

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

**BETWEEN:**

The Minister of Forests and the Attorney General of  
British Columbia on behalf of Her Majesty The Queen  
in Right of the Province of British Columbia,

**APPELLANTS  
(Respondents),**

- and

Council of the Haida Nation and Guujaaw, on their own behalf and  
on behalf of all members of the Haida Nation,

**RESPONDENTS  
(Appellants),**

**AND BETWEEN:**

Weyerhaeuser Company Limited,

**APPELLANT  
(Respondent),**

- and

Council of the Haida Nation and Guujaaw, on their own behalf and  
on behalf of all members of the Haida Nation,

**(RESPONDENTS)  
(Appellants),**

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**INTERVENERS.**

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**FACTUM OF THE INTERVENER  
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## INDEX

	<b>Page</b>
<b>PART I - STATEMENT OF FACTS</b>	<b>1</b>
<b>PART II - POINTS IN ISSUES</b>	<b>3</b>
<b>PART III - ARGUMENT</b>	<b>3</b>
<b>PART IV - SUBMISSIONS ON COSTS</b>	<b>23</b>
<b>PART V - ORDER REQUESTED</b>	<b>23</b>
<b>PART VI - LIST OF AUTHORITIES</b>	<b>24</b>

## PART I – STATEMENT OF FACTS

1. Haida Nation brought an application for judicial review of several decisions of the Minister of Forests of the Province of British Columbia (“the Minister”).
2. The Haida Nation (“Haida”) allege that the Minister made decisions in 1981, 1995 and 2000, to replace Tree Farm Licence 39 (T.F.L. 39) and to approve a transfer of T.F.L. 39 from MacMillan Bloedel Ltd. (“MacMillan”) to Weyerhaeuser Company Limited (“Weyerhaeuser”), and that in doing so, the Minister acted without jurisdiction, or in excess of his jurisdiction. In making the decisions challenged by these proceedings, the Minister was acting in reliance on the powers conferred upon him by the *Forest Act* of British Columbia.
3. The people of the Haida Nation include all Aboriginal people of Haida ancestry whose traditional territory is Haida Gwaii, also known as the Queen Charlotte Islands, and surrounding waters. The Haida have inhabited the Queen Charlotte Islands continuously from at least 1774 to the present time.
4. The area within T.F.L. 39 known as Block 6 is made up of several areas, all of which are located on the Queen Charlotte Islands, and contains old growth forests and second growth forests, including spruce, cedar, and hemlock timber (as well as other species), portions of which have been logged off.
5. From a time which is uncertain, but which pre-dates 1846, up to the present time, the Haida have used large red cedar trees from the old-growth forests of the Queen Charlotte Islands for the construction of canoes, houses, and totem poles, and have also used red cedar for carving masks, boxes, and other objects of art, ceremony, and utility. Since before 1846, the Haida have utilized red cedar trees obtained from old growth forests on both coastal and inland areas of what is now Block 6 of T.F.L. 39.

6. For more than 100 years, the Haida people have claimed title to the lands and surrounding waters of the Queen Charlotte Islands.

7. MacMillan was engaged in logging timber on the Queen Charlotte Islands since about the time of World War I, acquired T.F.L. 39 in 1961, and conducted logging operations pursuant to T.F.L. 39 until the transfer of its rights under T.F.L. 39 to Weyerhaeuser in November 1999.

8. T.F.L. 39 granted to MacMillan the exclusive right to harvest quantities of timber on the Queen Charlotte Islands within the areas collectively known as Block 6.

9. In 1981 and 1995, the Minister offered to replace, and upon acceptance of the offer by MacMillan, did replace T.F.L. 39 pursuant to the procedure authorized by the *Forest Act* of British Columbia.

10. On September 1, 1999, the Minister sent to MacMillan an offer to replace T.F.L. 39, with the knowledge that Weyerhaeuser would likely become the successor to MacMillan, and on February 10, 2000, the Minister issued the replacement to Weyerhaeuser effective March 1, 2000.

11. The three decisions of the Minister to replace T.F.L. 39, which are complained of, were all made without the consent of the Haida Nation, and the decisions in 1995 and 2000 were made against the objections of the Haida. The Haida also objected to the transfer of T.F.L. 39 from MacMillan to Weyerhaeuser.

12. This action was commenced on January 13, 2000. The Haida applied for a declaration that the 1981, 1995 and 2000 replacements of T.F.L. 39 are invalid, or, in the alternative, in the case of the 1995 and 2000 replacements, orders in the nature of certiorari quashing the replacements.

## PART II – POINTS IN ISSUE

13. On July 3, 2003, the Honourable Mr. Justice Gonthier set the following constitutional question:

- Q: “Is s. 36 of the Forest Act, R.S.B.C. 1996, c. 157, of no force or effect to the extent that the replacement of T.F.L. No. 39 violated any right of the Haida Nation, as recognized and affirmed by s. 35 of the Constitution Act, 1982, to be consulted and to have their asserted aboriginal rights accommodated prior to the replacement?”

The Attorney General of Alberta asks that the question be answered in the negative.

## PART III – ARGUMENT

14. Section 36(1) of the *Forest Act* reads as follows:

- s. 36(1) Unless a tree farm licence provides that a replacement for the licence must not be offered, the minister must offer the holder of an existing licence a replacement for the licence and the offer must be made during the 6 month period following
- (a) the fourth anniversary of the tree farm licence if its term commences on or after July 1, 1993, or
  - (b) the ninth anniversary of the tree farm licence if its term commences before July 1, 1993.

### A. DECISION OF HALFYARD J., SUPREME COURT OF BRITISH COLUMBIA

15. There were three grounds for the application for judicial review brought by the Haida. Halfyard J. considered, *inter alia*;

Whether the Minister acted in breach of a fiduciary duty owed by the provincial Crown to the Haida, not to replace T.F.L. 39 without first consulting with the Haida in good faith and with the intention of substantially addressing their concerns with respect to their asserted Aboriginal title to the lands comprising Block 6.

16. In considering whether the provincial Crown had a duty to accommodate the asserted Aboriginal title to the Haida Gwaii lands, prior to that title being proven,

Halfyard J. stated that the Haida were, in effect, asking that the Crown prove “justification” for infringing rights that have not yet been proved, in kind or in extent. At paragraph 28 of the decision, Halfyard J. stated:

“In my opinion, the issue of whether there has been infringement of an Aboriginal right cannot be decided until both the kind of right, and its extent, have been established. I think the fatal flaw is that the petitioners want results that could only be achieved at a trial, and only after the Haida proved their Aboriginal title, and its infringement.”

Reasons for Judgment, Halfyard J.,  
Joint Record of Appellants, Vol. I, p. 28 at para. 28

17. In considering whether the Crown had a legal obligation to consult with the Haida in good faith, before replacing T.F.L. 39, Halfyard J. stated, that the scope of the duty to consult is an issue that must be determined at trial. The extent of the duty to consult depends on the nature and extent of the Aboriginal title or other right that first must be established.

Reasons for Judgment, Halfyard J.,  
Joint Record of the Appellants, Vol. I, p. 30-31 at para. 34

18. Halfyard J. did find a reasonable probability that the Haida will be able to establish Aboriginal title to at least some parts of the coastal and inland areas of the Haida Gwaii, and that these areas will include coastal areas of Block 6. Halfyard J. also found that there is a reasonable possibility that the Haida may be able to prove Aboriginal title to the inland areas of Block 6. Further, Halfyard J. stated that there is a substantial probability that the Haida will be able to establish the Aboriginal right to harvest red cedar trees from various old-growth areas of Haida Gwaii, including both coastal and inland areas of Block 6, regardless of whether Aboriginal title to those forest areas is proven.

Reasons for Judgment, Halfyard, J.,  
Joint Record of the Appellants, Vol. I, p. 37-38 at para. 47

19. Halfyard J. found that the provincial Crown should have been able to assess the apparent strength of the Haida claims long before September of 1999, when the Minister

offered to replace T.F.L. 39. Halfyard J. found the creation of a moral duty to consult in relation to the decision to replace T.F.L. 39.

**B. COURT OF APPEAL – ORIGINAL REASONS - FEBRUARY 27, 2002**

20. The decision of the Court of Appeal was delivered by Lambert J.A. The principal issue in the appeal was whether there is an obligation on the Crown and on third parties to consult with an Aboriginal people who have specifically claimed Aboriginal title or Aboriginal rights, about potential infringements, before the Aboriginal title or rights have been determined by a Court of competent jurisdiction.

21. Lambert J.A. stated that *Delgamuukw v. British Columbia* set out the content of the duty to consult. Lambert J.A. stated that when Lamer, C.J.C., in *Delgamuukw*, stated that the measure of compensation for an infringement may depend on the extent to which Aboriginal interests were accommodated, he was clearly contemplating accommodations decided upon and put in place before the infringement, and, normally, before the Aboriginal right is endorsed by a court of competent jurisdiction. Lambert J.A. stated that the consultation aspect of the justification test with respect to prima facie infringement would never be met if the consultation did not take place before the infringement.

Reasons for Judgment, Lambert J.A.,  
Joint Record of the Appellants, Vol. I, p. 73-77 at para. 38 to 44

22. Lambert J.A. concluded that the obligation to consult and to seek an accommodation arose from these circumstances:

- (a) the provincial Crown had fiduciary obligations of utmost good faith to the Haida people with respect to the Haida claims to Aboriginal title and Aboriginal rights;
- (b) the provincial Crown and Weyerhaeuser were aware of the Haida claims to Aboriginal title and Aboriginal rights over all or at least some significant part of the area covered by T.F.L. 39 and Block 6, through evidence supplied to them by the Haida people and through further

evidence available to them on reasonable inquiry, an inquiry which they were obliged to make; and

- (c) the claims of the Haida people to Aboriginal title and Aboriginal rights were supported by a good prima facie case in relation to all or some significant part of the area covered by T.F.L. 39 and Block 6.

Reasons for Judgment, Lambert J.A.,  
Joint Record of the Appellants, Vol. I, p. 80-81 at para. 49

23. Lambert J.A. found that the obligations to consult and seek an accommodation with the Haida people were enforceable, legal and equitable duties, at the relevant times in 1999 and 2000, of the provincial Crown, MacMillan and its successor, Weyerhaeuser.

24. Lambert J.A. declined to make an order about the validity, invalidity, or partial validity of T.F.L. 39 and Block 6. Lambert J.A. stated that the proper time to determine that question would be at the same time as the determination of Aboriginal title, Aboriginal rights, prima facie infringement, and justification, by a court of competent jurisdiction.

25. The Court did grant a declaration that the provincial Crown and Weyerhaeuser have a legally enforceable duty to the Haida people to consult with them in good faith and to endeavour to seek workable accommodations between the Aboriginal interests of the Haida people, on the one hand, and the short term and long term objectives of the Crown and Weyerhaeuser to manage T.F.L. 39 and Block 6.

### **C. COURT OF APPEAL – SUPPLEMENTAL REASONS – AUGUST 19, 2002**

26. Following the issuance of the Court of Appeal's original reasons, Weyerhaeuser requested an opportunity to make submissions on two issues. Weyerhaeuser stated that (i) the issue of whether Weyerhaeuser had a duty to consult the Haida people was not in issue before the Court of Appeal and, as such, should not have formed a part of the declaration; and (ii) in the circumstances of this case there was not an obligation on

Weyerhaeuser to consult the Haida in relation to T.F.L. 39 or Block 6. The Court of Appeal directed a further hearing on these two issues.

27. In his reasons, Lambert J.A. concluded that the question of whether Weyerhaeuser had an obligation to consult the Haida people, and seek to accommodate them in relation to any aspect of T.F.L. 39 and Block 6, was properly in issue before the Court and could properly form the subject matter of a declaration and order of the Court.

Reasons for Judgment, Lambert J.A.,  
Joint Record of the Appellants, Vol. I, 128 at para. 47

28. Lambert J.A. concluded that there is an obligation on Weyerhaeuser as holder of T.F.L. 39, which gives it exclusive harvesting rights in the T.F.L. 39 area, to consult with the Haida people. The *Forest Act* requires a licensee to identify and consult with other users of the forest. Further, the provisions of the *Forest Act* were incorporated into the licence itself and required the licensee to identify and consult, specifically, with “aboriginal people claiming an aboriginal interest in or to the area.”

29. He also stated that the provincial Crown owed a fiduciary duty to the Haida people to consult with the Haida. Weyerhaeuser should have known of the breach of the Crown’s fiduciary duty to the Haida. This fact placed the case within the category of “knowing receipt” cases where the title, if any, that is passed to the third party, in breach of the fiduciary duty, is clogged by the fiduciary’s breach of duty, so that the third party is itself a constructive trustee and, in that capacity, owes a trust or fiduciary duty to the original beneficiary of the original fiduciary duty. Lambert J.A. stated, at paragraph 71:

“In my opinion, MacMillan Bloedel and Weyerhaeuser must have been aware of the provincial Crown’s fiduciary duty to the Haida people, including a duty to consult the Haida people before renewing or transferring T.F.L. 39, and must have been aware of the strong prima facie case of the Haida people to aboriginal title and aboriginal rights in at least a significant part of the land area of T.F.L. 39, and must have been aware, or at least, could have become aware on reasonable and necessary inquiry, of the Crown breach of its fiduciary duty to the Haida people, particularly in the

Crown's failure to consult the Haida people and to seek reasonable accommodations with them in the renewal and transfer of T.F.L. 39."

Reasons for Judgment, Lambert J.A.,  
Joint Record of the Appellants, Vol. I, p. 140 at para. 71

30. At paragraph 91, Lambert J.A. summarized the actions that potentially infringed the alleged Aboriginal title and rights of the Haida:

"The provincial Crown may infringe on the aboriginal title and aboriginal rights of the Haida people if it can justify the infringement. The infringement would consist in establishing a legislative and administrative scheme under the Forest Act, granting Weyerhaeuser an exclusive right to harvest timber in the area covered by T.F.L. 39, renewing the issuance of T.F.L. 39, transferring T.F.L. 39 to Weyerhaeuser, approving management plans, and issuing cutting permits, all in furtherance of the same legislative scheme, and all in violation of the aboriginal title and aboriginal rights of the Haida people. The provincial Crown may justify its actions by meeting the tests for justification. Among the tests is a requirement that the Haida people be consulted before the infringement actions are taken. In this case, the Crown provincial did not consult the Haida people in any effective way at any stage of the furtherance of the legislative and administrative scheme, and so is in breach of its obligation of consultation at every stage where a justification test would require effective consultation."

Reasons for Judgment, Lambert J.A.,  
Joint Record of the Appellants, Vol. I, p. 151 at para. 91

31. Lambert J.A. concluded that Weyerhaeuser was a party to every one of the Crown's infringements except the passing of the *Forest Act*.

32. In reasons concurring in the result reached by Lambert J.A., Finch C.J.B.C. stated that if Weyerhaeuser had no duty to consult, the Crown would lack the effective power to address any of Haida's concerns, or to accommodate their legitimate economic objectives. No effective remedy could be granted in this case, short of a declaration of invalidity of T.F.L. 39, that did not impose an obligation on Weyerhaeuser to participate in the consultation and accommodation that were the Haida's due.

Reasons for Judgment, Finch, C.J.B.C.,  
Joint Record of the Appellants, Vol. I, p. 168 at para. 120

33. Finch C.J.B.C. stated that it was not necessary to determine if Weyerhaeuser's duty to consult arose before 2000 when T.F.L. 39 was replaced. As such, Finch C.J.B.C. was of the opinion that the Court's earlier declaration should be modified to state that Weyerhaeuser currently has a duty to consult.

34. In dissent, Low J.A. stated that the Haida had established no basis in law for the Court to make a mandatory order directly against Weyerhaeuser in these proceedings. In any event, if such an order could properly be made in law, Haida, in its pleadings in the Supreme Court of British Columbia, made no claim for relief against Weyerhaeuser and it was not appropriate for the Court to entertain a claim against the company on appeal.

At paragraph 134, Low J.A. stated:

“Judicial review remedies are available against public officials and public bodies only, not against private citizens. Weyerhaeuser exercised no statutory power. The Minister of Forests exercised a statutory power in granting the T.F.L. to Weyerhaeuser and its predecessor. In pursuing its rights under the T.F.L., Weyerhaeuser exercises only contractual rights. Therefore, it seems to me, it was open to the appellant, in the form of proceedings it chose, to seek a remedy against the public official only. Weyerhaeuser had to be added as a respondent because any remedy obtained against the Crown would affect its contractual rights. However, if the appellant wished to seek a remedy directly against Weyerhaeuser, it would have been compelled to do so in an ordinary action. I am persuaded by the submissions we received on the second hearing of this matter last June 4<sup>th</sup> that no direct remedy against Weyerhaeuser was available to the appellant in the form of proceedings it brought.”

Reasons for Judgment, Low J.A.,  
Joint Record of the Appellants, Vol. I, p. 173-174 at para. 134

## **ARGUMENT**

### **A. FREE-STANDING DUTY TO CONSULT**

35. Alberta's position is that the duty to consult is a factor which could justify an infringement of a s. 35 *Constitution Act, 1982*, aboriginal or treaty right. This public law

duty would be to consult with Aboriginal people regarding proposals to develop natural resources, when this activity infringes s. 35 rights.

36. This Court held that:

Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented

*R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1119 at (f)-(g),  
TAB 28 of Book of Authorities of the Appellants,  
The Minister of Forests and The Attorney General of British Columbia

37. There must be a valid legislative objective, such as conservation or natural resource management, as well as a demonstration by government that its actions are consistent with the fiduciary duty of the government to aboriginal people.

*R. v. Gladstone*, [1996] 2 S.C.R. 723, para. 54,  
TAB 1 of the Authorities of the Intervener, Alberta

38. In *Delgamuukw*, Lamer C.J.C. wrote that there is always a duty of consultation. Alberta submits that the reference to the duty was in the context of aboriginal rights and not treaty rights.

*Delgamuukw v. British Columbia*, [1997]  
3 D.C.R. 1010, TAB 6 of Book of Authorities of  
the Appellants, The Minister of Forests and  
The Attorney General of British Columbia

39. Alberta submits that none of this suggests that a duty to consult may be imposed on government outside the context of the justification process that arises as a consequence of an infringement of an aboriginal or treaty right.

40. In *Haida Nation v. British Columbia Minister of Forests* the British Columbia Court of Appeal followed and elaborated upon the reasons of that Court in *Taku River*. Lambert J.A. held that the roots of the duty to consult are in the trust-like relationship that exists between the Crown and the Aboriginal peoples of Canada in the fiduciary duty owed by the federal and provincial Crown. He wrote that the fiduciary duty of the Crown “grounds a general guiding principle for s. 35(1) of the *Constitution Act, 1982*.” Lambert J.A. wrote that it would be contrary to that guiding principle in the reasons of *Sparrow* to interpret s. 35 as if it required that before an Aboriginal right could be recognized and affirmed, it first had to be made the subject of legal proceedings; then proved to the satisfaction of a judge of competent jurisdiction.

Reasons for Judgment, Lambert J.A.,  
Joint Record of the Appellants, Vol. I, p. 72-73 at para. 37

41. Alberta adopts the arguments of the Intervener, the Attorney General of Alberta, in *Taku River First Nation v. Tulesequah Chief Mine Project*, the companion case to the case at bar.

Factum of the Intervener, Attorney General of Alberta

42. The result of this approach is that there is great uncertainty in relation to when and to what degree there is a duty to consult. This uncertainty may manifest itself in the reluctance of business to initiate economic development of resources.

43. Alberta asks that the approach of the Ontario Court of Appeal in *Trans Canada Pipelines Ltd. v. Beardmore (Township)* be adopted wherein Borins J.A. held that there was no statutory obligation to consult with First Nations. The Court rejected the existence of free-standing duty to consult.

*Trans Canada Pipelines Ltd. v. Beardmore (Township)*  
(2000), 186 D.L.R. (4<sup>th</sup>) 403 (Ont. C.A.)  
TAB 2 of the Authorities of the Intervener, Alberta

44. It should be noted that this approach was recently followed by Dawson J. in *Treaty Eight First Nations v. Canada (AG)*. Dawson J. made the following comments specifically referring to the comments of Borins J.A. in *TransCanada v. Beardmore*:

For the reasons set out above, I have concluded that the applicants have not established that the Crown owed a duty to consult with them. In my view, the case as framed by the applicants asserts a free-standing ground upon which government action may be challenged. Such a free-standing ground is not, in my view, supported by jurisprudence and was rejected by the Ontario Court of Appeal in *TransCanada Pipelines Ltd. v. Beardmore (Township)* (2000), 186 D.L.R. (4<sup>th</sup>) 403; October 19, 2000 leave to appeal dismissed [2000] S.C.C.A. No. 264. Particularly apposite are the comments of the Court at paragraphs 112 and 120 as follows:

[112] In my view, O'Driscoll J. incorrectly applied the concept of the Crown's duty to consult with First Nations in setting aside the restructuring proposal on the ground of loss of jurisdiction. As I will explain, he elevated the Crown's duty to consult with First Nations from merely being one, of several, justificatory requirements to be met by the Crown when a challenge is mounted in law, or government action, on the ground that it unduly interferes with Aboriginal rights or treaty rights recognized and affirmed by s. 35(1) of the Constitution Act, 1982, to an independent ground on which such a law, or government action, may be challenged.

[...]

[120] As Lawrence and Macklem point out at p. 262, "in most cases involving the assertion of Aboriginal or treaty rights, the First Nation in question is simultaneously attempting to establish the existence of its rights and prevent interference with those rights by the Crown or a third party". As the decisions of the Supreme Court illustrate, what triggers a consideration of the Crown's duty to consult is a showing by the First Nation of a violation of an existing Aboriginal or treaty right recognized and affirmed by s. 35(1) of the Constitution Act, 1982. It is at this stage of the proceeding that the Crown is required to

address whether it has fulfilled its duty to consult with a First Nation if it intends to justify the constitutionality of its action.  
[underlining added]

*Treaty Eight First Nations v. Canada (AG)*,  
[2003] F.C.J. No. 1009 (Trial) at para. 79 to 80,  
TAB 3 of the Authorities of Intervener, Alberta

**B. NO PRIOR RESTRAINT ON LEGISLATIVE ACTION**

45. A requirement of aboriginal consultation cannot be a prior restraint on legislative action. Alberta submits that there can be no prior restraint on bills introduced into legislatures. In addition, bills introduced in legislatures are only subject to the legislative process of readings and passage. It is only after bills are passed into law that they would be subject to constitutional constraint.

*Reference Re Canada Assistance Plan (B.C.)*,  
[1991] 2 S.C.R. 525 (S.C.C.) at pp. 558-560 TAB 4  
of the Authorities of the Intervener, Alberta

**C. LIMIT DECISION TO ABORIGINAL RIGHTS**

46. Even if this Honourable Court would find that a duty to consult is owed without prior proof of Aboriginal rights in this case, Alberta submits that the Court should limit itself to Aboriginal rights and not make a determination that impacts treaty rights.

47. Alberta adopts the argument of Alberta in *Taku River* which is being heard along with this case.

Factum of the Intervener, Attorney General of Alberta

48. In any event, Alberta submits that there is no duty to consult in areas that are the subject of treaty as there is no infringement of a treaty right. Weyerhaeuser Company Limited also submits that it has no duty to consult.

49. Treaty 6, as an example of a treaty, reads as follows:

Her Majesty further agrees with Her said Indians that they, the said Indians, shall have *right to pursue their avocations of hunting and fishing* throughout the tract surrendered as hereinbefore described, *subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada and saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering or other purposes* by Her said Government of the Dominion of Canada, or by the said Government. (italics added)

50. The Natural Resources Transfer Agreement is a constitutional document (Schedule 2 of the *Constitution Act, 1930*) which dealt primarily with the transfer of power from Canada to Alberta over natural resources. The NRTA, in relation to hunting rights of First Nations members reads:

s. 12 In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that *the laws respecting game in force in the Province from time to time shall apply to the Indians* within the boundaries thereof, *provided, however, that the said Indians shall have the right*, which the Province hereby assures to them, *of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied crown lands and on any other lands to which the said Indians may have a right of access.* (italics added)

*Constitution Act, 1930, Schedule 2 (Natural Resources Transfer Agreement)*

51. The issue is whether the Treaty as modified by the Natural Resources Transfer Agreement permits hunting on lands not “taken up” or “occupied”, and that a taking up or occupying of lands means that there is no infringement of a right and there is no need to justify under the *Sparrow* test which includes a consultation component.

52. This issue has arisen in the case of *R. v. Cardinal* in Red Deer Provincial Court. The charges were discharging a firearm in a provincial recreation area and hunting in a wildlife sanctuary. The defence to the charges was that the defendant had an existing treaty right to hunt in the Kootenay Plains road corridor and the Kootenay Plains recreational area. Alberta argued that the right is a right to hunt for food and is subject to “lands taken up for settlement, mining, lumbering or other purposes” (Treaty 6) and “unoccupied Crown lands or lands to which they have a right of access” (NRTA). Expert

evidence was led by Alberta to the effect that consultation was not contemplated at treaty making. The Court agreed with Alberta, concluding that the duty to consult was fulfilled by negotiation of the treaty itself, the subsequent survey of reserves and the fulfillment of the treaty land entitlement requirement in the treaty.

*R. v. Cardinal*, [2003] A.J. No. 908, TAB 5 of the  
Authorities of the Intervener, Alberta

53. In *Sheila Copps v. Mikisew Cree First Nation*, [2001] F.C.J. No. 1877, Hansen J. of Federal Court Trial Division, dealt with a Judicial Review application from an authorization of the Minister of Canadian Heritage to construct a winter road in Wood Buffalo National Park. The road would be 118 km long and would connect two aboriginal communities. It would be 10m wide and have a 200m corridor wherein firearms would be permitted. Hansen J. concluded that the Mikisew Cree First Nation have treaty rights to hunt and trap in the park, that the Minister's decision infringed those rights and that there was no justification due to lack of consultation with the Mikisew Cree. The decision was appealed by Canada.

*Sheila Copps v. Mikisew Cree First  
Nation*, [2001] F.C.J. No. 1877, TAB 6 of  
the Authorities of the Intervener, Alberta

54. In that case Hansen J. was of the view that the reading of the Treaty and Natural Resources Transfer Agreement, would render nugatory the 1982 constitutionalization of treaty rights.

*Sheila Copps v. Mikisew Cree First Nation*,  
*supra*, at para. 85

55. Canada's Notice of Appeal to the Federal Court of Appeal sets out three grounds of appeal, as follows:

1. The judge made an error of law in finding that the Mikisew Cree First Nation has treaty rights to hunt and trap within Wood Buffalo National park;
2. In the alternative, if there are treaty rights to hunt and trap in the Wood Buffalo National Park, the judge made an error of law in finding that the Minister's decision to approve the winter road within Wood Buffalo National Park constituted an infringement of treaty rights.
3. In the further alternative, if the winter road within Wood Buffalo National Park constitutes an infringement of treaty rights, the judge made in error of law in finding that the infringement of the treaty right was not justified.

Alberta applied for leave to intervene at the appeal and was granted a right of intervention on appeal grounds 2 and 3. Strayer J.A. of the Federal Court of Appeal allowed the application and wrote:

"The first ground is very specific to the federal Park and its significance for treaty rights outside the park is tenuous. The other two issues, it appears to me, have closer parallels to the situation of the Province of Alberta in its exercise of governmental powers on Treaty 8 lands outside the Park and also have 'general importance' even if they do not directly affect the provincial government."

*Canada (Minister of Canadian Heritage) v. Mikisew Cree First Nation*, [2002] F.C.J. No. 1182 (CA) TAB 7 of the Authorities of the Intervener, Alberta

Alberta was also given leave to appeal on the basis of a lack of s. 57 *Federal Court Act* notice being given. The appeal was heard on September 29, 2003 in Edmonton. Judgment was reserved.

56. In *Halfway River First Nation v. British Columbia (Minister of Forests)* [1999] B.C.J. No. 1880 (CA), the B.C. Court of Appeal was faced with a judicial review of a forest cutting permit. That case is also cited by others in support of the proposition that Alberta cannot "take up" lands without justification.

In that case Finch J. held that it is:

“unrealistic to regard the Crown’s right to take up land as separate or independent right, rather than as a limitation or restriction on the Indians’ right to hunt.” (para. 136)

*Halfway River First Nation v. British Columbia  
(Ministry of Forests)* (1999), 178 D.L.R.  
(4<sup>TH</sup>) 666 at para. 136, TAB 8 of  
the Authorities of the Intervener, Alberta

Alberta’s position is that a close reading of the case does not lead to that conclusion.

57. The British Court of Appeal itself recognized the distinction between consultation in aboriginal title a treaty jurisdictions in *Taku River*. There, Justice Southin, in dissent, commented on the judgment of Borins J.A. in *Ontario (Minister of Municipal Affairs and Housing) v. TransCanada Pipelines Ltd.* Borins J.A. held that it was only after a First Nation had established an infringement of an existing aboriginal treaty right through an appropriate hearing that the duty of the Crown to consult with First Nations was a factor for the court to consider in the justificatory phase of the proceeding. Justice Southin noted that if *Taku River* were a treaty case, this case and this rationale might apply. This was the substance of Justice Southin’s judgment in *Halfway River First Nation v. B.C.* However, at least in reference to an aboriginal title jurisdiction, that rationale was rejected.

*Taku River First Nation v. Tulsequah  
Chief Mine Project*, [2002] B.C.J. No. 155, TAB 9

#### **D. DUTY TO CONSULT IS OWED BY THE CROWN**

58. Alberta submits that whether or not there is a free-standing duty to consult (and Alberta submits that there is no such free-standing duty), any duty to consult must be that of the Crown and not third parties.

59. In general, Alberta adopts the argument of the Appellants, the Minister of Forests and the Attorney General of British Columbia which assert that Weyerhaeuser does not owe the Haida a legal duty of consultation and accommodation.

Factum of the Appellants the Minister of Forests et al., at para. 122-132

60. In addition, Alberta adopts in general the arguments of the Appellant Weyerhaeuser Company Limited in relation to whether a duty to consult is owed by Weyerhaeuser to the Haida.

Factum of the Appellant Weyerhaeuser Company Limited

61. Alberta views Crown consultation as part of the *Sparrow* justification process. Though the obligation to consult is on the Crown, the Crown must be able to manage the consultation process by statute, regulation and policy. Though the role of third parties such as industrial approval seekers in supplying information in relation to their proposals and in accommodating Aboriginal concerns must not be minimized, it is the Crown that sets up the regulatory scheme.

62. In particular, Alberta submits that the justification test contemplates legislative or regulatory action, or, for example, issuance of a license under a statute or regulation. Legislation, regulation and approval issuance under legislation or regulation are purely governmental acts and cannot be imposed on non-governmental entities.

63. In *Sparrow* there was no need to consider the regulatory scheme as a whole as the issue related to the length of a net in a Band Indian food fishing licence. Regulatory schemes in their entirety may need to be reviewed as part of a justification analysis. In *R. v. Gladstone*, Lamer C.J.C. wrote:

40. At the infringement stage, the primary distinction between the factual context of *Sparrow*, and the context of this appeal, is that the regulation impugned in *Sparrow* – a net length restriction – was challenged

independently of the broader fisheries management scheme of which it was a part. In this case, while the appellants' constitutional challenge is focused on a single regulation – s. 20(3) of the Pacific Herring Fishery Regulations – the scope of the challenge is much broader than the terms of s. 20(3). The Appellants' arguments on the points of infringement and justification effectively impugn the entire approach taken by the Crown to the management of the herring spawn on kelp fishery.

41. The fact that the appellants' challenge to the legislation is broader than that of the appellant in *Sparrow* arises from the difference in the nature of the regulation being challenged. Restrictions on net length have an impact on an individual's ability to exercise his or her aboriginal rights, and raise conservation issues, which can be subject to constitutional scrutiny independent of the broader regulatory scheme of which they are a part. The Category J license requirement, on the other hand, cannot be scrutinized for the purposes of either infringement or justification without considering the entire regulatory scheme of which it is a part. The requirement that those engaged in the commercial fishery have licences is, as will be discussed in more detail below, simply a constituent part of a larger regulatory scheme setting the amount of herring that can be caught, the amount of herring allotted to the herring spawn on kelp fishery and the allocation of herring spawn on kelp amongst different users of the resource. All aspects of this regulatory scheme potentially infringe the rights of the appellants in this case; to consider s. 20(3) apart from this broader regulatory scheme for the herring fishery would distort the Court's inquiry.

42. The significance of this difference for the *Sparrow* test is that the questions asked by this Court in *Sparrow* must, in this case, be applied not simply to s. 20(3) but also to the other aspects of the regulatory scheme of which s. 20(3) is one part. In order to do this it will be necessary to consider, in some detail, the regulatory scheme being challenged by the appellants in this case.

*R. v. Gladstone* [1996], 2 S.C.R. 723, para. 40  
to 42, TAB 1 of the Authorities of the  
Intervener, Alberta

64. Lamer C.J.C. also wrote that:

62. The right is at once both procedural and substantive; at the stage of justification the government must demonstrate both that the process by which it allocated the resource and the actual allocation of the resource which results from that process reflect the prior interest of aboriginal rights holders in the fishery.

*R. v. Gladstone*, *Ibid*, at para. 62

65. In addition, the justification analysis is the way in which the overall public interest is reconciled with aboriginal rights. Again Lamer C.J.C. wrote:

73. Aboriginal rights are recognized and affirmed by s. 35(1) in order to reconcile the existence of distinctive aboriginal societies prior to the arrival of Europeans in North America with the assertion of Crown sovereignty over that territory, they are the means by which the critical and integral aspects of those societies are maintained. Because, however, distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole (taking into account the fact that aboriginal societies are a part of that community), some limitation of those rights will be justifiable. Aboriginal people are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are part, limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a necessary part of that reconciliation.

*R. v. Gladstone*, Ibid, at para. 73

66. The duty to consult as part of a justification analysis must be that of government. It is able to legislate and regulate; third parties do not have that power. In addition, the reconciliation of aboriginal societies with this political community which may result in a restriction of rights should be the responsibility of government not a third party.

67. Legislatures must be free to set up regulatory schemes that provide for quasi-judicial decision-makers who would decide whether an approval is to be granted in the public interest. There are limits to what governments can do in relation to consultation with Aboriginals where public interest approvals may be granted.

## **E. OWNERSHIP OF RESOURCES**

68. Ownership of natural resources in Alberta has been transferred to Alberta by the Natural Resources Transfer Agreement. Much of the ownership of natural resources in Alberta has not been alienated and thus remains subject to Alberta's proprietary right.

Natural Resources Transfer Agreement, 1930

69. In addition, Alberta can act as legislator in relation to natural resources to regulate mining, production, distribution and marketing of minerals and can obtain revenue by virtue of their development. Peter Hogg writes that:

When a province acts as legislator (as opposed to proprietor), in order to regulate the production and marketing of privately-owned minerals, or to obtain revenue from their production, it has to rely on its legislative authority over property and civil rights in the province (s. 92(13)), local works and undertakings (s. 92(10)), matters of local or private nature (s. 92(16)), natural resources (s. 92A) and taxation (ss. 92(2), 92A(4)). These powers are extensive with respect to resources that are marketed within the province, that is, resources that are consumed, or at least refined or processed, within the province of production.

Peter W. Hogg, "Constitutional Law of Canada"  
(Toronto: Thomson Canada Limited, 1997)  
at 29-3, TAB 10 of Authorities of Intervener, Alberta

70. The consultation issue is extremely important to Alberta. There are currently 176,000 active industrial and agricultural dispositions in relation to Crown land. Eighteen thousand new dispositions are added each year of which 12,000 are related to oil and gas.

## **F. KNOWING RECEIPT**

71. Alberta adopts the argument of Weyerhaeuser Company Limited in relation to "knowing receipt".

72. In addition, Alberta submits that knowing receipt should not be used to impose a duty on Weyerhaeuser. That doctrine requires constructive knowledge of breach of the duty. That would lead to uncertainty in relation to when the duty to consult is imposed on third parties. Alberta submits that this would be unworkable and could impact industrial and commercial development of natural resources. Furthermore, Alberta submits that Finch J.'s statement that the Crown lacks effective power to address First Nation's concerns if there is no duty to consult third parties is incorrect: As issuer of disposition, the Crown has the power to impact third parties. In particular, it can impose conditions on approval holders.

#### **G. UNPROVEN RIGHT**

73. When the extent of the Aboriginal title or right is uncertain or unproven, it is difficult, if not impossible, to assess whether consultation and accommodation have been adequate. The adequacy of consultation and accommodation will be dependent on the nature of the Aboriginal right and the nature of the infringement. Justice Lambert, in paragraphs 58 and 59 of the Court of Appeal's original reasons, recognized that it would be difficult to determine the validity of T.F.L. 39. Justice Lambert stated "... it seems to me that the proper time to determine that question would be at the same time as the determination of aboriginal title, aboriginal rights, prima facie infringement, and justification by a Court of competent jurisdiction."

74. Neither the provincial Crown nor the courts can adequately assess consultation and accommodation in the absence of a proven Aboriginal right and an infringement. This highlights that consultation, as set out in *R. v. Sparrow*, is not a free-standing duty; rather, consultation is to be considered in the justification test. Alberta submits that the issue of consultation and accommodation is not justiciable unless there is a proven right and infringement.

## H. JUSTIFICATION AS A DEFENCE

75. Alberta submits that justification is not a defence to an action for infringement as set out in the decision of Lambert J.A. It is as noted *supra* at paragraph 65, that it is a way to reconcile the public interest in a complex society with aboriginal rights. It is government that can provide the justification for infringement including legislative purpose and a demonstration of whether there has been as little infringement as possible to affect the desired result, whether fair compensation has been made available in the context of expropriation and whether there has been adequate consultation.

## PART IV – SUBMISSIONS ON COSTS

Nil

## PART V – ORDER REQUESTED

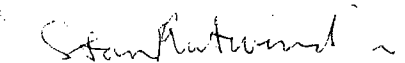
76. The Attorney General of Alberta asks that this appeal be allowed and that the Constitutional Question be answered in the following manner:

**Question:** Is s. 36 of the *Forest Act*, R.S.B.C. 1996 c. 157, of no force or effect to the extent that the replacement of T.F.L. No. 39 violated any right of the Haida Nation, as recognized and affirmed by s. 35 of the *Constitution Act, 1982*, to be consulted and to have their asserted rights accommodated prior to the replacement.

**Answer:** No.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

**DATED** at the City of Edmonton, in the Province of Alberta, this 15<sup>th</sup> day of December, 2003.



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**STAN RUTWIND**  
*Solicitor for the Intervener,*  
*the Attorney General of Alberta*

## PART VI - LIST OF AUTHORITIES

### TAB

	<b>PAGE</b>
1. <i>R. v. Gladstone</i> [1996], 2 S.C.R. 723	10
2. <i>TransCanada Pipelines Ltd. v. Beardmore (Township)</i> (2000), 186 D.L.R. (4 <sup>th</sup> ) 403; October 19, 2000	11
3. <i>Treaty Eight First Nations v. Canada (AG)</i> , [2003] F.C.J. No. 1009 (Trial)	13
4. <i>Reference Re Canada Assistance Plan (B.C.)</i> , [1991] 2 S.C.R. 525 (S.C.C.)	13
5. <i>R. v. Cardinal</i> , [2003] A.J. No. 908	15
6. <i>Sheila Copps v. Mikisew Cree First Nation</i> , [2001] F.C.J. No. 1877	15
7. <i>Canada (Minister of Canadian Heritage) v. Mikisew Cree First Nation</i> , [2002] F.C.J. No. 1182 (CA)	16
8. <i>Halfway River First Nation v. British Columbia (Minister of Forests)</i> [1999] B.C.J. No. 1880 (CA)	17
9. <i>Taku River First Nation v. Tulsequah Chief Mine Project</i> , [2002] B.C.J. No. 155	17
10. Peter W. Hogg, "Constitutional Law of Canada" (Toronto: Thomson Canada Limited, 1997)	21