

**IN THE SUPREME COURT OF CANADA  
(On Appeal from the Court of Appeal of British Columbia)**

**BETWEEN:**

NORM RINGSTAD, in his capacity as the Project Assessment Director for the Tulsequah Chief Mine Project, SHEILA WYNN, in her capacity as the Executive Director, Environmental Assessment Office, THE MINISTER OF ENVIRONMENT, LANDS AND PARKS and THE MINISTER OF ENERGY AND MINES AND MINISTER RESPONSIBLE FOR NORTHERN DEVELOPMENT

**APPELLANTS**  
(Appellants/Respondents on Cross Appeal)

**AND:**

THE TAKU RIVER TLINGIT FIRST NATION and MELVIN JACK,  
on behalf of himself and all other members of the Taku River Tlingit First Nation

**RESPONDENTS**  
(Respondents/Appellants on Cross Appeal)

**AND:**

REDFERN RESOURCES LTD.

**RESPONDENT**  
(Appellant/Respondent on Cross Appeal)

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## **PART I STATEMENT OF FACTS**

### **Introduction**

1. This is an appeal from the judgment of the British Columbia Court of Appeal, (“BCCA”), pronounced January 31, 2002, holding that prior to issuing a Project Approval Certificate to the Respondent, Redfern Resources Ltd. (“Redfern”) for its Tulsequah Chief Mine project in north-western British Columbia, the Provincial Ministers had a constitutional and fiduciary obligation to consult with the Tlingit regarding the potential infringement of aboriginal rights, and to be careful to ensure that the substance of the Tlingits’ concerns had been addressed.

**BCCA Reasons, Southin J.A., paras. 26, 28 and 35, and Rowles, J.A., paras. 199, 202 and 207, Appellants’ Record, Vol. 1, pp. 134-135 and 142-147, Vol. 2, pp. 252 and 254-257**

2. The Appellants submit that prior to the determination of rights, the obligation which the Provincial Crown owes is not fiduciary, and is best characterized as a duty of fair dealing.

### **The Project**

3. Redfern seeks to reopen the mine in a wilderness area of north-western British Columbia. Pursuant to the *Environmental Assessment Act*, RSBC 1996, c. 119 (the “EAA”), Redfern sought a Project Approval Certificate (“PAC”) from the British Columbia Minister of Environment, Lands and Parks, and the Minister of Energy and Mines, the Minister responsible for Northern Development (the “Provincial Ministers”), which would allow Redfern to, among other things, build a 160 km road from the mine to Atlin, BC.

**BCCA Reasons, Southin J.A., para. 4, Appellants’ Record, Vol. 1, p. 124.**

### **The Tlingits**

4. The Taku River Tlingit First Nation (the “Tlingit”) numbering about 300 persons, who reside in and around Atlin, BC, claim aboriginal title to a substantial area of north-western British Columbia. The Tlingit claim that the road which Redfern wishes to build will interfere with their hunting, fishing and gathering activities in the area and with their aboriginal title. Pursuant to the *Judicial Review Procedure Act*, the Tlingits sought judicial review of the Provincial Ministers’ decision granting the requested permission to Redfern.

**BCCA Reasons, Southin J.A., paras. 3 and 4, and Rowles J.A., para. 121, Appellants’ Record, Vol. 1, p. 124, Vol. 2, pp. 201-202.**

### **Environmental Assessment Process**

5. The *EAA* sets out a process of information gathering and consultation for projects within its purview. The Tulsequah Chief Mine reopening is such a project. The statutory review process of Redfern’s application spanned a period of three and a half years. The Project Committee (“Committee”) established pursuant to the *EAA* to undertake the statutory consultation and review process, included representatives from the BC government, the governments of Canada and Alaska, and representatives of the Tlingit and the public. The Tlingit participated fully in the environmental review process.

**BCCA Reasons, Southin J.A., paras. 5, 39 and Appendix “A”, Appellants’ Record, Vol. 1, pp. 125 and 149-150, Vol. 2, pp. 258-269;**

**Chambers Judge’s Reasons, Kirkpatrick J., para. 4, Appellants’ Record, Vol. 1 p. 39.**

6. By the time of the judgment in the court below, Redfern had spent seven years in pursuit of the PAC. Redfern has expended \$10 million dollars in the environmental review process and has sought to comply with the *EAA*, and to satisfy the concerns of the Tlingit.

**BCCA Reasons, Southin J.A., para. 28, Appellant’s Record, Vol. 1, pp. 134-137;**

**Chambers Judge’s Reasons, Kirkpatrick J., para. 137, Appellants’ Record, Vol. 1, pp. 112-113.**

7. Considerable effort was expended by the Committee to prepare the report necessary for the Provincial Ministers’ decision. In early 1998, it was clear to the Project Assessment Director, Mr. Norm Ringstad, that positions on the Committee had solidified. The Tlingit did not agree that the mitigation measures suggested by the majority of the Committee were sufficient. The Tlingit would not be satisfied with any measures short of changing the route of the proposed road. The majority of the Committee did not agree. As a result, the

Committee Director brought the matter to an end in early March by preparing and submitting the issue to the Provincial Ministers for determination. In response, the Tlingits prepared a dissenting report stating their position. On March 19, 1998, the Provincial Ministers issued the requested PAC to Redfern.

**BCCA Reasons, Southin J.A., paras. 35, 57 and 77, Appellants' Record, Vol. 1, pp. 142-147, 166-174 and 184-185.**

### **Judicial Review Proceedings**

8. On February 11, 1999, the Tlingit filed a petition for judicial review of the Provincial Ministers' decision both on administrative law grounds, and on grounds based on aboriginal rights and title. The Tlingits did not, however, seek a declaration of aboriginal rights or title.

**Petition, Appellants' Record, Vol. 2, pp. 278-293.**

9. On April 30, 1999, pursuant to an application by the Province, supported by Redfern, the Chambers Judge ordered that issues requiring the determination of the Tlingits' claims of aboriginal rights and title be severed from the judicial review proceedings and referred to the trial list. The Chambers Judge found that the aboriginal rights claimed by the Tlingit were in dispute, and that the determination of such matters, including whether the Crown's actions infringed Tlingit aboriginal rights, and whether any such infringements were justified, should be referred to the trial list for determination.

**Chambers Judge's Reasons, Kirkpatrick J., April 30, 1999, paras. 12 and 25-28, Appellants' Record, Vol. 1, pp. 11-12, and 18-19.**

10. Since then, the Respondent Tlingits have taken no steps to have those issues determined.

11. In the judicial review proceedings, the Chambers Judge found that in addition to their statutory and administrative law duties, the Ministers should have been mindful of the possibility that their decision might infringe aboriginal rights and therefore should have been careful to ensure that they had effectively addressed the substance of the Tlingits' concerns.

**Chambers Judge's Reasons, Kirkpatrick J., paras. 119-130, Appellants' Record, Vol. 1, pp. 102-108.**

12. The Chambers Judge reached this conclusion despite finding that until December 1997, the environmental review process met all of the statutory requirements, and any constitutional or fiduciary obligations that might apply. Further, the Chambers Judge found that the Provincial Ministers were adequately advised by the recommendations report on the potential effects of the project and the prevention or mitigation of adverse effects, as required by section 10 of the *EAA*.

**Chambers Judge's Reasons, Kirkpatrick J., paras. 92-94 and 132, Appellants' Record, Vol. 1, pp. 87-89 and 109-110.**

13. The Chambers Judge set aside the decision of the Ministers to issue the PAC and directed a reconsideration. On July 27, 2000, the Chambers Judge gave directions for the reconsideration which, *inter alia*, required the Project Committee to meet to discuss and meaningfully address the concerns of the Tlingit regarding the Tulsequah Chief Mine Access Road and its impacts; provided for the preparation of a revised draft recommendations report; and for the referral of that report to the Provincial Ministers.

**Chambers Judge's Reasons, Kirkpatrick J., June 28, 2000, paras. 136-137, Appellants' Record, Vol. 1, pp. 112-113;  
Order of Kirkpatrick J., July 27, 2000, entered September 12, 2000, Appellants' Record, Vol. 1, pp. 114-116.**

### **British Columbia Court of Appeal**

14. The decision of the Chambers Judge was appealed by Redfern and the Provincial Ministers. The Tlingit cross appealed.

**BCCA Reasons, Rowles J.A., para. 137, Appellants' Record, Vol. 1, pp. 214-215.**

15. The BCCA found unanimously for the Crown and Redfern on the administrative law questions, and dismissed the Tlingit's cross appeal.

**BCCA Reasons, Southin J.A., paras. 14-15 and Rowles, J.A., para. 108, Appellants' Record, Vol. 1, p. 129 and 197-198;  
BCCA Order, January 31, 2002, Appellants' Record, Vol. 1, pp. 117-119.**

16. The majority of the Court of Appeal dismissed the Provincial Ministers' appeal on the question of whether they owed a constitutional and fiduciary duty of consultation to the Tlingits, who had asserted, but not yet proven, aboriginal rights or title. The majority of the

BCCA found that the Provincial Ministers were not mindful of the possibility that their decision might infringe aboriginal rights and they did not ensure that the substance of the First Nations concerns were met.

**BCCA Reasons, Rowles J.A., paras. 199, 200 and 204-208, Appellants' Record, Vol. 2, pp. 252 and 255-257.**

17. In determining the consultation issue raised by the parties, the majority also found that:

[144] The appellants' broad proposition that "aboriginal rights may be infringed by Crown sanctioned activities" is open to question in the context of the present case for it ignores the limits on provincial power that result from the division of powers under the *Constitution Act, 1867*.

[151] While the analysis in *Delgamuukw* was directed to the question of whether the province was able to extinguish aboriginal title, in my opinion, the Supreme Court's analysis on the three questions arising out of the division of powers under the *Constitution Act, 1867*, would also apply so as to limit the power of the province to infringe aboriginal rights and title.

**BCCA Reasons, Rowles J.A., paras. 144 and 151, Appellants' Record, Vol. 2, pp. 219 and 221-222.**

18. However, in *Haida v. British Columbia v. British Columbia (Minister of Forests)*, decided by the BCCA on February 27, 2002, Mr. Justice Lambert clarified this portion of Madam Justice Rowles' decision:

[32] ... Counsel for the respondents suggested that Madam Justice Rowles was saying that the Provincial Legislature could not authorize any administrative action which might constitute an infringement of aboriginal title and so Madam Justice Rowles' reasons rested on a false premise. See *R. v. Cote*, [1996] 3 SCR 139. But Madam Justice Rowles was not saying that. From the context it is clear that what was being said was that the Provincial Legislature lacked capacity to authorize an infringement by a law in relation to a matter coming within the class of subjects, "Indians, and Lands reserved for the Indians". But, of course, the Provincial Legislature has the legislative capacity to authorize what proves to constitute an infringement of aboriginal title by a law of general application.

***Haida Nation v. British Columbia (Minister of Forests) (Haida No. 1)*, 2002 BCCA 147, [2002] BCJ No. 378 (BCCA) (QL) at p. 9-10, para. 32.**

**PART II  
QUESTIONS IN ISSUE**

19. Does the Provincial Crown have a constitutional or fiduciary duty to consult with First Nations and to seek to accommodate aboriginal interests in circumstances where First Nations have claimed, but not yet proven, aboriginal rights or title?

20. 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?

**PART III  
ARGUMENT**

**Prior to the Judicial Determination of Aboriginal Rights or Title, the Provincial Crown Does Not Owe a Fiduciary or Constitutional Duty of Consultation and Accommodation**

**A. Introduction**

21. This case raises for the first time in this Court the question of whether the Provincial Crown owes fiduciary and constitutional duties of consultation and accommodation in circumstances where a First Nation has asserted, but not proven, a disputed claim of aboriginal rights and title.

22. In these circumstances, the Appellants submit that the Crown's obligations are not fiduciary. Rather, the Crown owes a duty of fair dealing which requires it to take seriously the concerns raised by First Nations. This is not a case where the Crown has taken upon itself the obligation to exercise its discretionary powers only in the best interests of a First Nation. Nor, prior to the determination of a disputed claim of aboriginal rights and title,

and the extent of infringement of such rights, is the Crown's constitutional and fiduciary obligation of justification engaged.

23. The particular context in which this question arises includes the following factors:

(a) Provincial Ministers were exercising a broad discretion to approve, with or without conditions, or refuse a PAC, which the Respondent Redfern required in order to proceed with its Tulsequah Chief Mine Project.

***Environmental Assessment Act, RSBC 1996, c. 119, ss. 5 and 30.***

(b) The referral of Redfern's application to the Ministers followed a lengthy environmental review process in which the Tlingits fully participated as a member of the Project Committee.

(c) The Ministers' decision on whether or not the project would proceed required them to weigh competing interests. It was a polycentric, or "political" decision, using that term in its non-pejorative sense.

***Reasons, BCCA, Southin J.A., para. 80, Appellants' Record, Vol. 1, p. 118.***

24. The Appellants submit that:

(a) Not all aspects of the relationship between the Crown and First Nations attract fiduciary obligations.

(b) The relationship between Provincial Ministers who must make resource allocation decisions in the public interest, and First Nations whose undetermined aboriginal interests may be affected by those decisions, ought not to be characterized as fiduciary. Provincial Ministers, and other decision makers, charged with statutory and constitutional duties for the management of provincial resources in the interests of all British Columbians do not owe a duty to act only in the best interests of First Nations who may be affected by their decisions. Nor, prior to the determination of aboriginal title or rights is the Crown's s. 35(1) justificatory fiduciary duty engaged.

(c) Until the nature and extent of specific aboriginal interests are determined, by judgment or treaty, the Province is not in a position to assess the extent of any

*prima facie* infringement of aboriginal rights or title, or to discharge the burden of justifying the infringement of aboriginal rights or title.

- (d) Prior to the determination of aboriginal rights and title, the duty of the Provincial Crown is best characterized as a duty of fair dealing with First Nations. The components of that duty include the duty to inform First Nations, and to consult with them regarding the potential impact of statutory decisions on aboriginal interests. However, it stops short of a duty to ensure that all First Nations' concerns have been substantially addressed. To put it another way, the Provincial Crown's duty of fair dealing is not a duty to obtain the consent of First Nations to resource management decisions which may affect interests which they have asserted, but not yet established.
- (e) If the decision makers have considered the correct factors, including potential impacts on aboriginal interests, a reviewing court ought not to reweigh those factors. Provided the decision is not patently unreasonable, it should be upheld.

## **B. Fiduciary Duty of the Crown**

25. The Crown is not required to act in a fiduciary capacity in all aspects of its relationship with First Nations.

***Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] SCJ No. 99 (QL) at p. 25, para. 83;  
*Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 SCR 159 at p. 183.**

26. Both the existence, and the content of any fiduciary obligation of the Crown will depend upon the specific factual context before the Court.

***Wewaykum Indian Band v. Canada*, supra, at p. 27, para. 92.**

27. Even where a fiduciary relationship exists, not every aspect of the relationship between the fiduciary and beneficiary takes the form of a fiduciary obligation.

***Wewaykum Indian Band v. Canada*, supra, at p. 25, para. 83;  
*Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 SCR 574 at p. 597.**

28. Where a fiduciary duty is imposed on the Crown, it does not exist at large, but in relation to specific Indian interests.

***Wewaykum Indian Band v. Canada, supra, at p. 24, para. 81.***

29. Where Crown fiduciary obligations do exist, the Appellants submit they will fall into one of two distinct categories. The first is a protective fiduciary obligation, where the Crown must exercise its discretion in the best interests of a First Nation with respect to specific Indian interests: *Guerin v. Canada* [1984] 2 SCR 335. The second is the Crown's fiduciary duty to justify the infringement of existing aboriginal and treaty rights recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*. In this category, the fiduciary obligation is engaged for the purpose of reconciling Crown sovereignty with the fact of prior aboriginal use and occupation of lands.

***Guerin v. Canada, [1984] 2 SCR 335;***

***Delgamuukw et al v. The Queen, [1997] 3 SCR 1010, [1997] SCJ No. 109 (QL) at p. 52, para. 161.***

30. It is also necessary to consider whether, in the particular context, the Federal, or the Provincial Crown, has particular fiduciary obligations.

**(a) The Divisible Crown**

31. The powers and liabilities of the Crown in relation to aboriginal peoples attach to the Crown in right of Canada, or the Crown in right of a particular province.

Within Canada's federal system, legal recognition of the divisibility of the Crown may be dated from *Liquidators of the Maritime Bank v. Receiver General of New Brunswick*, [1892] AC 437, which decided that a debt owing to a province was held by the Crown in right of the province, and the Crown in right of the province was entitled to the prerogative privilege of payment in priority to other creditors. This important case established that the Lieutenant Governor of each province, although appointed by the federal government, was not the representative of the federal government, but of the Queen. The executive government of each province therefore enjoyed the powers, privileges and immunities of the Crown. But each province was still a separate legal entity from each other province and from the federal government. The separate existence of each province and of the Dominion is, of course, manifested by a separate treasury, separate property, separate employees, separate courts, and a separate set of laws to administer.

**Peter Hogg, “Constitutional Law of Canada” Fourth Edition, Loose-leaf (Toronto: Carswell, 1997), p. 10-2 and 10-3.**

32. By constitutional usage and practice, at least since the Imperial Conference of 1926, the Crown has been separate and divisible for each self-governing dominion or province or territory.

***R. v. Secretary of State for Foreign and Commonwealth Affairs ex parte Indian Association of Alberta*, [1982] 2 All ER 118 (CA) at p. 127-8 per Lord Denning MR.**

33. The Provincial Crown, unlike the Federal Crown, has no constitutional duty to protect Indian interests by interposing itself between First Nations and third parties. Exclusive legislative authority in relation to Indians is vested in Parliament under s. 91(24) of the *Constitution Act, 1867*.

34. In 1871, when British Columbia joined Confederation, any obligation of the Colonial Government to act on behalf of Aboriginal peoples passed to the Federal Crown, by virtue of Article 13 of the Terms of Union, which provides:

The charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government ... .

***British Columbia Terms of Union, 1871 (UK) RSC 1985, App. II, No. 10.***

35. When British Columbia joined Confederation in 1871, section 91(24) of the *Constitution Act, 1867* already conferred exclusive legislative authority on the Dominion Parliament to make laws in relation to Indians, and Lands reserved for the Indians. In order for Article 13 to have any meaning, it must be read to include the transfer to Canada of any residual responsibility to protect aboriginal interests which would otherwise have remained in the Provincial Crown after 1871.

**(b) No Assumption by Province of Discretion to Act on Behalf of Aboriginal Peoples**

36. In *Wewaykum*, at para. 85, Binnie J. stated that the creation of a fiduciary relationship depends on identification of a cognizable Indian interest and the Crown’s undertaking of discretionary control in relation thereto in a way that invokes responsibility “in the nature of a private law duty”.

37. The assumption of discretionary control by the Crown which triggers this fiduciary obligation occurs only where the Crown has taken upon itself the obligation to exercise discretionary powers in the best interests of a First Nation. In each of the leading cases, the Federal Crown has interposed itself between an Indian band and non-Indians with respect to specific Indian interests.

***Guerin v. Canada, supra;***

***Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development), [1995] 4 SCR 344, [1995] SCJ No. 99 (QL);***

***Osoyoos Indian Band v. Oliver (Town), [2001] 3 SCR 746, [2001] SCJ No. 82 (QL) at pp. 15, 16 and 17, paras. 47, 52 and 55;***

***Wewaykum Indian Band v. Canada, supra, at p. 28, para. 97.***

38. In *Guerin*, Dickson J., for the majority, held that it was the nature of Indian title and the framework of the statutory scheme for disposing of Indian land under the *Indian Act* upon surrender, which placed upon the Federal Crown an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians. He characterized this obligation as a fiduciary duty rather than a trust in the private law sense.

***Guerin v. Canada, supra, at p. 376.***

39. There is no question that in *Guerin*, the particular fiduciary obligation was unique to the Federal Crown. As Dickson J. put it:

The purpose of this surrender requirement is clearly to interpose the Crown between the Indians and the prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited. ... Through the confirmation in the *Indian Act* of the historic responsibility which the Crown has undertaken, to act on behalf of the Indians so as to protect their interests in transactions with third parties, Parliament has conferred upon the Crown a discretion to decide for itself where the Indians' best interests really lie. This is the effect of s. 18(1) of the Act.

***Guerin v. Canada, supra, at pp. 383-384.***

40. It was the statutory discretion of the Federal Crown to decide for itself what was in the Indians' best interests which transformed the Crown's obligation into a fiduciary one.

41. As Dickson J. stated:

Where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus

empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.

***Guerin v. Canada, supra, at p. 384.***

42. It is clear from *Guerin* that a statutory discretion to make decisions with respect to the management and disposition of Crown lands does not, in itself, trigger a fiduciary obligation. It is the obligation to exercise discretionary powers in the best interests of the Indians which triggers this federal fiduciary duty.

***Guerin v. Canada, supra, at pp. 383-385;*  
*Blueberry River Indian Band v. Canada, supra, at pp. 27 & 29, paras. 96 & 105.***

43. In *Wewaykum*, this Court found a limited federal fiduciary obligation where specific lands were subject to the reserve creation process for the Band's benefit, and where the Federal Crown had constituted itself as the exclusive intermediary with the Province.

***Wewaykum Indian Band v. Canada, supra, at p. 27, para. 93.***

44. Before reserve creation, the Federal Crown's fiduciary duty was limited to the basic obligations of loyalty, good faith in the discharge of its mandate, providing full disclosure and acting with a view to the best interests of the beneficiaries.

***Wewaykum Indian Band v. Canada, supra, at p. 28, para. 97.***

45. However, once a reserve is created, the content of the Federal Crown's fiduciary duty expands to include the protection and preservation of the band's quasi-proprietary interest from exploitation.

***Wewaykum Indian Band v. Canada, supra, at p. 28, para. 97.***

46. While the Provincial Ministers had a broad discretion which clearly had the potential to affect lands and resources to which the TRTFN asserted claims of aboriginal rights and title, the Provincial Crown had not taken on the mantle of protecting specific Indian interests.

47. If the Federal Crown does not have a fiduciary obligation to protect and preserve a band's interest in reserve lands from exploitation prior to completion of the reserve creation process, then surely the Province has no fiduciary obligation to protect Indian interests in lands or resources over which First Nations have asserted, but not yet established, title.

48. In *Wewaykum*, this Court recognized that the Crown, in exercising ordinary government powers in matters involving disputes between Indians and non-Indians, is obliged to have regard to the interests of all affected parties, not just the Indian interests:

[96] The Crown can be no ordinary fiduciary; it wears many hats and represents many interests some of which cannot help but be conflicting: *Samson Indian Nation and Band v. Canada* [1995] 2 FC 762 (CA). ...

***Wewaykum Indian Band v. Canada, supra, at p. 28, para. 96.***

49. The existence of conflicting interests tempers, but does not necessarily eliminate the fiduciary obligation where the Federal Crown has taken upon itself the mantle of protecting specific Indian interests. Here, the Province has neither taken on that obligation, nor does it have the constitutional responsibility to do so. Furthermore, where the Provincial Crown makes decisions regarding the allocation of natural resources in the public interest, before specific aboriginal rights have been established, the fact that the Provincial Crown must balance competing interests, in circumstances where its own interest may conflict with those of the First Nation, militates against the imposition of a fiduciary obligation of protection of indeterminate aboriginal interests.

**(c) *The Constitution Act, 1982, s. 35(1) and Justification of the Infringement of Existing Aboriginal Rights***

50. The fiduciary duty of protection of Indian interests, where the Crown interposes itself between the Indians and third parties, is unique to the Federal Crown. However, there is a distinct class of Crown fiduciary obligations to First Nations, applicable to both Canada and the Province, which arises by virtue of s. 35(1) of the *Constitution Act, 1982*. This is the obligation to justify the infringement of existing aboriginal or treaty rights.

51. In *Sparrow*, the Supreme Court of Canada stated a four part test which allows the Court to determine, in the specific context of each case, whether a First Nation has existing aboriginal or treaty rights, whether there has been an infringement and, if so, whether the Crown has met the obligation of justifying the infringement. If the First Nation fails to

prove an aboriginal right and a *prima facie* infringement of that right, the Crown's fiduciary obligation of justification is not engaged.

***R. v. Sparrow*, [1990] 1 SCR 1075 at pp. 1110-1113;**

***R. v. Van der Peet*, [1996] 2 SCR 507, [1996] SCJ No. 77 (QL) at p. 34, paras. 91-92;**

***Delgamuukw et al v. The Queen*, *supra*, at pp. 54-56, paras. 165-168.**

52. In *Sparrow*, the Supreme Court of Canada found that the words "recognition and affirmation" in s. 35(1) incorporated the fiduciary relationship and imported some restraint on the exercise of sovereign power. While the aboriginal rights recognized and affirmed by s. 35(1) were not absolute, the federal power under s. 91(24) and federal duty under s. 35(1) had to be reconciled. The best way to achieve that reconciliation was to demand the justification of any government regulation that infringed upon aboriginal rights.

***R. v. Sparrow*, *supra*, at p. 1109.**

53. The underlying purpose of section 35 is the reconciliation of aboriginal rights with the sovereignty of the Crown. The justificatory fiduciary obligation under s. 35(1) applies to both the Federal and Provincial Crowns. It is engaged if the exercise of the Crown's public law and regulatory responsibilities interferes with existing aboriginal or treaty rights.

***R. v. Van der Peet*, *supra*, at pp. 17, 19 and 23, paras. 21, 31 and 42-43;**

***Delgamuukw et al v. The Queen*, *supra*, at p. 52, para. 160;**

***R. v. Cote*, [1996] 3 SCR 138, [1996] SCJ No. 93 (QL).**

54. Aboriginal rights are not absolute. The reconciliation of aboriginal rights with the reality of Crown sovereignty does not involve the Crown taking upon itself the responsibility to act solely on behalf, or for the benefit of, aboriginal peoples. Rather, the focus of section 35 is aboriginal peoples and their rights in relation to Canadian society as a whole.

***R. v. Van der Peet*, *supra*, at p. 17, para. 21.**

55. The *Constitution Act, 1867*, vested the control, management and disposition of Crown lands and resources in the provinces. The Fathers of Confederation intended that the development of resources on these lands would provide a source of revenue for the provinces to carry out their constitutional functions. As Professor La Forest (as he then was) commented:

This then was the situation at Confederation in the provinces originally uniting to form the Dominion of Canada. The entire control, management, and disposition of the Crown lands, and the

proceeds of the provincial public domain and casual revenues arising in these provinces were confided to the executive administration of the provincial governments and to the legislative action of the provincial legislatures so that Crown lands, though standing in the name of the Queen, were, with their accessories and incidents, to all intents and purposes the public property of the respective provinces in which they were situate (Reference omitted). These revenues were quite substantial and the Fathers of Confederation thought that, along with the subsidies granted to the provinces and the absorption by Canada of a substantial part of provincial debts and the power of direct taxation, they should prove adequate to provide them with adequate revenue for performing their limited functions. This was made clear by Galt during the Confederation Debates where he said: "We may, however, place just confidence in the development of our resources, and repose in the belief that we shall find in our territorial domain, our valuable mines and our fertile lands, additional resources of revenue far beyond the requirement of the public service." (Reference omitted).

**G. La Forest, *Natural Resources and Public Property under the Canadian Constitution*, (Toronto: University of Toronto Press, 1969); *Constitution Act, 1867* (U.K.), RSC 1985, App. II No. 5, s. 92.**

56. In 1982, the amendment of the *Constitution Act, 1867* by the addition of s. 92A confirmed the exclusive legislative authority of the provinces in relation to the development, conservation and management of non-renewable natural resources and forestry resources. At the same time, s. 35(1) of the *Constitution Act, 1982* recognized and affirmed existing aboriginal and treaty rights.

***Constitution Act, 1867* (U.K.), RSC 1985, App. II No. 44, ss. 92A and 35.**

57. The existence of aboriginal rights or title does not mean that Provincial Crown use and allocation of crown lands must always give way to the aboriginal use. That result would produce absolute aboriginal rights, and an aboriginal veto over Crown decisions, which in turn would frustrate Provincial constitutional responsibility for the management and use of Crown lands for the good of all British Columbians. The Crown's obligation to balance the exercise of its sovereign powers with the prior existence of aboriginal people on the land is reflected in the justification analysis implied in s. 35 of the *Constitution Act, 1982*. This analysis implicitly recognizes that the Crown cannot fulfill this balancing role and be held to the standard of a traditional fiduciary to act "solely for the benefit" of aboriginal peoples.

***Delgamuukw et al v. The Queen, supra*, at pp. 52 and 55, paras. 160 and 168;  
*R. v. Gladstone*, [1996] 2 SCR 723, [1996] SCJ No. 79 (QL) at p. 25, paras. 59-63;**

***Wewaykum Indian Band v. Canada, supra, at p. 27, para. 92;*  
*Constitution Act, 1867, supra, at ss. 92 and 92A.***

58. Even where the Crown's fiduciary duty of justification is engaged, aboriginal rights need not always be given priority.

***Delgamuukw et al v. The Queen, supra, at p. 53 para. 162.***

59. Section 35 mandates the reasonable balancing of Provincial responsibilities with the recognition of aboriginal rights. In *R. v. Nikal*, Cory J. for the majority found that:

[110] It can, I think, properly be inferred that the concept of reasonableness forms an integral part of the *Sparrow* test for justification. ... So too in other aspects of information and consultation the concept of reasonableness must come into play. For example, the need for the dissemination of information and a request for consultations cannot simply be denied. So long as every reasonable effort is made to inform and to consult, such efforts would suffice to meet the justification requirement....

***R. v. Nikal, [1996] 1 SCR 1013, [1996] SCJ No. 47 (QL) at p. 31, para. 110.***

60. Aboriginal societies exist within and are part of, a broader social, political and economic community, over which the Crown is sovereign. In *R. v. Gladstone*, Chief Justice Lamer found:

[73] ... Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are a 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. (emphasis in original)

***R. v. Gladstone, supra, at pp. 26, 30 and 31, paras. 62, 73 and 75;*  
**and see also: *R. v. Sparrow, supra, at p. 1109 (b-g);*  
*Delgamuukw et al v. The Queen, supra, at pp. 52, 54 and 55, paras. 160, 165, 167 and 168.*****

61. This Court has recognized that the scope and content of Crown fiduciary obligations in connection with s. 35 are fact and situation specific.

***Delgamuukw et al v. The Queen, supra, at pp. 53-54, paras. 162-164.***

62. The fact and situation specific content of Provincial Crown fiduciary obligations in connection with s.35 must reflect the reconciliation objective and the constitutional responsibilities of the Crown to govern for all Canadians.

***R. v. Nikal, supra, at p. 27, para. 92.***

63. This Court has consistently addressed the Crown's fiduciary and constitutional obligation of consultation as an element of the final, or justificatory stage of its analysis, after the Court has determined that the First Nation has existing aboriginal or treaty rights under s. 35 of the *Constitution Act, 1982*, after it has considered whether any clear and plain act of the Crown had extinguished those rights, and after it has determined the extent to which Crown sanctioned activities infringed such rights.

***R. v. Sparrow, supra, at pp. 1110-1113, 1119;***

***R. v. Adams, [1996] 3 SCR 101, [1996] SCJ No. 87 (QL) at pp. 16 and 17, paras. 46 and 51-52;***

***Delgamuukw et al v. The Queen, supra, at pp. 53 and 55, paras. 162 and 168;***

***R. v. Gladstone, supra, at p. 33, para. 84.***

64. Again, in *R. v. Marshall (No. 2)*, this Court emphasized the importance in the justification context, of consultation with aboriginal peoples.

***R. v. Marshall (No. 2), [1999] 3 SCR 533, [1999] SCJ No. 66 (QL) at p. 16, para. 43.***

65. In *Ontario (Minister of Municipal Affairs and Housing) v. TransCanada Pipelines Ltd.*, the Ontario Court of Appeal held that it was only after a First Nation had established an infringement of an existing aboriginal or 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. After reviewing the authorities, Borins J.A. for the Court concluded at para. 120:

[120] ... 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 the First Nation if it intends to justify the constitutionality of its action.

***Ontario (Minister of Municipal Affairs and Housing) v. TransCanada Pipelines Ltd. (2000), 186 DLR (4th) 403, [2000] OJ No. 1066 (OCA) (QL) at pp. 31-32, paras. 112-120 [leave to appeal to SCC dismissed, [2000] SCCA No. 264 (QL)].***

66. Prior to the judgment of the Court below in this case, the British Columbia Supreme Court had held, in a number of cases, that the Crown did not owe a fiduciary duty of consultation prior to the judicial determination of aboriginal title.

***British Columbia (Minister of Forests) v. West Bank First Nation* (2000), 191 DLR (4th) 180, [2000] BCJ No. 1613 (BCSC) (QL) at paras. 84-85;**  
***Haida Nation v. British Columbia (Minister of Forests)*, [2001] 2 CNLR 83, [2000] BCJ No. 2427 (BCSC) (QL) at pp. 9 and 10, paras. 28-29 and 33-34;**  
***Kelly Lake Cree Nation v. Canada (Minister of Energy and Mines)*, [1998] BCJ No. 2471 (BCSC) (QL) at pp. 24-25, paras. 160-165;**  
**And see also *Tsawwassen Indian Band v. Canada (Minister of Finance)* (1998), 145 FTR 1, [1998] FCJ No. 370 (FCTD) (QL) at pp. 24 and 25, paras. 122-132, aff'd [2001] FCJ No. 516 (FCA) (QL).**

67. In *Delgamuukw*, Lamer C.J. stated that the second part of the test of justification requires an assessment of whether the infringement is consistent with the special fiduciary relationship between the Crown and aboriginal peoples. He emphasized that the requirements of the fiduciary duty are a function of the particular legal and factual context of each case.

***Delgamuukw et al v. The Queen, supra, at p. 53, para. 162.***

68. The Appellants submit that the particular legal and factual context of each case includes the nature and extent of the right, and the degree of infringement. As Lamer C.J. held, the manner in which the fiduciary duty of justification operates, both with respect to the standard of scrutiny by the Court, and the particular form that the fiduciary duty will take, will be a function of the nature of aboriginal title.

***Delgamuukw et al v. The Queen, supra, at p. 55, para. 166.***

69. The practical and conceptual problems of imposing a fiduciary obligation to, in effect, justify a *prima facie* infringement of asserted, but unproven rights or title become apparent from an examination of the characteristics of aboriginal title and their relationship to the Crown's fiduciary obligation of justification.

70. In *Delgamuukw*, Lamer C.J. identified three characteristics of aboriginal title which were relevant to both the standard of scrutiny and the particular form that the fiduciary duty takes in cases of infringement of aboriginal title:

1. aboriginal title encompasses the right to exclusive use and occupation of the land;
2. aboriginal title encompasses the right to choose to what uses land can be put;

3. lands held pursuant to aboriginal title have an inescapable economic component.

***Delgamuukw et al v. The Queen, supra, at p. 55, para. 166.***

71. At para. 167, the Chief Justice explained that the exclusive nature of aboriginal title was relevant to the degree of scrutiny of the infringing measure or action. Government was required to demonstrate both that the process by which it allocated the resource and the actual allocation of the resource which resulted from that process reflect the prior interest of the holders of aboriginal title to land.

***Delgamuukw et al v. The Queen, supra, at p. 55, para. 167.***

72. Until a disputed claim of aboriginal title is judicially determined, it is not possible to properly assess whether an infringing measure adequately reflects the prior interest of the holders of aboriginal title.

73. At para. 169, Lamer C.J. turned to the economic aspect of aboriginal title. He stated that:

[169] The economic aspect of aboriginal title suggests that compensation is relevant to the question of justification as well, a possibility suggested in *Sparrow* and which I repeated in *Gladstone*. Indeed, compensation for breaches of fiduciary duty are a well established part of the landscape of aboriginal rights: *Guerin*. In keeping with the duty of honouring good faith of the Crown, fair compensation will ordinarily be required when aboriginal title is infringed. The amount of compensation payable will vary with the nature of the particular aboriginal title affected and with the nature and severity of the infringement and the extent to which aboriginal interests were accommodated.

(emphasis added)

***Delgamuukw et al v. The Queen, supra, at p. 56, para. 169.***

74. The Appellants submit that, absent a negotiated agreement, there must be a final determination of the title claim before there can be any assessment of compensation.

75. The precise role of each of the three characteristics of aboriginal title in shaping the Crown's fiduciary obligation to justify an infringement can only be assessed once the Court has determined the area subject to title, and the nature and extent (if any) of the infringement.

76. In his concurring reasons for judgment in *Delgamuukw*, La Forest J. identified the two defining characteristics of aboriginal title as:

[190] ... First, this *sui generis* interest in the land is personal in that it is generally inalienable except to the Crown. Second, in dealing with this interest, the Crown is subject to a fiduciary obligation to treat aboriginal peoples fairly.

***Delgamuukw et al v. The Queen, supra, at p. 62, para. 190.***

77. La Forest summarized his analysis of justification in these terms:

[204] In summary, in developing vast tracts of land, the government is expected to consider the economic well being of all Canadians. But the aboriginal peoples must not be forgotten in this equation. Their legal right to occupy and possess certain lands, as confirmed by s. 35(1) of the *Constitution Act, 1982*, mandates basic fairness commensurate with the honour and good faith of the Crown.

***Delgamuukw et al v. The Queen, supra, at p. 66, para. 204.***

78. However, until the existence and scope of an asserted aboriginal right, or claim of aboriginal title, has been determined, the Crown ought not to be held to the standard of a fiduciary when making resource allocation decisions which may affect First Nations interests. Where rights or title are disputed, the onus of proving the right, and its infringement, is on the aboriginal group making the claim.

***R. v. Van der Peet, supra, at pp. 29 and 34, paras. 69 and 91;*  
*Delgamuukw et al v. The Queen, supra, at p. 47, para. 143.***

79. To require the Provincial Crown to accommodate unproven claims of aboriginal rights or title by discharging a fiduciary obligation of ensuring that all First Nations' concerns have been substantially addressed prior to the proof of rights, and their infringement, is to effectively reverse that onus. This Court has acknowledged that the justificatory standard places a heavy burden on the Crown. The Crown should not have to meet the onerous burden of justification before the First Nation has proven the right, or the extent of any infringement.

***R. v. Sparrow, supra, at p. 1119.***

80. The Appellants submit that before the Petitioners have proven the aboriginal rights and title they claim, no reciprocal, fiduciary obligation of accommodation should be imposed upon the Crown.

81. Prior to the determination of aboriginal rights or title, the Provincial Crown's obligation is best characterized as a duty of fair dealing. Such a duty would embrace obligations both to consult and to consider First Nations representations. This duty would be consistent with the honour of the Crown, and would require First Nations' interests to be taken seriously.

**C. The Tlingits' Claim, and the Crown's Role in this Case**

**(a) Aboriginal Interest**

82. The subject matter of the dispute in this case is the Tlingits' interest in maintaining their traditional way of life in an area over which they claim, but have not yet proven, aboriginal rights and title.

83. The Tlingits' claims include an assertion of aboriginal title (including mineral rights) over an area of approximately 32,958 km<sup>2</sup>, and aboriginal hunting, fishing, gathering and "other traditional land use activity rights". The full extent, scope and geographical limits of the claims are not clear.

**Affidavit of R. Salter, Exhibit "C", p. 5, Appellants' Record, Vol. 3, p. 397; Petition, paras. 43-46, Appellants' Record, Vol. 2, pp. 291-292.**

84. In the judicial review proceedings, the Tlingit claimed protection of these rights pursuant to s. 35(1) of the *Constitution Act, 1982*. However they did not seek a declaration of aboriginal rights and title.

**Petitioners' Outline, paras. 6, 7, cited in Chambers Judge's Reasons, Kirkpatrick J., April 30, 1999, para. 3, Appellants' Record, Vol. 1, pp. 6-7.**

85. The Tlingit also claimed that the Ministers' decision to issue the PAC breached the Province's fiduciary obligations to the Tlingit and unjustifiably infringed their claimed rights by authorizing the proponent, Redfern, to build a road through part of the territory claimed by the Tlingit. The Tlingits assert that the road will interfere with the exercise of traditional land use activities. Further, they claim that the road and the mine will foreclose the Tlingits' right to choose the uses to which the land can be put and the right to receive the economic benefit of the land including the mineral resources. The Tlingit claim that the

Province did not substantially address these concerns and did not receive the consent of the Tlingit before approving the PAC.

**Amended Petition, paras. 5, 6, 46 and 47, Appellants' Record, Vol. 2, pp. 303 and 313.**

86. On April 30, 1999, on application by the Province, the Chambers Judge ordered that issues requiring the determination of the Tlingits' claims of aboriginal rights and title be severed from the judicial review proceedings and referred to the trial list. Those issues included the question of whether, and to what extent, the Crown's actions infringed Tlingit aboriginal rights or title, and whether any such infringements were justified.

**Chamber Judge's Reasons, Kirkpatrick J., April 30, 1999, paras. 12 & 25-28, Appellants' Record, Vol. 1, pp. 11-12 and 18-19.**

**(b) Role and Obligations of Provincial Crown**

87. The particular obligation of the Ministers was to decide whether or not to issue a PAC, after having regard to relevant considerations, including the recommendations of the Project Committee, and the concerns expressed by the Tlingit. The Ministers made their decision following a lengthy environmental review. That review had commenced with Redfern's application for approval of the project in September 1994. A Project Committee, which included representatives of the federal and provincial governments and the State of Alaska, as well as the Tlingits, was established to review the project (pursuant to ss. 9 and 10 of the *EAA*). It made recommendations to the executive director of the Environmental Assessment Office regarding what "project report specifications" should be included in Redfern's project report (pursuant to s. 21 and 22 of the *EAA*). The Project Committee then made recommendations to the executive director on whether the project report met those specifications and should be accepted for review (pursuant to s. 26 of the *EAA*).

***Environmental Assessment Act, RSBC 1996, c. 119, ss. 2, 9, 10, 19(1)(b), 21, 22, 29 and 30; Affidavit of Norman Ringstad, paras. 10-44, Appellants' Record, Vol. 5, pp. 846-854.***

88. The majority of the Project Committee advised the executive director that the project report met the required project report specifications and then provided its report and recommendations to the executive director for referral of the project to the Ministers for a decision pursuant to s. 29 of the *EAA*.

**Affidavit of Norman Ringstad, paras. 47-62, and Exhibit “B”, pp. 6-9, and 103-108, Exhibits “F” and “G”, Appellants’ Record, Vol. 5, pp. 854-858, 871-874, 972-977, Vol. 8, pp. 1432-1448.**

89. The Tlingit prepared their own, dissenting Recommendations Report, a copy of which the Executive Director provided to the Minister of Environment, Lands and Parks.

**Affidavit of Sheila Wynn, para. 4, Appellants’ Record, Vol. 10, p. 1941; Report and Recommendations of the Taku River Tlingit First Nation, March 6, 1998, Affidavit of Tony Pearse, Exhibit 43, Appellants’ Record, Vol. 4, p. 682.**

90. The Ministers issued the PAC on March 19, 1998. It was the first step in a complex process. Redfern was still required to obtain and comply with all necessary permits and approvals for the construction and operation of the mine project.

***Environmental Assessment Act, RSBC 1996, c. 119, s. 5; Project Approval Certificate, M98-02, Ringstad Affidavit, Exhibit “H”, Appellants’ Record, Vol. 8, pp. 1449-1456, and Exhibit “B”, Recommendations Report, pp. 93-102, Appellants’ Record, Vol. 5, pp. 962-972.***

91. Under the *EAA* process, the Ministers’ decision as to whether a project shall or shall not proceed requires the weighing of competing interests following an assessment of the environmental, economic, social, cultural, heritage and health effects of a reviewable project. The Ministers made a political decision on whether the project should proceed or not after an assessment process in which the proponent, regulatory agencies, and the affected First Nation all participated.

**BCCA Reasons, Southin J.A., para. 80, Appellants’ Record, Vol. 1, p. 188.**

**(c) BCCA Decision**

92. The BCCA affirmed the decision of the Chambers Judge that the Provincial Ministers were under a constitutional and fiduciary duty to consult with the Tlingit First Nation regarding their claimed aboriginal rights. The majority of the BCCA found that the Provincial Ministers were not mindful of the possibility that their decision might infringe aboriginal rights and they did not **ensure** that the substance of the First Nation’s concerns were met. The Court remitted the matter to the Ministers.

93. Although the content of the obligations referred to are not fully articulated by the Court of Appeal in this case, in *Haida v. British Columbia*, decided a month later, the BCCA

held that the “general principles as stated by Madam Justice Rowles and as concurred in by Madam Justice Huddart [were] binding on the Court and determinative of the outcome” of the *Haida* appeal. Mr. Justice Lambert, writing for the Court in *Haida*, concluded that the “trust-like relationship and its concomitant fiduciary duty permeates the whole relationship between the Crown” and aboriginal peoples. Lambert J.A. held that this duty is one of “utmost good faith,” which comprises obligations to consult aboriginal peoples, and to seek to accommodate their cultural and economic interests. This duty arises not only from s. 35 of the *Constitution Act, 1982*, but also under the “broader fiduciary footing of the Crown’s relationship with the Indian peoples who are under its protection”.

***Haida Nation v. British Columbia (Minister of Forests) (Haida No. 1)*, supra, at pp. 9, 10, 11 and 15, paras. 29, 34, 36 and 55.**

94. The Appellants respectfully submit that the British Columbia Court of Appeal erred by characterizing the Crown’s obligation as an all-encompassing fiduciary duty engaging all aspects of the relationship between the Crown and aboriginal people.

***Wewaykum et al v. The Queen*, supra, at p. 24, para. 81.**

95. A consequence of this error is the imposition, on the Provincial Crown, prior to any determination of disputed claims of rights and title, of the onerous obligation of justifying *prima facie* infringement at all stages from the establishment of a legislative and administrative scheme through to the issuance of permits to harvest or extract resources.

***Haida Nation v. British Columbia (Minister of Forests) (Haida No. 2)*, 2002 BCCA 462, [2002] BCJ No. 1882 (QL) at p. 21, para. 91;  
*Gitksan First Nation v. British Columbia (Minister of Forests)*, 2002 BCSC 1701, [2002] BCJ No. 2761 at pp. 16-17, para. 79.**

96. The BCCA’s characterization of the fiduciary obligations of the Provincial Crown also place Provincial decision-makers in the untenable position of having to act in the “utmost good faith” for the benefit and protection of aboriginal peoples, while at the same time discharging their statutory and constitutional duties for resource management in the province.

97. If the broad fiduciary duty stated by the majority of the BCCA were interpreted to require the Ministers to ensure that the substance of the Tlingits concerns were addressed to

their satisfaction, it would effectively grant them a veto before their rights and title were established.

**BCCA Reasons, Rowles J.A., para. 93, Appellants' Record, Vol. 2, p. 249.**

98. Madam Justice Southin (in dissent) found that:

[42] Thus, by February 1996, what has always been and still is, the Tlingits' main sticking point – the location of the road from the mine to Atlin – had become clear.

[77] ... This process had gone on and on at very considerable expense. It was clear that nothing short of changing the route of the road from the mine to Atlin would satisfy the Tlingit. They had made their points. The majority did not accept them. The executive director and the chairman of the committee had a duty (whether it was a duty enforceable by *mandamus*, I need not address) to bring the matter to an end and put the issue before the Ministers for their determination. ...

**BCCA Reasons, Southin J.A., paras. 42 and 77, Appellants' Record, Vol. 1, pp. 153 and 184.**

99. Madam Justice Southin also referred to the affidavit of Mr. Ringstad regarding the concerns of the Tlingit:

[57] 80. In reply to paragraph 70 of the Pearse Affidavit, by mid February 1998, the TRTFN had clearly articulated their concerns regarding the potential impacts of the access road on wildlife and their use of the affected lands. Those concerns were identified in the Project Committee Recommendations Report, and were addressed through a range of measures including Redfern's Access Management Plan and the Environmental Monitoring and Follow-up Program which I have previously described, as well as in the recommendations of the majority of the Project Committee for increased wildlife management and enforcement.

81. Other concerns raised by the TRTFN include matters such as TRTFN jurisdiction to approve permits for the project, revenue sharing, and TRTFN control of use of the access road by third parties. As chair of the Project Committee, I believe that these matters were outside the ambit of the *EAA* process and were more appropriately the subject for negotiation between the TRTFN and government in a forum other than the *EAA* process.

82. By late February 1998, the positions of all of the Project Committee members, including the TRTFN had crystallized.

There had been extensive discussion and consideration of the wildlife and access issues through the subcommittee deliberations in which the TRTFN had fully participated. By March 3, 1998, when the Environmental Assessment Office circulated the Project Committee Recommendations Report, in my view the time had come, after a three and a half year review process, for the Ministers to make a decision.

**BCCA Reasons, Southin J.A., para. 57, Appellants' Record, Vol. 1, pp. 166-167 and 173.**

100. There is no question that the Tlingit were dissatisfied with the recommendations of the majority of the Project Committee regarding the route of the mine road, and the measures to be taken to mitigate effects upon wildlife and the Tlingits' way of life. While the Ministers were obliged to consider Tlingit concerns, ultimately they had the duty to decide whether or not the project would proceed.

101. The BCCA decision, by imposing a fiduciary obligation of protection of aboriginal interests prior to any determination of aboriginal rights or title, has the effect of undermining Provincial proprietary interests, and disturbs the balance of federalism. As this Court has recently emphasized:

[48] ... it is beyond debate that an appropriate balance must be maintained between the federal and provincial heads of power. A federal state depends for its very existence on a just and workable balance between the central and provincial levels of government, as this Court affirmed in *Reference re Secession of Quebec*, [1998] 2 SCR 217; see also *General Motors of Canada Ltd. v. City National Leasing*, *supra*.

***Reference re: Firearms Act (Can)*, 2000 SCC 31, [2000] SCJ No. 31 (QL) at pp. 11 and 48, paras. 26 and 48.**

102. Particularly before the resolution of contested claims of aboriginal rights, the need to balance competing interests is critical. The scope of the obligation imposed upon the Provincial Crown in these circumstances must reflect the multi-faceted role of the Province, the uncertainty of the right and the extent of the infringement, and the fact that "aboriginal communities exist within the broader social, political and economic community".

***Wewaykum Indian Band v. Canada*, *supra*, at p. 28, para. 96.**

#### **D. The Duty of Fair Dealing**

103. The Appellants submit that prior to the judicial or treaty determination of disputed aboriginal rights, the Provincial Crown owes a duty of fair dealing with aboriginal peoples which requires the Crown to take into consideration the potential impact of resource decisions upon aboriginal interests.

104. Fair dealing includes both consultation and consideration of the concerns raised by aboriginal peoples. The duty has several components.

**(a) The Duty to Inform and Consult**

105. Before making resource and land use decisions which could potentially affect aboriginal interests in lands over which a First Nation asserts aboriginal rights or title, decision makers must make every reasonable effort to inform and consult the First Nation regarding the potential impact of the proposed development.

106. Aboriginal peoples should be consulted prior to decisions which may affect their ongoing cultural interests and land uses. While all such activities may not be integral to the distinctive culture, and therefore may not be constitutionally protected aboriginal rights, the historic relationship between aboriginal peoples and the Crown requires that First Nations have the opportunity to make their concerns known regarding the effects of a proposed development on their interests, before the scope and extent of disputed aboriginal rights have been determined.

***R. v. Van der Peet, supra, at pp. 18, 19 and 25-26, paras. 30, 33 and 51-55.***

107. There is a reciprocal obligation on the First Nation to inform decision makers regarding the specific aboriginal uses and interests which they believe may be adversely affected by a proposed provincial use or development.

***Halfway River First Nation v. British Columbia (Minister of Forests) (1999), 178 DLR (4th) 666, [1999] BCJ No. 1880 (BCCA) (QL) at p. 32, para. 161; Kelly Lake Cree Nation v. Canada (Minister of Energy and Mines), supra, at pp. 23-26, paras. 154, 157-162, 164-165 and 167-176.***

108. The Appellants submit that in the case at bar, the Crown met this obligation. The Tlingits were represented on the Project Committee and were active participants in its

deliberations throughout the environmental review process. The Province responded to numerous information requests from the Tlingits regard potential impacts and proposed mitigation measures. It provided financial assistance to the Tlingits. When the Tlingits were dissatisfied with the results of the cultural and socio-economic impact study commissioned by Redfern, the Environmental Assessment Office engaged and paid for an expert of their choice, Mr. Lindsay Staples, to perform further studies. By the end of the environmental review process, the Tlingits were sufficiently well informed to be able to submit their own impacts report and dissenting recommendations report.

**Affidavit of Norman Ringstad, paras. 35-36, 70-78 and Exhibit “K”, TRTFN Requests for Information and Responses, Appellants’ Record, Vol. 5, pp. 852 and 859-861, Vol. 8, pp. 1462-1560;**  
**Affidavit of Martyn Glassman, para. 59, Appellants’ Record, Vol. 4, p. 785;**  
**Tlingit Report and Recommendations, March 6, 1998, Affidavit of Tony Pearce, Ex. 43, Appellants’ Record, Vol. 4, pp. 682-748;**  
**Environmental Impact Assessment, Tulsequah Chief Mine Re-opening Project, January 2, 1998, Supplemental Affidavit of Tony Pearce, Ex. 1, Appellants’ Record, Vol. 9, pp. 1964-2081.**

109. Not every Provincial resource allocation decision has a direct or immediate impact on aboriginal activities on the ground. Resource and land development decisions may be made incrementally in some circumstances, and have escalating implications for “on the ground” activities. For example, in the case at bar, the PAC precedes the numerous permitting decisions required for construction and operation of the mine and its access road. The scope of the obligation to inform should reflect this reality. It ought to be proportional to the potential impact of the decision in question and to the opportunities for further consultation at subsequent stages of the land development process.

**Project Committee Report and Recommendations, Affidavit of Norman Ringstad, Ex. B, pp. 91-103, Appellants’ Record, Vol. 5, pp. 960-972;**  
**Affidavit of Gary Alexander, paras. 39-41 and Ex. “P”, Appellants’ Record, Vol. 4, pp. 760-761 and 766-767;**  
**Ontario (Minister of Municipal Affairs and Housing) v. TransCanada Pipelines Ltd., supra, at p. 33, paras. 121-122.**

**(b) The Duty to Consider Aboriginal Interests**

110. Once informed regarding specific aboriginal uses or interests, including claims of rights and title, Provincial decision makers must take those uses and interests into consideration in making their decision.

111. Ultimately, discretionary administrative decisions must conform to the *Constitution Act, 1982*. However, the assessment of whether the government decision contravenes the s. 35 rights of the Tlingits is dependent upon proof of the existence and scope of the rights in question. As Madam Justice McLachlin (as she then was) commented, in dissent, with regard to the treaty rights asserted in *R. v. Marshall (No. 1)*:

[112] ... How can one meaningfully discuss accommodation or justification of a right unless one has some idea of the core of that right and its modern scope? How is the government in the absence of such definition, to know how far it may justifiably trench on the right in the collective interest of Canadians? How are the courts to judge whether the government that attempts to do so has drawn the line at the right point? Referring to the “right” in the generalized abstraction risks both circumventing the parties’ common intention at the time the treaty was signed, and functioning illegitimately to create, in effect, an unintended right of broad and undefined scope.

***R. v. Marshall*, [1999] 3 SCR 456, [1999] SCJ No. 55 (QL) at p. 39, paras. 109-113.**

112. In this case, the determination of constitutional rights and obligations under the four part *Sparrow/Delgamuukw* test has been referred to the trial list. However, before trial of the constitutional issues, the potential that Provincial decisions may interfere with ongoing aboriginal land use or cultural interests is a relevant consideration for the Ministers to take into account.

**(i) Evaluation of Potential Impacts and Concerns**

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

114. Decision makers must evaluate:

- (a) the nature and extent of potential impacts;
- (b) how aboriginal land use can be reconciled with the proposed development;
- (c) at what stage of the process reconciliation can and should take place; and
- (d) measures to mitigate impacts.

**(ii) Balancing Interests**

115. Decision makers must, in addition to their statutory obligations, also have regard to general public policy considerations such as the need for certainty for long term investors, job creation and regional development, to the extent that they have discretion to do so.

116. Ultimately, the decision makers must engage in a reasonable balancing of aboriginal interests and the other legitimate objectives of the Crown for the economic and social development of the Province.

117. In this case, the Ministers were made aware of the Tlingits' concerns related to the access road, wildlife, and wildlife habitat through the environmental review process. They imposed conditions on the PAC which were intended to mitigate adverse impacts. It is submitted that the Ministers took the concerns and the interests of the Tlingit seriously, and sought to balance those interests with other public policy considerations. There are opportunities for further consultation, and additional mitigative measures, at later stages of the project.

**Project Committee Recommendations Report, Ringstad Affidavit, Ex. "B", pp. 32-38, 58-66, 70-75 and 80-91, Appellant's Record, Vol. 5, pp. 900-906, 927-935, 939-944 and 949-960;**

**Environmental Follow Up and Monitoring Program, Appendix 11, Project Committee Recommendations Report, Appellants' Record, Vol. 6, pp. 1147-1160;**

**Project Approval Certificate M98-02, Ringstad Affidavit, Ex. "H", Appellants' Record, Vol. 8, pp. 1449-1456;**

**Affidavit of Brian Fuhr, paras. 8-42, Appellants' Record, Vol. 10, pp. 1942-1951;**

**Affidavit of Charles Milton Moore, paras. 4 and 10-22, Appellant's Record, Vol. 11, pp. 2082-2088.**

**E. Standard of Review**

118. The threshold determinations that the Provincial decision makers must make in relation to aboriginal interests are primarily factual. They must consider the nature of the ongoing aboriginal land use and cultural interests, and the concerns raised by aboriginal peoples whose interests may be affected by the decision. The decision makers must then

consider whether those concerns can and have been taken into account in the decision making process.

***Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] SCJ No. 3 (QL) at p. 16, para. 39;**  
***Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 SCR 748, [1996] SCJ No. 116 (QL) at p. 12, paras. 35-37.**

119. Administrative decision makers cannot be expected to make definitive legal determinations of the existence or scope of asserted aboriginal rights. Because their inquiry is primarily factual and does not involve the application or interpretation of legal rules, it attracts deference by the reviewing court.

***Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, [1999] SCJ No. 39 (QL) at p. 22, para. 60;**  
***Kitkatla Band v. BC (2000)*, 183 DLR (4th) 103, [2000] BCJ No. 86 (BCCA) (QL) at pp. 2 and 17-18, paras. 5 and 89-91 (Leave to SCC on this issue denied [2000] SCCA No. 122).**

120. Provincial ministerial and administrative decisions relating to land and resource development include a broad range of discretionary considerations that affect the interests of proponents, and the public, both aboriginal and non-aboriginal. Such decisions require the decision maker to balance factors which include not only the development and exploitation of the Province's resources, but also environmental, social and cultural factors, including aboriginal interests.

***Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] SCJ No. 33 (QL) at p. 21, para. 76;**  
***Suresh v. Canada (Minister of Citizenship and Immigration)*, *supra*, at p. 14, para. 31;**  
***Baker v. Canada (Minister of Citizenship and Immigration)*, *supra*, at p. 22, para. 60;**  
***Wewaykum Indian Band v. Canada*, *supra*, at p. 28, para. 96.**

121. The decision makers in this case were the Minister of Environment, Lands and Parks, and the Minister of Energy and Mines and Minister responsible for Northern Development. They were required to make a ministerial or political decision involving the balancing of competing interests. This type of polycentric decision lies at the core of ministerial, rather than judicial, decision making. The Ministers were discharging their constitutional responsibility to manage the Crown lands of British Columbia in the public interest.

**BCCA Reasons, Southin J.A., para. 80, Appellants' Record, Vol. 1, p. 188;**  
***Baker v. Canada (Minister of Citizenship and Immigration)*, *supra*, at p. 22, para. 59;**  
***Suresh v. Canada (Minister of Citizenship and Immigration)*, *supra*, at p. 16, para. 39.**

122. Aboriginal rights are not absolute and are subject to this balancing exercise. As Cory J. stated in *R. v. Nikal*:

[92] ...It has frequently been said that rights do not exist in a vacuum, and that the rights of one individual or group are necessarily limited by the rights of another. The ability to exercise personal or group rights is necessarily limited by the rights of others. The government must ultimately be able to determine and direct the way in which these rights should interact. Absolute freedom in the exercise of even a *Charter*, or constitutionally guaranteed aboriginal right has never been accepted, nor was it intended....

***R. v. Nikal, supra, at p. 27, para. 92.***

123. This concept is also articulated by Lamer C.J.C. in *Delgamuukw*, at para. 165

[165] ...In the wake of *Gladstone*, the range of legislative objectives that can justify the infringement of aboriginal title is fairly broad. Most of these objectives can be traced to the *reconciliation* of the prior occupation of North America by aboriginal peoples with the assertion of Crown sovereignty, which entails the recognition that 'distinctive aboriginal societies exist within, and are part of, a broader social, political and economic community'...

***Delgamuukw et al v. The Queen, supra, at p. 54, para. 165.***

124. The indeterminate nature of the rights in this case, the polycentric balancing that is required and the discretionary nature of the Ministers' decision militate in favour of high degree of deference. Provided the Ministers have had regard to all relevant considerations, the Court should not engage in reweighing those considerations. Only if the Court finds that the Ministers' decision is patently unreasonable should the Court interfere.

***Suresh v. Canada (Minister of Citizenship and Immigration), supra, at pp. 14-16, paras. 32-38 and 40;*  
***Slaight Communications Inc. v. Davidson, [1989] 1 SCR 1038 at pp. 1049 (d-j) and 1077 (g-i);*  
***R. v. Nikal, supra, at p. 31, para. 110.*******

125. Reweighing the relevant factors prior to the application of the four part test engages the Court in determining whether any interference with the asserted right is justified. This in turn places the unanswered question of the nature, scope and geographic location of the right squarely in issue. That issue will only be determined after a trial.

126. A large part of British Columbia's land base is claimed as aboriginal title lands. If the full extent of the Provincial Crown's section 35 obligations arise on an assertion of

aboriginal rights, the result, in practical terms, would be to require the Crown to assume that the entire province is subject to aboriginal rights and title to the full extent claimed. Not only would this requirement shift the onus of proof, it would also significantly compromise Provincial proprietary interests and legislative authority.

127. In this case, the Ministers' decision was based on the Recommendations Report of the majority of the Project Committee, which identified the concerns of the Tlingit, and addressed mitigation measures which in turn were incorporated in the conditions attached to the PAC. Further mitigation is possible as and when Redfern seeks permits for the construction and operation of the project. The Ministers must balance competing interests, and have regard to all relevant factors, including aboriginal interests. Their decision is neither unreasonable on its face, unsupported by the evidence, or vitiated by a failure to consider the proper factors. It is not patently unreasonable, and meets the standard for review.

***Suresh v. Canada (Minister of Citizenship and Immigration), supra, at p. 16, para. 41.***

## **F. Conclusion**

128. The definition of the content and scope of Provincial Crown obligations in these circumstances must be workable. Treaty negotiations which are proceeding in British Columbia and offer the best opportunity for lasting reconciliation, are a complex and lengthy process. How the relationship between aboriginal peoples and the Provincial Crown is managed in the interim will have a significant impact on the economic well being of the Province. Any test framed by this Court ought to produce reasonable, practical solutions that continue to encourage the parties to negotiate.

129. In order for the treaty process to be successful, a balance of interests must be maintained while negotiations proceed. The imposition of a fiduciary obligation of justification upon the assertion of aboriginal rights not only shifts the onus of proof, but also provides legal entitlement before disputed rights are proven. It thereby reduces the incentive for aboriginal peoples to negotiate.

130. A Provincial duty of fair dealing which recognizes the need for decision makers to take into account ongoing aboriginal land uses and cultural interests prior to making decisions regarding allocation of Crown lands and resources is reasonable. Its fulfillment requires the commitment by the Province of substantial administrative and fiscal resources. Its breach may attract substantive remedies. That ongoing commitment creates a pressing need for the Province to engage in treaty negotiations in order to finally address issues of reconciliation of aboriginal rights and Crown sovereignty. Its performance permits the balancing of aboriginal interests and other public policy considerations pending the negotiation of treaties, and yet provides the necessary incentive for both the Provincial Crown and aboriginal communities to continue to pursue negotiated resolutions.

**PART IV  
COSTS**

131. This Court granted the Appellants leave to appeal on terms that the Appellants pay the party and party costs of the Respondents, Taku River Tlingit First Nation and Melvin Jack in any event of the cause.

**Judgment of the Supreme Court of Canada, Nov. 14, 2002, Appellants' Record, Vol. 2, p. 353.**

**PART V  
NATURE OF ORDER SOUGHT**

132. That this appeal is allowed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

March 4, 2003

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**PAUL J. PEARLMAN, Q.C.**

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**KATHRYN L. KICKBUSH**

Solicitors for the Appellants

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