

IN THE SUPREME COURT OF CANADA

(On Appeal From The Court Of Appeal For British Columbia)

Between:

NORM RINGSTAD, In His Capacity As The Project Assessment Director For The
Tulsequah Chief Mine Project, SHEILA WYNN, In Her Capacity As The Executive
Director, Environmental Assessment Office, THE MINISTER OF ENVIRONMENT,
LANDS AND PARKS AND THE MINISTER OF ENERGY AND MINES AND MINISTER
RESPONSIBLE FOR NORTHERN DEVELOPMENT

Appellants

(Appellants/Respondents on Cross Appeal)

- And -

THE TAKU RIVER TLINGIT FIRST NATION And MELVIN JACK, On Behalf Of
Himself And All Other Members Of The Taku River Tlingit First Nation

Respondents

(Respondents/Appellants on Cross Appeal)

- And -

REDFERN RESOURCES LTD.

Respondent

(Appellant/Respondent on Cross Appeal)

- And -

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NATION

Interveners

**FACTUM OF THE INTERVENER
THE ATTORNEY GENERAL OF CANADA**

*Pursuant to the Order of Bastarache J. made May 28, 2003 and Rule 42(3) of the
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TABLE OF CONTENTS

	<u>Page</u>
PART I – STATEMENT OF FACTS	1
PART II – POINTS IN ISSUE	1
PART III – ARGUMENT	1
Overview	1
A. There is a Limited Requirement to Consult Prior to Establishment of an Existing Aboriginal Right	2
B. The <i>ex ante</i> Requirement to Consult Arises Under the Applicable Statutory Regime	6
C. The Scope or Content of the <i>ex ante</i> Requirement to Consult	11
D. The Standard of Review of the <i>ex ante</i> Requirement to Consult	15
E. Remedies for any Breach of the <i>ex ante</i> Requirement to Consult	16
PART IV – SUBMISSIONS ON COSTS	19
PART V – NATURE OF ORDER SOUGHT	19
PART VI – TABLE OF AUTHORITIES	20
PART VII – LEGISLATION RELIED ON	23

PART I - STATEMENT OF FACTS

1. The Intervener Attorney General of Canada ("Canada") accepts for purposes of this appeal the facts as set forth in the Appellants' Factum at paragraphs 1, 3 to 18 and 23.

PART II - POINTS IN ISSUE

2. Canada is bound to accept the issues as framed by the parties but, nevertheless, submits that Question 2 (Appellants' Factum paragraph 20) ought properly to read (changes in *italics*):

How may any ex ante requirement to consult, if it exists, be defined and applied in a manner that allows the Crown, both provincial and federal, to strike a workable balance between its proprietary interests and statutory duties, its obligations to First Nations, and the public interest at large?

PART III – ARGUMENT

Overview

3. Contrary to the decision of the majority of the Court of Appeal, Canada submits that prior to establishment of an aboriginal right or title there is no fiduciary or constitutional duty to consult with aboriginal groups or to accommodate potential aboriginal rights which may exist. Where, however, an aboriginal right may exist, and the Crown is exercising a statutory power of decision that may infringe that potential right, the statutory regime under which the power is being exercised should be read as including a limited requirement to consult. Such a requirement, which applies to both the provincial and federal governments, arises from the need to interpret and apply that statutory power of decision in a manner consistent with the constitutional values and purpose behind section 35 of the *Constitution Act, 1982*¹, and with the honour of the Crown.

¹ *Constitution Act, 1982*, R.S.C. 1985, App II, No. 44, s. 35 [Canada's Authorities, Tab 30]

4. This *ex ante* requirement is a limited one to act in good faith and to seriously consider potential aboriginal rights. The content of the requirement will vary depending on the circumstances. In fulfilling this requirement the Crown must seriously consider not only the potential aboriginal right but, as well, the interests of the public and other stakeholders which would reasonably be expected to be affected by the Crown's decision.

5. The word "requirement" is used in this Factum to refer to consultation the Crown must do when exercising a statutory power of decision in advance of establishing potential aboriginal rights. We refer to this as the *ex ante* requirement. This requirement is distinguishable from the justification standard set out in *Delgamuukw* and *Sparrow*.² In those cases the Court was looking at what the Crown must do in the context of proven aboriginal rights or title. In the present case, the potential aboriginal rights have not been proven and may ultimately be determined not to exist. If the aboriginal rights do not exist, then neither would a legal duty exist to consult about any infringement. Canada submits that even in that context it is reasonable to construe the statutory regime under which the decision is being made to include a requirement to act in good faith and consider seriously the possible existence of aboriginal rights. This would include some degree of consultation.

A. There is a Limited Requirement to Consult Prior to Establishment of an Existing Aboriginal Right

i. The requirement to consult prior to the establishment of an aboriginal right is to be distinguished from consultation as part of the justification process when an aboriginal right has been established and infringed

6. To date, most decided cases have addressed the question of a duty to consult in circumstances where an aboriginal or treaty right has been proved and an infringement has been established. The court then considers whether and to what extent

² *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, paras 160 to 169, esp. para 168 [Canada's Authorities, Tab 6]; *R. v. Sparrow*, [1990] 1 S.C.R. 1075, pages 1114 – 1115 [Appellants' Authorities, Tab 26]

consultation by government with an aboriginal group has occurred as part of the justificatory process outlined in *Sparrow*³. We shall refer to this sort of duty as an *ex post facto* duty.

7. Where the question of consultation prior to establishment of an aboriginal right has been considered, courts have generally not found a legally enforceable obligation to consult: *TransCanada Pipelines*⁴, *Westbank*⁵, *Treaty Eight*⁶, *Beattie*⁷.

8. By contrast, in this appeal and the appeal in *Haida*⁸, the Court of Appeal for British Columbia held that there is a legally enforceable duty on government to consult with an aboriginal group prior to proof of an aboriginal right.

9. Prior to the establishment of an aboriginal right, all parties operate in an environment of uncertainty, namely, uncertainty as to whether there is an existing aboriginal right, uncertainty as to the rights holders, and uncertainty regarding the implications of the proposed activities on the alleged aboriginal right.

10. Government will, as a matter of good practice, decide whether to consult with an aboriginal group and, if so, to what extent without knowing for certain whether there is an existing aboriginal right. In practice, the federal and provincial governments do consult in a wide variety of situations where there may be an existing aboriginal right and in the face of uncertainty.

³ *Sparrow, supra*.

⁴ *TransCanada Pipelines Ltd. v. Beardmore (Town)* (2000), 186 D.L.R. (4th) 403 (Ont. C.A.), paras 119-123 [Respondent Redfern's Authorities, Tab 11]; leave to appeal to the S.C.C. refused, [2000] SCCA No. 264 [Canada's Authorities, Tab 28]

⁵ *Westbank v. British Columbia (Minister of Forests)* (2000), 191 D.L.R. (4th) 180, [2000] BCJ No. 1613 (B.C.S.C.), para 85 [Appellants' Authorities, Tab 3]

⁶ *Treaty Eight First Nation v. Canada*, [2003] FCT 782, [2003] FCJ No. 1009 (F.C.T.D.) (June 25, 2003), para 79 [Canada's Authorities, Tab 29]

⁷ *Beattie v. Canada*, 2002 FCA 105, para. 18 [Canada's Authorities, Tab 5]

⁸ *Haida Nation v. British Columbia (Minister of Forests)*, 2002 BCCA 147, [2002] 6 W.W.R. 243, paras. 46 and 48 [Appellants' Authorities, Tab 8]; additional Reasons, 2002 BCCA 462, [2002] 10 W.W.R. 587 [Canada's Authorities, Tab 8]; leave to appeal to the S.C.C. granted [2002] SCCA No. 417 [Canada's Authorities, Tab 9]

11. If consultation is to be effective in understanding and addressing specific potential aboriginal rights it must occur early on and prior to establishment of the right: *Halfway River First Nation*⁹.

ii. The context in which the *ex ante* requirement to consult arises in this appeal

12. This appeal arises in the context of the judicial review of a decision made under a statutory regime. The Respondent Redfern Resources Ltd. ("Redfern") sought approval to reopen a mine which would involve, among other things, building a 160 km road from Atlin, in northern British Columbia, to the mine. The proposed road was to cross lands over which the Taku River Tlingit First Nation (the "Tlingits") claimed aboriginal rights and title. In order for the project to proceed, Redfern required a Project Approval Certificate to be issued by provincial Ministers under the provincial *Environmental Assessment Act* ("EAA").¹⁰

13. The EAA provides for a process of information gathering and public consultation for proposed projects. The EAA also provides that aboriginal groups be consulted as part of the public consultation process, but does not require any particular level of consultation with aboriginal groups. The committee established pursuant to the EAA to carry out the statutory consultation and review process included representatives from the Province, Canada, Alaska, the Tlingits, and the public. The statutory review process for Redfern's application spanned a period of three and a half years.

14. On March 19, 1998, the Ministers approved Redfern's application to reopen the mine, including construction of the road, subject to conditions. The Tlingits felt that the construction of the road would interfere with their asserted aboriginal rights and title and did not agree that the conditions in the Certificate were sufficient to protect their

⁹ *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1997] 4 C.N.L.R. 45 (B.C.S.C.) at p.71 [Canada's Authorities, Tab 10]; affirmed on appeal, [1999] 4 C.N.L.R. 1, 1999 BCCA 470 (B.C.C.A.), at para.191 [Canada's Authorities, Tab 11]

¹⁰ *Environmental Assessment Act*, R.S.B.C. 1996, c. 119 [Appellants' Authorities, Tab 34]

interests. They subsequently filed a petition for judicial review.

15. On the judicial review application, the Chambers Judge quashed and set aside the Ministers' decision to approve Redfern's project and referred the matter back to the Ministers for reconsideration after a revised project committee report which meaningfully addresses the concerns of the Tlingits.

16. This decision was upheld by the majority on appeal who held that the Province has a constitutional and fiduciary obligation to consult with the aboriginal group regarding the potential infringement of aboriginal rights, and to be careful to ensure that the substance of the aboriginal group's concerns were addressed.

17. This appeal, therefore, is fundamentally about the approach to be taken in the review of a discretionary decision made pursuant to a statutory regime, where there is uncertainty about the existence, scope and content of aboriginal rights, and what, if any, public law remedies apply in the particular situation. This appeal is to be distinguished from decided jurisprudence dealing with *ex post facto* consultation as a component of the justificatory process, as addressed in *Sparrow*¹¹.

iii. There is an *ex ante* requirement to consult in the context of this appeal

18. Canada submits that where an aboriginal right may exist and the Crown, provincial or federal, is exercising a statutory power of decision that may infringe the potential aboriginal right, the statutory regime under which the power is exercised should be interpreted to include a limited *ex ante* requirement to consult. This requirement applies here. Canada submits that the content of this *ex ante* requirement to consult should be determined according to the criteria set out below.

19. In the Court of Appeal, British Columbia advanced the argument that the Crown had no *ex ante* requirement to consult aboriginal groups. In this Court, British Columbia argues instead that there is an *ex ante* requirement to consult - namely, a duty of "fair

¹¹ *Sparrow, supra*

dealing" - but is unclear as to the source of that duty.

20. In this Factum, Canada substantially agrees with the position taken by British Columbia but makes submissions to assist the Court in the proper characterization of the consultation obligation, its source and its content.

B. The *ex ante* Requirement to Consult Arises Under the Applicable Statutory Regime

21. Contrary to the reasons of the majority of the Court of Appeal, an *ex ante* requirement to consult under the statutory regime at issue is not based on a constitutional or fiduciary duty to consult with aboriginal groups or to accommodate potential aboriginal rights. Section 35 does not give rise to an independent duty to consult prior to the establishment of an aboriginal right. Similarly, the Crown does not have a plenary duty to consult that is based on fiduciary duty.

22. Rather, an *ex ante* requirement to consult arises in this case as a result of the Crown making a decision under a statute in an environment where there is uncertainty about the existence, scope and content of claimed aboriginal rights. In these circumstances, the constitutional values and the purpose behind section 35 of the *Constitution Act, 1982*¹², and the honour of the Crown operate through the statutory regime to create a limited *ex ante* requirement of consultation.

i. The *ex ante* requirement to consult is not a section 35 right

23. Section 35(1) of the *Constitution Act, 1982* reads as follows:

s. 35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

24. If there were a duty on the Crown to consult, it would seem to follow that there would be a corresponding right of the aboriginal group in question to be consulted. Can it be said that the right to be consulted is a right recognized and affirmed under section

¹² *Constitution Act, 1982, supra*

35, i.e., a section 35 right? The answer must be no. The Crown consults about possible infringements of section 35 rights, but consultation is not itself one of those rights.

25. There are two kinds of section 35 rights:

(1) aboriginal rights, which exist by operation of law; and

(2) treaty rights, which exist by agreement.

Consultation in the context of a treaty right is not for consideration in this appeal.

26. An analysis of the meaning of aboriginal rights will reveal that consultation itself cannot be an aboriginal right. Two types of aboriginal rights have received the most attention by this Court to date:

(1) aboriginal rights to carry out specific practices such as hunting or fishing;
and

(2) aboriginal title over specified tracts of land.

27. Aboriginal rights to carry out specific practices have been defined by this Court as the right to carry out practices that were integral to the distinctive culture of the aboriginal people in question at the time of European contact.¹³ Being consulted by the Crown was not an integral practice of anyone's culture prior to the time of European contact.

28. This Court has defined aboriginal title as the right to exclusive use of land for all purposes, based on having exclusively occupied that land at the time of the assertion of Crown sovereignty.¹⁴ Being consulted by the Crown is not a form of aboriginal title.

ii. The *ex ante* requirement to consult is not a private law fiduciary duty

¹³ *R.v. Van der Peet*, [1996] 2 S.C.R. 507, para 46 [Canada's Authorities, Tab 24]

¹⁴ *Delgamuukw*, *supra*, para 143 [Canada's Authorities, Tab 6]

29. The requirement to consult prior to possible infringement of a potential aboriginal right is not a fiduciary duty in a private law sense, i.e., one that includes a duty of undivided loyalty. This Court has distinguished between the general fiduciary relationship the Crown has with aboriginal peoples, and the specific fiduciary duties that can arise in particular circumstances.¹⁵

30. A private law fiduciary duty arises when the Crown is exercising a discretionary power of control over the affairs or property of aboriginal people, such that the aboriginal people are particularly vulnerable to the exercise of that power and may reasonably expect that the power will be used in their best interests.¹⁶

31. Where, as here, the Crown is engaged in making a polycentric decision that must be based on a consideration of the public interest and the competing claims of many interests, including those of one or more aboriginal groups. The Crown cannot be said to have a fiduciary duty in a private law sense to act exclusively for the benefit of the aboriginal group¹⁷.

32. The Appellant British Columbia denies that a freestanding fiduciary duty to consult exists but suggests in its Factum that if it does, any such fiduciary obligation towards aboriginal peoples attaches only to the federal Crown, not the provincial Crown. British Columbia is plainly wrong in this assertion¹⁸.

33. The fiduciary relationship between the Crown and aboriginal peoples applies to both the federal and provincial Crowns. Numerous lower court decisions have affirmed that the Crown's fiduciary relationship with aboriginal people applies to the provincial

¹⁵ *Wewaykum Indian Band v. Canada*, 2002 SCC 79, File No. 27641, December 6, 2002, at paras. 80, 81 and 85 [Appellants' Authorities, Tab 32]

¹⁶ *Wewaykum, supra*; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, page 599 [Canada's Authorities, Tab 15]

¹⁷ *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 at para. 36 [Canada's Authorities, Tab 18]; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 53-56 [Canada's Authorities, Tab 4]

¹⁸ Appellants' Factum, at pp. 10, 14 and 15, paras. 30, 49, 50

Crown: *Haida*¹⁹; *Halfway River First Nation*²⁰; *Ardoch Algonquin First Nation*²¹; *Westbank*.²² Further, section 35 applies to provincial legislatures as well as to Parliament.²³

iii. The constitutional values and purpose behind section 35 and the honour of the Crown incorporate into the statutory regime a limited requirement to consult *ex ante*

34. Where the Crown is exercising a statutory power of decision with respect to lands or resources over which an aboriginal group asserts section 35 rights, the constitutional values and purpose behind section 35 and the honour of the Crown are relevant to a consideration of how the Crown must exercise that statutory power. In such circumstances, the statutory regime will be interpreted to require the Crown to take seriously the aboriginal rights claimed absent a clear expression to the contrary.²⁴

35. Section 35 provides for the recognition and affirmation of existing aboriginal and treaty rights. Its purpose is the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.²⁵ Existing aboriginal rights means more than simply proven rights. At the judicial review stage, however, one cannot be certain what are the "existing" aboriginal rights.

36. This case is not about a constitutional challenge to a law. It is about the proper interpretation and application of a statutory regime in a judicial review context. This Court has established that constitutional values can guide the Court in the interpretation

¹⁹ *Haida*, *supra*, at para. 61 [Appellants' Authorities, Tab 8]

²⁰ *Halfway River First Nation*, *supra*, at paras. 178, 179 and 191 [Canada's Authorities, Tab 11]

²¹ *Ardoch Algonquin First Nation v. Ontario (Perry v. Ontario)* (1997), 148 D.L.R. (4th) 96, [1997] O.J. No. 2314 (Ont. C.A.) at pg. 123 [Canada's Authorities, Tab 1]; leave to appeal to the S.C.C. dismissed [1997] SCCA No. 429 [Canada's Authorities, Tab 2]

²² *Westbank*, *supra*, para 84 [Appellants' Authorities, Tab 3]

²³ Appellants' Factum, at p. 15, para. 50; *Sparrow*, *supra*, at p. 1110 [Appellants' Authorities, Tab 26]; *R. v. Badger*, [1996] 1 S.C.R. 771, at paras. 14, 90 and 96 [Canada's Authorities, Tab 19]; *R. v. Cote*, [1996] 3 S.C.R. 139, at paras. 33 and 74 [Canada's Authorities, Tab 20]

²⁴ See *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85 [Canada's Authorities, Tab 17]; *R. v. Nowegijick*, [1983] 1 S.C.R. 29 [Canada's Authorities, Tab 23]. These cases set out interpretive principles to apply when interpreting Indian treaties and statutes relating to Indians, including that doubtful provisions be construed in favour of the Indians.

²⁵ *Delgamuukw*, *supra* at para 141 [Canada's Authorities, Tab 6]

of laws which may not be subject to constitutional challenge *per se*.²⁶ When Ministers of the Crown are exercising a statutory power of decision, the constitutional values and purpose behind section 35 may be taken into account in considering how the decision maker should act in the context of unproven aboriginal rights. In considering the exercise of the statutory power of decision by the Ministers, it is reasonable to infer that the legislature would have intended the Ministers to exercise their discretion in a manner consistent with the honour of the Crown and the purpose behind section 35.

37. Construing the statutory provision to require consultation when potential aboriginal rights may be infringed would uphold the honour of the Crown.

38. In this respect, Canada is in substantial agreement with the position taken by the Appellant British Columbia. Canada agrees particularly with the following passage from the Appellants' Factum:

113. Once aboriginal peoples provide the Crown with their perspective on the potential impacts of the decision on their specific uses, or claims to historical use or occupation of the land and resources, the integrity and honour of the Crown require that the aboriginal interests be taken seriously by the decision maker.²⁷

39. Where the Court is not satisfied that the decision maker has taken the potential aboriginal rights seriously, then it may be appropriate for the Court to make a declaration that the Crown has not acted in good faith, commensurate with the honour of the Crown.

40. It would be inconsistent with the honour of the Crown to ignore potential aboriginal rights on the basis that they have not been proven.

41. It is unnecessary for the Court to consider in this appeal what might be the case if there were no statutory regime under which the decision in question were being

²⁶ *Retail, Wholesale and Department Store Union, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 156, paras 18-20 [Canada's Authorities, Tab 25]; *Lalonde v. Ontario (2001)*, 208 D.L.R. (4th) 577, [2001] O.J. No. 4767 at para 174 [Canada's Authorities, Tab 16]

²⁷ Appellants' Factum, at p. 32, para. 113

made. Here, there is a statutory regime and the question is whether the Court ought to read into the statutory regime an *ex ante* requirement to consult.

42. Similarly, the Court does not need in this appeal to consider whether the *ex ante* requirement to consult described above would apply to the provincial legislatures and Parliament in the enactment of statutes or regulations.

iv. Participation in treaty negotiations does not create an *ex ante* requirement to consult

43. Canada disagrees with paragraphs 71 to 75 and 77 of Redfern's Factum. In these paragraphs, Redfern argues that the participation by the Crown in treaty negotiations creates duties of good faith which may define "the Crown's obligations in the context of the present case...".²⁸ Redfern suggests that, by engaging in the treaty negotiation process, the Crown has "accepted, to some extent, the legitimacy of aboriginal assertions of rights...".²⁹

44. The participation of the Crown in treaty negotiations has no relevance to the disposition of the present appeal or the existence of an *ex ante* requirement to consult. Participation by the Crown and First Nations in treaty negotiations is without prejudice to the legal positions of the negotiating parties. Accordingly, no inference should be drawn from any party's participation in treaty negotiations with respect to the existence, nature or scope of aboriginal rights or any other legal right or obligation.

45. If, in the judicial review of administrative decisions, participation in treaty negotiations were to be held against either the Crown or First Nations, this would create a disincentive to participate in such negotiations.

C. The Scope or Content of the *ex ante* Requirement to Consult

46. As stated, where aboriginal rights may exist and may be infringed by government

²⁸ Respondent Redfern's Factum, at p. 20, para. 71

²⁹ Respondent Redfern's Factum, at p. 21, para. 77

action, the constitutional values and purpose underlying section 35 and the honour of the Crown can inform the proper interpretation of the applicable statute to import an *ex ante* requirement to consult on the Crown. However, the Crown's *ex ante* requirement to consult is a limited one.

47. Aboriginal rights are not absolute. The Court has made it clear that the Crown can infringe even established aboriginal rights, provided such infringement is justified.³⁰

48. Established aboriginal rights necessarily warrant a greater degree of protection than potential aboriginal rights. The Crown cannot be expected to justify, under the *Sparrow* framework, a possible infringement of a potential aboriginal right prior to proceeding with a project because the Crown is not in a position to assess the extent of any infringement until the scope of the specific aboriginal right is established.

49. The Crown exercises its executive and legislative authority to achieve a variety of objectives, and in doing, must balance various competing interests.

50. To require the Crown to justify any possible infringement of potential aboriginal rights prior to acting or to accommodating such rights would be to deprive the Crown of the ability to govern effectively. As stated, in dissent, by Justice McLachlin (as she then was) in *Marshall No. 1*, at para. 112³¹:

How can one meaningfully discuss accommodation or justification of a right unless one has some idea of the core of that right and its modern scope? How is the government, in the absence of such definition, to know how far it may justifiably trench on the right in the collective interests of Canadians? How are courts to judge whether the government that attempts to do so has drawn the line at the right point?

51. As such, prior to the establishment of an aboriginal right, the honour of the Crown and the constitutional values and purpose behind section 35 guide the interpretation and application of the statutory regime in question to require the Crown

³⁰ *Sparrow, supra*, pages 1114-1115; *Delgamuukw, supra*, paras 160-169

³¹ *R. v. Marshall No. 1*, [1999] 3 S.C.R. 456, at para. 112 [Canada's Authorities, Tab 21]

to act in good faith and to seriously consider the concerns of aboriginal groups that may be affected by the Crown's decisions.

52. In many cases, the Crown will have to:

- a) ensure the aboriginal group is provided with relevant information in a timely manner;
- b) inform itself of the concerns of the aboriginal group;
- c) engage the aboriginal group regarding the project so the aboriginal group has an opportunity to articulate its concerns on the effects of the proposed action;
- d) seriously consider the representations of the aboriginal group; and
- e) seriously consider opportunities for mitigating potentially deleterious effects on the aboriginal group.

53. The nature and content of the Crown's *ex ante* requirement to consult will vary with the circumstances.³² All of the circumstances must be considered but factors that may affect the content of the *ex ante* requirement include:

- a) the nature of the potential aboriginal right;
- b) the strength of the claim;
- c) the likelihood of the potential infringement;
- d) the severity of the potential infringement; and
- e) the imminence of the potential infringement.

54. Though some of the factors listed above relate to a potential aboriginal right, a judicial review of the *ex ante* requirement to consult should focus on an assessment of the conduct of the Crown, rather than on an assessment of the strength of the potential right.

³² *Delgamuukw, supra* at para 168

55. In appropriate circumstances, the scope of the *ex ante* requirement to consult may also be tempered by the urgency and importance of the Crown objective and by the implications of delaying the decision in question on third parties.³³

56. At one end of the spectrum - where an aboriginal rights claim is relatively weak and/or where the potential infringement is minor - the Crown's *ex ante* requirement to consult may require no more than providing adequate notice, gathering and sharing relevant information and acting in a procedurally fair manner towards the aboriginal group. Where the Crown must act with urgency, even these minimal elements may not be in place prior to the alleged infringement.

57. On the other hand, at the other end of the spectrum - where an aboriginal rights or title claim is strong, where the potential infringement is imminent and severe, and where the Crown is not required to act urgently - the Crown's *ex ante* requirement to consult would require more of the Crown in seriously considering the concerns of the aboriginal group.

58. The Crown's *ex ante* requirement to consult does not include a requirement to obtain the consent of the aboriginal group in question. Nor does the limited *ex ante* requirement to consult include a substantive requirement to accommodate, in the sense of ensuring the plan of action minimizes the potentially deleterious effects on the aboriginal group, unless the failure to do so could be described as patently unreasonable or in bad faith. To equate consultation with accommodation of potential aboriginal rights or consent of the aboriginal group is clearly inappropriate in the pre-justification context where rights remain uncertain.

59. In those cases where the full *ex ante* requirement to consult is applicable, the Crown's determination of what it takes to meaningfully address the concerns of the aboriginal group should not be set aside by the court unless the Crown's conduct is

³³ *Klahoose First Nation v. British Columbia (Minister of Forests)*, [1996] 1 W.W.R. 757, para 20, [1995] BCJ No. 2033 (B.C.S.C.) [Canada's Authorities, Tab 13]; appeal dismissed, [1996] 6 W.W.R. 759, [1996] BCJ No. 584 (B.C.C.A.) [Canada's Authorities, Tab 14]

patently unreasonable or the Crown has acted in bad faith.

60. The Court has made it clear that the concept of reasonableness will form an integral part of any assessment of consultation between the Crown and aboriginal groups³⁴. The requirement of reasonableness implies that consultation must be considered to be a "two-way street"³⁵. As stated by Finch J.A. in *Halfway River*³⁶, para 161:

...There is a reciprocal duty on Aboriginal Peoples to express their interests and concerns once they have had the opportunity to consider the information provided by the Crown, and to consult in good faith by whatever means are available to them. They cannot frustrate the consultation process by refusing to meet or participate, or by imposing unreasonable conditions.

61. If aboriginal groups refuse to reasonably or meaningfully participate in a reasonable consultation process, they may forfeit their right to be consulted.

62. Moreover, the Crown's *ex ante* requirement to consult does not necessarily require the Crown to create a distinct process of consultation with the interested aboriginal group. The question to be answered is whether, in all of the circumstances, the Crown's *ex ante* consultation process with the interested aboriginal people is reasonable and adequate and is consistent with the Crown acting in good faith. In some cases - such as the environmental assessment process at issue in this appeal - adequate consultation may be achieved through a general, public consultation process.

D. The Standard of Review of the *ex ante* Requirement to Consult

63. This appeal deals with a Ministerial decision to issue a Project Approval Certificate pursuant to a statutory regime. The matter arises in the context of uncertain or potential aboriginal rights. A constitutional right has not been established at this stage.

³⁴ *R. v. Badger, supra; R. v. Nikal*, [1996] 1 S.C.R. 1013 at page 1065 [Canada's Authorities, Tab 22]

³⁵ *Kelly Lake Cree Nation v. Canada*, [1999] 3 C.N.L.R. 126, [1998] BCJ No. 2471 (B.C.S.C.) at para 243 [Canada's Authorities, Tab 12]

³⁶ *Halfway River, supra*, at para 161 [Canada's Authorities, Tab 11]

64. This Court has accepted that it is appropriate to apply the "pragmatic and functional approach" when reviewing decisions made pursuant to a statutory regime where, as here, the decision in question is discretionary, polycentric and largely fact-driven and where the level of uncertainty is high³⁷. This may, depending on the circumstances, lead to a standard of patent unreasonableness which, in this context, means where a decision was made arbitrarily or in bad faith, it cannot be supported on the evidence, or where the decision maker failed to consider the appropriate factors. This standard of review applies to the Ministers' decision to issue the Certificate.

65. Canada is in substantial agreement with the position articulated in para. 124 of British Columbia's Factum³⁸.

E. Remedies for any Breach of the *ex ante* Requirement to Consult

i. Remedies to enforce an *ex ante* requirement to consult are limited

66. There are limitations to the remedies that may be granted prior to a judicial determination that the underlying aboriginal rights exist. Prior to establishment of an aboriginal right, public law remedies would be available to an aboriginal group where the Crown has not met its *ex ante* requirement to consult. In most cases, a declaration would suffice. Injunctive relief may also be available in appropriate circumstances.

67. The precise nature of the remedy available will of course depend on the circumstances of each case. A distinction must be kept in mind between the circumstances of the present appeal, where the underlying aboriginal rights about which the consultation is taking place have not yet been held to exist, and a case in which the duty to consult is being considered as part of the justification of proven aboriginal rights. In the latter type of case, the full range of judicial remedies is available, including damages or other forms of compensation.

³⁷ *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 at paras. 29 and 41 [Canada's Authorities, Tab 26]; *Baker, supra*

³⁸ Appellant's Factum, at p. 36, para. 124

68. In a case such as the present appeal, by contrast, caution is appropriate with respect to the granting of remedies. At the end of the case the trial judge may find that the underlying aboriginal rights do not exist and/or there was no infringement. In that event, consultation as part of the justification defence would not be required.

ii. Remedies available on judicial review are limited

69. The present appeal is from the hearing of a petition brought under the provincial *Judicial Review Procedure Act*, (the "JRPA")³⁹. In a petition under the JRPA the range of available remedies is limited. Under section 2 of the JRPA, the court may grant relief in the nature of the old prerogative writs of *mandamus*, prohibition, or *certiorari*, as well as a declaration or an injunction. Under section 5, the court may direct the decision maker to reconsider the decision. Under section 6, the court may set aside the decision. Beyond these remedies, however, the court cannot go. For example, on the hearing of a judicial review petition, the court may not award damages. In order to obtain damages, the aboriginal party would be required to bring an action by writ of summons.

70. The *ex ante* requirement to consult does not give rise to an action for damages independently of the potential underlying section 35 rights. If the underlying section 35 rights are later shown not to exist, then the failure to consult about the possible infringement of these non-existent rights cannot lead to damages against the Crown.

71. In a case where the petitioner is seeking to enforce a requirement to consult regarding the possible infringement of unproven aboriginal rights there are particular reasons for caution in the choice of remedies to enforce that requirement. Aboriginal rights raise difficult and complex issues of both fact and law and generally require a full trial to establish their existence.⁴⁰

iii. Courts should exercise caution in granting remedies to enforce the *ex ante* requirement to consult

³⁹ *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, ss. 2, 5 and 6 [Canada's Authorities, Tab 31]

⁴⁰ *B.C. (Minister of Forests) v. Wilson*, 2000 BCSC 1135, , per Sigurdson J., July 25, 2000 at para. 22 [Canada's Authorities, Tab 3]; *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project* (1999), 128 BCAC 120, 1999 BCCA 442, per Goldie J.A., June 25, 1999 [Canada's Authorities, Tab 27]

72. In deciding what is the appropriate remedy, courts should exercise caution and should grant relief only to the extent necessary to do justice between the parties. Such judicial caution is supported by the uncertainty of the aboriginal rights in question.

73. To date, courts have correctly preferred to allow the parties to work out the particulars of consultation themselves.⁴¹

74. In general, courts should refrain from issuing mandatory orders against statutory decision makers relating to the *ex ante* requirement to consult. While courts are well equipped to make declarations that the decision maker has failed to meet the *ex ante* requirement to consult and may provide guidance as to how the requirement may be met, courts are not well situated to either impose a particular consultation process or to provide detailed instructions on what decisions should be made in the circumstances.⁴²

iv. The direction given by the Court of Appeal was wrong in law

75. The remedy granted by the Court of Appeal in the case giving rise to the present appeal was to remit the decision of the Ministers to grant a Project Approval Certificate to the Ministers for reconsideration, with a direction that the Ministers bear in mind the reasons of the Court of Appeal and "the decisions of the Supreme Court of Canada concerning the Crown's constitutional and fiduciary obligations to aboriginal people in relation to matters that may affect their aboriginal rights."⁴³

76. These directions imply that this Court has decided that there is a fiduciary obligation to consult aboriginal people about matters that may affect their aboriginal rights. The Court of Appeal incorrectly stated the law. No decision of this Court contains such a finding.

⁴¹ *Gibxan First Nation v. British Columbia (Minister of Forests)* (2002), 10 B.C.L.R. (4th) 126, 2002 BCSC 1701, at paras 106-107 [Canada's Authorities, Tab 7]; *Haida, supra*

⁴² *Gibxan First Nation, supra*

⁴³ Appellants' Record, Court of Appeal decision, p. 257 at para. 207

PART IV – SUBMISSIONS ON COSTS

77. Canada makes no submissions on costs.

PART V - NATURE OF ORDER SOUGHT

78. Canada respectfully requests that the appeal be determined in accordance with the foregoing principles.

All of which is respectfully submitted.

Dated at Vancouver, British Columbia this 16th day of July 2003:



for

Mitchell Taylor
Of Counsel for the
Attorney General of Canada



Brian McLaughlin
Of Counsel for the
Attorney General of Canada

PART VI - TABLE OF AUTHORITIES**Case Law****Cited at Paragraph**

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<i>B.C. (Minister of Forests) v. Wilson</i> , 2000 BCSC 1135	71
<i>Baker v. Canada (Minister of Citizenship and Immigration)</i> , [1999] 2 S.C.R. 817	31, 64
<i>Beattie v. Canada (Minister of Indian Affairs and Northern Development)</i> , [2002] FCA 105	7
<i>Delgamuukw v. British Columbia</i> , [1997] 3 S.C.R. 1010	5, 28, 35, 47, 53
<i>Gibxsan First Nation v. British Columbia (Minister of Forests)</i> (2002), 10 B.C.L.R. (4 th) 126, 2002 BCSC 1701	73, 74
<i>Haida Nation v. British Columbia (Minister of Forests)</i> , 2002 BCCA 147, [2002] 6 W.W.R. 243; additional Reasons, 2002 BCCA 462, [2002] 10 W.W.R. 587; leave to appeal to the S.C.C. granted, [2002] SCCA No. 417	8, 33, 73
<i>Halfway River First Nation v. British Columbia (Ministry of Forests)</i> , [1997] 4 C.N.L.R. 45, (B.C.S.C.); affirmed on appeal, [1999] 4 C.N.L.R. 1, 1999 BCCA 470 (B.C.C.A.)	11, 33, 60
<i>Kelly Lake Cree Nation v. Canada</i> , [1999] 3 C.N.L.R. 126, [1998] BCJ No. 2471 (B.C.S.C.)	60
<i>Klahoose First Nation v. British Columbia (Minister of Forests)</i> , [1996] 1 W.W.R. 757, [1995] BCJ No. 2033 (B.C.S.C.); appeal dismissed, [1996] 6 W.W.R. 759, [1996] BCJ No. 584 (B.C.C.A.)	55
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<u>Case Law</u>	<u>Cited at Paragraph</u>
<i>Lalonde v. Ontario</i> (2001), 208 D.L.R. (4 th) 577, [2001] O.J. No. 4767	36
<i>Mitchell v. Peguis Indian Band</i> , [1990] 2 S.C.R. 85	34
<i>Pushpanathan v. Canada (Minister of Citizenship and Immigration)</i> , [1998] 1 S.C.R. 982	31
<i>R. v. Badger</i> , [1996] 1 S.C.R. 771	33, 60
<i>R. v. Cote</i> , [1996] 3 S.C.R. 139	33
<i>R. v. Marshall No. 1</i> , [1999] 3 S.C.R. 456	50
<i>R. v. Nikal</i> , [1996] 1 S.C.R. 1013	60
<i>R. v. Nowegijick</i> , [1983] 1 S.C.R. 29	34
<i>R. v. Sparrow</i> , [1990] 1 S.C.R. 1075	5, 6, 17, 33, 47, 48
<i>R. v. Van der Peet</i> , [1996] 2 S.C.R. 507	27
<i>Retail, Wholesale and Department Store Union, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.</i> , [2002] 1 S.C.R. 156	36
<i>Suresh v. Canada (Minister of Citizenship and Immigration)</i> , [2002] 1 S.C.R. 3	64
<i>Taku River Tlingit First Nation v. Tulsequah Chief Mine Project</i> (1999), 128 BCAC 120, 1999 BCCA 442	71
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Case Law

Cited at Paragraph

Wewaykum Indian Band v. Canada, 2002 SCC 79,
File No. 27641, December 6, 200229, 30

PART VII - LEGISLATION RELIED ON

Legislation

Cited at Paragraph

Constitution Act, 1982, R.S.C. 1985, App II, No. 44, s. 35 3, 21, 22, 23, 24, 25
..... 33, 34, 35, 36, 46, 51, 70

Environmental Assessment Act, R.S.B.C. 1996, c. 119 12, 13

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