EAGLE

Environmental-Aboriginal Guardianship through Law and Education

March 15, 2004

Council of the Haida Nation
Attention: Guujaaw and Arnie Bellis

This memo replaces the memo we provided to you on February 10, 2004, summarizing the arguments of the Interveners in the Supreme Court of Canada proceedings regarding TFL 39. This memo contains everything included in the previous one, and also summarizes the facta of the Council of the Haida Nation, Weyerhaeuser, British Columbia and Port Clements.

BRITISH COLUMBIA

The Province's position is that the lower Court erred in finding that the Province owed a constitutional and fiduciary duty to consult and to seek workable consultations with First Nations, especially in the context of unproven Aboriginal Rights. The Crown also submits that the lower Court erred in finding the source of that obligation in a freestanding, all pervasive obligation of the Crown to protect First Nations' interests. British Columbia argues that the Crown merely owes a duty of fairness where Aboriginal Rights are being asserted.

The Province submits that for unproven Aboriginal Rights, administrative fairness principles are sufficient to guide Crown activities. This essentially amounts to a right to be heard, and places no substantive requirements on the Crown regarding the outcome. The Crown's duty of consultation in this context should be measured against a standard

of reasonableness. They further argue that administrative decision makers cannot be expected to make assessments of the existence or scope of asserted Aboriginal Rights.

British Columbia argues that the Court of Appeal's decision requires the assessment of the strength of an Aboriginal claim based on a "prima facie case" test, an assessment for which foresters and other resource managers lack the training, education, and experience. The Province raises concerns related to the impracticalities associated with engaging in such assessments, given the 198 registered Indian Bands and the potential for stifling economic development.

The Crown submits that decision makers are already guided by government policy to consult with Aboriginal Peoples claiming Aboriginal Rights and Title. They argue that s.35 allows government to balance other interests, not only those of Aboriginals. The Province argues that the Haida were consulted with respect to forest development plans and cutting permits, and that the Province has taken steps to mitigate any adverse effects.

The Province argues that imposing a fiduciary duty for unproven Aboriginal Rights strains the division of powers and is inconsistent with the Province's duties for the management and disposition of its natural resources. They argue that the objective of s.35 is the reconciliation of Crown sovereignty and Aboriginal Rights, but that such reconciliation must take into account both the interests of Aboriginal Peoples and the reality of Crown sovereignty. B.C. submits that s.35 requires that the First Nation prove the existence of the right and infringement before the Crown is required to meet the justification test under *Sparrow*. To require the Provincial Crown to accommodate Aboriginal claims prior to proof of the right and infringement amounts to reversing the onus of proof.

Lastly, the Province submits that Weyerhaeuser does not owe a legal duty of consultation and accommodation. They point out that the Supreme Court of Canada has never decided or even suggested that any party other than the Crown has a duty to consult. The

Crown argues that imposing such a duty on licensees of the Crown and other private actors would only create uncertainty and discourage economic development.

WEYERHAEUSER COMPANY LTD.

Weyerhaeuser's position is that any rights that Aboriginal Peoples have with respect to consultation and accommodation are obligations of the Crown and not of third parties operating on Crown land. The company cites *Sparrow, Delgamuukw, Nikal, Gladstone* and *Marshall* as support for its position.

The company argues that the relationship between Aboriginal Peoples and third parties is governed by private law and that the appropriate remedy is to grant an interlocutory injunction. One reason for this approach is the inability of licensees to assess the strength or scope of an Aboriginal claim giving rise to a *prima facie* case to give content to the consultation obligation. They further submit that the consultation approach does not balance competing interests more effectively than the injunction process, since consultation depends on the assessment of the claim, not the balance of convenience.

Weyerhaeuser argues that none of the three sources expressed by Lambert J.A. support the imposition of the obligation on the company. They first argue that s.35(1)(d)(vi) of the *Forest Act* does not require licensees to consult with First Nations. The Act merely requires licensees to identify, to the satisfaction of government officials, plans to consult other users of the licence area. Secondly, the company argues that it is inappropriate to impose a duty on Weyerhaeuser based on the trust principle of "knowing receipt" given the doctrine's restitutionary and proprietary natures. More specifically, they argue that restitutionary principles are "concerned with giving back to someone something that has been taken from them", which presupposes that the licence and the Rights conferred under the licence belong to the Haida. Thirdly, the company argues that Lambert J.'s reasoning that a third party would wish to rely on justification as a defence to infringement assumes that this public law concept applies to third parties as well.

Finally, Weyerhaeuser argues that the Crown has ample powers to engage in effective consultation without requiring the licensee's participation, contrary to Lambert J.A.'s

conclusion that imposing a duty on Weyerhaeuser was necessary because the Crown had no capacity to effectively do so without Weyerhaeuser's co-operation. The company submits that the government's legislative authority over provincial natural resources gives the Province the necessary tools to adequately deal with the government's legal responsibilities.

Council of the Haida Nation

The Haida factum places the arguments of the Province within the context of the Province's historical and continuing denial and resistance of the reality of Aboriginal Title. The Haida position is that in the face of a reasonable assertion of Aboriginal Title and Rights, the Crown has fiduciary, constitutional and substantive, as opposed to merely procedural, obligations to consult and accommodate prior to proof of Aboriginal Title and Rights. A duty to consult and accommodate arises when a representative of the Crown contemplates a decision with knowledge that the result may infringe on Aboriginal Title or Rights, or in circumstances that would lead a reasonable person to make inquiries.

The duty to consult and accommodate prior to proof of rights reflects the pre-existing nature of those rights. The duty to consult and accommodate is rooted in the historical and fiduciary relationship between Aboriginal Peoples and the Crown. Aboriginal Title, as reflected in the *Royal Proclamation of 1763*, is a continuation of Title that existed prior to the arrival of Europeans. A duty to consult and accommodate prior to litigation to determine the nature and scope of Aboriginal Rights and Title serves the purpose of preventing unjustifiable infringements before they occur, and this is consistent with the purpose of s. 35(1) of the *Constitution Act, 1982*. It also serves to encourage negotiated settlements as opposed to ongoing litigation. Aboriginal Title is a "cognizable interest", (an interest capable of being known or recognized) prior to a court decision confirming its precise nature and scope. Convenience is not a valid reason to turn a blind eye to constitutional and pre-existing rights, and it cannot trump justice.

The Haida point out that the Province's title the lands and resources in TFL 39, and therefore, its ability to grant an exclusive tenure, is in question and remains to be decided. To the extent that Aboriginal Title exists, s. 109 of the *Constitution Act, 1867*, provides that the Province's title is incomplete.

As to the content of the duty to accommodate, the Haida submit that this should be informed by the elements of the "justification analysis": the goals should be to avoid infringements, minimize infringements necessary to achieve a "valid and substantial objective", compensate for necessary infringements and involve the Haida in decision making in a meaningful way. The goal should be to reach agreement, but at the least, accommodation should be reflected in the end result and not merely in the process of decision making.

With respect to the declaration regarding Weyerhaeuser's obligation to consult and seek accommodations, the Haida submit that in the circumstances of this case, it was lawful, necessary and appropriate to include Weyerhaeuser in the declaration. The Court of Appeal, having concluded that the Crown breached its duty to consult and accommodate, could have granted the Haida the order they sought, i.e., overturning the replacement of TFL 39. The Court, however, declined to do so because of the potential economic consequences. However, the Court was not willing to provide no remedy at all (as it was urged to do by the Crown and Weyerhaeuser). As a compromise, and to encourage the parties to work out the ultimate resolution of the issues between themselves, the court issued the declaration that both the Crown and Weyerhaeuser must consult and accommodate. For so long as the TFL remains in place, Weyerhaeuser's cooperation is necessary to achieve an accommodation.

Manitoba

Manitoba has withdrawn its intervention. We summarize their factum for your information.

Manitoba argues that consultation is the means by which the province's exclusive legislative jurisdiction over resources is harmonized with s. 35's constitutional protection of Aboriginal Rights. Manitoba's position is that the Province's duty to protect Aboriginal interests is a "public law duty" and that "public law duties are inconsistent with a fiduciary responsibility."[1]

Manitoba also argues that prior to proof, an Aboriginal interest or right is uncertain, and therefore it is uncertain whether there is any infringement. Manitoba argues that legal proof of rights is a prerequisite to seeking legal remedies.

From a practical or policy perspective, Manitoba submits that government decision makers lack the training and expertise to assess the strength of cases of rights or title. Manitoba argues that governments should be permitted to decide whether and to what extent to consult and accommodate based on a risk/benefit analysis.

Manitoba submits that the courts should only consider interim remedies to protect asserted Aboriginal Title or Rights by applying the test for injunctions. That test requires the party seeking an injunction to show that there is "a serious question to be tried", and that it will suffer "irreparable harm" if the activity is allowed to proceed.[2] It also requires the court to assess the "balance of convenience" – who will be inconvenienced more by an injunction against them should they later be successful when there is a final determination.[3] Courts often require the party seeking an injunction to undertake to pay the damages of the other party should the other party ultimately be successful.

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[1] In the *Guerin* case, the Supreme Court of Canada held that Aboriginal Peoples' interest in land "is not a creation of either the legislative or executive branches of government. The Crown's obligation to the Indians with respect to that interest is therefore not a public law duty."

[2] Companies argue that the harm to Aboriginal Title and Rights is not irreparable because First Nations can obtain compensation and damages.

[3] At this stage in the analysis, courts are often influenced by the companies' projected financial losses that would result from the injunction being granted.

Ontario

Ontario submits that all s. 35 issues should be decided in accordance with the analysis set out in *Sparrow*.[4] Imposing a legally enforceable duty to consult would be, in Ontario's submission, "manipulating the law of fiduciary obligations to respond to s. 35 rights assertions prior to their determination."

Ontario argues that fiduciary law is inappropriate for reconciling the prior occupation of Canada by Aboriginal Peoples with the assertion of European sovereignty, or reconciling the interests of Aboriginal and non-Aboriginal people. While reconciliation suggests some balancing of Aboriginal Rights and non-Aboriginal interests, fiduciary law requires fiduciaries to act in the best interests of the beneficiary.

Ontario argues that as a result of history and the division of powers, the provinces are not in a general fiduciary relationship with the Aboriginal Peoples within their boundaries. According to Ontario, the special historic relationship between the *federal* Crown and Aboriginal Peoples is a continuance of the Imperial Crown's relationship with Aboriginal Peoples. Any fiduciary obligations on a province must arise through particular conduct. Ontario cites that province's Court of Appeal in *Bear Island*: "... the fiduciary duty owed by the provincial Crown is a "shield and not a sword."

Ontario submits that a province has fiduciary obligations when its actions infringe or are likely to infringe *proven* Aboriginal Rights. Otherwise, the provinces only have fiduciary obligations to Aboriginal Peoples if they "take specific steps that create a fiduciary duty." In particular, Ontario cites the Supreme Court of Canada to the effect that the fiduciary must "have assumed or undertaken to 'look after' the interests of the beneficiary..."

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[4] The *Sparrow* analysis arose in the context of Aboriginal Rights being used as a defence to a charge of fishing in violation of a net length restriction. In that context, the court held that the defendant had to prove his fishing right, and that the net length restriction interfered with its exercise. Then, to show that it acted constitutionally, Canada had to show that the infringement was justified by pointing to a "valid legislative objective", and showing that it interfered with the right minimally, that it gave priority to the right, that it consulted with the First Nation prior to imposing the restriction and that compensation was available.

Ontario submits that the provinces have not promised, and don't have the capacity to promise, to look after the best interests of Aboriginal Peoples.

Ontario also argues that to trigger a fiduciary duty, there must be both a fiduciary relationship and control by the fiduciary over a "cognizable interest" of the beneficiary. A "cognizable interest" is one that is capable of being known or recognized. In this case they say there is neither a fiduciary relationship nor control over a cognizable interest of the Haida.

Ontario submits that interlocutory injunctions should be the only interim remedy available, and that the courts can take into account the unique nature of Aboriginal interests in applying the injunction test.[5]

Ontario suggests that a legally enforceable duty in the interim is also unnecessary, because "upon the assertion of a s. 35 right, prudent governments take reasonable steps in good faith to assess whether there is a valid concern regarding the potential infringement of the asserted right."

Ontario raises the issue that Aboriginal Rights assertions may prove to be unmeritorious. Ontario argues that the Court of Appeal's order allows Aboriginal Peoples to "obtain a remedy at an interim stage in the proceedings that effectively determines the constitutional issues in dispute." Ontario submits that the Court of Appeal erred in suggesting that TFL 39 could be declared invalid as an interim remedy, because that would amount to a declaration regarding breach of a s. 35 right prior to legal proceedings to determine whether there has been such a breach.

With respect to third party obligations, Ontario submits that s. 35 constrains government action, but that in justifying a potential infringement, governments should be allowed to rely on the actions of third parties.

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[5] This test is described in the summary of Manitoba's factum.

Alberta

Alberta submits that the Haida ask the Court to require the Crown to prove justification for infringing rights that have not yet been proved in kind or extent. They submit that consultation is part of the *Sparrow* justification test and the scope and extent of the duty to consult is an issue that must determined at trial because it depends on the nature and extent of the right.

Alberta submits that the duty to consult, as a factor which could justify an infringement of a s. 35 right, is a public law duty to consult with Aboriginal Peoples when development proposals contemplate activities that infringe s. 35 rights.

Alberta submits that a duty to consult prior to proof of rights results in uncertainty regarding when and to what degree there is a duty to consult, and may lead to reluctance of business to initiate economic development of resources.

Alberta argues that the Crown and the courts can only assess consultation and accommodation where a right and infringement are proven. Therefore, the issue of consultation and accommodation is not justiciable[6] unless there is a proven right and infringement.

Alberta's argument is primarily concerned with distinguishing Treaty Rights from Aboriginal Rights. They argue that the statement in *Delgamuukw* that there is always a duty to consult does not apply to Treaty Rights. Their argument is that the province has a right to "take up or occupy lands" under the treaty. Therefore, when they authorize developments there is no infringement of Treaty Rights so no duty to consult. The duty to consult was fulfilled by negotiation of the treaty. They refer to Southin's dissent in *Taku*, in which she suggested that if *Taku* were a treaty case *Transcanada* might apply.

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[6] Justiciable means capable of being litigated.

Alberta argues that any duty to consult should only be on the Crown and not third parties. Their role in consultation should be regulated by the Crown. Third parties cannot legislate and regulate and can't have a duty to consult.

Nova Scotia

Nova Scotia submits that there can be no constitutional and fiduciary duty of consultation and accommodation based on unproven rights. They do not set out any arguments on this position, but instead focus on an alternative argument that if there is a duty to consult it is only with respect to parts of Block 6, where there are "areas where there is a substantial probability of native success at trial." This is a site specific approach to Aboriginal Title. In Nova Scotia, there is a claim of Aboriginal Title to the whole of the province. Nova Scotia argues that a duty to consult when every government activity is being considered would encumber the machinery of government. A duty on private actors, they argue, is unworkable.

Saskatchewan

Saskatchewan argues that any duty to consult is triggered by the *Sparrow* justification test and is engaged only once a *prima facie* infringement of an existing Aboriginal Right is established. Saskatchewan argues that consultation cannot be considered outside of the *Sparrow* framework.

Saskatchewan argues that consultation is simply one of the factors that <u>may</u> be taken into account in the *Sparrow* justification test, and argues that the Supreme Court of Canada has never recognized that lack of adequate consultation, in and of itself, is a separate ground upon which First Nations can challenge government action infringing Aboriginal Rights.

Saskatchewan submits that it is important for the Court to consider that TFL 39 is not a new disposition, but a tenure that has been in place since 1961, prior to the enactment of s. 35. Saskatchewan submits that when government actions which infringe Aboriginal Rights occurred prior to 1982, a different and less onerous standard of consultation should be incorporated into the *Sparrow* test. In this case, either no consultations, or a lesser degree of consultations, would be sufficient to meet the *Sparrow* test.

Saskatchewan submits that the Court of Appeal's decision reflects a misunderstanding of fiduciary law in the context of Aboriginal Rights and overlooks the dichotomy between private law and public law fiduciary duties. Saskatchewan cites *Wewaykum* for the proposition that not all aspects of the relationship between the Crown and Aboriginal Peoples are fiduciary in nature.

Saskatchewan argues that there are two types of fiduciary duties in the context of Crown-Aboriginal relations. The first is in the nature of a private law duty and applies when the Crown is in a position to exercise discretionary control over property that is subject to a "cognizable Indian interest".[7]

The second type of fiduciary duty is the one embodied in the *Sparrow* decision, and it serves to limit government's ability to infringe upon constitutionally protected Aboriginal and Treaty Rights. In the context of the *Sparrow* test, Saskatchewan argues that the fiduciary duty is purely a public law duty – when the province legislates with respect to the conservation, management and disposition of natural resources, it cannot act with only the interests of Aboriginal Peoples in mind. Governments have to be able to balance these rights with the broader public interest and so must have regard to the interests of all affected parties. Saskatchewan submits that the public law duty requires no more from governments than to be mindful of existing Aboriginal and Treaty Rights when

[7] Saskatchewan suggests that while the Aboriginal interest in reserve lands is "cognizable", the Aboriginal interest in Aboriginal Title lands is not cognizable until considered by the courts.

legislating and to take those rights seriously. Because the duty is a public law duty, Aboriginal Rights can be subordinated to the public interest (justifiable infringements).

Saskatchewan concedes that rights exist prior to a judicial determination of the rights, and that, to be effective, consultation should take place before infringements occur. However, Saskatchewan argues that the *Sparrow* justificatory test is sufficient to ensure that consultations take place before infringements occur. Saskatchewan argues that the *Sparrow* justification test motivates governments to consult prior to infringing rights, but the decision whether to consult is part of a risk-benefit analysis. A free-standing duty to consult could result in the creation of a duty to consult in circumstances where no underlying Aboriginal Right exists. Saskatchewan submits that it also ignores the fact that in some circumstances consultations may not be required in order to justify infringements.

If First Nations want to protect their rights before proving them, Saskatchewan submits that they should seek interlocutory injunctions. Saskatchewan argues that interlocutory injunctions are powerful remedial tools and provide an incentive to governments to take Aboriginal Rights seriously. They argue that injunctions are more appropriate than imposing a duty to consult and accommodate because injunctions allow for a balancing of interests to take place. They argue that injunctions are not all-or-nothing. In this case for example, a court could issue an injunction restraining logging in Haida Protected Areas but not outside those areas.

Saskatchewan also addresses Treaty Rights and submits that the duty in that context depends on the terms of the treaty, and whether the treaty contemplates consultations in the circumstances. They urge to the court to confine its decision in this case to unproven Aboriginal Rights.

Quebec

Quebec submits that the Court of Appeal should not assume that unless forced to consult with Aboriginal Peoples, the Crown will refuse to recognize claims or engage in

negotiations with Aboriginal Peoples. Quebec submits that the Crown is entitled to consider claims and determine that it does not have any obligation to consult or seek accommodations, because it has determined that the claims are unfounded or that the actions are not liable to infringe any rights protected by s. 35. If the government does not consult, it takes a risk that it will later not be able to justify an infringement. This, Quebec says, is sufficient incentive for the Crown to consult Aboriginal Peoples. Furthermore, good faith must be presumed. "It is not reprehensible in itself that the Crown contests the claims presented by aboriginal groups and she may reasonably rely on the jurisprudence to this Court to do so." Quebec submits that to challenge such a determination requires Aboriginal Peoples to prove the right.

Quebec raises the issue of "nomadic aboriginal people", and refers to a statement in *Delgamuukw* suggesting that nomadic people many not be able to demonstrate Aboriginal Title.

Quebec submits that if the Court of Appeal decision is upheld, courts will be determining whether developments affect Aboriginal Rights. The analysis of the strength of a claim and whether an infringement would occur should be made within the *Sparrow* analysis with sufficient evidence. Quebec also submits that the courts should not declare an action or decision to be invalid without applying the *Sparrow* test. Consultation should not be an independent ground for challenging Crown actions or decisions.

Quebec raises the question what if, after a trail in accordance with Sparrow, the court determines that the project should have been authorized: "who will assume the economic losses incurred by the State or by a third party?"

Canada

Canada argues that that any obligation to consult Aboriginal Peoples is not justiciable or enforceable by Aboriginal Peoples prior to proving a right and infringement. If the claimed right is subsequently found not to exist, there can be no infringement and no duty to consult. Canada claims that the Court of Appeal and the Haida factum assume that all claimed Aboriginal Rights will be proven.

Canada argues that there is a duty on the Crown to consult about claimed rights if the legislation provides for or permits such consultation. Statutes should be interpreted to require the Crown to seriously consider claimed rights unless the statute includes a clear expression to the contrary. However, if legislation precludes consultation at the pre-proof stage, Canada submits that Aboriginal Peoples must prove their rights and a *prima facie* infringement[8] in order trigger a consideration of the sufficiency of the Crown's consultation.

Canada submits that the Court of Appeal erred in suggesting that the protection of Aboriginal Rights is the focus of the inquiry prior to proof of a right. Canada argues that proof of an Aboriginal Right is a prerequisite to challenging the constitutionality of a statutory provision. To protect rights in the meantime, First Nations can seek interlocutory injunctions.

Canada submits that there is no need for the court to create an alternative framework to interlocutory injunctions. Injunctions are sufficient to reconcile and balance competing interests prior to proof of Aboriginal Rights.

In this case, Canada submits that s. 36 of the *Forest Act* (the replacement provision) permits a limited consultation requirement. The nature and size of the TFL means that the replacement or transfer must be a topic of consultation to fulfill the requirement to consult.

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[8] In other words, sufficient evidence to prove an infringement.

Canada submits that if the courts require the Crown to consult and seek accommodations prior to the determination of the rights and infringement by the courts, the duty must be "defined and applied in a manner that allows the Crown, both provincial and federal, to strike a workable balance between its proprietary interests and statutory duties, its obligations to First Nations, and the public interest at large."

Canada submits that the following principles should apply to determine the content of the duty to consult:

- the nature of the potential Aboriginal Right;
- the strength of the claim;
- the likelihood of the potential infringement;
- the severity of the potential infringement; and
- the imminence of the potential infringement.

In accordance with the above principles, the Crown's consultation requirement would fall along a spectrum: if the Aboriginal Rights claim is weak, or the potential infringement minor, the duty to consult may require no more of the Crown than "providing adequate notice, gathering and sharing relevant information and acting in a procedurally fair manner towards the aboriginal group." At the other end of the spectrum, if the potential infringement is imminent and severe, the duty to consult "would require more of the Crown in seriously considering the concerns of the aboriginal group."

According to Canada, prior to proof, consent is never required and the consultation requirement does not include a substantive requirement to accommodate. The Crown must ensure minimization of potential negative effects only if failure to do so is arbitrary or in bad faith. The Crown does not have to provide a separate process for consultation with Aboriginal Peoples.

Canada relies on *Wewaykum* for the proposition that not all obligations of a fiduciary towards a beneficiary are fiduciary in nature. The Crown owes fiduciary obligations only if the Crown assumed discretionary control in relation to the Aboriginal interest.

According to Canada, to establish a fiduciary obligation requires establishing that in exercising its discretionary powers pursuant to the *Forest Act*:

- the Crown took on a fiduciary role and obligation to act in the best interests or for the benefit of the Aboriginal group;
- the Crown interposed itself as the exclusive intermediary to deal with the interests of the Aboriginal group in a way that invokes responsibility in the nature of a private law duty; or
- the Crown undertook to act on the Aboriginal group's behalf.

Canada argues that the Crown was acting entirely in its public law capacity when making the decisions in question. Canada says the situation here is different from that in *Guerin*, where a fiduciary duty was found to exist, because there the interest was in reserve lands, and so was certain. The Crown also had a duty under the surrender provisions of the *Indian Act* to act in the best interest of the Musqueam.

Canada submits that third parties do not have a legal requirement to consult that is enforceable by Aboriginal Peoples. Private industry does not have the same historical and fiduciary relationship with Aboriginal Peoples as does the Crown. Any requirements on private parties to consult must be imposed by the Crown and are only enforceable by the Crown.

Canada argues that the provincial legislatures and Parliament assumed the role and responsibilities of the Imperial Crown. Historical provincial responsibilities are not ousted by s. 91(24) of the *Constitution Act, 1867*.

With respect to remedy, Canada submits that the Court of Appeal took an appropriate approach: if a Court determines that a requirement to consult prior to proof of the rights was breached, the appropriate remedy is for the Court to make a declaration and not to quash or set aside the decision or licence.

Canada submits that the courts should always presume that the Crown will act in good faith and therefore suggests that a legally enforceable duty prior to proof is not necessary.

With respect to the constitutional question, Canada submits that the constitution cannot be invoked without proof of the Aboriginal Rights. A remedy under the constitution is only available within the *Sparrow* framework. The constitutionality of a statutory provision cannot be answered without proof of the right.

British Columbia Cattlemen's Association

The Cattlemen are concerned that if upheld, the decision of the Court of Appeal imposes a duty to consult and seek accommodations that will apply to them.

They submit that it is not practical for all private parties to have legally enforceable duties to consult and accommodate similar to the Crown's duties. They submit that while most ranchers and nearby Aboriginal communities have developed good working relationships, most cattlemen lack the financial resources, knowledge and skills to consider and analyze Aboriginal Rights issues. They also submit that private parties are unsuited to take responsibility for balancing their interests with the interests of others and that licencees should be able to depend on leases, permits, licences, and other approvals, including that the appropriate level of Crown consultation and accommodation has occurred.

The Cattlemen submit that the Court of Appeal erred in holding that Weyerhaeuser owes fiduciary or constitutional duties that are similar to those owed by the Crown. The constitution applies only to the Crown and private parties cannot infringe s. 35.

The Cattlemen submit that the Crown's duty to consult is not founded in the fiduciary relationship and exists on a spectrum. The Cattlemen submit that there are four potential sources of a duty to *consult*:

1) The Crown's duty to be fair to all subjects and general administrative law principles of procedural fairness applicable to all Canadians. This duty does not require the Crown to accommodate unproven rights. This duty attaches to bodies exercising public authority and so cannot apply to third parties.

2) The honour of the Crown in dealing with Aboriginal Peoples, rooted in the special historic relationship. Where Aboriginal Rights have not been proven, the duty is to genuinely consider and address the views of Aboriginal Peoples and ensure adequate information exchange. There is no obligation to accommodate unproven rights. Only the requirements of procedural fairness have to be met. Private parties cannot owe a duty based on the honour of the Crown.

3) The justification test for Crown infringements, including the duty to consult and other procedural and substantive duties, in situations where an Aboriginal Right is proven. The Cattlemen submit that the *Sparrow* analysis precludes consideration of the Crown's duty to consult prior to a determination of an Aboriginal Right. The justification analysis cannot apply to private parties and cannot be the basis for imposing a duty to consult on private parties.

4) The requirement of the Crown, as a fiduciary, to consult with Aboriginal Peoples, where fiduciary obligations are established. The Cattlemen submit that the Court of Appeal's characterization of the fiduciary duty is overly broad. In any event, the fiduciary relationship, the Cattlemen argue, cannot apply to third parties.

The Cattlemen submit that a duty to *accommodate* must be based on proven Aboriginal Rights, and that it rests solely with the Crown unless imposed by legislation or governmental regulation. If accommodation was required prior to proof, "it is not apparent what additional benefit would accrue to the aboriginal group for the great cost and expense of proving such right."

Business Council of British Columbia and Others ("Business Interveners")

The Business Interveners submit that the Court of Appeal's decision has imposed an onerous and unworkable burden on private parties. They suggest that First Nations are making unreasonable demands, including demands for royalties and vetos. They argue that: "The decisions of the Court of Appeal in this case, if upheld, will lead to financial instability and institutional paralysis, as government agencies and private parties struggle with claims that have not yet been adjudicated."

The Business Interveners submit that the Crown does not have a fiduciary or constitutional duty to consult and seek accommodations with respect to asserted Aboriginal Rights or Title. They say that the nature and scope of a right must be defined before a remedy can be crafted. The Business Interveners submit that the Court of Appeal "convert[ed] the shield of justification into the sword of a new constitutional duty."

The Business Interveners submit that if the Haida want to prevent an infringement of their rights they can seek injunctions. The Business Interveners suggest that the Haida in effect got an injunction, arguing that the declaration is in effect "extraordinary interlocutory injunctive relief, tantamount to the suspension of legislation, prior to meeting the criteria for injunctive relief..." They argue that interlocutory relief generally should not be granted where the interest is Aboriginal Title (because of the economic component, First Nations can be compensated if they prove their title).[9]

The Business Interveners submit that in the absence of an injunction Weyerhaeuser is entitled to assume that tenures and rights acquired from the Province are constitutionally valid. They submit that a consultation requirement prior to proof of Aboriginal Rights or

[9] They suggest that infringements of Aboriginal Title are purely economic.

Title "inevitably implies that the tenures and rights are encumbered or invalid," and incorrectly assumes that the rights have been established.

They also argue that fiduciary law is inappropriate in the context of the Crown's need to balance interests because loyalty is required of the fiduciary. They argue that fiduciary obligations should not be imposed in "circumstances where it is impossible for the alleged fiduciary to know the extent of its obligations," that is, prior to proof in court of the Aboriginal Rights.

The Business Interveners submit that there is no basis in law to impose a duty on private parties. Private parties cannot owe constitutional obligations. They say that private parties lack the resources and expertise to assess the strength of claims. Private parties' interests inevitably conflict with the economic component of Aboriginal Title and it is the Crown's responsibility to balance the need to exploit resources with Aboriginal Rights and Title.

The Business Interveners submit that it is inappropriate to place fiduciary obligations on companies competing with Aboriginal Peoples for the use of the same land. Private parties cannot be required to subordinate their own interests. The Business Interveners suggest that the result of imposing obligations to consult and accommodate on Weyerhaeuser is an "implied delegation" of the Crown's duty.

They also disagree with our position that the declaration of Weyerhaeuser's duty is a question of procedure and jurisdiction. They submit that Aboriginal Peoples have relied on the Court of Appeal's decision to assert substantive rights against third parties, and accommodation engages the substantive interests of private parties (eg., protecting areas, reducing the annual cut).

The Business Interveners' conclusion is as follows:

> The decisions under appeal encumber all existing grants, licences and permits granted by the Province. If the decisions are correct, a citizen of the Province cannot accept that any grant, licence or permit from the

> Province is constitutionally valid. Further, the citizens of the Province who have accepted such grants, licences or permits have unknowingly assumed constitutional or fiduciary obligations to aboriginal groups who assert interests inconsistent with those grants, licences or permits. The inevitable consequence of the decisions of the Court of Appeal ... has been institutional paralysis on the part of the Province and the creation of a cloud over grants, licences and permits in the Province. It would be inappropriate for this Court to affirm the judgment of the Court below and thereby impose this constitutional chaos on the whole country.

Tenimgyet (Gitxsan)

The Gitxsan submit that the Court has been presented with two models of consultation and accommodation. The Crown/Industry model reflects a narrow and legalistic view of the Crown's powers and duties. The model advanced by the Haida and other First Nations is a broader, purposive model designed to reflect the nation-to-nation quality of the relationship between Aboriginal Peoples and the Crown in the context of Crown decision making potentially affecting Aboriginal Peoples' rights and interests. The Gitxsan submit that the latter approach is more consistent with s. 35 and that the Crown must recognize and respect the social structure and laws of the Gitxsan.

The Gitxsan submit that the Crown cannot defer recognition of Aboriginal Rights until some future act of court recognition – s. 35 embodies a present recognition. The Crown's approach would entrench Aboriginal Peoples and the Crown in a process of systematic dispute and litigation.

The Gitxsan rely on three constitutional principles to argue that the Crown must consult and accommodate prior to judicial recognition of the rights in question:

1) Section 35 is intended to remedy the historic failure of the Crown and Canadian society to respect Aboriginal and Treaty Rights as communal, legal rights. The Gitxsan argue that the failure to respect Aboriginal Rights has denied Aboriginal Peoples effective control or a significant say over the disposition of rights and resources on their

lands. The Gitxsan see the duty to consult as reflecting the recognition of Aboriginal Peoples and their ability to make collective decisions.[10] Aboriginal Title includes the collective right to decide how to use lands and therefore Aboriginal Peoples must have a meaningful say in land use and resource decisions. This should be accomplished through recognition of Aboriginal governance and decision making systems.

The Gitxsan highlight the history of British Columbia's relations with Aboriginal Peoples and in particular the denial of rights and failure to conclude treaties. They argue that the Crown must consult and seek workable accommodations if it is to fulfill its s. 35 obligations and recognize in the present the collective decision making power of Aboriginal Peoples who hold Aboriginal Title. The Gitxsan argue that if deferred until judicial recognition of Aboriginal Title, the right to make decisions concerning lands will be rendered largely meaningless.

2) The principle of constitutionalism requires the Crown to found all of its actions and decisions in some legitimate constitutional basis. This requires Crown decisions makers to have regard to whether or not a Crown act may unjustifiably infringe s. 35 rights. Consultation is the means by which government can obtain information to assess the likelihood of rights or infringements. It allows the Crown to ascertain the First Nation's wishes and integrate them into the proposed course of action.

3) The constitutional principle of respect for minorities mandates the Crown to respect the unique interests (including rights) of minorities, including Aboriginal Peoples, in its day-to-day activities as a matter of policy.

The Gitxsan respond to the Crown's arguments that the duty to consult and accommodate prior to proof is impractical. They say the Crown cannot confer powers on decision makers that can have profound effects on Aboriginal Rights and then cite the incapacity of its decision makers to deal with Aboriginal Rights and Title. The Crown cannot avoid

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[10] The Gitxsan refer to the principles embodied in the Royal Proclamation and the recognition of Aboriginal land ownership in s. 109 of the *Constitution Act 1867*.

its obligation to consult and accommodate by creating administrative decision making processes that are not suited for accommodating Aboriginal Rights.

The Gitxsan submit that consultation and accommodation prior to proof is workable. They argue that a pre-proof duty to consult and accommodate will fuel the treaty negotiation process. The Gitxsan say that since the decision of the BC Supreme Court holding that the Crown had breached its duties to the Gitxsan in approving the change of control of Skeena Cellulose,[11] the Crown has engaged in negotiations with the Gitxsan with a view to reaching an accommodation of their interests.

First Nations Summit

The Summit's factum places this case in the context of the treaty process and centres on the concept of cultural sustainability, which is in turn dependent on ecological sustainability. The Summit submits that the duty to consult and accommodate can be based on facts with respect to vulnerable Aboriginal interests, rather than on a *prima facie* case of rights within s. 35. "Aboriginal interests" are "the ecological integrity and availability of the territorial lands, waters and other resources on which [First Nations] rely to sustain their collective way of life and identity, now and into the future."

The Summit argues that while the treaty process is proving to be "long and arduous", the federal and provincial governments continue during the process to authorize developments throughout the province that threaten Aboriginal Peoples' traditional cultural and economic activities. By the time treaties are concluded, the lands and resources needed to sustain Aboriginal Peoples may no longer be available. The Summit argues that the Court of Appeal's order strengthens the treaty process.

The Summit argues that s. 35 is the source of the duty to consult and accommodate when deciding whether to exercise a power that may harm Aboriginal interests because s. 35

[11] The court followed the Court of Appeal's decision in *Haida 2*.

was intended to protect Aboriginal Peoples' cultures and relationships to land. The Summit grounds the fiduciary duty in the historical relationship and recognition that Aboriginal Peoples were in possession of their territories and had jurisdiction over the lands and resources.

Fiduciary obligations arise when the fiduciary can unilaterally exercise a power or discretion so as to affect the beneficiary's legal or practical interests. The Summit submits that the Crown's fiduciary obligations are triggered by decisions that put vulnerable Aboriginal interests at risk. In this case, the decision to replace TFL 39 threatened Haida sustainability and rights. The Crown's fiduciary duty in this context can be defined without adjudicating Aboriginal Rights.

The Crown must consult in order to inform itself about the proposal, the effects on Aboriginal interests, the significance of those effects and ways to mitigate them. The Crown must also ensure that Aboriginal interests are protected and accommodated.

According to the Summit, the purposes of s. 35 will not be achieved if the duty to consult and accommodate is only defined and enforced after the harm occurs, rather than to prevent harm. The Summit submits that at a minimum, accommodation requires the Crown to deny authorizations that would undermine or endanger Aboriginal interests, or alienate or encumber such interests that need to be secured for First Nations to sustain themselves.

The Summit argues that the empty box theory of the Appellants is based on denial of Aboriginal Rights rather than recognition and affirmation, as required by s. 35. The Summit submits that the Appellants' position is adversarial and not conducive to negotiated settlements.

The Summit argues that interlocutory injunctions will not promote reconciliation because they are inflexible and result in win-lose situations. They also argue that the injunction test is inappropriate in the context of constitutional interests. Injunctions also assume that

specific Aboriginal Rights will need to be adjudicated whenever a First Nation seeks protection for vulnerable Aboriginal interests.

The Summit submits that the remedy in the *Haida* case is appropriate in the context of an ongoing development, while the remedy in *Taku* (quashing the authorization and directing the decision makers to reconsider) is appropriate for a new development.

The Haisla Nation

The Haisla discuss their experience in the BCTC process: They have been engaged since 1996, have dedicated considerable resources to the process, and have incurred a significant debt. The Province and Canada have taken the position that the Haisla must choose between negotiation and litigation. In 1999, the Haisla filed a Writ of Summons and Statement of Claim seeking a declaration of unextinguished Aboriginal Title. The action was put into abeyance to allow for negotiations under the BCTC process.

The Haisla note that one of the most significant challenges facing Aboriginal Peoples that are in the BCTC Process is how to protect their rights in the interim, while negotiations proceed.

Haisla's argument is grounded in the "protective" aspect of s. 35. Like the Summit, they take a purposive approach to s. 35. They argue that the "corrective aspect" of s. 35, which provides redress for unjustified infringements does not exhaust the full extent of s. 35. It is open to the courts to further elaborate on s. 35 to give effect to s. 35 as a protective measure. A consultation and accommodation requirement serves to minimize the likelihood that Aboriginal Rights will be unjustifiably infringed. They submit that the Crown's obligation to consult with Aboriginal nations flows directly from the Crown's constitutional obligation to recognize and affirm Aboriginal Rights. The purpose of consultation is to identify the potential that an anticipated Crown decision will infringe s. 35 rights and to determine what mitigative and compensatory steps are available.

The Haisla note that Aboriginal Rights and Title litigation is expensive and time-consuming. Unlike the remedy provided by the Court of Appeal, interlocutory injunctions stop the development and in this case would stop logging pending the conclusion of the Aboriginal Title action. They conclude that the Attorneys General and industry are advocating for injunctions in the comfort of knowing that Aboriginal Peoples have been unsuccessful in obtaining injunctive relief.

The Haisla also argue that the Court of Appeal's order is consistent with the Supreme Court of Canada's repeated direction that negotiated settlements are the best way to achieve reconciliation between Aboriginal Rights and Crown sovereignty. The decision of the Court of Appeal provides an incentive for progress in treaty negotiations. The Haisla Nation has noted an improvement in the treaty negotiation process since the Court of Appeal's decision in *Haida*.

The Haisla also submit that upholding the decision of the Court of Appeal will not hinder economic development in British Columbia. They note that it has been two years since the *Taku* decision, the economy has not ground to a halt, and the Province has started taking steps towards reconciliation.

Dene Tha'

Dene Tha' is a signatory to Treaty 8, which confirms rights to hunt, fish and trap. Dene Tha' submits that the Crown owes a fiduciary and constitutional duty to consult and seek accommodations when there is the potential that a Crown action or decision may infringe an Aboriginal or Treaty Right. They submit that the duty is engaged prior to judicial determination of rights.

The Dene Tha' argue that the Appellants' position is inconsistent with s. 35's requirements to impair Aboriginal Rights as minimally as possible, and to give priority to Aboriginal Rights. They also argue that this approach is inconsistent with the *Adams* decision, which requires legislatures to give proper guidance to Crown decision makers whose decisions risk infringing Aboriginal Rights.

The Dene Tha' argue that the Crown's position fails to allow Aboriginal Peoples to effectively exercise their rights in the face of the desire of the Crown and third parties to exploit resources. If the Crown is allowed to wait until rights are proven in court, there may be nothing left, and the promise of s. 35 would be hollow.

Dene Tha' address the *Transcanada* decision of the Ontario Court of Appeal. They argue that when that Court held that a First Nation must show a violation of an existing right before consultation is required, the Court did not mean that First Nations must prove their rights in a court-like setting. They say that as in the *Halfway River* decision, the requirement on First Nations is to provide sufficient information to the decision maker about the right and its potential infringement, and not to prove the right in court. The Dene Tha' submit that to trigger the duty, First Nations must put the Crown on notice, outlining their rights, interests and the potential infringements.

Dene Tha' submits that injunctions are not suitable because they are difficult for First Nations to obtain and inadequate for achieving reconciliation. Injunctions are "winner-take-all" remedies that do not balance interests as part of the remedy itself. The Appellants' approach promotes litigation because to get an injunction, First Nations will have to commence legal proceedings. As a general rule, injunctions are also not available against the Crown.

The Dene Tha' argue that if Treaty Rights must be proven to trigger a consultation requirement, then the Treaty 8 Nations surrendered vast portions of their territory in return for a chance to prove rights to hunt, trap and fish.

The Dene Tha' suggest that the Court may want to provide guidelines for consultation and accommodation. They submit that "while consultation and accommodation do not mandate a specific outcome, a decision maker must take into account the doctrines of minimal impairment of Aboriginal and Treaty Rights, the aboriginal priority in resource allocation, the aboriginal perspective of the right, and the decision that is ultimately reached must recognize that the honour of the Crown is at stake..." They also argue that First Nations must be provided with capacity to engage in consultation. Consultation and accommodation must occur before the decision maker selects a course of action and should seek to avoid or at least minimize infringements. Compensation is also part of consultation and accommodation where the infringement cannot be avoided.

Squamish and Lax Kw'alaams

The Squamish and Lax Kw'alaams (hereinafter the "Squamish") submit that the Court of Appeal's decision has led to an increase in negotiations to achieve reconciliation. They submit that without a duty prior to proof of rights, there is no incentive for government and industry to consult or negotiate. They submit that third party involvement is necessary for effective consultation and accommodation.

Squamish submits that interlocutory injunctions are inadequate. To obtain injunctions First Nations must commence Aboriginal Title litigation. Injunctions are not conducive to reconciliation because they are winner-take-all remedies. The courts will be reluctant to grant injunctions in the face of claims covering most of the province. Because Aboriginal Title litigation is complex, injunctions can be in place for a long time and this leads to reluctance to grant injunctions. The injunction analysis assumes that Aboriginal claims are compensable in damages and so ignores the social and cultural aspects of Aboriginal Title. In addition, interlocutory injunctions are not available against Crown decision makers. In contrast to injunctions, judicial reviews allow for flexible remedies, consistent with reconciliation.

Squamish supports the Court of Appeal's declaration of a duty owed by Weyerhaeuser. They submit that the company's duty is derived from the Crown's duty and that the doctrine of "knowing receipt" applies to all fiduciary relationships and not just trusts. Weyerhaeuser knowing received the TFL subject to the Crown's fiduciary obligations. They also argue that to allow Weyerhaeuser to keep the benefit of the TFL without a duty to consult and accommodate would result in Weyerhaeuser's unjust enrichment.

VILLAGE OF PORT CLEMENTS

The Village of Port Clements is located on Graham Island in Haida Gwaii. The Village is composed largely of non-Aboriginals, the majority of whom are employed by Weyerhaeuser. The Village's arguments center on concerns that the current allowable annual cut (AAC) on Haida Gwaii is unsustainable.

Port Clements' position is that the Court of Appeal's decision is the correct approach since consultation provides the opportunity to balance Haida Rights and Title, the public interest, and the interests of industry. The Village submits that they share the same concerns, interests, and objectives as the Haida, namely the detrimental rate, method, and environmental effects of logging. These concerns have not been addressed by the Province or industry and can only be addressed through the process of consultation and accommodation. The Village supports the Court of Appeal's order, arguing that it is workable and is the best remedy to balance competing interests. It is also the best method for achieving long-term sustainability. The *Husby Forest Products* decision was cited as illustrating that the enforcement of the Crown's duty to consult can lead to workable solutions.

Port Clements argues that, to ensure a meaningful balancing of interests, the obligation to consult and accommodate should not be deferred until after the right is proven in court. They point out that the Supreme Court has stated a clear preference for negotiation over

litigation to settle Aboriginal Title and Rights. Consultation is another form of negotiation where the objective is to accommodate infringing actions. The Village further submits that any real accommodation would require Weyerhaeuser's participation.

The Village of Port Clements also argues that the case law supports the Crown's fiduciary duty and does not support Saskatchewan's distinction between "public" and "private" fiduciaries. Port Clements grounds the existence of the duty to consult in the historical interaction of the Crown and Aboriginal Peoples, as articulated in *Guerin* and *Sparrow.*