Nation are distinct and that the GTS has merely undertaken administrative tasks at the request of the Gitxsan Nation, which retains ultimate control over the treaty process and could choose *not* to have the GTS act on its behalf. Such a decision would not involve the BCTC, the GTS or the courts. The BCTC submits that GTS cannot ratify any agreement reached in the treaty process, but that the rights of the Gitxsan Nation could only be affected with the collective approval of the membership of the Gitxsan Nation.

[19] The observations of the BCTC broadly conform with the position taken by the petitioner. Its submissions include the following observations on the role of the GTS relative to the Gitxsan Nation:

3. When looking at the context in which this petition is brought, it is important to distinguish between the governance of the GTS, which is an internal GTS matter governed by the *Society Act*, and the governance of the Gitxsan Nation, which is a broader Gitxsan matter for the Gitxsan and not the subject of this petition.
4. The Simgiigyets hold and exercise the Gitxsan Nation’s aboriginal rights, including title, on behalf of their Wilp (House). The Simgiigyets, and not the GTS, are the leaders of the Gitxsan Nation. The Gitxsan Nation, as represented by the Simgiigyets, is the party in treaty negotiations with the Crown. The GTS plays a support role to the Simgiigyets in that effort. The Simgiigyets originally incorporated the GTS to be eligible for treaty funding to support the Simgiigyets’ reconciliation negotiations with the Crown, on behalf of their Wilp members.

5. As a provincially incorporated entity, the GTS does not and cannot replace the Simgiigyet. The Simgiigyet govern the Gitxsan Nation according to Ayookim Gitxsan (Gitxsan laws).
6. As a provincial society, the GTS is bound by provincial law. The BC Court of Appeal has made it clear that entities incorporated pursuant to provincial law must be adjudicated according to those laws. In the same decision, the Court of Appeal said it is in error for the court to consider extraneous factors, like underlying community disputes, when adjudicating a provincially incorporated entities rights or obligations.

*Gitga'at Development Corp. v. Hill,*  
2007 BCCA 158, at paras. 14-23.

7. The GTS seeks this court's assistance, pursuant to s. 85 of the *Society Act*, to resolve a defect in its bylaws which relates to the process for appointing GTS directors. Currently, the bylaws recognize the four Gitxsan Pdeek (Clans) as having the power to appoint directors. Although that process respects Gitxsan law and structures, it runs afoul of provincial law, which recently was clarified to require that a society's members select its directors.
8. The GTS requires this court's assistance to resolve this defect in its bylaws. It cannot act alone to amend the bylaw. With only nine known members, an extraordinary general meeting to amend the bylaws would not meet the bylaw's quorum requirement of 10. This court's assistance is required so the GTS may take further steps to bring itself back into compliance with the *Act*.
9. The issues raised in this petition are of the type contemplated by s. 85 of the *Society Act*. In enacting s. 85, the legislature expressly contemplated that a society may occasionally run afoul of the provincial regime, or its own bylaws, and require external assistance in order to bring the society into full compliance.

[from the GTS submissions]

**V**

[20] I have noted that the GTS takes the position that the court does not have the jurisdiction to order the participatory process the GTS has nevertheless undertaken. It submits that there is no mandate to impose a democracy on a society, which has a right to govern its own membership. It has, however, carried out what it calls an "open and transparent process based on Gitxsan Traditional Governance" and proposes a revised solution to its by-law problem.

[21] In the process the GTS developed, every Gitxsan Wilp (House) had a chance to select representatives for membership in the GTS. In a manner that they submit respects Ayookin Gitxsan (Gitxsan Laws) each Wilp managed its own appointment

processes. This process yielded the names of 37 new members that the GTS proposes be the members of the society for the purpose of carrying out the meetings and votes necessary to put the GTS back in good standing and able to continue to carry out its mandate. The GTS submits that this accords with the court's limited mandate under s. 85 of the *Society Act*, as described by the Court of Appeal in *Erickson v. Luggi*, 2004 BCCA 52. In that case, which involved a society that incorporated the Carrier-Sekani Tribal Council, the court's remedial powers were found not to extend to making new by-laws. Similarly in *Hong v. Young Kwang Presbyterian Church* 2007 BCCA 544, at para. 7, the Court of Appeal noted:

[7] In my opinion, the court should be involved in the affairs of the society as little as possible. There is nothing in these proceedings that should stand in the way of the members of the society governing the affairs of the society as they see fit. If they, through the initiative of the directors or otherwise, see fit at a legally convened and properly conducted meeting to debate and vote on dissolution of the society, there is no reason why this court should stand in the way of that democratic process. It makes no difference that the legal status of the directors continues to be suspect because of election irregularities asserted by the respondent. There is no reason that the business of the society, including dissolution proceedings, should be delayed by this narrowly-focussed litigation.

[22] The GTS describes itself as "akin to an administrative secretariat", or a vehicle through which government provides funding to enable the Gitxsan Simgiigyet to engage in what it calls "reconciliation negotiations" with the Crown. It is not, itself, in a position to make decisions on behalf of the Nation; that is the role of the Gitxsan Simgiigyet. The GTS submits that this is beyond debate, as it conforms to the traditional model of governance recognized in the *Delgamuukw* case.

[23] Section 26 of the current by-laws reads:

26(1) At each annual general meeting of the society, those directors whose term of office has expired, as specified by their Pdeek at the time of their appointment, shall retire, and their successor shall be appointed.

(2) For the year 2001 appointment, each Pdeek will appoint an equal number and no more than 3 directors, and will specify their respective terms of office as one, two, or three years. For the year 2002 and subsequent appointments, each director appointed by a Pdeek will serve for a 3 year term. No director for any Pdeek will serve for more than 6 years.

[24] The by-laws define “Pdeek” as “those Huwilp with a common ancestry who associate themselves as Pdeek, one of four phratries or Clans: the Ganeda, also known as the Lax See (Frog Clan), the Lax Gibuu (Wolf Clan), the Lax Skiik (Eagle Clan), and the Giskaast (Fireweed Clan).” Huwilp is defined as the plural of “Wilp”, which according to the bylaws “means a group of individuals related along the matriline, and may range in size from 25 to 250 people.”

[25] The GTS submits that this structure was an attempt to integrate Gitxsan governance structures with the structure of the society, as is the objective that decision making be by consensus, whenever possible (S.S. 1(1)(a), 22 and 40(1) of the bylaws), and that voting membership is restricted to those who belong to a Wilp (ss. 1(1)(g), 4(1), and 23).

[26] The relevant sections of the *Society Act* are ss. 6 and 24. They read:

6(1) The bylaws of a society incorporated under this Act must contain provisions for the following:

...

(e) the appointment and removal of directors and officers and their duties, powers and remuneration, if any;

(2) Subject to subsection (1), the bylaws of a society may be in the form of Schedule B or a modified form or another form altogether.

24(1) The members of a society may, in accordance with the bylaws, nominate, elect or appoint directors.

(2) Subject to this *Act* and the constitution and bylaws of the society, the directors

(a) must manage, or supervise the management of, the affairs of the society, and

(b) may exercise all of the powers of the society.

(8) If a society has less than 3 members for more than 6 months, each director is personally liable for payment of every debt of the society incurred after the expiration of the 6 months and for so long as the number of members continues to be less than 3.

[Emphasis added].

[27] While the GTS submits that s. 24 does not say only members may appoint directors, it acknowledges that that is the only reasonable interpretation, and that the practice of delegating the power of appointment to Gitxsan Pdeek does not comply

with the *Act*. The GTS submits that this was not noted by the Registrar of Companies, who approved the by-laws in 2002, at a time when the Registrar was still responsible for ensuring compliance. The GTS also submits that until recently the law was ambiguous, and that there was case authority that suggested that in some circumstances indirect appointments to boards was permissible (See: *Lee v. Lee's Benevolent Society* 2004 BCCA 168, para 15)

[28] Whether or not the by-laws were non-compliant from the start, they are currently, in light of *Kwantlen University College Student Association v. Canadian Federation of Students - BC Component* 2011 BCCA 133 which states unequivocally, at para. 43 that a society's by-law "must place the selection of directors in the hands of members of the society." This authority, reinforces a plain reading of the *Act*.

[29] The GTS has submitted that there were several possible way the problem could have been addressed, including three proposals it outlined in submission:

- (a) recognize each head Simgiigyet as an interim member of the society with the power to hold an extraordinary general meeting ("EGM") to amend the bylaws;
- (b) affirm the existing Board of Directors, who could then take steps to admit new members, leading to a future EGM to amend the bylaws: or
- (c) direct the 9 existing members to hold an EGM to amend the bylaws and/or affirm the existing Board for the purpose of admitting new members.

[30] The process the GTS adopted was more extensive, given the court's direction to develop a model that would open participation to the broader community. I have set out the context at para. 5 of these reasons. The segment of the interested community represented by the *Spookw* plaintiffs have sought the dissolution of the society from outside, that is without standing as members. A rather brief investigation into how they might become members showed that it was rather difficult, and that in any event, membership under the current by-laws did not carry with it the necessary prerogative of a voice in the directors. It appears, in other words, that the only way to influence the governance of the GTS was from the outside.

[31] In order to address these issues, the GTS put forward a plan in four phases:

Step one: Meeting of the Gitxsan Simgiigyey (Hereditary Chiefs) to update and consult with the Simgiigyey about the proposal for resolving the defect in the GTS's bylaws in a manner that adhered to both Ayookim Gitxsan and the March 27 Decision;

Step Two: Meeting of the Simgiigyey and the broader Gitxsan Nation to appoint new members to the GTS. The GTS's proposed membership structure asked each Wilp (House) to appoint one member, if that Wilp wanted to participate in GTS governance;

Step Three: GTS returns to court, seeking approval of new membership list that it obtained as a result of the previous two steps; and

Step Four: GTS calls an extraordinary general meeting of new members to revise GTS bylaws.

[32] The BCTC was consulted and attended the meetings. A meeting of the Gitxsan Simgiigyey (Hereditary Chiefs) was held on June 26, 2012. Skanu'u (Ardythe Wilson), one of the chairs of the meeting, summarized the discussion as follows:

Many of the Simgiigyey understood references to a "community based" solution in the June Materials to be a reference to *Indian Act* bands. The Simgiigyey firmly rejected any process for the GTS that was based on *Indian Act* governance. Instead, the Simgiigyey emphasized that they are the leaders of the Gitxsan Nation and are meant to control the GTS. They insisted that the Gitxsan's Wilp (House) system must be respected, and must not be placed by *Indian Act* communities. During the meeting, GTS representatives clarified that any reference to "community-based" in the GTS's proposal was a reference to the Gitxsan Huwilp (Houses), and not Indian Bands, and the Simgiigyey accepted that clarification;

Many of the Simgiigyey questioned why it was necessary to prove the Gitxsan's hereditary system again, because the Gitxsan already had succeeded in doing so before the Supreme Court of Canada in the *Delgamuukw* case;

A large majority of the Simgiigyey agreed that if the GTS was broken, they had a responsibility to fix it. However, that "fix" must respect Ayookim Gitxsan (Gitxsan law). This point was stressed repeatedly at the meeting; and

The Simgiigyey did not want to accept foreign structures, like the provincial society, and expressed frustration that their own systems and laws were not being respected by the Crown. The Simgiigyey understood that they had no option but to use the provincial structure in order to be eligible for treaty funding, because of the Crown's position on that issue, but accepted the use of a provincial entity under a sense of duress, or because they felt they had no other choice.

[33] Ms. Wilson declared at the end of the meeting that a consensus had emerged approving the four step process.

[34] A further meeting was held July 17 - 19, 2012. Efforts were made to distribute materials giving notice of the meeting throughout the Gitxsan Nation. These included:

- (a) the GTS posted the July Materials in public areas around the Gitxsan's territory, like Band offices and bulletin boards in the various Band communities. one was posted at the bulletin boards at the Kispiox Band Office and Glen Vowel Band Office, and also at the Royal Bank in Hagwilget;
- (b) the GTS ensured the July Materials remained the top post on its website, beginning July 6 until the meeting concluded on July 19;
- (c) the GTS posted the June Materials on a Facebook page used regularly by opponents of the GTS on July 6; and
- (d) the GTS issued a news release about the July Meeting on July 10, clearly stating the meeting's purpose was "to admit new members to the GTS and re-affirm the GTS's continuing mandate to support the Simgiigyet and the Gitxsan people in their efforts to advocate for Gitxsan aboriginal rights in treaty negotiations..." The news release also clearly stated that the meeting was "open to all Gitxsan".

[35] Ms. Wilson again co-chaired the meeting. She deposes that 66 Simgiigyet and 50 others attended; as well as the GTS "directors" and staff.

[36] Each Wilp was told it could submit a membership application to the GTS if it wanted to appoint a GTS member. Each Wilp was left to decide internally whether it would do so. At the end of the meeting 37 names were put forward from Huwilp that were supportive. Some 18 Simgiigyet indicated that they did not wish to put forward a name from their Wilp.

[37] The GTS submits that this process demonstrates a substantial effort to involve all Gitxsan Huwilp, and gave everyone an opportunity to participate. They have now presented the 37 named individuals they propose should form the reconstituted membership of the GTS in order to make the necessary revisions to the GTS by-laws.

[38] The GTS submits that the appropriate remedy is for the court to affirm these names. It submits that this reflects minimal involvement by the Court in the internal affairs of the GTS and respects Gitxsan traditional governance, based on the Wilp and Simgiigyet systems.

## VI

[39] In ordinary circumstances this would be the end of the matter. The society brings a Petition to the court under s. 85 and the court either approves of the proposal made or makes some other order. Section 85 is a remedial provision, and such applications are not normally occasions for adversarial proceedings.

[40] The court has been presented with extensive submissions on the part of the *Spookw* plaintiffs and others, in particular, a Mr. Stephens and a Mr. Patsey. They essentially view this petition as or a spinoff or subset of the action some of them have brought out of the Smithers Registry #15150. The problem with the GTS by-laws arose, as I have previously noted, in the course of GTS submissions on the plaintiff's on standing in that proceeding. I directed that the *Spookw* plaintiffs be given notice of these proceedings. While I heard the *Spookw* plaintiffs when this matter was before the court, the question of standing is similar to the issue raised by the GTS in the *Spookw* litigation, itself, although the context is much narrower.

[41] The GTS submits that in order to have standing, a prospective respondent must show that:

- (a) the remedy sought in the petition will directly effect a private legal entitlement; or
- (b) He or she is a member, director or officer of the society, or someone in an analogous position with a direct interest in the society's internal governance, like an applicant for membership.

[42] They submit that the proposed respondents [hereinafter referred to for convenience as the "respondents"] have no standing because they do not fit within these categories, and specifically that they are not members, directors or officers of the GTS.

[43] At the heart of the respondent's positions in this matter and in the *Spookw* litigation are questions of governance, both of the GTS, as such, and in its relationship to the larger community. The respondents are disenchanted with the way the GTS has been run, and question whether it has acted in the best interests of

the community. It appears that they believe that those who have been running the GTS have had too much control.

[44] It was for this reason that I directed that a more open process for appointing members be developed, on the theory that, if the system devised by those in control of the GTS was unduly restrictive, a system that created opportunities for those who felt disenfranchised to participate might improve the situation. I accept that in making that suggestion the court may have made itself vulnerable to the sort of jurisdictional arguments the GTS has asserted. The alternative however, the minimal “fix” the GTS first suggested, would have placed the court in the position of appearing to ratify the very thing complained of in the *Spookw* action, without a hearing.

[45] The GTS notes that notwithstanding the process that was followed, none of the respondents took advantage of the opportunity to influence the GTS from within by becoming members. Instead the GTS submits that the Hereditary Chiefs among the *Spookw* plaintiffs, and Mr. Stephens and Mr. Patsey, rejected the process in July 2012, on behalf of their respective houses.

## VII

[46] The respondents submit that given that the GTS purports to represent the Gitxsan people in treaty negotiations they are “stakeholders” or the “beneficial” owners of GTS assets. They submit, in the alternative, that should the court adopt a narrow view of standing, they meet the test for public interest standing articulated by the Supreme Court of Canada in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45. The headnote reads:

In determining whether to grant standing in a public law case, courts must consider three factors: whether the case raises a serious justifiable issue; whether the party bringing the case has a real stake in the proceedings or is engaged with the issues that it raises; and whether the proposed suit is, in all of the circumstances and in light of a number of considerations, a reasonable and effective means to bring the case to court. A party seeking public interest standing must persuade the court that these factors, applied purposively and flexibly, favour granting standing. All of the other relevant considerations being equal, a party with standing as of right will generally be preferred.

[47] The respondents concede that this is not a public law matter but suggests that it is akin to a public law question because the impact of the GTS actions on the Gitxsan people is much like government.

[48] The respondents further submit:

... should only members have standing, an organization can immunize itself by limiting membership. GTS has deliberately kept its membership small in the past and, according to their proposal developed during the January 2012 Gimlitxwit meeting, they will have a maximum membership of approximately 65 members despite claiming to speak for all Gitxsan people. Some of the *Spookw* Plaintiffs, the Bands and those they represent, are completely excluded from membership. The other *Spookw* Plaintiffs, the Hereditary Chiefs, are unable to join in membership because they cannot agree with the membership structure adopted by GTS that unfairly restricts membership,... If the Respondents are not found to have standing, it would allow GTS to continue to restrict its membership so as to immunize itself from challenges on grounds of lack of standing. At the very least, the issue of standing cannot be decided as a preliminary matter, and can only be determined after hearing all of the evidence on the petition.

[from the respondent's submission]

[49] I think I should make three observations. The first is that the concept of granting standing to non-parties is ordinarily premised on there being no other way for a matter of importance to be brought before the court. It is not normally an alternative for people who have elected not to take standing in a more conventional way (eg. by participating in membership) to come before the courts.

[50] The second is that the GTS is not akin to government. As has been satisfactorily established before this court, the GTS is an agency of the Gitxsan Nation and has only the power to recommend action that must be ratified by the community.

[51] The third is that the submissions reproduced in para. 48 herein is well ahead of itself. The proposal is only to create a slate of members who will then go on to appoint directors and do whatever the society chooses to do respecting membership. In refusing to participate the respondents have given up an opportunity to persuade the other initiating members of their point of view.

## VIII

[52] I will address the respondents' legal submissions briefly, in light of their contention that the standing issue cannot be addressed unless the legal context is understood.

[53] The first objections the respondents have is to the court's remedial powers under s. 85. They submit that the observations of Southin J.A. in *Erickson v. Luggi*, 2004 BCSC 52 at paras 5 and 6 are pertinent:

I can only assume, or infer, that the learned judge below at the urging of the petitioners concluded that s. 85 was broad enough to permit the court to, as it did in this order, impose bylaws upon a society. In my opinion, s. 85 gives the court no such power. The power to change the bylaws is found in s. 23 and anything short of a special resolution is simply unacceptable.

The court does, in my view, have the power under s. 85 if, as appears to be so here, there has been a muddle in the drafting of bylaws and an unwillingness on the part of somebody with the power to call a meeting to address the problem, to order the holding of a meeting and give directions for those who have a right to be heard at that meeting. That is as far as the matter can go. In my view, the attempt engaged in here to fill what appears to be a gap in the bylaws was ill-advised.

[54] The respondents submit that all the court can do under s. 85 of the *Act* is:

- a) To rectify, negate, or modify the consequences in law of an omission, defect, error, or irregularity which has occurred in the conduct of the affairs of the society;
- b) To validate an act, matter, or thing rendered invalid by or as a result of the omission, defect, error, or irregularity; and
- c) To give ancillary or consequential directions it considers necessary.

[55] They submit that the court cannot "deem" members into the society, and that none of the powers the court may exercise under the identified criteria avail the GTS.

[56] The respondents submit, alternatively, that if the court has the power to make the order sought under s. 85, it ought to decline to do so because the process was flawed. This submission turns on some of the observations of this court in January 2012, and in March 2012. The principal concern at that time was with creating a process that the respondents would not later assert was not open to them. The

awkwardness of reconciling “democracy” with Gitxsan governance led this court to conclude that “an indirect model might work as long as there is a transparent process informing the appointment of members that gives all who wish to participate an opportunity to do so.” This was to preclude those regarded as insiders by the respondents from simply putting forward enough names to cure the problem with the quorum.

[57] The respondents are critical of the process that was adopted because it did not amount to universal suffrage: the problem with this is that no one asserts that that is how Gitxsan governance has traditionally operated, and the court has an obligation to respect traditional governance.

[58] The respondents question whether the process in fact followed Gitxsan law; they dispute the notice that was given; they suggest the resolution tendered at the January 17, 2012 meeting was unclear that the discussion was limited in that, for example, there was no discussion of whether the GTS had a mandate to negotiate a treaty; they submit that the vote was called too soon and they debate the attendance lists.

[59] The respondents submit that the June 26, 2012 meeting was characterized by similar flaws.

[60] The respondents further submit that the July 17, 18 and 19 meeting was similarly deficient and that it did not follow Gitxsan law. They submit that the court would have to embark on an enquiry into, and make findings respecting, Gitxsan law and whether it was followed or correctly applied to properly address these matters.

[61] The respondents submit that:

59. The “Gimlitzwit” is a creature of GTS and there is no entity in the traditional system to enable a consensus, given all Houses are autonomous. Consensus is a western concept that does not fit with the Gitxsan traditional system. In the traditional system, it is not possible for Simgiigyets from other huwilps to make decisions that impact another Simogyet’s rights or territories.

60. Gitxsan House members were not included nor consulted by GTS neither about the decision to limit GTS membership to one per house nor

about who should represent the House as a member nor about the question of mandate to negotiate treaty on their behalf. Those that signed membership forms on behalf of their houses did not hold house meetings to consult with house members and get their input. House members should have the right to vote on these matters that will impact them.

[from the respondents' submission]

[62] The respondents claim the meetings were run by individuals who were biased in favour of the GTS, and that the minutes are inaccurate. They submit that the community-based resolution proposed by the GTS is flawed because it does not include the Indian Bands, that is, the statutory entities created under the *Indian Act*. They submit that:

87. Courts intrude as little as possible in private associations, including on questions of membership; in this case making the order sought by GTS will legitimize exclusion and will effectively give support to a faction in the Gitxsan community that seeks to limit rights of a segment of the population. This contravenes principles set out in s. 15(1) of the *Charter* and more particularly, s. 3 of the *Canadian Human Rights Act* which as of June 17, 2011 applies to Indian Bands and First Nations Governments. Court approval of GTS's proposed re-organization will sanction what we say are discriminatory membership provisions as they fail to recognize equality based on sex and gender. It is not in line with the Supreme Court of Canada's decision in the *Mclvor* case wherein discrimination based on gender breached *Charter* rights and found to be unconstitutional. See *Gitxsan Treaty Society v. Hospital Employees' Union*, [2000] 1 FC 135 regarding GTS being within federal jurisdiction.

[63] The respondents summarize their positions as follows:

92. While there is significant disagreement regarding the conduct of GTS, at the core of the dispute between the factions in the GTS community is whether Gitxsan should be in treaty negotiations, and if so what entity will hold the mandate to negotiate. The Court considered a similar dispute in *Tsimshian Tribal Council v. British Columbia Treaty Commission*, 2005 BCSC 860 (CanLII), 2005 BCSC 860. In that case Cullen J. decided that the dispute is not one that can be settled by the Court, stating at para. 59.

"The question of for what and how the Tsimshian community should be negotiating is an internal question to be decided collectively by its membership. It cannot be decided by the BCTC or by the court. The requirement of securing and advancing a mandate is an open one conducive to debate, persuasion, and resolution through ongoing processes."

93. It is submitted that should the Court grant GTS's petition, it will be taken as recognition, if not affirmation of a particular structure, that is membership restricted to a maximum of 64 chiefs, instead of thousands of Gitxsan people, and confirmation that exclusion of children of males does not

conflict with the Charter. It will also affirm that the process GTS undertook to seek a mandate to negotiate during the course of their three day meeting on their Section 85 process.

94. The Court, in its decision, Re: *Gitxsan Treaty Society*, 2012 BCSC 452, stated at paragraph 38 that the parties, GTS, Gitxsan people, the Crown and BCTC would be placed in an untenable situation should the Court decide not to intervene in the internal affairs of GTS. It is submitted that there are viable options provided by BCTC policies as well as various legislation available to both creditors and debtors. Specifically:

- a) BCTC's position as expressed at paragraph 27 of the Reasons for Judgment of March 27, 2012, is that a decision in GTS's section 85 application should not disturb the validity of contracts entered into. However, BCTC has policies and procedures in place to respond to internal disputes in a First Nations involved in treaty negotiations. These steps, described at paragraph 12 to 16 of the *Tsimshian Tribal Council v. BCTC* decision by Cullen J. include provisions on how existing debt will be handled.
- b) Canada's position as expressed at paragraph 29 of the Reasons for Judgment of March 27, 2012, speaks to validity of past acts and obligations, particularly loans made by Canada. Whether the loans are valid, considering the particular circumstances the loans were made; and whether any of the parties, wish to challenge the validity is beyond the scope of a s. 86 application. As noted above, BCTC addresses repayment as well as the terms of the loan agreement. Various legislation, including the Business Corporations Act are also available to address.
- c) BC's position, as expressed at paragraph 28 of the Reasons for Judgment of March 27, 2012, also speaks to the treaty debt but also raises concern regarding the importance of treaty negotiations and the need for a legal, legitimate and representative body capable of speaking for the Gitxsan people. Recently, an alternative representative body capable of speaking for the Gitxsan people. Recently, an alternative representative organization, the Gitxsan Huwilp Advisory Services Association ("GHASA") has been incorporated. The organization is properly accountable to the Simgiigyet by way of Protocols which the Chiefs and GHASA have entered into. The terms of the Protocols were developed to respond to short comings in the GTS structure (e.g., requiring that any representative of the wilp must provide written confirmation of the House chief that the individual has the necessary authority). The bylaws include provisions to ensure accountability and transparency (e.g., requiring the Board to submit annual audits and to report on activities and plans at least one each fiscal year) to the Gitxsan people at public meetings to be held at least once each fiscal year.
- d) GTS's position and the rights of those Houses who share GTS's philosophical viewpoint, will be protected as they may continue to negotiate once they have satisfied BCTC that they consent to GTS acting as their agent and borrowing funds on their behalf.

e) Gitxsan people's rights will be protected by not being subjected to GTS' proposed limited membership structure as provided for in GTS' Petition. Gitxsan people's rights will also be protected by not confirming a structure that is contrary to the principles of democracy, including those provided for in the *Charter* and one of the cornerstones of the Canadian Constitution, universal suffrage.

f) The parties can ensure that Gitxsan people's rights are protected by holding a referendum as outlined in the Written Argument of the Petition Respondents filed in March 2012.

[from the respondent's submission]

## **IX**

[64] As is evident from the detailed nature of the respondent's submission, their position is that the petition brought under s. 85 effectively engages the whole range of issues raised in the *Spookw* litigations. They caution that approval of the GTS proposal will be taken as an affirmation of a particular structure of governance, and as an affirmation that the GTS has a mandate to negotiate.

[65] The decision called for in the circumstances is, however, narrow and confined to the question of whether it is possible to set the GTS, which is currently non-compliant with the requirements of the *Act* and incapable of correcting the difficulty, back into compliance, thus serving the requirement of the Government of Canada that the Gitxsan conduct treaty negotiations through a legal entity.

[66] In this case, despite a process that created the opportunity to participate, the respondents' choice not to engage leaves them in no position to assert standing, and I decline to grant it to them.

## **X**

[67] This is not to say that I have not considered their submissions carefully. On the contrary, they have informed my appreciation or the larger questions within the Gitxsan community. It must be recognized, however, that the s. 85 issue is, for the respondents, purely fortuitous, and arose in the course of submissions on the standing of the *Spookw* litigants in their own action.

[68] My task on this petition is not to pronounce on the merits of the larger controversies between the factions who support the treaty process and those who do not. It is to address the defect in an entity of some long standing that has to date, in the Treaty process, been accepted by the BCTC as an agency of the Gitxsan Hereditary Chiefs. As the BCTC has indicated, the GTS operates while it has the confidence of the Gitxsan Nation and could cease to be the negotiating agent for the Gitxsan if the Nation so decided.

[69] The BCTC explained that its role in the meetings leading to the proposed restructuring process, in 2012, “related to the mandate issue”; it specifically wanted the GTS to seek confirmation from the Gitxsan Hereditary Chiefs and the broader Gitxsan community respecting their collective wishes regarding the GTS administration of treaty matters on behalf of the Gitxsan Nation. Nothing before me suggests that issue was settled in a way that presently compromises the standing of the GTS, although the question of “mandate” is not presently before the court.

[70] My considered view of the matter is that the court is essentially faced with a technical issue. Given the context in which the issue of non-compliance with the *Act* arose, it would not have been helpful to fail to direct that the opportunity for membership be open to at least the possibility of the respondents or some of them becoming members. I am satisfied that the process adopted did so, despite the criticisms the respondents have levelled against it.

[71] What is left is the basic question of whether the technical “fix” proposed – the approval of a slate of those leaders of Huwilp who choose to become members is within the courts’ powers under s. 85 of the *Act*.

[72] I am of the view that the lack of a quorum is, in the circumstances, a defect, error or irregularity that has occurred in the conduct of the affairs of the Society. The remedial power set out in s. 85 of the *Act* strikes me as meant for precisely such contingencies, where through neglect or oversight something has occurred within a society that has adverse legal consequences for its continued operation, particularly where the society has dealings with third parties that might be affected by the

oversight or omission. The canvas of the community directed by this court does not imply endorsement of any particular model of governance of the GTS, but was for the limited purpose I have described, within a presently dynamic political situation.

[73] The decision I must make under s. 85 is simply to create a quorum for a first meeting following which the governance of the society will proceed as the members and directors decide.

## **XI**

[74] Accordingly, I order that:

1. The GTS hold an extraordinary meeting within 30 days of this court order for the purpose of appointing directors.
2. For the purpose of the EGM only, voting members of the GTS include all Gitxsan Hereditary Chiefs who are head of a Gitxsan house and who have submitted a membership form at the time these reasons are given.
3. Mr. James Angus is authorized and directed to organize the EGM, and must send a meeting notice to the members stating the time and place of the meeting, no later than 14 days from the date of this court order.
4. Within 21 days of this court order, anyone wishing to stand for appointment as a director of the GTS must provide written notice to that effect to the Meeting Organizer.
5. The Meeting Organizer will provide a list of candidates to the members at the start of the EGM.
6. Members will appoint 12 directors at the EGM, with equal representation from each of the four Gitxsan Pdeek (Clans), if possible.

7. The status of existing members has not been the subject of any application or ruling.

“T. M. McEwan”