

**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 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)

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Interveners

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**FACTUM OF THE INTERVENER  
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## PART I – STATEMENT OF FACTS

1. The Intervener, the Attorney General of Alberta (“Alberta”), generally adopts the facts as set forth in the Appellant’s factum.

## PART II – POINTS IN ISSUE AND POSTION OF ALBERTA

2. The issues as framed by the Appellant<sup>1</sup> in this appeal are as follow:

- 10
1. **Does the Provincial Crown have a constitutional or fiduciary duty to consult with First Nations and to seek to accommodate aboriginal interests in the circumstances where First Nations have claimed, but not yet proven, aboriginal rights or title?**
  2. **If the duty is not constitutional or fiduciary, how may it be defined and applied in a manner, which allows the Provincial Crown to strike a workable balance between its proprietary interests and statutory duties, its obligations to First Nations, and the public interest at large?**

20 3. In addition, the parties have made submissions in their facta relating to statutory and administrative law issues.

4. Alberta submits that the first issue should be determined in the negative in that there is no duty to consult in advance of proof of aboriginal title or an aboriginal right. As a constitutional remedy, the duty to consult arises from the justificatory test for infringement contained in the *Sparrow*<sup>2</sup> decision. When aboriginal title, or aboriginal or treaty rights are established by Aboriginal people, Crown resource development in infringement of that right or title must be justified by the Crown, or the Crown disposition, licence or lease may be struck down by the Court. The source of the duty to consult is the *Constitution*, and laws that are inconsistent with the *Constitution* are invalid to the extent of that inconsistency by virtue of section 52 of the *Constitution*. It is not a freestanding obligation of the Crown,  
30 but is intrinsically linked to, and dependent upon, section 35.

5. The inapplicability of legislation or acts performed pursuant to legislation as contrary to section 35 is a negative remedy, corresponding to the corrective justice model. The negative remedy of striking down dispositions, for failure to consult under the justificatory requirement imposed by *Sparrow*, creates a positive obligation. It will be suggested in Alberta’s factum that this Court has been willing to embrace positive obligations to protect *Charter* rights, and the *Sparrow* test is one example of the adoption of a positive obligation for section 35. However, traditionally this Court has been reluctant to accord protection to rights that are speculative or unknown.

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<sup>1</sup> Appellant’s Factum, at p. 6, paras 19 and 20.

<sup>2</sup> *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at TAB [1] of the Intervener’s Authorities.

6. The second issue identified by the Appellant, while important, is already covered by the law of interlocutory remedies, including injunctions, which provide the necessary judicial balancing of the public interest of resource development and any prospective rights of Aboriginal people.

7. Alberta takes no position with respect to the administrative and statutory issues framed by the parties.

10 8. While Alberta adopts much of the factum of the Appellant, Alberta does not endorse a duty to consult (whether *ex ante*, as maintained by Canada; or as part of a duty of fair dealing, as maintained by the Appellant) prior to the proof of Aboriginal title or rights. That is not to say the Provincial Crown will not consult prior to an established right, it is simply that consultation must be undertaken if the Crown wishes to justify activities that infringe section 35 of the *Constitution*. To hold otherwise would be to create a situation where Aboriginal people enjoy a remedy without necessarily having a right.

### PART III – ARGUMENT

#### A. The Characterization of the Duty to Consult by the B.C. Court of Appeal

20 9. It is significant that, in the British Columbia Supreme Court, Justice Kirkpatrick ordered that issues requiring the determination of the Tlingits' claims of aboriginal rights and title, be severed from the judicial review application and referred to the trial list. This, however, did not prevent the Court from considering the provincial Crown's requirements to consult. Kirkpatrick J. concluded that the statutory obligations of consultation were not discharged by the relevant Ministers. Little effort was made in characterizing the duty to consult. Kirkpatrick J. merely concluded that the Ministers' obligations under the statute and at common law were not fulfilled.<sup>3</sup>

10. There was also very little elaboration of the nature of the duty to consult in the British Columbia Court of Appeal. The majority decision rejected British Columbia's proposition that

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...[T]he constitutional or fiduciary obligation to consult with First Nations, as distinct from any administrative law duty of procedural fairness, only arises after there has been a determination that the First Nation has existing aboriginal or treaty rights under section 35 of the *Constitution Act, 1982*, and that those rights may be infringed by Crown sanctioned activities.<sup>4</sup>

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<sup>3</sup> Reasons for Judgment of Kirkpatrick J., paras 106 and 135, at p. 0094 and 0111 of the Appellant's Record.

<sup>4</sup> Reasons for Judgment of the Court of Appeal, per Rowles J.A., para 153, at p. 022 of the Appellant's Record.

11. Justice Rowles rejected this proposition after a review of the *Sparrow*, *Van der Peet*, and *Delgamuukw* decisions of this Court:

In my opinion, the jurisprudence supports the view taken by the chambers judge that, prior to the issuance of the Project Approval Certificate, the Ministers of the Crown had to be “mindful of the possibility that their decision might infringe aboriginal rights” and, accordingly, to be careful to ensure that the substance of the Tlingits’ concerns had to be addressed.

10 In summary, I am of the view that the Crown’s argument that any obligation to consult the Tlingits would arise only after there had been a determination that the Tlingits had aboriginal rights or aboriginal title which could be infringed by issuance of the Project Approval Certificate rests on a misreading of the decisions of the Supreme Court of Canada. To accept the Appellants’ proposition would largely negate the purpose of the constitutional protection provided by s. 35(1) of the Constitution Act, 1982.<sup>5</sup>

12. The dissenting opinion did not cast much more light on the duty to consult. Justice Southin concluded that the *Transcanada Pipelines* decision<sup>6</sup> of the Ontario Court of Appeal (which will be addressed by Alberta, *infra*) “might apply” if this were a Treaty case. Justice Southin concluded that:  
20 “Here there is no treaty, and yet I cannot think it right, when it is plain that the Tlingit have some sort of rights in north western British Columbia, to say there is no duty at all.”<sup>7</sup> Justice Southin, however, concluded that the demands of *Delgamuukw* had been met. The relevant legislation provided a process of consultation sufficient to the purpose which, on the facts, was carried out.

13. The British Columbia Court of Appeal added more substance to the analysis of the duty to consult in *Haida Nation v. British Columbia (Minister of Forests)*.<sup>8</sup> There, the Crown again argued there was no obligation on the Crown to consult in advance of proof of Aboriginal rights or title.<sup>9</sup>

14. Justice Lambert indicated that the reasons of the B.C. Court of Appeal were handed down in *Taku River* one week before the Haida appeal was set for hearing. That ruling was held to be binding on the  
30 panel hearing the *Haida* case.<sup>10</sup> Justice Lambert then went on to add some comments on the duty to consult, and the root of such obligation. The roots were said to be in the trust-like relationship that exists between the Crown and the Aboriginal people of Canada; in the fiduciary duty owed by the Federal and

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<sup>5</sup> Reasons for Judgment of the Court of Appeal, per Rowles J.A., paras 193-194, at p. 0249 of the Appellant’s Record.

<sup>6</sup> *Transcanada Pipelines Ltd. v. Beardmore (Township)*, [1997] O.J. No. 1066 (C.A.), (2000) 186 D.L.R. (4<sup>th</sup>) 403 leave to appeal dismissed [2000] S.C.C.A. No. 264 at TAB [2] of the Intervener’s Authorities.

<sup>7</sup> Reasons for Judgment of the Court of Appeal, per Southin J.A., para 94, p.0193 of the Appellant’s Record.

<sup>8</sup> *Haida Nation v. British Columbia (Minister of Forests)*, [2002] B.C.J. No. 378 (C.A.), currently under appeal to this Court at TAB [3] of the Intervener’s Authorities.

<sup>9</sup> *Ibid.* at para 9.

<sup>10</sup> *Ibid.* at paras 27 and 29.

Provincial Crown.<sup>11</sup> One manifestation of the fiduciary duty of the Crown is that it “grounds a general guiding principle for s. 35(1) of the *Constitution Act, 1982*.” It would be contrary to that guiding principle and to the reasons in *Sparrow* to interpret section 35 as if it required that before an aboriginal right could be recognized and affirmed, it first had to be made the subject matter of legal proceedings; then proved to the satisfaction of a judge of competent jurisdiction.<sup>12</sup>

15. The Court went on to hold that both the Crown Provincial and Weyerhaeuser had an obligation to consult the Haida people about accommodating the aboriginal title and aboriginal rights of the Haida people. The obligation to “consult and to seek accommodation” arose from the circumstances that the Provincial Crown had fiduciary obligations of utmost good faith to the Haida people; B.C. and Weyerhaeuser were aware of the Haida claims; and the claims of the Haida people were supported by a “good prima facie case.”<sup>13</sup>

16. Justice Lambert stated the following:

20 The strength of the Haida case gives content to the obligation to consult and the obligation to seek an accommodation. I am not saying that if there is something less than a good prima facie case then there is no obligation to consult...In my opinion, the obligations to consult and seek an accommodation...were enforceable, legal and equitable duties...of the Crown provincial ...and... Weyerhaeuser.<sup>14</sup>

17. Lambert J.A added that the obligation to consult was a freestanding enforceable legal and equitable duty. The duty to consult and seek an accommodation does not arise simply from a *Sparrow* analysis of section 35: “It stands on the broader fiduciary footing of the Crown’s relationship with the Indian peoples who are under its protection<sup>15</sup>.”

18. According to the Court, the aim of the remedy should be to protect the interests of all parties pending the final determination of the nature and scope of aboriginal title and aboriginal rights. Lambert J.A. then states:

30 Once that final decision is made, and perhaps in the same proceedings, a final determination can be made of the quality and extent of any prima facie infringement of the aboriginal title and aboriginal rights that may have occurred before that determination...When the decisions are made about infringement then further decisions about justification can be made.<sup>16</sup>

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<sup>11</sup> Ibid. at paras 33 and 34.

<sup>12</sup> Ibid. at para 37.

<sup>13</sup> Ibid. at para 49.

<sup>14</sup> Ibid. at paras 51 and 52.

<sup>15</sup> Ibid. at para 55.

<sup>16</sup> Ibid. at para 54.

19. In *Haida*, the B.C. Court of Appeal did not invalidate the Tree Forest Licence or its transfer to Weyerhaeuser. This was an issue that could be argued after the extent of any infringement of aboriginal title and rights had been determined by a court of competent jurisdiction. Lambert J.A. concluded:

10 In the end, the manner in which the duty to consult and reach accommodations is discharged in the immediate and the long-term future will have a very significant impact on the final determinations by a court of competent jurisdiction which is considering the aboriginal title and aboriginal rights of the Haida people, about whether that title or those rights have been infringed, or continue to be infringed, and particularly, about whether any infringement was justified.

The extent to which any further remedies may be required or may properly be claimed at a later but still interim stage in these proceedings cannot now be predicted. Much may depend on the quality of the consultation and accommodation processes. So, to the extent it may be thought necessary, I would order that the parties have liberty to apply to a judge of the Supreme Court of British Columbia for whatever orders they may be instructed to seek, pending the conclusion of the proceedings with respect to the determination of aboriginal title and aboriginal rights, infringement and justification.<sup>17</sup>

20 20. It is clear, therefore, that the British Columbia Court of Appeal has elevated any obligation of the Crown to consult beyond the *Sparrow* justification test to an independent, freestanding, equitable and *interim* duty. Its source is not the *Constitution per se*, but the fiduciary duty of the Crown. Respectfully, as will be illustrated, the approach taken by the B.C. Court of Appeal is not supportable at law. It leads to extensive intervention by the Courts at the interim stage, does not consider issues of irreparable harm and balance of convenience of competing interests, and enforces a remedy based on the mere allegation, and not proof, of a right. The approach of the Ontario Court of Appeal is preferable, and is in keeping with the practice of this Court in constitutional cases.

### 30 B. The Characterization of the Duty to Consult by the Ontario Court of Appeal

21. The conclusions and findings of the B.C. Court of Appeal are in contradiction with the principles set forth by the Ontario Court of Appeal. In *TransCanada Pipelines Ltd. v. Beardmore (Township)*,<sup>18</sup> Justice Borins indicated that as the Ontario *Municipal Act* did not impose an obligation to consult with First Nations, any obligation to consult had to derive from another source. The elevation of the Crown's duty to consult to an independent ground on which such a law, or government action, may be challenged

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<sup>17</sup> Ibid. at paras 61 and 62.

<sup>18</sup> *Transcanada Pipelines Ltd v. Beardmore (Township)*, *supra* note 6.

amounted to an error of law.<sup>19</sup> After reviewing *Sparrow*, *Badger*, and *Delgamuukw*, Justice Borins stated:

In my view, what these cases decide is that the duty of the Crown to consult with First Nations is a legal requirement that assists the court in determining whether the Crown is constitutionally justified in engaging in a particular action that has been found to prima facie infringe an existing Aboriginal or treaty right of a First Nation. It is only after the First Nation has established such infringement through an appropriate hearing that the duty of the Crown to consult with First Nations becomes engaged as a factor for the court to consider in the justificatory phase of the proceeding.

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...As the decisions of the Supreme Court of Canada 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.<sup>20</sup>

22. This approach was followed recently in the Federal Court of Canada.<sup>21</sup> Alberta submits that the Ontario Court of Appeal's approach is in keeping with the evolution of this Court's jurisprudence relating to constitutional rights. To understand this, we must examine the evolution of the duty to consult in Canada.

### C. The Characterization of the Duty to Consult as a Constitutional Remedy

#### (i) Evolution of the Duty to Consult

23. Prior to the enactment of section 35(1) of *The Constitution Act, 1982*, the duty to consult as a public law obligation did not exist. The first reference by this Court to consultation with Aboriginal people was made by Justice Dickson in *Guerin v. Canada*<sup>22</sup> who stated that: "In obtaining without consultation a much less valuable lease than that promised, the Crown breached the fiduciary obligation it owed the Band." Alberta submits that the term "consultation" was being used in *Guerin* in a more generic sense of that word. No independent constitutional duty to consult was being created by the Court. Justice Dickson was merely stating that consultation was required of a fiduciary when less favourable terms are being obtained for disposition of the property of a beneficiary.

<sup>19</sup> Ibid. at para 112.

<sup>20</sup> Ibid. at paras 119 and 120.

<sup>21</sup> *Treaty Eight First Nations v. Canada (Attorney General)*, [2003] F.C.J. No. 1009, 2003 FCT 782 (T.D.), at para 79, at **TAB [4]** of the Intervener's Authorities.

<sup>22</sup> *Guerin v. Canada*, [1984] 2 S.C.R. 335 at p. 389 at **TAB [5]** of the Intervener's Authorities.

24. The next reference to any requirement to consult was made in *R. v. Horseman*.<sup>23</sup> There, Justice Cory stated the following with reference to the *Natural Resources Transfer Agreement*:

In addition, although it might be politically and morally unacceptable in today's climate to take such a step as that set out in the 1930 Agreement without consultation with and concurrence of the Native peoples affected, nonetheless the power of the Federal Government to unilaterally make such a modification is unquestioned...<sup>24</sup>

10 25. Again, this passage cannot be seen to be the genesis of the duty to consult as a public law obligation. Any obligation of the Crown to consult is indicated to be a political and moral rather than a legal one.

26. Unquestionably, the obligation of the state to consult was elevated beyond a mere moral or political consideration to a positive public law duty in *R. v. Sparrow*.<sup>25</sup> The case required the Court to explore for the first time the scope of s. 35(1) of the *Constitution Act, 1982*. This Court determined that while section 35(1) was not subject to section 1 of the *Charter*, this did not mean that any law or regulation affecting aboriginal rights would automatically be of no force or effect by the operation of section 52:

20 Legislation that affects the exercise of aboriginal rights will nonetheless be valid if it meets the test for justifying an interference with a right recognized and affirmed under s. 35(1).<sup>26</sup>

27. In *Sparrow*, this Court held that the government was required to bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under section 35(1).<sup>27</sup> Accordingly, the Court set out the test for a *prima facie* interference with an existing aboriginal right and for the justification of such interference. Within the justificatory analysis were included the questions of whether there has been as little infringement as possible in order to affect the desired result; whether in the 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."<sup>28</sup>

30 Specifically in reference to natural resources, the court stated:

The aboriginal peoples, with their history of conservation-consciousness and interdependence with natural resources, would surely be expected, at the least, *to be*

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<sup>23</sup> *R. v. Horseman*, [1990] 1 S.C.R. 901 at TAB [6] of the Intervener's Authorities.

<sup>24</sup> *Ibid.* at p. 934.

<sup>25</sup> *R. v. Sparrow*, *supra* note 2.

<sup>26</sup> *Ibid.* at p. 1109.

<sup>27</sup> *Ibid.* at p. 1110.

<sup>28</sup> *Ibid.* at p. 1119.

*informed* regarding determination of an appropriate scheme for the regulation of the fisheries. [emphasis added]<sup>29</sup>

28. The *Sparrow* case is therefore the first decision positively obligating the Crown to consult, in certain instances, to properly justify an infringement of section 35(1). That public law duty, informed by the honour of the Crown, would be to consult with (at least to inform) Aboriginal people regarding proposals to manage natural resources, when this activity infringes section 35 rights. The consultation requirement only arises as part of the Crown's obligation to justify the infringement.

10 29. In *Delgamuukw*,<sup>30</sup> then Chief Justice Lamer indicated that the general economic development of the interior of British Columbia, through agriculture, mining, forestry, and hydroelectric power, as well as the related building of infrastructure and settlement of foreign populations are valid legislative objectives that, in principle, satisfy the first part of the justification analysis as outlined in *Sparrow*. Under the second part of the justification test, these legislative objectives are subject to accommodation of the aboriginal peoples' interests:

20 This accommodation must always be in accordance with the honour and good faith of the Crown. Moreover, when dealing with a generalized claim over vast tracts of land, accommodation is not a simple matter of asking whether licences have been fairly allocated in one industry, or whether conservation measures have been properly implemented for a specific resource. Rather, the question of accommodation of "aboriginal title" is much broader than this. Certainly, one aspect of accommodation in this context entails notifying and consulting aboriginal peoples with respect to the development of the affected territory.<sup>31</sup>

30 Three aspects of aboriginal title were indicated to be relevant to the second part of the justification test. First, the right to exclusive use and occupation of land is relevant to the degree of scrutiny of the infringing measure or action. Second, the right to choose to what uses land can be put suggests that the fiduciary relationship between the Crown and aboriginal peoples may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their lands. Chief Justice Lamer (as he then was) stated:

Moreover, the other aspects of aboriginal title suggest that the fiduciary duty may be articulated in a manner different than the idea of priority. This point becomes clear from a comparison between aboriginal title and the aboriginal right to fish for food in *Sparrow*. *First, aboriginal title encompasses within it a right to choose to what ends a piece of land can be put. The aboriginal right to fish for food, by contrast, does not contain within it the same discretionary component.* This aspect of aboriginal title suggests that

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<sup>29</sup> Ibid.

<sup>30</sup> *Delgamuukw v British Columbia*, [1997] 3 S.C.R. 1010 at TAB [7] of the Intervener's Authorities.

<sup>31</sup> Ibid. at p.1133, para 203.

10 the fiduciary relationship between the Crown and aboriginal peoples may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their lands. There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified, in the same way that the Crown's failure to consult an aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law: *Guerin*. The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken *with respect to lands held pursuant to aboriginal title*. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.<sup>32</sup> [Emphasis added]

31. This case was the first analysis by the Court of the *Sparrow* justification test as it applies to Aboriginal title, and this Court outlined differences and similarities between Aboriginal food fishing and  
20 Aboriginal title. Although the *Delgamuukw* court comments upon the variable nature of consultation, consultation is predicated on the notion that title is *held*, not merely alleged to be held. The positive duty to consult finds its source in the justification of an infringement of section 35 of the *Constitution*.

(ii) **The Corrective and Public Law Models of Justice**

32. We have seen that the obligation to consult originates from the *Sparrow* test as a component of the justification of any infringement of section 35. Both the *Sparrow* test and the *Oakes* test<sup>33</sup> concerning limitation of *Charter* rights under section 1 of the *Charter of Rights and Freedoms*, are touchstone decisions concerning limitations of constitutional rights. According to Professor Dwight Newman: "In  
30 understanding the rights of citizens in relation to the Canadian government, there is no escaping the need to fully grasp the principles and tests for limits on those rights."<sup>34</sup>

33. Professor Kent Roach argues<sup>35</sup> that disagreements about the appropriate role of the judiciary lie at the heart of debate about remedial purposes and constraints in the area of constitutional remedies. The goal of correcting constitutional violations is associated with a classical model of adjudication "in which judges provide remedies for those who have suffered violations and attempt to restore victims to the position they occupied before the violation." Under corrective theory, judges are "only justified and

<sup>32</sup> *Ibid.* at p. 1112, para 168.

<sup>33</sup> *R. v. Oakes*, [1986] 1 S.C.R. 103 at TAB [8] of the Intervener's Authorities.

<sup>34</sup> Dwight Newman, "The Limitation of Rights: A Comparative Evolution and Ideology of the *Oakes* and *Sparrow* Tests" (1999), 62 Sask. L. Rev. 543-566, p. 543 at TAB [9] of the Intervener's Authorities.

<sup>35</sup> Kent Roach, *Constitutional Remedies in Canada* (Aurora Ontario: Canada Law Book Inc., 2002) at p. 2-39 at TAB [10] of the Intervener's Authorities.

competent to order remedies to the extent that they repair harms caused by government's violation." Further: "Judges should leave more robust remedial ambitions to the legislative and administrative direction of the community as the pursuit of distributive justice."<sup>36</sup>

34. However, according to the corrective theory, once a violation is proven, the Court should be concerned with "full correction without attempting either to balance the affected interests or change government behaviour in the future. If a court focuses on correcting harms caused by proven violations, it will not have to worry about infringing the role of other branches of government pursuing distributive justice."<sup>37</sup>

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35. The corrective justice model is in contrast with the public law model, where:

Relief is not conceived as compensation for a past wrong in a form logically derived from the substantive liability and confined in its impact to the immediate parties; instead it is forward looking, fashioned *ad hoc* on flexible and broadly remedial lines, often having important consequences for many persons including absentees.<sup>38</sup>

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36. The public law model advances constitutional remedies that attempt to regulate government behaviour and stresses that remedial decision-making is a more instrumental and contingent process than determining violations of constitutional rights. Judges do not attempt to deduce remedies from the nature of the violation, but rather fashion them to achieve compliance with the Constitution in the future. Courts can invoke the breadth of their remedial powers at equity to justify ordering remedies that respond to harms and conditions that may not be causally connected to proven violations and also to balance all the interests affected by the remedy.

37. It is within the public law model that the declarations and findings of the British Columbia Court of Appeal fall, in both *Haida* and this case. Alberta submits that, for reasons that follow, an analysis corresponding with the corrective justice model is more in keeping with the Constitution.

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**(iii) Positive and Negative Remedies**

38. Constitutional remedies may be divided into negative or defensive remedies and positive or affirmative remedies.<sup>39</sup> Negative remedies, such as stays of proceedings, exclusion of evidence and

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<sup>36</sup> Ibid. at p. 3-2.

<sup>37</sup> Ibid.

<sup>38</sup> Abraham Chayes, "The Role of the Judge in Public Law Litigation" (1976), 89 Harv. L. Rev 1, in Kent Roach, *Constitutional Remedies in Canada*, *supra* note 35, at p. 3-2.

<sup>39</sup> Marilyn Pilkington, "Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms" (1984), 62 Can. Bar Rev. 517 at pp. 518-19; Dale Gibson, *The Law of the Charter: General Principles* (Toronto,

declarations of no force and effect, deny the state benefits as a form of redress. Positive remedies, however, require the government to take positive steps to provide a remedy.

39. Justice Arbour held, in dissenting reasons in *Gosselin v. Quebec*,<sup>40</sup> with respect to *Charter* rights, that any claim that only negative rights are constitutionally recognized was “patently defective”:

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The rights to vote (s. 3), to trial within a reasonable time (s. 11(b)), to be presumed innocent (s. 11(d)), to trial by jury in certain cases (s. 11(f)), to an interpreter in penal proceedings (s. 14), and minority language education rights (s.23) to name but some, all impose positive obligations of performance on the state and are therefore best viewed as positive rights (at least in part). By finding that the state has a positive obligation in certain cases to ensure that its labour legislation is properly inclusive, this Court has also found there to be a positive dimensions to the s. 2(d) right to associate. Finally, decisions like *Schacter v. Canada* [1992] 2 S.C.R. 679, and *Vriend*...confirm that “[I]n some contexts it will be proper to characterize s. 15 as providing positive rights....This list is illustrative rather than exhaustive.”<sup>41</sup>

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40. In *Schacter v. Canada*, Lamer C.J.C. (as he then was) recognized that negative remedies striking out parts of legislation might have the positive effect of extending legislative benefits.<sup>42</sup> As Alberta’s position is the obligation to consult is linked to the violation of section 35, there is no means by which to force the state to consult independently of that violation. The only remedy available is to strike down the disposition or Crown-sanctioned activity upon proof of a violation of a section 35 right. The striking down (a negative remedy), as envisioned by Justice Lamer, requires the Crown to perform a positive duty. The threat of inapplicability or invalidity itself promotes the positive action of Crown consultation in appropriate cases. In this context, the obligation to consult as a negative remedy can be seen as corresponding to the corrective justice model, in its attempt to address the dispute of individual parties. It does not focus on broad obligations of distributive justice, but requires a firm nexus between right and remedy.

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**(iv) Anticipatory, Speculative or Suppositive Obligations of the Crown**

41. As was stated, Alberta submits that in order to trigger the positive obligation of consultation relating to section 35 rights, a violation of section 35 must be first proven. Without proof of such a right, any remedy would be anticipatory, speculative, or suppositive on such a breach eventually being established. After all, this was the conclusion of Justice Lambert in *Haida, supra*. As will be suggested, the better approach for protecting prospective rights of Aboriginal people is the utilization of interlocutory

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Carswell, 1986, at pp. 198-200; Ken Cooper-Stephenson, *Charter Damage Claims* (Toronto, Carswell, 1990), at pp. 4-6, in Kent Roach, *Constitutional Remedies in Canada, supra* note 35, at p. 3-9.

<sup>40</sup> *Gosselin v. Quebec*, [2002] S.C.J. No. 85, 2002 SCC 84 at TAB [11] of the Intervener’s Authorities.

<sup>41</sup> *Ibid.* at para 320.

<sup>42</sup> *Schacter v. Canada*, [1992] 2 S.C.R. 679 at TAB [12] of the Intervener’s Authorities.

remedies, including injunctions.<sup>43</sup> Courts in Canada have not traditionally provided a final remedy until a right has been proven.

42. In *Nelles v. Ontario*<sup>44</sup>, Justice Lamer wrote:

10 When a person can demonstrate that one of his *Charter* rights has been infringed, access to a court of competent jurisdiction to seek a remedy is essential for the vindication of a constitutional wrong. To create a right without a remedy is antithetical to one of the purposes of the *Charter* which surely is to allow courts to fashion remedies when constitutional infringements occur.<sup>45</sup>

43. This passage has two significant imports. The first and rather trite element is that in order to have access to a court of competent jurisdiction, one must establish a constitutional infringement. The second is that in order for the *Constitution* to be effective, one must have the power to order a remedy. While the second may be characterized by the saying that it is impermissible to have a right without a remedy, it is equally appropriate that the first be characterized as: "It is impermissible to have a remedy without a right."

20 44. This Court certainly has indicated that relief under section 24(1) of the *Charter* can be based on an anticipatory breach of the *Charter*, however only in situations where the breach is provable. Although the decision has been touted as standing for the principle that section 24(1) may be used to remedy a threat of a violation of the *Charter*, Chief Justice Dickson (as he then was) in *Operation Dismantle*<sup>46</sup> refused to grant a suppositive remedy under section 7 of the *Charter*. Remedial action could be granted if it were provable that deprivation of a legal right will occur as a result of the challenged action. In that case, the Appellants alleged that a decision made by the Government of Canada violated section 7 of the *Charter*. It was argued that the development of the cruise missile heightened the risk of nuclear war. The claim was rejected because the causal link or nexus between the actions of the Canadian Government, and the alleged violation of the Appellants' rights under the *Charter* was too uncertain. The then Chief Justice stated:

30 I do not believe the action impugned in the present case can be characterized as contrary to the duties of the executive under the *Charter*. Section 7 of the *Charter* cannot reasonably be read as imposing a duty on the government to refrain from those acts which might lead to consequences that deprive or threaten to deprive individuals of their life and security of the person. A duty of the federal cabinet cannot arise on the

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<sup>43</sup> According to Professor Cooper-Stephenson, "the remedy which will most intrusively effect a reallocation of societal benefits by way of structural justice is the injunction. Ken Cooper-Stephenson, *Charter Damages Claims* (Toronto: Carswell, 1990), at p. 58 at TAB [13] of the Intervener's Authorities.

<sup>44</sup> *Nelles v. Ontario*, [1989] 2 S.C.R. 170 at TAB [14] of the Intervener's Authorities.

<sup>45</sup> *Ibid.* at page 196.

<sup>46</sup> *Operation Dismantle Inc. v. Canada* [1985] 1 S.C.R. 441 at TAB [15] of the Intervener's Authorities.

basis of speculation and hypothesis about possible effects of government action. Such a duty only arises, in my view, where it can be said that a deprivation of life and security of the person could be proven to result from the impugned government act.<sup>47</sup> [Emphasis added]

45. In *R. v. Vermette*<sup>48</sup> this Court was asked to consider an application to stay criminal charges under section 24(1) of the *Charter* because it was impossible to conduct a fair trial on account of the exceptional publicity given to statements made in the Quebec National Assembly about the accused's defence and the credibility of a witness. The trial judge had entered a stay of proceedings under section 24(1) of the *Charter*, opining that the remarks and the publicity infringed the rights of the accused to a full and complete defence and to a fair trial as guaranteed by ss. 7 and 11(d) of the *Charter*.

46. Justice La Forest noted that *Operation Dismantle* decided that section 24(1) applied not only in the case of an actual interference with the guaranteed rights, but "also when an apprehension of such interference at a future trial can be established by an applicant."<sup>49</sup> The Crown argued that the respondent had neither established that his right to a fair and public hearing by an impartial tribunal was infringed or denied, or that such an interference may be apprehended. The Court stated that a stay of proceedings was premature:

20 In my view, a stay of proceedings was, in this case premature. It is only at the stage when the jury is to be selected that it will be possible to determine whether the respondent can be tried by an impartial jury...[T]here is no evidence indicating that it will be impossible to select an impartial jury in a reasonable time. This is rather a matter of speculation.<sup>50</sup>

47. In *Metropolitan Stores (MTS) Ltd. v. Manitoba Food and Commercial Workers, Local 832*<sup>51</sup>, this Court recognized that there were rare occasions in which a court could be confident about deciding the merits of a *Charter* case on an interlocutory application. Justice Beetz warned:

30 ...[T]o think that the question of constitutional validity can be determined at the interlocutory stage is to ignore the many hazards of litigation, constitutional or otherwise. A plaintiff may fail for lack of standing, lack of adequate proof, procedural or other defect. As was correctly put by Professor J.E. Magnet:

Unconstitutionality cannot be understood as an unqualified condition. It has to be understood in light of the plaintiff's ability to bring to fruition judgment in his favour.

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<sup>47</sup> Ibid. at p. 455.

<sup>48</sup> *R. v. Vermette*, [1988] 1 S.C.R. 985 at TAB [16] of the Intervener's Authorities.

<sup>49</sup> Ibid. at p. 992.

<sup>50</sup> Ibid. at p. 992.

<sup>51</sup> *Metropolitan Stores (MTS) Ltd. v. Manitoba Food and Commercial Workers, Local 832*, [1987] 1 S.C.R. 110 at TAB [17] of the Intervener's Authorities

(J.E. Magnet, "Jurisdictional Fact, Constitutional Fact and the Presumption of Constitutionality" (1980), 11 Man.L.J. 21, at p. 29.)

10 However, the principle I am discussing is not absolute. There may be rare cases where the question of constitutionality will present itself as a simple question of law alone which can be finally settled by a motion judge. A theoretical example, which comes to mind, is one where Parliament or a legislature would purport to pass a law imposing the beliefs of a state religion. Such a law would violate s. 2(a) of the Canadian Charter of Rights and Freedoms, could not possibly be saved under s. 1 of the Charter and might perhaps be struck down right away;<sup>52</sup>

48. There has been an interesting line of cases in the Federal Court to the same or similar effect. In *Bowen v. Minister of Employment and Immigration*<sup>53</sup>, Justice Heald refused to grant a section 24(1) remedy in relation to a deportation order for an alleged violation of section 11(c) of the *Charter*:

20 Counsel also submitted that section 24 of the Charter would apply. I do not agree. A condition precedent to the operation of section 24 is that a person's rights or freedoms, as guaranteed by the *Charter*, have been infringed or denied. Since I have concluded that the applicant has not made out a case for infringement of his rights or freedoms under paragraph 11(c) or any other section of the *Charter* it follows, in my view, that the condition precedent to the operation of section 24 has not been met in this case.<sup>54</sup>

49. This line of reasoning was endorsed by the Federal Court of Appeal in *Yri-York v. Canada (Attorney General)*<sup>55</sup>. There, the applicant had applied for an order by way of prohibition restraining the hearing of any proceedings pending before the Restrictive Trade Practices Commission until the constitutionality of section 17 of the *Combines Investigation Act* could be determined in a case before this Court. It was alleged that section 17 contravened section 7 and 8 of the *Charter*. In relation to section 24 of the *Charter*, Justice Heald, again, stated:

30 I am not able to accept the submissions of the Appellants that their *Charter* rights were violated when the order of the R.T.P.C. issued requiring them to give evidence pursuant to section 17. Subsection 24(1) of the Charter entitles anyone whose Charter rights "have been infringed or denied" to apply to a court of competent jurisdiction for an appropriate remedy. In the case at bar, the Appellants' rights have not actually been infringed at this juncture. Accordingly, in my view, an application under section 24 is premature since no infringement or denial of Charter rights has as yet occurred.<sup>56</sup>

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<sup>52</sup> Ibid. at p. 132 to 133.

<sup>53</sup> *Bowen v. Minister of Employment and Immigration*, [1984] 2 F.C. 507, 58 N.R. 223 (C.A.) at TAB [18] of the Intervener's Authorities.

<sup>54</sup> Ibid. at p. 3.

<sup>55</sup> *Yri-York v. Canada (Attorney General)*, [1988] F.C.J. No. 17, 83 N.R. 195 (C.A.) at TAB [19] of the Intervener's Authorities.

<sup>56</sup> Ibid. at para 20. However, see *Kravets v. Minister of Employment and Immigration*, [1985] 1 F.C. 434 at TAB [20] of the Intervener's Authorities and *Tyler v. Canada (Minister of National Revenue - M.N.R.)*, [1991] F.C.J. No. 1035 (C.A.) at TAB [21] of the Intervener's Authorities.

50. Other courts in Canada have commented on the inappropriateness of granting relief under circumstances where the breach of a right was speculative: see *R. v. Dahlem*<sup>57</sup>; *R. v. Kenny*.<sup>58</sup>

51. Failure to provide a remedy prior to proof of an infringement does not mean that the Crown will not consult where appropriate. Alberta disagrees with the contention by Justice Rowles in the Court below that the need to find the infringement of an Aboriginal or Treaty right prior to considering issues of justification is inconsistent with *Sparrow* and *Van der Peet*.<sup>59</sup> The issue is not whether the various methods of establishing justification should take place prior to adjudication by a court. The Crown should not, and does not, wait for a determination by a court before beginning attempts at mitigation and consultation. These processes necessarily begin on the determination by the Crown of the possibility of an infringement. However, when the matter must be adjudicated by a third party, a right and an infringement must be established prior to further analysis of justification. This is supported by this Court in *Van der Peet* where the failure to establish an aboriginal right obviated the need for further analysis.<sup>60</sup>

#### D. Fiduciary Duty of the Crown

52. Alberta adopts the submissions of the Appellant with respect to this issue. As has been held by this court in *Wewaykum, supra*, there is not a plenary fiduciary duty on the part of the Crown<sup>61</sup>. To date, this Court has only recognized a fiduciary duty arising in matters dealing with existing reserve land and section 35(1) rights. Leaving aside cases involving existing reserve land, there is no factual basis for positing the existence of a fiduciary duty absent sufficient evidence of an infringement of a section 35(1) right.

#### E. Section 52 of the Constitution

53. Alberta submits that the fact that section 35 rights are not part of the *Charter* make it more difficult to craft anticipatory, speculative or suppositive remedies in favour of distributive justice.

*Operation Dismantle* and the other cases cited above all involve an application for a remedy under section 24(1) of the Charter. Section 24(1) provides:

<sup>57</sup> *R. v. Dahlem* [1983] S.J. No. 1, 25 Sask. R. 10 (Q.B.) at TAB [22] of the Intervener's Authorities.

<sup>58</sup> *R. v. Kenny* [1991] N.J. No. 253, 92 Nfld. & P.E.I. R. 318 (S.C.T.D.) at TAB [23] of the Intervener's Authorities.

<sup>59</sup> Reasons for Judgment of the Court of Appeal, per Rowles J.A., para 161 at p. 0229 of the Appellant's Record.

<sup>60</sup> *R. v. Vander Peet*, [1996] 2 S.C.R. 507 at para 92 at TAB [24] of the Intervener's Authorities.

<sup>61</sup> *Wewaykum Indian Band v. Canada*, [2002] S.C.J. No. 79, 2002 SCC 79 at para 81 at TAB [25] of the Intervener's Authorities.

24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.<sup>62</sup>

54. For section 35 remedies, the source of the Court's constitutional remedy power must be s. 52, which states:

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52(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

55. Both sections 24(1) and 52(1) require some degree of nexus between right and remedy. However, section 52 speaks only to the invalidity of laws to the extent of their inconsistency. In the context of the power of the Court in relation to the Charter and section 52, this Court held in *Schacter*<sup>63</sup>:

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A court has flexibility in determining what course of action to take following a violation of the Charter, which does not survive s. 1 scrutiny. Section 52 of the Constitution Act, 1982 mandates the striking down of any law that is inconsistent with the provisions of the Constitution, but only "to the extent of the inconsistency". Depending upon the circumstances, a court may simply strike down, it may strike down and temporarily suspend the declaration of invalidity, or it may resort to the techniques of reading down or reading in. In addition, s. 24 of the Charter extends to any court of competent jurisdiction the power to grant an "appropriate and just" remedy to "[a]nyone whose [Charter] rights and freedoms ... have been infringed or denied". In choosing how to apply s. 52 or s. 24 a court will determine its course of action with reference to the nature of the violation and the context of the specific legislation under consideration.<sup>64</sup>

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56. While the analysis of section 24(1) cases is instructive in demonstrating a need to establish a nexus between right and remedy, it must be reinforced that section 24(1) is not available as a remedial tool for prospective infringement of section 35 rights. Section 52 only contemplates striking down, severing or in instances reading in requirements to statutes to the extent they are inconsistent with the Constitution. There is no remedial power for the Court to determine an "appropriate and just" remedy, and certainly no power to find as a prospective remedy an equitable freestanding duty to consult prior to the proof of Aboriginal title or rights. The nexus between right and remedy must be clear. No matter how strong a case there may be for Aboriginal title or rights, until such time as a Court rules that there is title or a right, and further that the impugned activity otherwise amounts to a *prima facie* infringement, section 52 cannot be engaged. Therefore, a disposition cannot be struck down using section 52 unless and until an inconsistency is established.

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<sup>62</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11.

<sup>63</sup> *Schacter v. Canada supra* note 42.

<sup>64</sup> *Ibid.* at p. 695.

## F. Interlocutory Injunctions as Constitutional Remedies

57. Simply because there is no prospective remedy under the Constitution does not mean that Aboriginal people have no remedy at all when state action threatens their asserted but unproven rights or title. Access to the substantial case law on interlocutory remedies may be had to protect a section 35 right. In this respect, Alberta agrees with, and adopts the submissions of the Respondent Redfern at paragraphs 40 – 49.<sup>65</sup>

10 58. In issuing resource dispositions, the Crown must balance competing interests. The test set forth by this Court in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*<sup>66</sup> and *RJR-Macdonald Inc. v. Canada (Attorney General)*<sup>67</sup> provides the requisite degree of protection to constitutional rights while balancing other interests. The three-stage test requires a preliminary assessment of the merits of the case, a determination of whether the claimant will suffer irreparable harm if the remedy is not granted, and a balancing of convenience.<sup>68</sup>

20 59. An analysis of irreparable harm and balance of convenience is mandated when section 35 rights may be at stake. This court has indicated that such a balancing of public interests is endemic to the justification of any infringement in *Sparrow*. More recently, this Court has acknowledged the public duties of the Crown to both Aboriginal and non-Aboriginal interests in *Wewaykum Indian Band v. Canada*<sup>69</sup>:

When exercising ordinary government powers in matters involving disputes between Indians and non-Indians, the Crown was (and is) obliged to have regard to the interest of all affected parties, not just the Indian interest. The Crown can be no ordinary fiduciary; it wears many hats and represents many interests, some of which cannot help but be conflicting: [citations omitted]<sup>70</sup>

30 60. Therefore, there already exists a body of law well suited to the protection of section 35 rights, and the balancing of other interests, without creating a suppositive obligation on the part of the Crown.

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<sup>65</sup> Factum of the Respondent Redfern Resources Ltd., paras 40-49.

<sup>66</sup> *Metropolitan Stores (MTS) Ltd. v. Manitoba Food and Commercial Workers, Local 832*, *supra* note 51.

<sup>67</sup> *RJR – Macdonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at TAB [26] of the Intervener's Authorities.

<sup>68</sup> See also: *Harper v. Canada (Attorney General)*, [2000] 2 S.C.R. 764 at TAB [27] of the Intervener's Authorities and *Canada (Canadian Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626 at TAB [28] of the Intervener's Authorities.

<sup>69</sup> *Wewaykum Indian Band v. Canada* *supra* note 61.

<sup>70</sup> *Ibid.* at para 96.

**G. Conclusion**

61. Alberta therefore submits that the British Columbia Court of Appeal erred when it fashioned a freestanding equitable duty to consult in advance of proof of a violation of section 35 of the Constitution. The obligation of the state to consult derives from section 35 and from the *Sparrow* test for justifying an infringement of section 35. It is dangerous to craft a remedy without a proven right, and this Court has demonstrated that a clear nexus must be established between right and remedy before this Court will act on mere assertions of prospective breaches of the Constitution. The protection of unproven prospective rights has been the bailiwick of interlocutory remedies including injunctions where the Court has sufficient flexibility to balance competing interests. There can be no better examples of competing interests than in resource development by the Provincial Crown.

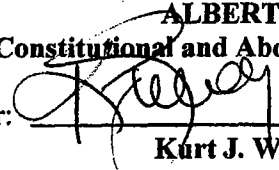
**PART IV – NATURE OF ORDER SOUGHT**

62. Alberta therefore requests that this appeal be allowed.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

Dated at the City of Edmonton, in the Province of Alberta this 11<sup>th</sup> day of September, 2003.

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**ALBERTA JUSTICE**  
**Constitutional and Aboriginal Law**  
Per:   
**Kurt J. W. Sandstrom**

## PART V

### INTERVENER'S AUTHORITIES

1. *R. v. Sparrow*, [1990] 1 S.C.R. 1075.
2. *Trans Canada Pipelines Ltd. v. Beardmore (Township)*, [1997] O.J. No. 1066 (C.A.), (2000) 186 D.L.R. (4<sup>th</sup>) 403 – leave to appeal dismissed [2000] S.C.C.A. No. 264.
3. *Haida Nation v. British Columbia (Minister of Forests)*, [2002] B.C.J. No. 378 (C.A.).
4. *Treaty Eight First Nations v. Canada (Attorney General)*, [2003] F.C.J. No. 1009 at para 79, 2003 FCT 782 (T.D.).
5. *Guerin v. Canada*, [1984] 2 S.C.R. 335 at p. 389.
6. *R. v. Horseman*, [1990] 1 S.C.R. 901.
7. *Delgamuukw v. B.C.*, [1997] 3 S.C.R. 1010.
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