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Case Name:

**Da'naxda'xw/Awaetlala First Nation v. British Columbia
(Attorney General)**

**IN THE MATTER OF the Judicial Review Procedure Act, R.S.B.C.
1996, c. 241**

Between

**Da'naxda'xw/Awaetlala First Nation and Kleana Power
Corporation, Petitioners, and
The Minister of Environment as represented by the Attorney
General of British Columbia, Respondent**

[2011] B.C.J. No. 887

2011 BCSC 620

Docket: S105951

Registry: Vancouver

British Columbia Supreme Court
Vancouver, British Columbia

B. Fisher J.

Heard: December 13-17, 2010; January 31 and February 1-2,
2011.

Judgment: May 10, 2011.

(236 paras.)

Appeal From:

On judicial review from the decision by the Minister of Environment dated April 27, 2010.

Counsel:

Counsel for the Petitioners: J.J.M. Arvay, Q.C. and B. Elwood.

Counsel for the Respondent: G.H. Copley, Q.C. and P.E.
Yearwood.

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1 B. FISHER J.:-- The Petitioners, one of them a First Nation, challenge a decision of the Minister of Environment refusing to recommend changes to the boundaries of a protected area, or conservancy, which is within the asserted traditional territory of the First Nation. They sought an amendment to the southern boundary of the conservancy to remove some of the land, in order to allow a hydro-electric power project to be assessed in an environmental review process. The First Nation considered this project to be an economic opportunity consistent with their cultural and ecological interests.

2 The Petitioners are the Da'naxda'xw/Awaetlala First Nation (the Da'naxda'xw) and Kleana Power Corporation (Kleana). In the decision under review, dated April 27, 2010, the Honourable Barry Penner, then Minister of Environment, refused to recommend to the Lieutenant Governor in Council an amendment to the boundary of the Dzawadi/Upper Klinaklini River Conservancy (Upper Klinaklini Conservancy). This conservancy is located north of Knight Inlet on the central coast of British Columbia.

3 The Petitioners bring this application under the *Judicial Review Procedure Act* seeking relief in the nature of *certiorari* and declarations. It is not disputed that the Minister's decision of April 27, 2010 was made in the exercise of his statutory power under s. 3 of the *Park Act*, R.S.B.C. 1996, c. 344. Their challenge is based on constitutional and administrative law principles. They seek to quash the Minister's decision on the following grounds:

- a. the decision was in breach of the Crown's duty to consult and accommodate the aboriginal interests of the Da'naxda'xw;
- b. the decision was in breach of the legitimate expectations of Kleana and the Da'naxda'xw;
- c. the Minister was estopped by prior assurances from denying his recommendation of the amendment; and
- d. the decision was an abuse of discretion and unreasonable.

4 The Petitioners seek a declaration that the Minister must recommend to the Lieutenant Governor in Council the amendment requested by them. In the alternative, they seek a declaration that they hold legitimate expectations that the Minister will consider their request, will give effect to his prior assurances to amend the boundary, will take the Petitioners' interests and their reliance on his prior assurances into account, and will not apply the "Provincial Protected Area Boundary Adjustment" policy.

5 The Crown opposes the Petition on all grounds. It says that there was no duty to consult in this case, and if there was, there was no breach of that duty. It challenges the Petitioners' assertions that the Minister made any assurances and says that the doctrines of legitimate expectations and public law estoppel do not apply in these circumstances. Finally, the Crown says that the Minister's decision was a reasonable one made in the proper exercise of his discretion.

The evidence

6 The main factual issue in dispute is whether Minister Penner made assurances to the Petitioners that the amendment to the conservancy boundary would be made. In addition to affidavit evidence, the Petitioners obtained an order

permitting them to examine Minister Penner on the issue of whether or not he gave any assurances to them and if so, the nature of those assurances. I have before me the transcript of that examination, which took place on December 7, 2010.

7 There are conflicts between the evidence of the Petitioners and the evidence of Ministry staff and Minister Penner on this issue. All counsel acknowledged the difficulty for the court in making findings of fact based on conflicting evidence in affidavits and a transcript. However, they all submitted that I will be able to resolve the conflicts in the evidence by reference to various documents.

8 While not ideal, I have carefully reviewed the evidence submitted and I have been able to make the necessary findings of fact to decide the issues before me.

The facts

Background

9 The Da'naxda'xw are an amalgamation of the Da'naxda'xw and Awaetlala Tribes. Their traditional territories are described as the lands adjacent to Knight Inlet from mountain top to mountain top, the watersheds that empty into Knight Inlet to their head waters, and the Klinaklini River to its source. The Da'naxda'xw assert aboriginal title and rights over the lands north of Knight Inlet including the Klinaklini River canyon and watershed. They are in the process of negotiating a treaty with the federal and provincial governments. The Da'naxda'xw say that they continue to use these lands for traditional and contemporary purposes, including economic development.

10 Kleana is an independent developer and operator of hydro-electric projects. Kleana proposed a run-of-the-river hydro-electric project on the Klinaklini River near the head of Knight Inlet (the Project). It sought to participate in the environmental review process under provincial and federal legislation. It also sought to compete in a process to sell the electricity generated from the Project, if built, to BC Hydro.

11 The area where Kleana proposed to build the Project is located within the Upper Klinaklini River, which was within a protected area temporarily designated in 2002 under the *Environment and Land Use Act*, R.S.B.C. 1996, c. 115, and designated in 2008 as a conservancy under the *Park Act*. Under either designation, the Project is not a permitted use within the area. Conservancies were set aside to protect and maintain natural environments and recreational values, to preserve and maintain social, ceremonial and cultural uses of First Nations, and to ensure that any development used the natural resources in a sustainable manner consistent with the purposes described. Commercial logging, mining, and hydro-electric power generation other than local run-of-the-river projects, are prohibited. The Kleana Project was not a local run-of-the-river project as defined in the legislation.

Land use management planning processes

12 These designations were made after a lengthy and complex land and resource management process for the central and north coast that involved collaboration between the provincial government and First Nations, industry, environmentalists, local governments and other stakeholders. The Da'naxda'xw participated in this process. They did so on the condition that an acceptable co-management model would be agreed upon. They also did so without prejudice to their treaty negotiations and on an assurance from the government that it would continue negotiations on their specific interests within the proposed protected areas, which could result in changes to a boundary or conditions. Government-to-government consultation with First Nations began in 2004 and is still on-going.

13 In February 2006, the Premier announced an agreement on the combined Central and North Coast Land and Resource Management Plan (LRMP), which set aside over 100 protected areas and established an ecosystem based management approach. The Upper Klinaklini was identified as one of the areas proposed for protection as an "EBM Protection" area, or conservancy. The Da'naxda'xw supported this designation for the Upper Klinaklini. At that time, the areas were generally defined and there were no detailed maps.

14 In March 2006 the Da'naxda'xw were among eight First Nation signatories to a land use planning Agreement in Principle with the Province. This agreement attempted to establish a government-to-government management process and it identified a number of protected areas recommended from the LRMP, including the Upper Klinaklini.

15 In July 2006, the Province enacted legislation amending the *Park Act*, to create the conservancy as a new designation of protected area. There were 24 conservancies established and about 85 more were expected to be established by the end of 2007. The Upper Klinaklini was not included in this initial legislation.

16 In June 2007, the Da'naxda'xw and the Ministry of Environment entered into a "Collaborative Agreement for the Management of Protected Areas in First Nation Traditional Territory". This agreement provided that each party would appoint representatives who would be responsible for making recommendations about a number of things, including the refinement of the conservancy boundaries prior to designation. There is some dispute in this proceeding about what "refinement" of the boundaries entailed. The Crown says that the general boundaries of the proposed conservancies had been agreed to and this was intended only to create maps to establish the precise boundaries. The Da'naxda'xw do not dispute that they had agreed in principle to the Upper Klinaklini protected area but that this did not preclude adjustments to the boundaries in their discussions pursuant to the Collaborative Agreement.

17 In my view, there is merit to both positions. The identification of the Upper Klinaklini to be designated as a conservancy had been established through the rather unprecedented LRMP process and agreed to by the Da'naxda'xw in parallel government-to-government consultations. At the time of these agreements in 2006 and 2007, there were no detailed maps of the boundaries and the implementation phase of the LRMP and First Nations consultations was ongoing. There was room to adjust boundaries. However, as I review below, the amendment proposed by the Da'naxda'xw to facilitate investigation of the Project was one not contemplated before and was a material change to the Agreement in Principle. In light of this, proposing such a change was not necessarily a simple task.

Boundary amendment request and environmental assessment process

18 Meanwhile, in 2005, Alexander Eunall, President of Kleana, met with the Chief and Council of the Da'naxda'xw. Kleana committed to involving the Da'naxda'xw community in the planning, development and operation of the Project. After various meetings and consultations, the Da'naxda'xw decided to support the Project to promote the economic and social well-being of their people. Kleana offered the Da'naxda'xw a share in the income stream of the Project and jobs and training for their people. Fred Glendale, a councillor and resource manager for the Da'naxda'xw, is a director of Kleana.

19 While Kleana's initial plan was to locate the Project outside the proposed Upper Klinaklini protected area, environmental and engineering studies showed that it would be necessary to modify its proposal to construct the intake for the Project at a higher elevation, which was about five kilometres north of the southern boundary.

20 On July 16, 2006, Fred Glendale wrote to the Manager of Crown Lands Adjudication in the Integrated Land Management Bureau of the Ministry of Agriculture and Lands (ILMB), requesting assistance in modifying the boundaries of the proposed Upper Klinaklini protected area. The Da'naxda'xw wanted to pursue the technical and environmental assessment of Kleana's modified proposal. He stated:

If the change in the project boundaries is permitted, we would propose that once final surveys are complete ... the lands not required for the project within this corridor would be returned to the Crown to become part of the protected area once again.

21 Mr. Eunall followed this up by sending a sketch map of the proposed boundary amendment to a representative in the Water Stewardship Division of the Ministry of Environment. In October 2006, Kleana applied to the B.C. Environmental Assessment Office for the Project to be designated a reviewable project under the harmonized federal and provincial environmental review process (the EAO process). On November 6, 2006, the EAO granted the designation and issued an order requiring Kleana to obtain an environmental assessment certificate.

22 There were two processes going forward. One was Kleana's application under the EAO process. The other was the Da'naxda'xw's request to amend the conservancy boundary before it was confirmed in legislation. From time to time these two processes became intertwined. Kleana's application became dependent on obtaining a boundary amendment, and each Petitioner supported the other.

23 On January 25, 2007, Mr. Eunall and Mr. Glendale attended a first working meeting of the EAO process with representatives of the responsible agencies of the provincial and federal governments. At the end of the meeting, a special session was convened to discuss the conservancy area boundary. There is conflicting evidence between Mr. Eunall and Mr. Glendale and the government officials who were present about whether there was an agreement that the boundary would be located upstream of the intake.

24 Mr. Eunall and Mr. Glendale deposed that the senior staff of the Ministry of Environment assured them that the boundary would be located upstream of the intake at approximately 390 metres above sea level, and the final configuration could be determined by the technical requirements of the project. Chris Kissinger, then the Strategic Initiatives Manager with the Ministry of Environment, deposed that he told Mr. Eunall and Mr. Glendale that it was possible for the proposed conservancy boundary to be amended but that it would require Cabinet approval. He also told them that B.C. Parks had a process for requesting a modification of a protected area boundary, contained in a July 2004 "Provincial Park Boundary Adjustment Policy" (the 2004 Park Policy), which could serve as a guide for their request for an amendment. He stated:

No assurances or agreements were made at this meeting other than that it was possible for the proposed conservancy boundary to be modified utilizing an existing policy regarding the modification of protected area boundaries. I also informed them that the proponent needed to provide sufficient information so that the modification request could be fully considered, and that I would assist them ...

25 I cannot accept the evidence of Mr. Eunall and Mr. Glendale that the Ministry staff made any assurances to them at this meeting. None of these people had the authority to do so. Nor does it make any sense that such an immediate commitment to a material amendment to a conservancy boundary would be made after the lengthy consultation processes that created the LRMP and the subsequent land use planning and collaborative agreements with the First Nations. Mr. Kissinger was very clear in his recollection and provided some detail about the tenor of the discussion. Moreover, the brief minutes of this meeting do not support the interpretation of the discussion put forward by Mr. Eunall and Mr. Glendale. While the minutes initially imply that the conservancy boundary will be at a particular location, the actions that were required to be done show that this new boundary was simply that proposed by Mr. Eunall. The minutes were also incomplete. Mr. Kissinger is not shown as having attended and the evidence shows that he did. The pertinent parts of the minutes state:

The group reviewed maps and engaged in discussion about an appropriate boundary for the Conservancy area. The Conservancy area boundary will be located upstream of the diversion, and the final distance is to be determined.

Actions:

- * Parks requires a letter from the Proponent stating that the water will remain at or below the natural stream boundary (i.e. the water behind the diversion must be contained within the stream channel);
- * The Proponent will specify to Parks the area the investigative permit will cover;
- * The Proponent will amend their maps of the stream Project to show water contained entirely within the stream channel; and

* The new boundary for the Conservancy area is proposed at 390 m above sea level.

26 The Petitioners accept that the Ministry staff did not have the authority to agree to amend the boundary but they say that this evidence shows that the senior staff, including Mr. Kissinger, supported the proposal to move the boundary. In my view, this evidence simply shows that the Ministry staff set out to assist the Petitioners to move the request forward. Kleana subsequently provided them with a map showing the proposed revisions and the Ministry began developing a paper to determine if the modification would be approved.

27 In April 2007, the Ministry introduced legislation to establish 41 additional conservancies in the central and north coast planning areas. The Upper Klinaklini was not included, partly due to the request to modify the boundary.

28 On May 11, 2007, Kleana obtained an investigative use permit under the EAO process that did not include the area within the Upper Klinaklini protected area. This posed a problem for Kleana.

May 17, 2007 meeting

29 The Da'naxda'xw raised this issue directly with Minister Penner. On May 17, 2007, Mr. Glendale and Dallas Smith, a representative of the Nanwakolas Council (of which the Da'naxda'xw were a part) met with the Minister and Mr. Kissinger. Mr. Glendale and Mr. Smith outlined to the Minister the request to amend the Upper Klinaklini boundary and sought his assistance in securing the amendment, as well as an amendment of Kleana's investigative use permit.

30 According to Mr. Glendale, they showed the Minister a map and talked about removing the land needed for the intake from the south end and possibly adding land in return on the north end of the conservancy. Mr. Glendale deposed that the Minister said the request was reasonable and he could not see any reason why the boundary could not be amended. He also deposed that the Minister agreed to assist them and gave his assurance that the boundary would be amended before it was designated as a conservancy.

31 According to Mr. Kissinger, the Minister was advised that the Da'naxda'xw and the Nanwakolas Council supported Kleana's request to amend the boundary and that Ministry staff had been assisting Kleana to develop options for a boundary adjustment. He recalled that a draft map with options was reviewed but he did not recall the Minister giving any assurances that the boundary would be amended. He recalled that the Minister said that his staff would continue to work with them to prepare a final boundary request proposal.

32 Minister Penner did not have a specific recollection of this meeting. He did recall being shown a map with a proposed deletion from the conservancy. He could not deny that he said the proposed amendment looked reasonable but he said that it was not his practice to commit to recommending an amendment without first being informed by his staff.

33 Mr. Arvay acknowledged that the evidence does not support a finding that Minister Penner promised at this meeting to recommend the amendment. I don't doubt that the Minister expressed the view, based on what he was told at the time, that the request looked reasonable. It makes no sense that Minister Penner would have given his assurance that the boundary would be amended, given the preliminary nature of this meeting, the fact that his staff had not yet reviewed it, and in the context of the extensive regional land management process that had recently identified the Upper Klinaklini as a protected area that would receive conservancy designation.

34 Moreover, Mr. Glendale's letter to Minister Penner the following day does not suggest that such an assurance was made. After asking for the Minister's assistance in securing an investigative use permit that included the Upper Klinaklini, he said this:

Kleana Power Corporation also needs assurance that the proposed Upper Klinaklini Protection Areas boundary will be altered before it goes to legislation so project planning can move forward. If Mr. Kissinger's recommendations are adopted and the proposed boundary is modified in the planning stages of the legislation, the intake area will no longer be included within the proposed

protected area and uncertainty will be removed from engineering considerations. ...

We would like to thank you for the consideration and interest that you have shown for this urgent matter that, if resolved, will bring benefit to our people.

(emphasis added)

35 Mr. Kissinger denied that he had given his support for the boundary amendment but had simply participated in developing options to address the request. This may be so, but Mr. Glendale and Mr. Eunall had the impression that the staff who were assisting them with the amendment proposal supported it. Given the extent they were assisting, I find that impression to have been a reasonable one.

36 It is apparent to me that Mr. Glendale's primary purpose at this meeting was to seek the Minister's assistance for Kleana to obtain an amendment to its investigative use permit under the EAO process. There were some challenges. Because the Upper Klinaklini was not yet a conservancy, it was not administered by the Ministry of Environment. Mr. Kissinger advised the ILMB, who was responsible for the permits under the EAO process, that it was not possible for the Minister to approve or reject Kleana's application to undertake test drilling in the Upper Klinaklini. In the end, the ILMB granted the amendment to Kleana on July 20, 2007.

37 Looking at all of this evidence, I find that all of those involved with this issue were working towards addressing the boundary amendment request before the Upper Klinaklini was established as a conservancy in the new legislation, as it was recognized (at least implicitly) that to change it afterwards would be more difficult.

The Kissinger Proposal

38 In September 2007, Minister Penner sent an email to Dallas Smith about the land requirements for the Project. In this message, he acknowledged that Kleana had been authorized to conduct test drilling in the proposed conservancy area, and added:

In the near future, staff will arrange a meeting with the representatives of Nanwakolas Council and Da'naxda'xw/Awaetlala First Nation to review the Province's proposal for an appropriate land use designation which will allow the project to be considered once the feasibility analysis has been completed.

(emphasis added)

39 This message implies that the Ministry itself was proposing to do something to the protected area designation for the Upper Klinaklini to allow the Project to be assessed in the EAO process. Minister Penner said that this was not his recollection. He said that the Project could be considered before it was removed from the conservancy or the proponent could request an amendment to the boundary.

40 In any event, in October 2007, what became known in these proceedings as the "Kissinger Proposal" was formulated by the Ministry staff assisting the Petitioners. The plan was:

- a. a smaller area, to be identified on a map to be prepared by the Ministry, was to provide Kleana with the working area it required;
- b. this area would be removed from the Upper Klinaklini Conservancy when the conservancy was created by legislation and designated as a protected area under the *Environment and Land Use Act*, so that other projects could not intervene;

- c. if the Project satisfied the environmental assessment and permitting requirements under the EAO process, if Kleana obtained an energy purchase agreement with BC Hydro, and if the Project was actually built, the land area required for the Project would remain outside the Upper Klinaklini Conservancy and would be removed from the protected area designation;
- d. any land that was not required for the Project would be returned to the Upper Klinaklini Conservancy following construction; and
- e. if the Project did not satisfy environmental assessment and permitting requirements, or did not proceed to construction, all of the land area would return to the Upper Klinaklini Conservancy and the boundary would be restored to its original proposed configuration.

41 Mr. Eunall deposed that at a meeting in Nanaimo and in subsequent email correspondence, he was told that a decision had been made to modify the boundary of the proposed conservancy. The evidence does not support this. Statements may have been made in positive terms, but none were statements by anyone with authority to make the boundary amendment. Everyone was simply working on finalizing the precise amendment that would be requested in accordance with the process set out in the Kissinger Proposal.

42 Mr. Kissinger said that a process was established to define the area, finalize the mapping and consult with the First Nations that claim that area as their traditional territory. In addition to the Da'naxda'xw, the Ulkatcho First Nation asserted that the Upper Klinaklini River was located in their traditional territory. Although the original request for the boundary amendment was made by the Da'naxda'xw, at this point it appears that the Ministry treated the request as going forward from Kleana as the proponent, with the support of the Da'naxda'xw. This was in accordance, to some extent, with the process set out in the 2004 Park Policy.

43 In December 2007, the boundary of the proposed amendment was finalized in a map prepared by Bill Munn, who was then a contractor working for B.C. Parks. The map showed that the proposed amendment required a removal of approximately 1000 hectares from the originally proposed Upper Klinaklini Conservancy. This was based on the suggestion of Ministry staff that the boundary be moved temporarily to the 395 metre mark, which was more than what Kleana had requested. In addition to requesting a move only to the 390 metre mark, Mr. Eunall was of the view that the final area that would eventually be required for the Project would be considerably less than 1000 hectares. He deposed that they needed approximately 620 hectares to investigate the higher intake and likely less than 165 hectares for the completed Project.

44 On January 24, 2008, the Ministry, through the Environmental Stewardship Division (ESD), sent a consultation letter to the Ulkatcho First Nation about the proposed amendment to the conservancy boundary. This letter stated in part:

The Environmental Stewardship Division (ESD) is considering a possible amendment to the currently proposed boundaries of the Upper Klinaklini Conservancy, to enable further investigation of this project through the provincial environmental assessment process. ...

ESD would like to have the area required for the project ... established as a protected area under the *Environment and Land Use Act* during the environmental assessment of the proposed project. Once a determination has been reached in the environmental assessment, the *Environment and Land Use Act* protected area may be cancelled. Alternatively, if the project does not go ahead, the lands may be added to the proposed Upper Klinaklini River Conservancy as per the tentative boundaries identified in 2006.

ESD is currently proceeding on the basis that legislation may be introduced in the Legislature in the Spring of 2008, to establish the Upper Klinaklini Conservancy. Thus, ESD is interested in

hearing from the Ulkatcho about your views on the proposed change to the boundaries of the proposed conservancy, and the potential creation of the area shown on the map as a protected area under the *Environment and Land Use Act* for the duration of the environmental assessment process.

ESD is not considering the merits of the proposed IPP in proposing this boundary change. The merits of the IPP will be determined through the environmental assessment process, which will include opportunities for the Ulkatcho Nation to provide its views on the project itself.

(emphasis added)

45 Mr. Kissinger set out the same text in an email to one of the Da'naxda'xw representatives, seeking a response from Mr. Glendale.

46 This evidence is significant. It shows that the Ministry staff supported the amendment in the context of the Kissinger Proposal. It also shows that the Ministry was not considering the merits of the Project, which I take to mean that the environmental impacts were to be assessed in the EAO process. This was a variation on the 2004 Park Policy, which required that social and environmental impacts be identified and documented. Thus the consultation, with the Da'naxda'xw in particular, was on the basis that they did not have to respond to issues related to environmental impacts. Mr. Glendale's response of January 29, 2008 reflects this:

... our Nation does support a possible amendment to the currently proposed boundaries of the Upper Klinaklini Conservancy to enable further investigation of this project through the environmental assessment process.

47 In February 2008, the Ulkatcho sought more information as well as funding to assist them to properly consider the application. There is no evidence that they had any further involvement.

48 On March 3, 2008, the EAO issued Approved Terms of Reference for Kleana's application for an environmental assessment certificate, which showed the proposed head pond and intake within the original Upper Klinaklini Conservancy area.

49 Later in March 2008, Mr. Kissinger wrote to Mr. Glendale again, asking for his views about whether there may be any impacts to the Da'naxda'xw from the establishment of a protected area under the *Environment and Land Use Act* over the site of the Project area during the environmental assessment process. Mr. Glendale responded, saying that the Da'naxda'xw continued to support the concept and urging the ESD to make the amendment.

Bill 38

50 On April 29, 2008, the government introduced Bill 38, (*Protected Areas of British Columbia (Conservancies and Parks) Amendment Act*, 4th Sess., 38th Parl., B.C., 2008 (assented to 29 May 2008) S.B.C. 2008, c. 26), which included the "Dzawadi/Upper Klinaklini River Conservancy" without the requested boundary amendment. This came as a surprise to Mr. Glendale and Mr. Eunall. Letters were written, threatening legal action. The Da'naxda'xw requested further consultation before Bill 38 was enacted into law. This resulted in a rather unprecedented meeting on May 22, 2008, which I will describe shortly.

51 The evidence as to why Bill 38 did not include the proposed amendment to the Upper Klinaklini Conservancy boundary is unclear. Mr. Kissinger deposed that the request, based on the work he and his staff had done with the proponent and their consultants, was "not accepted". Minister Penner's evidence about this was somewhat inconsistent. He could not recall receiving a recommendation from his staff about the boundary amendment but said that his staff told

him that the requested change was not consistent with the agreement in the LRMP as announced in February 2006. The Minister explained that he was going to live up to the commitment made in the LRMP and introduce the boundaries that had been agreed to in 2006 by all parties, including the Da'naxda'xw. He said that he would not recommend a boundary change before consulting with the other parties to the LRMP. He did not consult with any of those parties because he was told that the Da'naxda'xw and Kleana were seeking a minor change as a result of a drafting error but it later became clear that the change was more substantive. He claimed to have been misled about this, as he later learned that the proposal was to remove 1,000 hectares.

52 On this last point, the Minister was clearly mistaken. Mr. Copley conceded this point. There is no evidence that any representative of either Petitioner misled the Minister about the scope of the proposed amendment. A suggestion that there may have been a drafting error arose after Bill 38 was introduced, when the Petitioners were questioning what had happened. Mr. Arvay submitted that the Minister's evidence about this taints all of his evidence. Given the nature of the evidence before me, I cannot draw such a conclusion.¹

53 What I can conclude, based on the evidence of Mr. Kissinger and Minister Penner, is that the Minister gave little, if any, consideration to the Kissinger Proposal or even to the 2004 Park Policy, and was not prepared to recommend any boundary changes that were not consistent with the conservancy areas that had been agreed to in 2006 through the LRMP process. It is no wonder that the Petitioners were upset, considering the amount of work that had been done in the previous year to move the amendment request forward.

May 22, 2008 meeting

54 On May 22, 2008, while Bill 38 was before the Legislature, Minister Penner, Minister de Jong (then Minister of Aboriginal Relations), Minister Neufeld (then Minister of Energy, Mines and Petroleum Resources), and Minister Bell (then Minister of Forests) met with Mr. Glendale, Mr. Smith and Mr. Eunall. A number of deputy ministers and senior staff also attended. The Petitioners say that Minister Penner gave them an assurance that the boundary would be amended after the next election. The government says that the Minister gave them encouraging words about working with them but did not give them such an assurance.

55 Mr. Eunall deposed that Minister Penner told them that he personally supported these projects and felt badly about the matter but he was not going to be able to do the boundary alteration then because the time was not right. The Opposition was asking questions about the Klinaklini Project and the amendment. There was then a discussion about Kleana losing the ability to participate in BC Hydro's clean power call. Mr. Eunall advised the Ministers that Kleana was prepared to enter a power call but the decision to proceed with Bill 38 would badly damage the company. Minister Neufeld suggested a solution. He was willing to give a directive to BC Hydro to keep a place open to allow Kleana to negotiate an energy purchase agreement and to provide a letter to that effect. This was received positively. Minister de Jong said that they had a solution and the Deputy Ministers would assist in the next few weeks to produce a letter to provide comfort to investors. Mr. Eunall asked Minister de Jong if they should expect the correction to take place after the election and Minister de Jong told him not to worry about the amendment, that it would be done when the time was right. Minister de Jong also asked them to stop the legal talk, to which they agreed.

56 Mr. Glendale deposed that Minister Penner said that he wanted to work with them to fix the problem of the boundary but the timing was not right. He said that Ministers de Jong and Neufeld came up with the idea that they would "fix the problem" if the Petitioners kept it low key and agreed not to go to the media. Minister Neufeld said he would direct BC Hydro to negotiate an energy purchase agreement with Kleana if there was no power call when they were ready. He also said that the Ministers asked them not to litigate because this would prevent any further discussion.

57 Mr. Smith deposed that he gave a presentation at the meeting, going over the background, and that Minister Penner said that a correction would be made to the boundary but the timing was "horrible for the government". He said that the Ministers asked them to shelve the matter, which he understood to be until after the election. He then described the discussion about the BC Hydro power call, Minister Neufeld's offer to provide a letter giving a directive to BC

Hydro to keep a place open for Kleana, and Minister de Jong's request to keep the matter out of the press and to stop the legal talk.

58 Minister Penner said that he explained that there was a process to adjust boundaries that have been established in legislation and the fact that an area has been so designated as a park or a conservancy did not mean that it could not be subsequently changed. He told them:

... we would not be proposing - definitely would not be making amendments in the 2008 session to reduce the size of the conservancy and that given the likely reduced length of the legislative session before 2009 it would be unlikely that even if government were inclined to make the amendment requested that we would do so or be in a position to introduce such legislation for the legislature to consider in the spring of 2009.

59 Minister Penner recalled questions being put to Minister Neufeld with respect to the BC Hydro acquisition process and a significant amount of discussion about whether Kleana would have another opportunity beyond the next power call.

60 The Minister recalled the meeting as ending cordially. He acknowledged that the Project would not proceed unless the conservancy boundary was changed and this would have been the ultimate concern of the Petitioners, but his sense of the meeting was that there was a pressing concern about timing and the impending BC Hydro call for proposals. He said that the parties at the meeting seemed pleased to hear that there was an opportunity to pursue a power purchase agreement at a later date outside of a call process and that there was a policy available to seek a boundary change to a conservancy established in legislation. He agreed that the election cycle was a complicating factor:

It was likely discussed that the timing of the election cycle would make it more difficult to accommodate the request. It didn't mean that it wouldn't happen or that it would happen if the election wasn't happening.

... the fact of a legislative election period in the spring of 2009 would truncate that session. It means that we weren't going to get much legislation through even if we were inclined to proceed with the proposal to amend the boundary and secondly, given the political dynamic, it would make it more challenging.

61 There are two sets of minutes from this meeting. One set was taken by Mr. Eunall and the other by Joel McLaughlin, Minister de Jong's ministerial assistant. Mr. Eunall's minutes are quite detailed, and reflect the evidence in his affidavit. Mr. McLaughlin's minutes are brief.

62 Mr. McLaughlin deposed that one of the main focuses of his minutes is to note any commitments or promises made by any of the Ministers and he is careful to try to capture this. He did not recall Minister Penner making any commitment to alter or amend the conservancy boundary at a later date. His minutes state:

Minister Penner provided an update on the status of Bill 38, which defines the conservancy boundaries. At the time of the meeting, it had passed second reading with bipartisan support. Minister Penner stated that government made the decision to proceed with the boundaries based on the maps that were agreed to in 2006. He also expressed government's support for clean energy and economic development. He stated that government would not be amending the conservancy boundaries before the end of the spring legislative session but that there would be a process at a later date for parties to make applications for boundary amendments.

63 Mr. McLaughlin did not recall either Minister de Jong or Minister Neufeld saying that they would fix the problem if the parties agreed not to go to the media and kept it low key. He did not recall anyone making a statement about

staying away from the media and litigation nor did he recall anyone making a statement about "fixing the problem". He did recall Minister de Jong saying words to the effect that we can all choose where to spend our resources, either in litigation or negotiation.

64 Mr. Eunall deposed in reply that Mr. McLaughlin's minutes are incomplete and inaccurate. With respect to the boundary amendment issue, he said:

At no time during the May 22, 2008 meeting did any of the Ministers or participants refer to an application process for an amendment to the boundary of the conservancy. Indeed, no one ever used the word "application" during the meeting. Instead, what was discussed was the timing of the amendment and why the timing was not good for the government and so it would be done at a later date.

65 Mr. Arvay submitted that the version of events described by Mr. Glendale, Mr. Eunall and Mr. Smith makes sense in the context of all the work that had been done to date and should be preferred over the version described by Minister Penner and Mr. McLaughlin. He says that there would have been a strong reaction by the Petitioners to a suggestion of an application process but the evidence clearly shows that the meeting ended cordially. He also pointed out that the commitment made by Minister Neufeld to give a directive to BC Hydro was not reflected in Mr. McLaughlin's minutes but was later confirmed in writing.

66 Mr. Copley submitted that the Petitioners' version of what occurred at this meeting is inconsistent with correspondence that followed. He suggested that this court should view Mr. Eunall's minutes with caution because he had the most at stake and would have been inclined to hear what he wanted to hear. He also raised concerns about recent fabrication because these minutes were produced only in a reply affidavit.

67 I am not concerned about recent fabrication. Mr. Eunall deposed that he wrote his notes within 24 hours of the May 22, 2008 meeting. Mr. Arvay explained why he chose not to append the minutes to Mr. Eunall's initial affidavit and I accept that explanation. The minutes themselves are not evidence, but were used by Mr. Eunall to refresh his memory. I also agree with Mr. Arvay that Mr. McLaughlin's minutes were incomplete. Subsequent correspondence from Minister Neufeld confirmed that he agreed to direct BC Hydro to enter into negotiations with Kleana if a power call was not available when the company was ready to move forward. I would have thought that this was a commitment that would have been captured in minutes, given Mr. McLaughlin's evidence.

68 However, despite the detailed version of events given by the Petitioners, I am not convinced that they have proven on a balance of probabilities that Minister Penner made a clear assurance to amend the conservancy boundary at a later date.

69 First, the evidence must be considered in context. The Minister did not have the authority to make an amendment to a conservancy boundary. He did, of course, have the authority to recommend the amendment to Cabinet. If Minister Penner made any assurance, it could only have gone so far as to voice support for the amendment. Yet, the evidence of the Petitioners is that he assured them that the amendment would be done. Mr. Arvay's submission that such an assurance could have been given because the Ministers who attended the meeting could make the amendment happen ignores the fact that the allegation is made against Minister Penner only. I have considered whether the Minister's statements may have gone so far as to say that the amendment would be done, given the apparent support of his Cabinet colleagues at the meeting, but I am not satisfied that the evidence supports such a finding. At most, his encouraging statements may have given this impression to the Petitioners.

70 Second, the Petitioners' own evidence is not consistent about what Minister Penner is alleged to have said. According to Mr. Glendale, the Minister said that he wanted to work with them to fix the problem of the boundary but he attributed the idea that the problem would be fixed to Ministers de Jong and Neufeld. This evidence falls short of establishing a clear assurance. Mr. Eunall and Mr. Smith attributed stronger statements to Minister Penner. Mr. Eunall

said that Minister Penner told them that he was not going to be able to "do" the boundary alteration "now" but he attributed the more forceful statement that "it will be done when the time is right" to Minister de Jong. Mr. Smith said that Minister Penner told them that a correction would be made to the boundary but the timing was "horrible for the government". I find it improbable that Minister Penner would have described the issue as a "correction" as it appears that he was then aware that the amendment requested was material.

71 This is not to say that I find the evidence of the Petitioners to be untruthful. I am satisfied that they endeavoured to remember the Minister's words as carefully as they could. I have no doubt that Minister Penner was very positive in his approach to the boundary issue and I doubt that anyone referred to an "application" process. The Petitioners certainly had the impression that the Minister would support a boundary change when the time was right. Saying that one personally supports these projects and saying things like "the fact that an area is designated as a park or a conservancy doesn't mean that it can't be subsequently changed" sends an encouraging message. However, such encouragement is not an unambiguous promise.

72 Finally, the documentary record that followed this meeting does not support a finding that Minister Penner made the alleged assurance.

Correspondence after the May 22, 2008 meeting

73 The first correspondence to follow the meeting was from Minister Neufeld to Mr. Glendale, dated June 10, 2008. This was consistent with his commitment to provide a comfort letter for Kleana's investors. With respect to Bill 38 and the amendment issue he stated:

I understand your concern that establishing the Dzawzadi/Upper Klinaklini River Conservancy with the boundaries identified in Bill 38 ... could affect your ability to advance your economic interests.

Bill 38, which establishes 50 conservancies in the Central and North Coast Land and Resource Management Plan areas and sets out their boundaries, has now received Royal Assent and as such, no amendments can be made without introducing new legislation. Bill 38 fulfills the Government's commitment to implement the Coastal Land Use Decision and reflects the outcome of the Central and North Coast planning processes and subsequent government-to-government land use negotiations. However, having said that, the establishment of these conservancies does not necessarily preclude future consideration by Cabinet and the Legislative Assembly of possible amendments to a conservancy boundary in the future that might enable these projects to proceed.

74 These comments, which were repeated in a second letter from Minister Neufeld, dated July 3, 2008, are inconsistent with an assurance having been given. Mr. Glendale responded in a letter dated July 10, 2008 "to set out clearly the commitments made by government at our meeting in Victoria on May 22":

It was made clear at this meeting to all the Ministers that attended ... that [Kleana] need a clear path to an Electricity Purchase Agreement with BC Hydro. It was understood that [Kleana's] ability to participate in BC Hydro's anticipated call for clean energy proposals would be jeopardized by any delay in resolving the boundary issue. ...

The government said that it did not intend to amend the boundaries of the Conservancy area prior to the passage of Bill 38, but promised to make such amendments within a reasonable time.

(emphasis added)

75 He went on to clarify the extent of Minister Neufeld's commitment to direct BC Hydro to enter into negotiations with Kleana once the boundary amendment was made. He added:

Moreover, it was clearly understood the promised boundary amendment will not be based on the government's amendment procedures, and will not require any formal request to be made by [the Da'naxda'xw] or [Kleana], but rather will be made at the initiative of government, in reflection of the need to properly accommodate the rights, titles and interest of [the Da'naxda'xw].

76 I note that this last statement is not reflected in Mr. Glendale's recollection of the discussion at the May 22, 2008 meeting but appears to be his interpretation of the effect of "the promised boundary amendment".

77 Minister Neufeld responded in a letter dated October 15, 2008. He confirmed his commitment to give a direction to BC Hydro. With respect to the amendment issue, he stated:

I note that you also raise a concern about the process for considering potential future boundary changes to the Conservancy and believe that my letter did not accurately reflect discussions at our meeting of May 22, 2008. Given that the issue of conservancies fall within the mandate of my colleague, Honourable Barry Penner, Minister of Environment, who was also at this meeting, I have forwarded your letter to him for his consideration and response.

78 I note that all of this correspondence was copied to Minister Penner. He did not respond to it. He did, however, write to Mr. Smith on August 1, 2008, stating that he understood his concern that establishing the Upper Klinaklini Conservancy could affect the ability of the Da'naxda'xw to advance their economic interests. With respect to the May 22, 2008 meeting he stated:

I am hopeful that the May 22, 2008 meeting that you attended ... satisfactorily addressed your concerns. As a follow-up to that meeting, the Honourable Richard Neufeld, Minister of Energy, Mines and Petroleum Resources, will be writing Chief Councillor Glendale respecting future opportunities to pursue electricity purchase agreements.

79 He made no mention of the boundary amendment issue.

80 Mr. Glendale wrote directly to Minister Penner on October 27, 2008. He stated that since the May 22 meeting, they had received letters from Minister Neufeld clarifying the commitments made and referring the issue of the conservancy boundaries to Minister Penner. He attached a draft letter proposed for the Minister's signature "which sets out the clarification needed to assure us that the outstanding issue in respect of the conservancy boundaries will be addressed by government, working collaboratively with the Danaxda Awaetlala First Nation." It is significant, in my view, that the draft letter did not reiterate the promise set out in Mr. Glendale's letter of July 10 to Minister Neufeld that the boundaries would be amended. The relevant text of the draft was as follows:

The Province acknowledges that you have raised concerns with the impact of the establishment of the Dzawadi/Upper Klinaklini Conservancy on the asserted Aboriginal rights and title of the Da'naxda'xw Awaetlala First Nation. I believe that there is sufficient common ground for us to continue to work together through our joint commitment to address these issues in a way that encourages sustainable economic development in the Knight Inlet area for the benefit of Da'naxda'xw and non-Da'naxda'xw community members.

With respect to the boundary of the Dzawadi/Upper Klinaklini Conservancy established under [Bill 38], the Province is prepared to consider a boundary modification in the future and is willing

to work with you to:

- a) Develop a workplan within 90 days of this letter to explore opportunities for, and the constraints upon, mechanisms to achieve such a boundary modification.
- b) Confirm representatives who will undertake this work, and
- c) Report out on technical matters which require further work by the Province to implement such arrangements as may be agreed upon.

The Ministries of Environment, of Agriculture and Lands, of Aboriginal Relations and Reconciliation, and Energy, Mines and Petroleum Resources have all committed to work together to ensure that discussions related to these matters move ahead within an appropriate time frame.

(emphasis added)

81 Mr. Copley submitted that this proposed draft accurately reflected the commitment made by Minister Penner on May 22, 2008, to the effect that the Province is prepared to consider a boundary modification in the future. He says that this is also consistent with Minister Penner's evidence and Mr. McLaughlin's minutes of the May 22 meeting.

82 Mr. Arvay submitted that if Mr. Glendale's draft letter accurately reflects the commitment Minister Penner made at the meeting, it must be the entire draft considered in context. Minister Penner's evidence was that the statement "the Province is prepared to consider a boundary modification in the future and is willing to work with you" reflected his recollection of the meeting but he did not recall the specific components set out in (a), (b) and (c) regarding a process.

83 Mr. Glendale deposed that he suggested this draft text to provide some comfort to Kleana, its First Nation partners and the investors, using a precedent letter on how to deal with the matter procedurally. Mr. Arvay suggested that this evidence shows that Mr. Glendale was attempting to jump start a collaborative process to implement the amendment to the boundary. While this may be so, Mr. Glendale's explanation is unclear. I would have thought that the language would have been much stronger had he been seeking to have the Minister confirm his promise in writing. In my view, this letter strongly suggests that the Petitioners were comforted by an assurance that the government would consider the boundary amendment. I say this in the context of a meeting where Minister Penner and the other ministers were positive in their support for clean power projects and encouraging about a future boundary amendment.

84 Minister Penner did not respond to this letter until December 12, 2008. Before that, however, there was another meeting.

November 4, 2008 meeting and follow up

85 On November 4, 2008, Minister Penner met with Mr. Glendale, Mr. Smith and Mr. Eunall at Milestone's Restaurant in Victoria. This meeting was precipitated by the Petitioners' concerns about the timing of the amendment. BC Hydro had issued a clean power call request for proposals in June, with a deadline of the end of November 2008. Mr. Smith had been working with Ministry of Environment staff on a government-to-government boundary adjustment process but progress was slow and the Upper Klinaklini issue remained outstanding. The Petitioners say that the Minister confirmed his assurance at this meeting.

86 Mr. Eunall deposed that he told Minister Penner that Kleana was about to submit the Project into the BC Hydro power call with the intake inside the Upper Klinaklini Conservancy and he needed the Minister's re-assurance that the boundary issue would be resolved in a timely manner. He said that the Minister responded by saying that he was a big supporter of private power and he believed the Project was a good one that should move forward. He said that the Minister agreed with Mr. Smith that a separate government-to-government process was needed to solve these kinds of

problems, the Upper Klinaklini Conservancy boundary amendment would be done as was committed to, and it was only a matter of working out the mechanics. Mr. Eunall left this meeting feeling pleased that the boundary issue would be resolved within the time limits of the BC Hydro power call.

87 Mr. Smith deposed that he told the Minister that the boundary was not placed where it should have been and this was an error that needed to be fixed between the Da'naxda'xw and the Province. He discussed a government-to-government process to deal with future issues in conservancies but emphasized that the Upper Klinaklini was a priority "and was promised to be dealt with" at the May 22 meeting. He suggested that it could be dealt with in the context of an administrative error.

88 Mr. Glendale deposed that they asked Minister Penner to commit to making the correction to the boundary, that he said he would, that he would go back to his office where there was a pile of work, and that a government-to-government process was "a good way to effect this correction".

89 Minister Penner was not examined about this meeting and none of his staff were in attendance.

90 Mr. Copley submitted that it is not credible that the Minister would reverse his previously stated position about using the existing policy framework to deal with future boundary amendments in the informal environment of a lunch meeting. He emphasized that the Minister's follow-up letter of December 12, 2008 re-iterates that same position.

91 The letter of December 12, 2008 was a response to Mr. Glendale's letter of October 27, 2008. The Minister stated that he understood the concern about the boundaries of the Upper Klinaklini Conservancy being identified in Bill 38 but no amendments could be made without introducing new legislation. With respect to modifying the boundary:

... the BC government has an existing policy framework for considering such proposals. As you can appreciate, the government will need to consider the outcome of any future process respecting boundary modifications against the broader public interest and commitments it has made with respect to these conservancies.

I understand that there have been preliminary discussions with ministry staff and representatives of the Nanwakolas Council on developing the principles and protocols of a government-to-government relationship on conservancy management. I believe this is a positive development.

92 There is no further correspondence following up on these matters. Kleana had submitted a proposal to BC Hydro on November 25, 2008 on the basis that a process was being developed by the Nanwakolas Council with the Ministry of Environment "to correct" the Upper Klinaklini Conservancy boundary.

93 Given my findings about what occurred at the May 22, 2008 meeting, I can only conclude that the evidence of Mr. Eunall and Mr. Smith, and to a lesser extent Mr. Glendale, overstated the issues. I don't doubt that Mr. Eunall and Mr. Smith were strongly putting forward their position. As to whether Minister Penner acknowledged a previous commitment, Mr. Glendale's evidence suggests otherwise, as he said that they asked Minister Penner to commit to making the correction to the boundary.

94 I find it noteworthy that there was no follow up with the Minister about the Upper Klinaklini Conservancy boundary amendment for over a year after this. If the Petitioners took issue with the Minister's failure to confirm an assurance and his insistence on using the existing policy framework to consider the amendment, as set out in his letter of December 12, 2008, I would have expected a timely response from Mr. Glendale. The only written comment about this lunch meeting was contained in a January 6, 2010 letter from Mr. Glendale to the Minister where he stated that the Minister assured them that he was going to go back to his office to work on the file.

95 There was, however, considerable work done in the following year on establishing a government-to-government process for considering amendments to conservancies and other protected areas. Mr. Smith, on behalf of the Nanwakolas Council, took the lead on this. Whether or not this process was intended to apply to the specific issue of the Upper Klinaklini Conservancy boundary is in dispute.

Government-to-government process

96 On January 6, 2009, Mr. Smith wrote to Minister Penner about moving forward with developing a government-to-government process for addressing boundary adjustments to conservancies. Minister Penner responded by re-affirming the government's commitment to government-to-government discussions but stated this with respect to the boundary adjustment process:

... the British Columbia Government has established a policy for considering requests for boundary changes related to protected areas. The Nanwakolas Council and its member First Nations would be consulted directly by our government.

Further, I fully support continued discussion between the Nanwakolas Council and representatives from the Ministry of Environment to more fully understand and explore opportunities for enhancing First Nations' access to compatible economic opportunities in protected areas within the traditional territories of the First Nations of the Nanwakolas Council.

97 At about the same time, Doug Konkin, then Deputy Minister of Environment, also wrote to Mr. Smith. In a letter dated February 25, 2009, Mr. Konkin stated:

This letter is to confirm the Ministry of Environment's commitment to immediately begin discussions with the Nanwakolas Council on establishing a government-to-government process for considering boundary amendments to conservancies and other protected areas.

As you are aware the ministry has a cabinet approved process for amending boundaries for protected areas. The ministry's interests will be to ensure the principles of that process are reflected in the outcomes of this discussion and any future process that may be designed for reaching agreement on a government-to-government basis.

98 Minister Penner's evidence was that his support of a government-to-government process was limited to management issues within conservancies and he denied representing to the Da'naxda'xw that the Upper Klinaklini boundary amendment would be addressed at a government-to-government level. Mr. Konkin's letter shows that a government-to-government process would not be so limited, as it would include a process for considering amendments to conservancy boundaries. Mr. Konkin also made it quite clear that the Ministry's interest was to incorporate the principles of the existing policy into a government-to-government process. However, there was no commitment to consider the Upper Klinaklini Conservancy issue on this basis.

99 The election took place in May 2009. Minister Penner was re-elected and continued in his role as Minister of Environment. By October, the Nanwakolas Council and the Ministry had agreed on a draft government-to-government boundary amendment process. Mr. Smith deposed that Mr. Konkin assured him that the "error" in the case of the Upper Klinaklini would move through an expedited process and would be rectified in the very near future. Mr. Konkin did not recall these specific statements but he deposed that:

... in all my conversations I have been guided by the knowledge that an amendment to any conservancy boundary would require legislation and that the boundary amendment proposed for the Dzawadi/Upper Klinaklini River Conservancy was more than a housekeeping or

administrative change to rectify an "error". As such, I believe I was clear in my approach in discussions with Mr. Smith that I did not control the timelines or the decision, and could not and did not commit to any specific outcomes or timelines. Mr. Smith had indicated that his first interest was in getting a decision on the boundary amendment proposal, and I encouraged him to get the appropriate information in for the Minister's consideration.

100 On December 3, 2009 Mr. Smith attended a meeting with Brian Bawtinheimer and Ken Morrison of the Ministry of Environment and Merv Child, a legal representative of the Kwakiutl District Council, a larger umbrella organization of First Nations of which the Da'naxda'xw was a member. In an email, Mr. Child set out his understanding of what had been agreed to at this meeting with respect to the process for dealing with the Upper Klinaklini boundary amendment. This email described two concurrent processes. The first was the Da'naxda'xw's request for the boundary change and the second was Kleana's EAO application. It was clear that the boundary amendment was being pursued by the Da'naxda'xw to keep it a government-to-government process. This process was described as follows:

This will commence by pulling together relevant information supporting the adjustment - why is it needed? (i.e. environmental, economic and social information related to the boundary adjustment and hydro project, including the past dialogue, commitments and understandings around the adjustment). We need enough information to defensively justify the adjustment - thus providing Minister Penner enough information to make an informed recommendation to Cabinet, then to defend it in the Legislature (assuming that a boundary modification was supported by Cabinet).

The idea discussed was that this work would commence in the immediate future - such that a recommendation to Cabinet by Minister Penner regarding the boundary adjustment request could be made in a timely manner. Timing on introducing a boundary adjustment will be partly reliant on ensuring the economic, environmental and social impacts are considered.

If the amendment is introduced ahead of the final completion of the EA process and approved by the Legislature, it would not likely be brought into force until the EA process for the hydro project is concluded, and a decision on whether to issue an EA certificate is made.

(emphasis added)

101 The EAO process was to run separately but the two processes would be linked in the sense that "much of the social, environmental and economic information will satisfy both processes" and also in the sense that the government would not bring a boundary adjustment into force unless and until an EAO certificate was issued. The email went on to say that the Ministry representatives

... expressed an interest that before the adjustment could formally be put to the Legislature by Minister Penner, it would require that, at a minimum, Kleana Power has submitted its EAO application and that Minister Penner is made aware of the economic, environmental, and social impacts of the proposed boundary adjustment.

102 The email ended with this:

We also discussed that the above process was specifically for the Upper Klinaklini River Conservancy, and that Wally and I will engage with Brian about developing a GtoG process that will be used for other conservancies.

103 While this email did not set out a definitive agreement, this evidence suggests that representatives of the Ministry and the Da'naxda'xw were working on a government-to-government process to deal with the Upper Klinaklini amendment request, which incorporated the considerations set out in the 2004 Park Policy and required Kleana to submit its application in the EAO process. However, the Minister denied representing to the Da'naxda'xw that any amendment to the Upper Klinaklini Conservancy boundary would be done at a government-to-government level.

104 Mr. Arvay submitted that the reference in Mr. Child's email to "providing Minister Penner enough information to make an informed recommendation to Cabinet" suggests that a positive recommendation to Cabinet was presumed and the process was to be designed simply to give the Minister what he needed to support the recommendation. While I find some merit to this submission, I think it overstates the government's position at the time. The most that can be said is that to this point, the Minister had at all times expressed support for independent power projects and was positive about the boundary amendment. This approach continued in 2010, as I review below.²

105 In the meantime, on December 16, 2009, a government-to-government protocol on conservancy management was signed by the Nanwakolas Council and the Province. Mr. Glendale did not sign it at that time due to his frustration about the Upper Klinaklini boundary issue, but he did sign it several months later, in March 2010.

Events leading up to the Minister's April 27, 2010 decision

106 Also on December 16, 2009, Mr. Eunall met with BC Hydro and learned that the only significant hurdle for Kleana was the conservancy issue. On December 21, 2009, BC Hydro advised him that it would require comfort, directly from the government, with respect to the required amendment to the conservancy boundary. Mr. Eunall wrote to Minister Penner about this on December 31, 2009. After reviewing the background and the commitments he understood the Minister had made, he requested that the government "undertake direct communication with BC Hydro providing comfort that there is a reasonable likelihood of a boundary amendment" by January 7, 2010, as this was a condition to the Project moving to the next round of negotiations. He suggested that the boundary issue and the EAO process be de-linked to allow the amendment to be addressed in a government-to-government process with the Da'naxda'xw.

107 The Minister did not provide the requested comfort to BC Hydro. Deputy Minister Konkin responded to Mr. Eunall on January 7, 2010. He took issue with Mr. Eunall's assertion that the Minister had committed to amend the conservancy boundary and re-iterated that the government had an existing policy framework for considering the proposal. He advised Mr. Eunall to contact him to pursue a request for a boundary adjustment.

108 Before Mr. Eunall received the Deputy Minister's response, Mr. Glendale wrote to Minister Penner expressing his frustration. In his letter dated January 6, 2010, Mr. Glendale outlined his understanding of the past dialogue, commitments and understandings about the Upper Klinaklini Conservancy boundary issue. He asserted that at the May 22, 2008 meeting the government promised to amend the boundary and he was still waiting for the Minister to deliver on this promise.

109 The Deputy Minister responded to Mr. Glendale in a letter dated January 7, 2010. As he had with Mr. Eunall, Mr. Konkin took issue with Mr. Glendale's assertion that Minister Penner committed to amend the boundary and referred to the existing policy framework. He acknowledged that Ministry staff had discussed this process with representatives of the Nanwakolas Council, to whom it had been made clear that enough information must be provided to enable the Minister to make an informed decision. Surprisingly, he advised Mr. Glendale to contact him or his staff "to pursue a request for a boundary adjustment". I say surprisingly because the Da'naxda'xw request had been ongoing for well over three years and in the past year Ministry staff had worked with the Nanwakolas on establishing a government-to-government protocol on conservancy management and amendments to boundaries, as well as a separate process to deal with the Upper Klinaklini amendment request.

110 In any event, shortly after this, Mr. Smith met with Mr. Konkin to discuss the continuing delay in the amendment

request. Mr. Konkin recommended that the Da'naxda'xw submit a formal request to Cabinet. On January 10, 2010, Mr. Bawtinheimer provided Mr. Smith with the information required for the submission, including economic, environmental and social impacts, as set out in the 2004 Park Policy. On January 18, 2010, the Da'naxda'xw sent to Mr. Konkin a "Submission to the Government of BC to Adjust the Lower Boundary of the Dzawadi/Upper Klinaklini River Conservancy".

111 Mr. Arvay submitted that the whole tenor of this turn of events was that Ministry staff were telling the Da'naxda'xw what information was needed for the Minister to justify his recommendation for the boundary amendment. Mr. Copley submitted that the Ministry was always clear that the process would involve presenting enough information for the Minister to make an informed decision, which included the considerations set out in the 2004 Park Policy. It is difficult to assess this kind of nuance on the basis of affidavit evidence. My impression is that the tenor of the discussions implied that a positive recommendation was expected. No one from the Ministry, including the Minister, had ever expressed any concerns about potential adverse environmental impacts.

112 The Da'naxda'xw made the January 18, 2010 submission on the basis that the 2004 Park Policy was to be applied only as a guideline and environmental impact issues would not foreclose a favourable recommendation. They provided the background to the request and information about the matters requested. Consistent with the Ministry's approach to the amendment issue since 2007, the Da'naxda'xw stated that they were not asking government to approve the Project or to review its potential environmental impacts, as that review was to take place under the EAO process. If the Project failed to satisfy environmental assessment and permit requirements or for any other reason was not constructed, the area in question would be returned to the conservancy. In any event, Mr. Eunall subsequently provided further information to the Minister about various issues related to the Project, and its potential environmental impacts and economic benefits.

The Park and Protected Area policies

113 In March 2010, the Ministry of Environment published a new "Provincial Protected Area Boundary Adjustment Policy" (the 2010 Protected Area Policy). This policy was substantially similar to the 2004 Park Policy, but was updated to apply to all provincial protected areas, including conservancies. It did, however, include several changes that in my view are significant in the context of this case.

114 The 2004 Park Policy was designed to permit the Minister of Water, Land and Air Protection to consider proposals for developments that were prohibited by the *Park Act*. The guidelines were based on principles for maintaining the integrity of park values and a clear process for evaluation. It stated:

In recognition of the public interest in the designation and management of parks, and the integral role parks play in supporting local economies and community based recreation, government has afforded parks a high level of legislative protection. Because of this, boundary adjustments require legislation and are normally approved only where there are significant benefits to the Province.

Consideration of proposals for park boundary changes will be guided by the following principles:

- * The Province is committed to the long term protection of provincial parks and the integrity of their associated ecological, recreational and cultural values.
- * Proposals for park boundary amendments will be considered on a case by case basis where there are compelling provincial economic, environmental and social benefits that exceed preserving the integrity of the existing park boundary and values.
- * The review and evaluation process will be timely and transparent.

- * The proponent must establish the case to amend a park boundary and bear the associated costs.
- * Where a change is to be made to a park established through a local public process, participants in the original process will be consulted on the proposed change, within reasons.
- * Consultation with First Nations will be required, as appropriate.
- * Suitable public consultation will be required, consistent with the significance of the proposed change.

(emphasis added)

115 The policy defined "proponents" as "private individuals, companies or government agencies/ministries". It provided guidelines for proposals, setting out six things a proponent needed to address:

1. Alternatives to avoid the park have been considered.
2. Overall economic benefits to the Province have been documented.
3. Social and environmental impacts have been documented.
4. Mitigation and restoration have been identified.
5. First Nations have been adequately consulted.
6. Local community has been consulted.

116 Under "Important Procedural Notes", the policy stated:

Decisions to consider a proposal for a park boundary adjustment are made by the Minister based on the economic, social and environmental considerations. There is an increased risk of a proposal being rejected under one or more of the following circumstances:

- * There is significant First Nations opposition.
- * There is significant public or local government opposition.
- * Impacts to species at risk cannot be overcome.
- * There is insufficient overall benefit to the Province.

117 The process for reviewing formal requests required BC Parks staff to assess the proposal and make a recommendation to the Minister. If the Minister decided to reject the proposal the proponent was to be notified without delay. If the Minister decided to recommend the proposal, he would seek the approval of Cabinet and then, if necessary the Legislature.

118 The 2010 Protected Area Policy is based on the same principles. However, it expands the list of proponents to include First Nations. It adds to the guidelines that "provincial and federal agencies have been consulted". Where a proposed boundary adjustment relates to a reviewable project under the EAO process, it says this:

... BC Parks and the Environmental Assessment Office will coordinate their respective information requirements to the greatest extent possible. While the boundary adjustment and environmental assessment processes involve independent decision by Government, the intent is to identify means for the proponent to collect and report on information required by both processes in an effective and efficient manner.

119 Finally, the "Procedural Notes" include a new circumstance which may increase the risk of a proposal being rejected:

- * significant adverse effects on environmental or social values cannot be avoided, mitigated or compensated for ...

120 These broader environmental factors replaced what was in the 2004 Park Policy as "impacts to species at risk cannot be overcome".

121 Mr. Eunall deposed that Kleana was not informed about this new policy or given an opportunity to comment on its application to the Project. There is no evidence that the Da'naxda'xw were informed about it either. The January 18, 2010 submission included the information requirements from the 2004 Park Policy. Had they been aware of the 2010 Protected Area Policy, I would have expected further information to have been provided or at least considered. The obvious inference from the evidence is that the Da'naxda'xw were not informed about the new policy and were given no opportunity to comment on its application to the boundary amendment request.

The April 27, 2010 decision

122 On April 27, 2010, Minister Penner wrote to Mr. Glendale and to Mr. Eunall advising them that he did not intend to recommend an amendment to the conservancy boundary. The Minister noted that the information he reviewed provided differing descriptions of the Project. He considered the potential economic benefits, listed a number of specific environmental impacts, and concluded:

I must at this time advise that I do not intend to recommend to Cabinet or to government that legislative changes occur to amend the boundary of the Upper Klinaklini Conservancy in order to facilitate this Project. Similarly, I am not prepared to direct ministry staff to devote additional time and resources in pursuing a more detailed review of this proposal.

123 This decision appears to have been based only on the considerations set out in the 2010 Protected Area Policy and more particularly on potential negative environmental impacts of the Project. It is silent on the fact that the Project was to be assessed in the EAO process. There is no evidence that at any time before April 27, 2010 the Minister advised the Da'naxda'xw that he had any substantive concerns about the Project in the context of the amendment request.

Summary findings of fact

124 I will summarize the findings of fact that are particularly relevant to the legal issues:

- * In 2006, after the regional process leading to the Central and North Coast LRMP and subsequent government-to-government negotiations, the Da'naxda'xw agreed in principle to the area of the Upper Klinaklini River being protected as a conservancy.
- * The Da'naxda'xw made the initial request to modify the boundaries of the proposed Upper Klinaklini Conservancy in July 2006 for the purpose of allowing the Project to be assessed in the EAO process. They proposed that any lands not required for the Project after final surveys were complete would be returned to the conservancy.
- * In October 2006, Kleana submitted its application under the EAO review process.
- * In January 2007, Ministry of Environment staff set out to assist the Da'naxda'xw to move the boundary amendment request forward.
- * At a meeting with Mr. Glendale and Mr. Smith of the Da'naxda'xw on May 17, 2007, Minister Penner expressed the view, based on what he was told at the time, that the amendment request looked reasonable but he gave no assurance that the boundary would be amended.
- * Under the June 2007 Collaborative Agreement, there was room to adjust conservancy boundaries, but the amendment proposed by the Da'naxda'xw was a material change to the 2006 land use planning Agreement in Principle.
- * From October to December 2007, Ministry of Environment staff assisted the Da'naxda'xw

to define and map the boundary amendment request. Using the 2004 Park Policy as a guide, the Ministry then treated the request as going forward from Kleana as the proponent, with the support of the Da'naxda'xw, rather than by the Da'naxda'xw themselves. Ministry staff supported the amendment as defined in the Kissinger Proposal, which contemplated removing an area from the conservancy while the EAO process was going forward and returning the land to the conservancy in the event the Project did not satisfy environmental requirements.

- * In January 2008, the Ministry sought to consult with the Da'naxda'xw and the Ulkatcho First Nations as those who may be affected by the proposed boundary amendment. The Ministry consulted on the basis that it was not considering the merits of the proposed Project, as the potential environmental impacts would be determined through the EAO process, where further consultations would take place.
- * Everyone involved with this issue was working towards addressing the Da'naxda'xw's boundary amendment request before the Upper Klinaklini was established as a conservancy in the new legislation.
- * Without any notice to the Da'naxda'xw or to Kleana, on April 29, 2008, the government introduced Bill 38, (*Protected Areas of British Columbia (Conservancies and Parks) Amendment Act*), which included the Upper Klinaklini Conservancy without the requested boundary amendment.
- * The Minister gave little, if any, consideration to the Kissinger Proposal or even to the 2004 Park Policy and was not prepared to recommend any boundary changes that were not consistent with the conservancy areas that had been agreed to in 2006 through the LRMP process.
- * Minister Penner did not give a clear assurance to the Da'naxda'xw or to Kleana on May 22, 2008 that the Upper Klinaklini Conservancy boundary would be amended at a future time. He did, however, express personal support for independent power projects and was positive in his approach to the request, and at no time prior to April 27, 2010 did he advise either of the Petitioners that he had any substantive concerns about the Project in the context of the boundary amendment request.
- * Minister Penner did not make any further assurances to the Da'naxda'xw or to Kleana on November 4, 2008.
- * The government was committed to a government-to-government consultation process with the Da'naxda'xw for managing conservancies and other protected areas, which included a process for considering boundary amendments. However, no definitive agreement was reached on a government-to-government process with respect to the Upper Klinaklini boundary amendment request and the Ministry insisted that the process follow the 2004 Park Policy.
- * In January 2010 the Da'naxda'xw submitted a formal amendment request to Cabinet on the basis that the potential environmental impacts would be reviewed under the EAO process.
- * The Da'naxda'xw were not informed about the 2010 Protected Area Policy and were given no opportunity to comment on its application to the boundary amendment request.
- * The Minister's decision of April 27, 2010 refusing to recommend the boundary amendment appears to have been based only on the considerations set out in the 2010 Protected Area Policy and more particularly on potential negative environmental impacts of the project.

The issues

1. Did the Crown have a duty to consult with the Da'naxda'xw with respect to their request to amend the

- boundary of the Dzawadi/Upper Klinaklini River Conservancy?
2. If the Crown had a duty to consult, what is the scope of the duty and did the Crown fulfil it?
 3. Is the Minister's April 27, 2010 decision a breach of the legitimate expectations of the Petitioners?
 4. Is the Minister estopped by prior assurances from refusing to recommend the boundary amendment?
 5. Was the April 27, 2010 decision an abuse of discretion as a decision made in excess of jurisdiction or otherwise unreasonable?

Constitutional issues

1. The duty to consult

125 The duty to consult arises where three elements are present: (1) the Crown has knowledge, real or constructive, of the potential existence of an aboriginal claim or right; (2) the Crown contemplates a decision or conduct that engages the aboriginal claim or right; and (3) the contemplated Crown decision or conduct may adversely affect the aboriginal claim or right: *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 35; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 at paras. 40-50.

126 The Da'naxda'xw say that the duty to consult arose when the Minister contemplated a decision on their request to amend the conservancy boundary, as this decision implicated their ability to use the land, water and resources in their asserted traditional territory to promote the economic and social well being of their people. They submit that the right to exclusive use and occupation, the right to choose how the land is to be used, and the economic component are aspects of aboriginal title that may be adversely affected by the Minister's decision whether or not to recommend the boundary amendment.

127 The government says that the duty to consult was not triggered here because the Crown's contemplated decision or conduct-maintaining the *status quo*-would not adversely affect the Da'naxda'xw's claims of aboriginal title and rights. It says that preserving the lands is more likely to enhance the Da'naxda'xw's claims. It submits that the duty to consult must not be considered independently from its purpose, which is to prevent irreversible damage to claimed aboriginal interests pending proof or determination through treaty negotiations. In the circumstances here, the government says that the Da'naxda'xw are seeking to benefit from aboriginal title before proving it.

Standard of review

128 The standard of review on the question of whether there is a duty to consult is correctness: *Haida Nation* at paras. 61-63; *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para. 48.

Legal principles and analysis

129 The question of the duty to consult arises in this case in a somewhat unusual set of circumstances. This is not a case where the Crown initiated a proposed decision or conduct. Rather, the First Nation requested the Crown to make a specific decision. That request must, however, be considered in the broader context of the extensive consultation between the Crown and the Da'naxda'xw in the LRMP process and government-to-government negotiations that created the Upper Klinaklini Conservancy in the first place, the Collaborative Agreement, and the on-going negotiations for a government-to-government process for managing conservancies and considering boundary amendments. There is no question that the Crown had a duty to consult with respect to the land use designation and the boundaries of the Upper Klinaklini area. I view the Da'naxda'xw's request to amend the boundary as part of an ongoing process of consultation.

130 In this context, it is my opinion that the Crown had a duty to consult the Da'naxda'xw about the proposed boundary amendment. In fact, it set out to do so over a fairly extensive period of time. That duty did not cease when the Minister contemplated a refusal of the request. I disagree with the government that conduct which contemplates conserving the *status quo* necessarily means that aboriginal interests will not be adversely affected.

131 *Haida Nation* established that the government has a duty to consult and reasonably accommodate aboriginal interests pending resolution of unresolved land claims. This is not a free-standing duty and it is not a fiduciary duty. The duty to consult and accommodate stems from the honour of the Crown:

32 The jurisprudence of this Court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*. This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people.

132 The court held at para. 38 that consultation and accommodation

... is an essential corollary to the honourable process of reconciliation that s. 35 demands. It preserves the Aboriginal interest pending claims resolution and fosters a relationship between the parties that makes possible negotiations, the preferred process for achieving ultimate reconciliation ...

133 The Da'naxda'xw are attempting to resolve their claims of aboriginal rights and title through treaty negotiations. There is no dispute that the government has knowledge of the Da'naxda'xw's claims or that the Minister's decision engages their claim to aboriginal title. The primary issue is whether the Crown's contemplated conduct might adversely affect the Da'naxda'xw's claim to aboriginal title.

134 In *Rio Tinto*, the court discussed the element of adverse impact at paras. 45 and 46:

... The claimant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights. ...

Again, a generous, purposive approach to this element is in order, given that the doctrine's purpose, as stated by Newman, is "to recognize that actions affecting unproven Aboriginal title or rights or treaty rights can have irreversible effects that are not in keeping with the honour of the Crown" (p. 30, citing *Haida Nation*, at paras. 27 and 33). Mere speculative impacts, however, will not suffice. As stated in *R. v. Douglas*, 2007 BCCA 265, 278 D.L.R. (4th) 653, at para. 44, there must be an "appreciable adverse effect on the First Nations' ability to exercise their aboriginal right". The adverse effect must be on the future exercise of the right itself; an adverse effect on a First Nation's future negotiating position does not suffice.

135 The government submits that the Minister's decision, which effectively preserves the conservancy boundaries, will not adversely affect the Da'naxda'xw's aboriginal title claim. It also submits that any impact is hypothetical and speculative because there were many uncertainties as to whether the Project would ever proceed. Even if the Minister recommended the boundary amendment, there was no guarantee that Cabinet would agree and it was far from certain whether the Project would obtain the required approvals through the EAO process.

136 While the economic benefits the Da'naxda'xw hoped to receive from the Project may or may not have been realized, I do not see the adverse impact as speculative. The effect of the Minister's decision is a certainty that the Project will not be realized. The Da'naxda'xw have lost a unique opportunity, which is significant to them, especially considering the remote location of their traditional territories.

137 The government's preservation argument is an interesting one. Mr. Yearwood emphasized that the duty

established in *Haida Nation* arose in the context of proposed Crown conduct that exploited resources. He referred to these comments at para. 33:

... When the distant goal of proof is finally reached, the Aboriginal peoples may find their land and resources changed and denuded. This is not reconciliation. Nor is it honourable conduct.

138 He also relied on *Tsuu T'ina Nation v. Alberta (Minister of Environment)*, 2010 ABCA 137, where the court found no adverse impact where the Crown proposed a water management plan that maintained the *status quo* and enhanced conservation.

139 I accept that in some circumstances, decisions preserving lands or the *status quo* may not have an adverse impact on aboriginal claims. *Tsuu T'ina* is an example of this. However, I do not interpret *Haida Nation* as establishing a duty to consult only for the purpose of preserving land from development. I agree with Mr. Elwood's submission that there was an economic component to the Haida's claim to the lands and forests of their traditional territory, and another aspect of the Crown's conduct in issue was the exclusion of the Haida from the benefits of the forest resource. Proposed conservation measures could have an adverse affect on claimed aboriginal rights and title, as they may limit future uses of land. The LRMP process and the government-to-government consultations regarding the Upper Klinaklini area clearly demonstrate this. In my opinion, limiting the duty to consult in the manner suggested by the government is inconsistent with the "generous, purposive approach" to this element of the duty to consult as described in *Rio Tinto* and inconsistent with the goal of achieving reconciliation.

140 The government also submits that the duty to consult is not intended to provide aboriginal people now with what they could be entitled to if and when they prove their claims or settle them through treaty. If it were, there would be no incentive for aboriginal people to negotiate treaties or seek to prove their claims. In *Rio Tinto*, the court emphasized that the purpose of the duty to consult cannot be reduced to giving one side in the negotiation process an advantage over the other.

141 I agree with this, but I do not view the Da'naxda'xw as seeking the benefits of aboriginal title through the consultation process. They are not seeking to decide how the land in the Upper Klinaklini will be used. That decision remains with the Crown. The Da'naxda'xw are simply seeking an accommodation that will allow the Crown to consider whether the Project is feasible, taking into account all of the environmental, social, economic and public interests. I don't see this as interfering with incentives to negotiate or giving them a negotiating advantage.

142 For all of these reasons, I find that the Minister's decision not to recommend the boundary amendment may adversely affect the Da'naxda'xw's claim of aboriginal title. It limits the future uses of the land in the Upper Klinaklini Conservancy and because it was made under the government's policy, it may impact the Da'naxda'xw's right to participate in strategic decisions in respect of future uses. All three elements of the duty to consult having been proven, I have concluded that the Minister had a duty to consult with the Da'naxda'xw in respect of his decision of April 27, 2010.

2. The scope and adequacy of the duty to consult

Standard of review

143 The standard of review regarding the scope and adequacy of consultation and the resulting decision was discussed in *Haida Nation* and more recently in *Beckman*.

144 In *Beckman*, Binnie J. described the standard of review as correctness in respect of both the legal and constitutional limits established by a decision maker in exercising a discretion and the adequacy of the consultation itself, as "[a] decision maker who proceeds on the basis of inadequate consultation errs in law." He described the standard of review of the decision itself as reasonableness, "[w]ithin the limits established by the law and the Constitution" (para. 48).

145 Chief Justice McLachlin provided a consistent but more nuanced approach in *Haida Nation*. Recognizing that generally, the standard of review is correctness on questions of law and reasonableness on questions of mixed fact and law, she described the existence or extent of the duty to consult or accommodate as a legal question that is typically premised on an assessment of the facts. While a degree of deference to findings of facts may be appropriate, the need for deference and its degree will depend on the nature of the question and the extent to which the facts are within the expertise of the decision-maker. She held that the process itself would likely be examined on a standard of reasonableness, but should the Crown misconceive the seriousness of the claim or the potential impact on the right claimed, "this question of law would likely be judged by correctness." She emphasized that the focus "is not on the outcome, but on the process of consultation and accommodation" (at paras. 61-63).

146 The Da'naxda'xw submit that the standard of correctness applies in this case with respect to the adequacy of the consultation, as the Minister made no pretence of deliberating in terms of a duty to consult. Instead, he approached the Da'naxda'xw's request as he would any other application under the 2010 Protected Area Policy.

147 In my view, this is a situation where the Crown misconceived the impact of the Minister's decision and, as I outline below, also misconceived the seriousness of the Da'naxda'xw's claim. No deference should be given to the government's decision to determine the issue under the 2010 Protected Area Policy. In these circumstances, the scope and adequacy of the consultation should be reviewed on a standard of correctness. However, the Minister's decision to refuse to recommend the amendment, being based on public policy considerations, should be reviewed on a standard of reasonableness.

The scope of the duty to consult

148 The scope or content of the duty to consult, in general terms, is proportionate to a preliminary assessment of the strength of the claim and to the seriousness of the potentially adverse effect on the right or title claimed. The duties that may arise in different situations were described by the Chief Justice in *Haida Nation*. She suggested the concept of a spectrum "to indicate what the honour of the Crown may require in particular circumstances":

43 ... At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. "[C]onsultation' in its least technical definition is talking together for mutual understanding": T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" (2003), 41 *Alta. L. Rev.* 49, at p. 61.

44 At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. ...

45 Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the

interests at stake. Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.

(emphasis added)

149 The government says that the duty to consult in this case is at the low end of the spectrum because the Da'naxda'xw do not have a strong claim for aboriginal title to the Upper Klinaklini Conservancy area and the nature of the impact on this claim is entirely speculative and compensable in any event. It also says that the level of consultation provided exceeded any obligation owed, particularly considering the lengthy history of consultation in the LRMP process and the subsequent agreements reached with the Da'naxda'xw.

150 The Da'naxda'xw dispute the government's assessment of their aboriginal title claim, which relies only on archaeological evidence, and they say that the impact on their claim is very real, as without the boundary amendment, the Project is dead. They say that the Crown cannot rely on their participation in the LRMP process as this was not structured as meaningful consultation with First Nations, and the agreements reached subsequently recognize an on-going relationship and commitment to further consultation about issues related to the conservancies. Essentially, the position of the Da'naxda'xw is that the consultation which took place before Bill 38 was enacted in May 2008 was not meaningful and there was no consultation after.

The strength of the aboriginal title claim

Legal principles and the evidence

151 As the Supreme Court of Canada established in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, to establish aboriginal title, First Nations must prove exclusive pre-sovereignty occupation of the land by their forebears. The principles of occupation and exclusive occupation were further discussed in *R. v. Marshall*; *R. v. Bernard*, 2005 SCC 43:

56 "Occupation" means "physical occupation". This "may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources": *Delgamuukw*, per Lamer C.J., at para. 149.

57 "Exclusive" occupation flows from the definition of aboriginal title as "the right to *exclusive* use and occupation of land": *Delgamuukw*, per Lamer C.J., at para. 155 (emphasis in original). It is consistent with the concept of title to land at common law. Exclusive occupation means "the intention and capacity to retain exclusive control", and is not negated by occasional acts of trespass or the presence of other aboriginal groups with consent (*Delgamuukw*, at para. 156, citing McNeil, at p. 204). Shared exclusivity may result in joint title (para. 158). Non-exclusive occupation may establish aboriginal rights "short of title" (para. 159).

58 It follows from the requirement of exclusive occupation that exploiting the land, rivers or seaside for hunting, fishing or other resources may translate into aboriginal title to the land if the activity was sufficiently regular and exclusive to comport with title at common law. However, more typically, seasonal hunting and fishing rights exercised in a particular area will translate to a hunting or fishing right. ...

152 In this case, the Da'naxda'xw claim aboriginal title to the Upper Klinaklini River on the basis of regular and exclusive use of this remote area for fishing and hunting and exploiting other resources, the area being close (37 kms) to its established presence and origins at the head of Knight Inlet.

153 Given the nature of this judicial review proceeding, I am not in a position to assess the weight of the evidence or make any detailed findings of fact on the strength of the Da'naxda'xw's claim of aboriginal title. My role is to make only a preliminary assessment of the strength of the claim: see *Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management)*, 2003 BCSC 1422 at paras. 47-48.

154 The evidence related to the Da'naxda'xw's aboriginal title claim comes from a traditional use study by Kevin Neary, an anthropological researcher, an archaeological impact assessment conducted for the Project by Duncan McLaren, the work of Wilson Duff, and some oral history.

155 The archaeological evidence indicates the presence of Da'naxda'xw use sites south of the southern boundary of the Upper Klinaklini Conservancy. There is evidence of the remains of a dwelling site 17 km south of the conservancy boundary and a culturally modified tree 1 km south. Ethnographic evidence and some of the oral history show a significant presence south of the conservancy boundary and some evidence of possibly exclusive use further north into the conservancy area.

156 The conservancy is located in a steep mountain canyon so it is not surprising that there would be little evidence of uses such as village sites. Wilson Duff described the Klinaklini River valley as "virtually impassable." He noted that:

[T]he Tenaktut fished for dog salmon a few miles up the river, and hunted as far as the [Klinaklini] glacier, which empties its milky meltwaters in the river about 16 miles [25.7 kms] above tidewater, but seldom if ever ventured beyond that.

157 A government researcher interpreted Duff's description to suggest that the Da'naxda'xw [Tenaktut] rarely ascended the Klinaklini River beyond the point where it is fed by the Klinaklini Glacier, at the confluence of the river's west and main branches. Mr. Elwood challenges this suggestion, pointing out that the Klinaklini Glacier ascends some distance further into the mountains on the west side of the Klinaklini River. On its face, Duff's description does not limit hunting activity to the confluence of the river branches. It indicates that the Tenaktut "seldom if ever ventured beyond that", which can be interpreted to refer to the glacier itself.

158 Mr. Glendale provided some oral history told by his grandmother about a "grease trail" from the head of Knight Inlet through the Klinaklini Canyon north into the Chilcotin, which was used regularly for hunting, trapping and gathering berries and plants, as well as to trade eulachon oil with other First Nations. He deposed that the history of the Da'naxda'xw people, as taught to him by his parents and grandparents, is that they have a deep historical and spiritual connection to the land and waters of Knight Inlet and the rivers that flow into it.

159 The government says that this evidence is not relevant because it does not speak to the use of the land in the pre-sovereignty period. The Da'naxda'xw say that the oral history provided by Mr. Glendale is relevant to a preliminary assessment of the claim as it is consistent with the oral histories recorded in Mr. Neary's report. Mr. Neary recorded some traditional stories of the Da'naxda'xw that describe origins from supernatural or mythic ancestors as well as their rights to sites in their territory and in particular, along the Klinaklini River. Some of these traditional stories refer to activities and legends along the Klinaklini River, and at least one mentions the upper part of the river.

160 In my opinion, the oral history provided by Mr. Glendale may be relevant, particularly if the Da'naxda'xw rely on present occupation as proof of occupation pre-sovereignty. As the court held in *Delgamukw* (at para. 143), in such a case, the First Nation must establish continuity between the two.

161 The government submits that a preliminary assessment of this evidence shows that the Da'naxda'xw do not have a strong *prima facie* claim of aboriginal title to the lands in the Upper Klinaklini Conservancy, as there is no evidence of

pre-sovereignty exclusive occupation and the ethnographic records indicate that the Da'naxda'xw rarely ventured upstream into that area. It says that if the Da'naxda'xw have a claim, it is a claim for aboriginal rights, which will only benefit from the protection of the land within the conservancy.

162 The Da'naxda'xw submit that they have a credible *prima facie* claim for title based on their clear presence in the area immediately south of the conservancy and the ethnographic and oral history evidence that shows some use of the area within it. They caution against the court taking a piecemeal approach to determining title and say that evidence of exclusive occupation in the area adjacent to the Upper Klinaklini may be relevant to their title claim to the whole area. They say that in any event they have a strong *prima facie* claim to the area south of the conservancy, where the power house for the Project is proposed to be located, and for the purpose of assessing the strength of claim in this context it is sufficient to show a *prima facie* claim to the Project area.

163 While the test for proving aboriginal title established in *Delgamuukw* is well established, the application of the test in the context of aboriginal conceptions of territory and land use is not an easy task. In *Marshall and Bernard*, Chief Justice McLachlin, for the majority, examined more closely the issues of exclusive control, whether nomadic and semi-nomadic peoples can ever claim title to land and the requirement of continuity. She held (at para. 68) that underlying these issues "is the need for a sensitive and generous approach to the evidence tendered to establish aboriginal rights, be they the right to title or lesser rights to fish, hunt or gather."

164 On the issue of exclusive control, the Chief Justice held that evidence of acts of exclusion is not required to establish aboriginal title, recognizing that evidence may be hard to find, particularly if an area was sparsely populated or if the aboriginal group exercised control by sharing rather than exclusion. It is therefore critical to view this question from the aboriginal perspective. At para. 65:

All that is required is demonstration of effective control of the land by the group, from which a reasonable inference can be drawn that it could have excluded others had it chosen to do so.

165 On the issue of whether a nomadic or semi-nomadic people enjoyed sufficient physical possession to give them title, she held that this is a question of fact that depends on all the circumstances, "in particular the nature of the land and the manner in which it is commonly used" (at para. 66).

166 Finally, she explained that the requirement of continuity means that claimants must establish a connection with the pre-sovereignty group upon whose practices they rely. At para. 67:

To claim title, the group's connection with the land must be shown to have been "of a central significance to their distinctive culture": *Adams*, at para. 26. If the group has "maintained a substantial connection" with the land since sovereignty, this establishes the required "central significance": *Delgamuukw*, per Lamer, C.J., at paras. 150-51.

167 These principles are summarized at para. 70, where the Chief Justice reiterated that both the aboriginal and common law perspectives must be taken into account.

168 LeBel and Fish JJ. concurred in the disposition of the case but dissented on the basis that the approach of the majority was too narrowly focused on common law concepts relating to property interests. The aboriginal perspective was considered in relation to title claims at para. 140:

In *Delgamuukw*, Lamer C.J. acknowledged having stated in *R. v. Adams*, [1996] 3 S.C.R. 101, that a claim to title is made out when a group can demonstrate "that their connection with the piece of land ... was of a central significance to their distinctive culture" (*Adams*, at para. 26). He concluded that this requirement, while remaining a crucial part of the test for aboriginal rights generally, is subsumed by the requirement of occupancy in the test for aboriginal title. This demonstrates that anyone considering the degree of occupation sufficient to establish title must be

mindful that aboriginal title is ultimately premised upon the notion that the specific land or territory at issue was of central significance to the aboriginal group's culture. Occupation should therefore be proved by evidence not of regular and intensive use of the land but of the traditions and culture of the group that connect it with the land. Thus, intensity of use is related not only to common law notions of possession but also to the aboriginal perspective.

169 It is not for me in this proceeding to consider the strength of the claim in any but a preliminary way, but based on the evidence before me, I cannot conclude that the Da'naxda'xw's title claim is as weak as the government submits. There is evidence of a strong *prima facie* claim to the area immediately south of the conservancy and the ethnographic and oral history evidence relating to the Da'naxda'xw peoples' tradition and culture may connect it with the Upper Klinaklini area. There may be evidence from which reasonable inferences could be drawn that the Da'naxda'xw enjoyed sufficient physical possession given the nature of the land and the manner in which it was commonly used, and that they did or could have excluded others from the area.

Treaty negotiations and overlapping claims

170 The parties raised two other matters related to the preliminary assessment of the claim: (1) the Da'naxda'xw's involvement in treaty negotiations under the B.C. Treaty Commission process; and (2) the overlapping claim of the Ulkatcho First Nation to the Upper Klinaklini area.

171 The Da'naxda'xw say that the fact that they are pursuing their claim in treaty negotiations is some evidence that their claim is credible. They rely in part on *Huu-ay-aht First Nation v. British Columbia (Minister of Forests)*, 2005 BCSC 697, where the court found that acceptance of the First Nation's claim into the B.C. treaty process established a *prima facie* case in support of its aboriginal rights and title. The government pointed out, however, that acceptance of a claim into the B.C. treaty process is not based on or subject to any preliminary determination that the First Nation has aboriginal rights or title in the traditional territory that form the subject of the negotiations. The Policies and Procedures of the B.C. Treaty Commission state that the Commission

... does not make any determination of the boundaries of a First Nation's traditional territory. However, the Commission must be able to determine that the aboriginal people represented in the Statement of Intent have a distinct traditional territory that is generally recognized as being their own.

172 There is no explanation as to how the Commission determines that the traditional territory of the aboriginal people is "generally recognized as being their own" and there is no reference at all to aboriginal rights and title claims.

173 The court in *Huu-ay-aht* apparently relied on the following paragraph in *Taku Tiver Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74:

30 There is sufficient evidence to conclude that the TRTFN have *prima facie* Aboriginal rights and title over at least some of the area that they claim. Their land claim underwent an extensive validation process in order to be accepted into the federal land claims policy in 1984. The Department of Indian Affairs hired a researcher to report on the claim, and her report was reviewed at several stages before the Minister validated the claim based on the TRTFN's traditional use and occupancy of the land and resources in question. In order to participate in treaty negotiations under the B.C. Treaty Commission, the TRTFN were required to file a statement of intent setting out their asserted territory and the basis for their claim. An Aboriginal group need not be accepted into the treaty process for the Crown's duty to consult to apply to them. Nonetheless, the TRTFN's claim was accepted for negotiation on the basis of a preliminary decision as to its validity. In contrast to the *Haida* case, the courts below did not engage in a detailed preliminary assessment of the various aspects of the TRTFN's claims, which are broad in

scope. However, acceptance of its title claim for negotiation establishes a *prima facie* case in support of its Aboriginal rights and title.

174 I interpret these comments, which refer specifically to the extensive validation process under the 1984 federal land claims policy, to be an important part of the conclusion that the acceptance of Taku's claim for negotiation established a *prima facie* case in support of its claim. The evidence before me shows that the B.C. Treaty Commission does not itself make any assessment of the aboriginal rights and title claims asserted by First Nations who enter the treaty process.

175 I agree with the government that acceptance into the B.C. treaty process does not *in itself* establish a *prima facie* case in support of a claim for aboriginal rights and title. However, other factors may provide support to a claim that is being pursued in treaty negotiations, such as prior validation under the 1984 federal policy, or evidence that negotiations are at an advanced stage of discussions regarding the specific land in question. In this case, the only evidence before me is that the Da'naxda'xw filed a Statement of Intent with the B.C. Treaty Commission on April 9, 1997 and is currently in the process of negotiating an agreement in principle. In these circumstances, it is my opinion that there is little to be taken from the fact of these treaty negotiations, other than that the Da'naxda'xw are consistently pursuing their claims to their traditional territories, which include the Upper Klinaklini River in the area of the conservancy.

176 The government raised the issue of the competing or overlapping claim to the Upper Klinaklini area by the Ulkatcho First Nation. It submitted that this competing claim raises uncertainty and weakens the claim of the Da'naxda'xw. However, there is no evidence about the basis for the Ulkatcho First Nation's claim, other than the fact that the Carrier Chilcotin Tribal Council has published a "Draft Territory Boundaries" map that includes the asserted territorial boundaries of the Ulkatcho, which extend from the Chilcotin area south to include the Klinaklini River. There is no basis upon which I can make any preliminary assessment of this competing claim, nor would it be appropriate to do so in this proceeding. This is a very different circumstance than that in *Lax Kw'Alaams Indian Band v. British Columbia (Minister of Forests)*, 2004 BCSC 420, where First Nations with overlapping claims intervened in the proceeding. It is also different from *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, 2005 BCCA 128, where there was evidence in an archaeological report that the Musqueam had the strongest case for title over a piece of land than the other bands in the area who had made competing claims. Here, I have no evidence before me that compares the claim of the Da'naxda'xw with that of the Ulkatcho. The mere fact that the Ulkatcho First Nation also asserts a claim to the conservancy area is insufficient evidence to conclude that the Da'naxda'xw's claim is thereby weakened.

Preliminary assessment

177 The Da'naxda'xw may have difficulty proving aboriginal title to the Upper Klinaklini River in accordance with the tests established in *Delgamuukw* and *Marshall and Bernard* but I cannot conclude on a preliminary assessment that their claim is at all bound to fail. I do not consider it a strong claim but I am satisfied that it is a reasonably credible one, as they claim that this area was of central significance to their culture. According to *Marshall* and *Bernard*, the Da'naxda'xw may be able to establish that they enjoyed sufficient exclusive physical possession when the nature of the land and the manner in which it was commonly used is considered.

The seriousness of the potentially adverse effect

178 The government says that the potential impact of the Minister's decision is hypothetical and speculative given that the ultimate decision to amend the boundary did not lie with the Minister and there was no certainty that the Project would succeed in obtaining the required environmental approvals. It also submits that the nature of the alleged harm to the Da'naxda'xw's aboriginal title is not irreversible or irreparable, given its economic nature. In the event the Da'naxda'xw proved aboriginal title, they may be entitled to compensation if the Minister's refusal to recommend the boundary amendment is determined to be an unjustified infringement of that title.

179 The Da'naxda'xw say that the impact of the Minister's decision is serious because they have lost a unique opportunity to benefit economically and they have been denied a say in the management of the conservancy. They submit that the concept of irreversible or irreparable harm is relevant where an injunction is sought but not in relation to the duty to consult.

180 The concepts of irreversible or irreparable harm are closely related to the law of injunctions and they do form a backdrop to the overall purpose of the duty to consult, as noted in *Rio Tinto* (at para. 41). While they may be relevant, it is not necessary, in my view, to find irreversible or irreparable harm to conclude that a potentially adverse impact is serious.

181 I have earlier found that the potential impact of the Minister's decision was not speculative. The Minister's decision means that the amendment request will not be considered by Cabinet. While the extent of the Da'naxda'xw's lost economic opportunity is by no means certain, the effect of the decision definitively puts an end to the Project and this future use of the land is now foreclosed. The decision has also established a process of consultation about boundary amendments within the confines of the Ministry's own policy, and this may foreclose future consideration in the government-to-government process that has been the subject of on-going negotiations. In this context, I consider the potentially adverse impact to the Da'naxda'xw to be quite serious.

The adequacy of the duty to consult: did the Crown fulfill its duty?

182 Given my conclusions that the Da'naxda'xw's aboriginal title claim is reasonably credible and the potentially adverse impact of the Minister's decision quite serious, it is my view that the scope of consultation required a meaningful exchange of information with a view to considering a reasonable accommodation, within the mid-range of the spectrum.

183 Both the Da'naxda'xw and the government rely on the lengthy history of consultation in the LRMP process and subsequent agreements in principle, but for different reasons.

184 The Da'naxda'xw say that that the Crown cannot rely on this prior consultation to answer its duty to consult in relation to the request to amend the conservancy boundary. They submit that the duty to consult is an ongoing obligation which cannot be isolated to a particular phase of a decision-making process.

185 The government says that the Da'naxda'xw's position is an artificially compartmentalized approach to the facts. It submits that the consultation history evidences the full participation of the Da'naxda'xw in the LRMP process and their express agreement with the scope of protection in and the boundaries to the Upper Klinaklini Conservancy. Mr. Yearwood referred me to this comment in *R. v. Lefthand*, 2007 ABCA 206 at para. 40:

There is also no duty to consult with respect to every minute decision made by government. If there has been adequate consultation with respect to a program or regime of regulation or development, that will satisfy the constitutional requirement for consultation. It is not thereafter necessary to consult again with respect to every administrative decision made to implement that strategy: *R. v. Douglas*, 2007 BCCA 265, at para. 42. That is so even if some particular decision arguably takes the program in a different direction or expands somewhat the parameters of the regime, so long as the new direction was fairly within the scope of the original consultation. Thus there was no fresh duty of consultation when the *Variation Orders* were renewed each year.

186 In that case, the issues arose in the context, similar to that in *R. v. Douglas*, of a treaty rights defence asserted in a prosecution for breaches of variation orders made to regulations under the *Fisheries Act*, R.S.C. 1985, c. F-14. The accused argued that the variation orders were invalid because of a failure to consult with the aboriginal peoples affected by them before they were adopted but there was no evidence that the government failed to provide a reasonable opportunity to consult in the regulatory review process. That is quite a different context than this case. I do not characterize the Minister's decision of April 27, 2010 as an administrative decision made to implement a strategy earlier

established after consultation. It was a decision that was consistent with the earlier consultations, but it was made after the Da'naxda'xw brought concerns about the boundary to the government's attention not long after the implementation phase of the LRMP process began in 2006.

187 I have already reviewed the evidence related to this history of consultation. In my view, this earlier consultation and negotiation, while important, cannot satisfy the Crown's duty to consult with respect to the concerns raised by the Da'naxda'xw about the boundary amendment needed to allow the Project to be considered for environmental approval. It is important to note that the LRMP process involved consultations on a regional scale, and while the Da'naxda'xw participated in the process, they did so on the basis that there would also be direct negotiations with the government to address their specific interests within the protected areas and for co-management agreements. The agreements that were reached in March 2006 and June 2007 establish that the parties considered co-management of the conservancy to be an important part of defining a new relationship. When the Da'naxda'xw decided that the Project was compatible with their interests within the conservancy, they reasonably concluded that their request to amend the boundary would be dealt with in the collaborative manner as contemplated by these agreements, and before the conservancy was established in legislation.

188 What followed was quite different. I do not accept the government's submission that there was extensive consultation with the Da'naxda'xw before the introduction of Bill 38. While the Ministry staff were immensely helpful in facilitating the Da'naxda'xw's request, none of them had any authority to materially change the boundaries, and the work they did was not considered by the Minister. As I have found, the Minister was not prepared to recommend any boundary changes that were not consistent with the protected areas that had been agreed to in 2006 through the LRMP process. Given this, I cannot conclude that the efforts of Ministry staff constituted adequate consultation. I find that the meeting with the Minister of May 17, 2007 was a start, but it went nowhere, and prior to Bill 38, the specific concerns of the Da'naxda'xw regarding the boundary were not considered at all. Consultation that excludes the possibility of any form of accommodation is meaningless: see *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para. 54.

189 The government argued that the Da'naxda'xw had actually agreed to the boundaries of the Upper Klinaklini Conservancy in December 2006. I consider the evidence about this to be wholly insufficient, as it is vague and relies on hearsay. The Da'naxda'xw representative who allegedly agreed to an unidentified map provided no evidence in this proceeding. In any event, I have found that the Da'naxda'xw had agreed to the conservancy generally and the boundary amendment was something that no one had previously contemplated. This does not change the fact that their concerns about the boundary amendment were not addressed by the Crown through adequate consultation.

190 Following the enactment of Bill 38, the Minister was prepared to consider the Da'naxda'xw's boundary amendment request. Negotiations continued in respect of a government-to-government consultation process for managing the Upper Klinaklini Conservancy, which included a process for considering boundary amendments, but the government insisted that this specific request be dealt with under the Ministry's existing 2004 Park Policy. I find the government's insistence to apply this policy to be inconsistent with the intent and purpose of the Collaborative Agreement of June 2007.

191 It is important that the parties to the Collaborative Agreement are the Da'naxda'xw and the Province as represented by the Ministry of Environment. In it, the parties expressly stated their wish "to collaboratively work together" and the purpose of the agreement was "to develop a collaborative relationship" with respect to the planning, management and use of the conservancy (then described as Protected Areas). While the agreement was not intended to be legally binding, it was intended to "establish a working relationship and to improve communications between the Parties." Paragraph 18 provided:

Through their collaborative relationship, the Parties will plan, manage and use the Protected Areas in a manner that:

- (e) provides the First Nation with enhanced access to economic opportunities in the Protected Areas that are compatible with protecting the natural, cultural and recreational values of the Protected Areas ...

192 A process was established for developing a management plan, which was to "guide the management of natural, cultural, spiritual, recreational and heritage values and to identify compatible economic opportunities, all being consistent with provincial and federal legislation and Aboriginal Rights." A management plan could include "guidelines and other proposals concerning compatible economic development."

193 In my view, these provisions show that the parties contemplated a relationship where the Da'naxda'xw would be involved in managing the Upper Klinaklini Conservancy in a way that would give them access to economic opportunities, provided those opportunities were compatible with the protection of the other values identified. The Da'naxda'xw considered the Project to be such an economic opportunity. By insisting on applying the existing policy, the government failed to work collaboratively, contrary to its commitment in the agreement, and effectively ignored the Da'naxda'xw's interests in participating in management decisions that included proposals for compatible economic development within the conservancy. I do not think that this approach is in keeping with the honour of the Crown.

194 It is important that throughout the entire process, from the time the Da'naxda'xw first requested the boundary amendment in July 2006 to the Minister's decision of April 27, 2010, no one from the Ministry of Environment, including Minister Penner, expressed any substantive concerns about the potential adverse environmental impacts of the Project in the context of the boundary amendment. If the Minister became concerned after he reviewed the material provided to him in January and April 2010 (as set out in the decision letter), he ought to have informed the Da'naxda'xw about this and given them an opportunity to respond. This is particularly important in the context here because of the expressly stated assumption in the Da'naxda'xw's January 18, 2010 submission that the potential environmental impacts would be addressed in the EAO process. It is also important because the Minister stated in the decision letter that "it has been difficult to pin down project specifics" due to differing descriptions in the January 18, 2010 submission and other correspondence subsequently received from Kleana. The Da'naxda'xw should have been given the opportunity to clarify the specifics of the Project.

195 In addition to this, the government amended the 2004 Park Policy after the Da'naxda'xw made the January 18, 2010 submission, and without any notice to them. As I reviewed before, the 2010 Protected Area Policy included several changes that are relevant here. First, the new policy expressly states that a proponent may also be a First Nation. Second, there is a new provision that applies where a proposed boundary adjustment relates to a reviewable project under the EAO process. BC Parks and the EAO are to "coordinate their respective information requirements" to assist a proponent to collect and report on information required by both processes. Finally, a proposal could now be rejected where "significant adverse effects on environmental or social values cannot be avoided, mitigated or compensated for". The 2004 Park Policy did not include these broader environmental factors as a basis for rejection.

196 The Minister's decision letter of April 27, 2010 lists a number of potential adverse environmental impacts, which appear to be based on the 2010 Protected Area Policy and form the basis for his rejection of the Da'naxda'xw's request. If the Minister was applying the 2010 Protected Area Policy, this should have been clear, and the Da'naxda'xw should have been given an opportunity to review the new policy and provide further comments. Moreover, the decision letter makes no reference to the fact that the Project was at the time reviewable under the EAO process and there is no evidence that any effort was made by BC Parks or the EAO to coordinate their respective information requirements.

197 As I indicated before, the scope of consultation in this case required a meaningful exchange of information within the mid-range of the spectrum. In the particular circumstances here, a meaningful exchange of information required the Minister to consider the Da'naxda'xw's request in the context of the terms of the Collaborative Agreement and the on-going negotiations about a government-to-government process for managing the conservancy and considering boundary amendments, and to provide the Da'naxda'xw with an opportunity to respond to any substantive concerns the Minister may have had. While the Minister was entitled to consider the public interest as described in the

government's policy, this required something more than the opportunity for the Da'naxda'xw to make an application within the scope of that policy. It required an opportunity for some dialogue on a government-to-government basis with a view to considering a reasonable accommodation of the Da'naxda'xw's interests in allowing the Project to be assessed in the EAO process.

198 For all of these reasons, I have concluded that the Crown failed to fulfill its duty to consult. The consultation carried out in respect of the boundary amendment request was inadequate. Prior to the enactment of Bill 38, despite the efforts of Ministry staff, the Minister did not consider at all the specific concerns of the Da'naxda'xw regarding the boundary of the Upper Klinaklini Conservancy in relation to the Project. Subsequently, the Minister failed to provide the Da'naxda'xw with an opportunity to respond to his concerns about the potential environmental impacts of the Project and failed to consider any form of accommodation.

Administrative law issues

1. Legitimate expectations

199 The Petitioners' argument that the Minister's decision was a breach of their legitimate expectations relies on findings that there were two promises or assurances of a process. In their initial submission, they describe the two assurances as: (1) prior to Bill 38, Ministry staff assured them that the Minister would address the boundary amendment request separately from the environmental assessment of the Project, which would be addressed through the EAO process, and (2) after Bill 38, the Minister and Deputy Minister assured them that the request would be resolved through a government-to-government process with the Da'naxda'xw. They submit that they are seeking only procedural relief in the form of a declaration that they have legitimate expectations to one or both of these processes.

200 In their Reply, the Petitioners describe the assurances in stronger terms: (1) the Minister would recommend a proposal by the Da'naxda'xw to amend the conservancy boundary; and (2) the Minister would not reject a proposal by the Da'naxda'xw without first engaging them in a meaningful government-to-government process to resolve his concerns.

201 I have not found that the Minister made assurances that he would recommend the amendment or that he would address the Da'naxda'xw's request regarding the Upper Klinaklini Conservancy in a government-to-government process. I have found that prior to Bill 38, the Minister's staff consulted with the Da'naxda'xw on the basis that they were not considering the merits of the Project, as the potential environmental impacts were to be determined through the EAO process, and in January 2010 (after Bill 38) the Da'naxda'xw made their submission to the government on the same understanding. Given these findings, I need only consider whether the Petitioners had a legitimate expectation that the issues related to the potential environmental impacts would be considered in the EAO process, and not in the boundary amendment request.

202 The government submits that the doctrine of legitimate expectations does not apply in this case because the Minister was exercising a statutory power under s. 3 of the *Park Act*, which provides no indication that the Legislature intended that the Minister adopt any process or procedure in making his decision.

203 The doctrine of legitimate expectations is an extension of the rules of natural justice and procedural fairness and does not, in Canada, create substantive rights: *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, 2001 SCC 41 at paras. 29-38. In *Old St. Boniface*, the court held (at p. 1204) that this principle

.. affords a party affected by the decision of a public official an opportunity to make representations in circumstances in which there otherwise would be no such opportunity. The court supplies the omission where, based on the conduct of the public official, a party has been led to believe that his or her rights would not be affected without consultation.

204 It is not in dispute that this doctrine does not apply to a body exercising purely legislative functions: see *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525 at 558; *Mount Sinai* at paras. 33-34. The parties disagree as to whether Minister Penner's decision was legislative in nature. The government says that it was, as the decision whether or not to make a recommendation to Cabinet is part of the legislative process. The Petitioners say that the general management authority in s. 3 of the *Park Act* is not a legislative power as the Minister cannot make regulations or issue any other enactment.

205 As Binnie J. acknowledged in *Mount Sinai* (at para. 34), there may be difficulty in some contexts in distinguishing when the legislative exception applies and when it does not. In *Reference Re Canada Assistance Plan*, the court held that the exception applied to the executive in respect of the introduction of legislation, emphasizing the integral role of the executive in the legislative process. Mr. Copley sought to equate the Minister's role here with the legislative process of Cabinet.

206 Section 3 of the *Park Act* gives the Minister jurisdiction over conservancies and directs him to manage and administer all matters concerning these lands and public and private use in them. Section 7 gives Cabinet the power to revise the boundaries of a conservancy.

207 *Reference Re Canada Assistance Plan* concerned a restraint on the executive in the introduction of legislation. The court held (at p. 559) that "[p]arliamentary government would be paralyzed if the doctrine of legitimate expectations could be applied to prevent the government from introducing legislation in Parliament" and "would place a fetter on this essential feature of democracy." In the context of the statutory powers in this case, where Cabinet has the power to revise a conservancy boundary, the Minister's decision whether or not to make a recommendation to Cabinet is similar to an executive decision whether or not to introduce legislation in Parliament. Conceptually it should make no difference that the decision is not to recommend legislation; the function as part of the legislative process is the same.

208 In this case, however, despite the power in s. 7 of the *Park Act*, the government has consistently taken the position that an amendment to the conservancy boundary would require the introduction of legislation in the Legislature. The evidence shows that this was government's intention after Bill 38 was passed into law.³ In this context, the Minister's role in making a recommendation to Cabinet is a step removed from the legislative process, as Cabinet would decide whether or not to introduce legislation. I have serious doubts that the Minister's decision in these particular circumstances falls within the legislative exception. However, it is not necessary for me to decide this interesting issue, as I have concluded that the doctrine of legitimate expectations does not provide procedural protection to the Petitioners given the nature of the decision in any event and the representations that were made about the process.

209 Assuming that the legislative exception does not apply, the decision here can be characterized as a ministerial decision made on grounds of public policy. It was a decision made under the Minister's statutory authority to manage the conservancy and apparently in accordance with the 2010 Protected Area Policy. A purely ministerial decision made on broad grounds of public policy will not typically afford procedural protection: see *Martineau v. Matsqui Institution*, [1980] 1 S.C.R. 602. However, the decision affected the individual interests of the Petitioners.

210 The Petitioners submit that the requirement of the Minister's recommendation before a boundary amendment will go to Cabinet is a matter of government policy and practice, the application of which had significant implications to them, and the fact that this was a ministerial decision does not in itself exempt it from procedural fairness or legitimate expectations. I agree that the decision would still afford some degree of procedural fairness, but in this case it does not extend to legitimate expectations.

211 In *Mount Sinai*, Binnie J. stated at para. 29:

Under our case law the availability and content of procedural fairness are generally driven by the nature of the applicant's interest and the nature of the power exercised by the public authority in relation to that interest: Brown and Evans, *supra*, p. 7-13 *et seq.*; D.J. Mullan, "Confining the

Reach of Legitimate Expectations' Case Comment: *Sunshine Coast Parents for French v. School District No. 46 (Sunshine Coast)*" (1991), 44 Admin. L.R. 245, at p. 248. The doctrine of legitimate expectations, on the other hand, looks to the *conduct* of the public authority in the exercise of that power (*Old St. Boniface, supra*, at p. 1204) including established practices, conduct or representations that can be characterized as clear, unambiguous and unqualified (Brown and Evans, *supra*, at p. 7-41). The expectations must not conflict with the public authority's statutory remit.

(emphasis added)

212 I have difficulty with the Petitioners' submission that the Minister or his staff could promise to follow any procedure without coming into conflict with a statutory duty. While s. 3 of the *Park Act* is silent about procedure, the declaration sought by the Petitioners, that they had legitimate expectations that the environmental impacts would not be assessed in the boundary amendment request but in the EAO process, seeks more than just procedural relief. It seeks to limit the Minister's discretion to consider the broader public interest in carrying out his statutory duties and responsibilities. The Minister's duties to manage and administer all matters concerning conservancies are expressed in broad terms, and include specific matters all of which involve considerations of the public interest. In this way, the Petitioners' expectations may conflict with the Minister's statutory remit.

213 I am also not satisfied that the conduct of the Minister's staff or the representations made to the Petitioners that the merits of the Project would be assessed in the EAO process were clear, unambiguous and unqualified. This was the basis on which the government proceeded to consult with the Da'naxda'xw in January 2008. However, before the Da'naxda'xw made their formal submission in January 2010, the Minister and his staff insisted on applying the 2004 Park Policy, which mandated boundary adjustments "only where there are significant benefits to the Province" and required that environmental impacts be "documented". Although the Da'naxda'xw made their submission expressly on their prior understanding, the conduct by the Minister's staff was ambiguous at least and the earlier representations were qualified by the application of the policy.

214 I have found that the Minister failed to live up to the honour of the Crown in relation to the duty to consult with the Da'naxda'xw for reasons that are related to the matters raised here, but my findings on these more discreet issues are not sufficient, in my view, to establish a breach of the legitimate expectations of the Petitioners.

2. Public law estoppel

215 Public law estoppel includes the following requirements from private law, as summarized in *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50 at 57 and referred to in *Mount Sinai* at para. 45:

... The party relying on the doctrine must establish that the other party has, [1] by words or conduct, made a promise or assurance [2] which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, [3] in reliance on the representation, [4] he acted on it or in some way changed his position ...

[T]he promise must be unambiguous but could be inferred from circumstances.

216 In the public law context, circumstances that might otherwise create an estoppel may have to yield to an overriding public interest as expressed in applicable legislation: *Mount Sinai*, para. 47.

217 The Petitioners' argument based on public law estoppel relies on a finding that the Minister made a promise or assurance that he would recommend the boundary amendment to Cabinet. Given my findings to the contrary, there is no factual foundation to apply the doctrine of public law estoppel and it is not necessary to consider the Petitioners'

argument that the Minister's assurances were consistent with his statutory duties.

3. Abuse of discretion and unreasonable decision

Excess of jurisdiction

218 In a "beguilingly simple" argument, the Petitioners submit that the Minister's refusal to make a recommendation and to convey the Da'naxda'xw's January 2010 submission to Cabinet is in excess of his jurisdiction. Because the Minister has no authority to decide whether or not a boundary will be amended, they say that his decision to refuse to make a recommendation effectively denies them the right to have the matter considered by Cabinet, the body with the authority to decide. They also say that the 2010 Protected Area Policy improperly gives the Minister a gatekeeper function.

219 The government submits that it is not in excess of jurisdiction to refuse to refer a matter to Cabinet, as anyone, including the Petitioners, may make a submission directly to Cabinet. While this may be so, the fact is that the current policy requires a recommendation by the Minister before a proposal can go to Cabinet.

220 Despite this, I do not think that the Minister's decision was made in excess of his jurisdiction. The Petitioners rely on passages from Wade & Forsyth, *Administrative Law*, 7th ed. at pp. 349-350, which discuss examples of improper delegation of decision-making authority. At p. 350:

Convenience and necessity often demand that a public authority should work through committees, executive officers and other such agencies. The law makes little difficulty over this provided that the subordinate agencies merely recommend, leaving the legal act of decision to the body specifically empowered.

(emphasis added)

221 This case does not involve Cabinet delegating its decision-making authority to the Minister. The 2010 Protected Area Policy does not give the Minister authority to decide that a boundary amendment will be made. Under the policy, the Minister decides only whether or not to make a recommendation. If he does, the matter will go to Cabinet for a decision. If Cabinet decides to proceed with a "boundary adjustment", there are two routes that can be taken. If the existing boundary was established by Order in Council, Cabinet may amend a boundary in the same way. Otherwise, a legislative amendment will be introduced. Either way, the final decision rests either with Cabinet or the Legislature.

222 In my opinion, the Minister acts within his jurisdiction when he decides whether or not to make a recommendation for Cabinet to consider. The consequence of a refusal to make a recommendation may be that Cabinet will not be asked to make a decision but I cannot conclude that this usurps Cabinet's decision-making authority.

Unreasonable decision

223 The Petitioners' arguments that the Minister's decision was unreasonable are based primarily on issues of procedure. They refer to the history of encouragement by the Minister and his staff and the Petitioners' reliance on this. Given this, they submit that if the Minister had concerns with the Project it was incumbent on him to at least consult with them. This is not a sufficient basis on which I can conclude that the substantive decision was unreasonable.

224 I accept the submission of the government that the Minister's decision was one made in the exercise of his discretion and should be given considerable deference. Mr. Copley referred me to a number of cases which establish that such decisions should be upheld unless it can be shown that they are patently unreasonable: *Mount Sinai; Baker; Maple Lodge Farms Ltd. v. Government of Canada*, [1982] 2 S.C.R. 2; *Shell Canada Products Ltd. v. Vancouver (City)*,

[1994] 1 S.C.R. 231. Since the standard of patent unreasonableness was eliminated in *Dunsmuir v. New Brunswick*, 2008 SCC 9, I have considered these authorities in the context of a standard of reasonableness. Nevertheless, the amount of deference to be given will depend on various factors, including the nature of the decision itself.

225 In *Mount Sinai*, Binnie J. held (at para. 58) that "[d]ecisions of Ministers of the Crown in the exercise of discretionary powers in the administrative context should generally receive the highest standard of deference". This is particularly so where the exercise of the power turns on a Minister's appreciation of the public interest, "which is a function of public policy in its fullest sense."

226 I have already discussed the nature of the Minister's decision here and his duty to consider the public interest. I am not satisfied on the basis of the evidence before me that the decision was unreasonable.

227 The Petitioners also referred me to the evidence of Mr. Eunall about various aspects of the Project to support an argument that the decision was unreasonable. I am not in a position to assess the weight of this evidence. The matters raised here are more properly addressed in the further consultations with the Da'naxda'xw that will be required as a result of the Minister's breach of the duty to consult.

Remedy

228 The Petitioners have not established that they are entitled to any relief on administrative law grounds but the Da'naxda'xw have established that they are entitled to a remedy for the Crown's breach of its duty to consult. While it may be obvious, it is important to emphasize that the Crown's constitutional duty to consult is owed only to a First Nation.

229 In this case, Mr. Glendale is both a councillor of the Da'naxda'xw and a director of Kleana. I have considered his evidence with this in mind, as it is not proper for a corporate entity with First Nation directors (or shareholders) to be the recipient of this constitutional duty. In this case, the evidence clearly shows that the Da'naxda'xw have been actively engaged in consultations with the Crown for many years in respect of the Upper Klinaklini and I am satisfied that they are entitled to be adequately consulted about the requested boundary amendment.

230 The Da'naxda'xw seek an order quashing the Minister's decision of April 27, 2010, and declaratory relief directing the Minister to recommend to Cabinet that the boundaries of the Upper Klinaklini Conservancy be amended. Alternatively, they seek an order directing the Minister to consult in a government-to-government process.

231 The government submits that the appropriate order in these circumstances is one directing the Minister to reconsider his decision after carrying out the appropriate level of consultation. It says that the order sought by the Da'naxda'xw is akin to *mandamus* and the jurisdictional prerequisites for the issuance of such an order have not been met, citing *Apotex v. Canada (Attorney General)*, [1994] F.C. 742, aff'd [1994] 3 S.C.R. 1100.

232 The court may quash a decision where it has been made without adequate consultation or accommodation: *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2010 BCSC 359 at para. 78. It is rare, however, for the court to become involved in directing a particular form of accommodation. In *Musqueam Indian Band* it was held that the Crown and First Nation should be left to engage in "the broadest consideration of appropriate arrangements". See also *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1620 at para. 23.

233 The consequence of the Minister's breach of the duty to consult is that no accommodation of the Da'naxda'xw's interests was considered. The circumstances here are quite different from those in *West Moberly First Nations*, where the court found that accommodation which was put in place was not reasonable.

234 I do not consider this an appropriate case to direct the Minister to make the recommendation sought. However, I have concluded that the Da'naxda'xw are entitled to the following relief:

1. an order in the nature of *certiorari*, quashing the Minister's decision of April 27, 2010;
2. a declaration that the Minister has a legal duty to consult with the Da'naxda'xw about their request for an amendment to the boundary of the Upper Klinaklini Conservancy, with a view to considering a reasonable accommodation; and
3. a declaration that the Minister failed to fulfill his constitutional duty to adequately consult with the Da'naxda'xw in the course of deciding whether to recommend an amendment to the boundary of the Upper Klinaklini Conservancy to Cabinet.

235 As I have determined, the scope of consultation in this case requires the Minister to consider the Da'naxda'xw's request in the context of the terms of the June 2007 Collaborative Agreement and the on-going negotiations about a government-to-government process for managing the conservancy and considering boundary amendments, and to provide them with an opportunity to respond to his concerns about the potential negative environmental impacts of the Project. While the Minister is entitled to consider the public interest as described in the government's policy, this requires something more than the opportunity to make an application within the scope of that policy. It requires an opportunity for some dialogue on a government-to-government basis with a view to considering a reasonable accommodation of the Da'naxda'xw's interests in allowing the Project to be assessed in the EAO process.

236 All other relief claimed in the Petition is dismissed. The issue of costs may be spoken to.

B. FISHER J.

cp/e/qllxr/qlvxw

1 I suspect that Mr. Smith's later characterization of the amendment as an "error" and the need to make a "correction" to an "administrative error", on November 4, 2008 and in October 2009, may have been the source of the Minister's confusion about the representations made by the Petitioners as to the extent of the boundary amendment. However, it is neither possible nor necessary to make a finding on this point.

2 Mr. Smith made other allegations that Minister Penner told him at various times that the correction would be made. This evidence was imprecise. He also alleged that other Ministers told him they were going to "fix this thing for you". I did not find any of this evidence to be sufficiently reliable to support a specific finding.

3 Mr. Copley submitted that either process is available. I agree. Cabinet could revise a conservancy boundary under s. 7 of the *Park Act* or it could introduce legislation to amend a boundary that was initially established in legislation.