

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

BETWEEN:

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

Appellants
(Respondents)

- and -

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

Respondents
(Appellants)

AND BETWEEN:

Weyerhaeuser Company Limited

Appellant
(Respondent)

- and -

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

Respondents
(Appellants)

- and -

Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec,
Attorney General of Nova Scotia, Attorney General of Manitoba, Attorney General of Saskatchewan,
Attorney General of Alberta, Squamish Indian Band and Lax Kw'alaams Indian Band,
Haisla Nation, First Nations Summit, Dene Tha' First Nation,
Tenimgyet, also known as Art Matthews, Gitxsan Hereditary Chief,
Business Council of British Columbia, Aggregate Producers Association of British Columbia,
British Columbia & Yukon Chamber of Mines, British Columbia Chamber of Commerce,
Council of Forest Industries and Mining Association of British Columbia,
British Columbia Cattlemen's Association

Interveners

**FACTUM OF THE INTERVENER,
BRITISH COLUMBIA CATTLEMEN'S ASSOCIATION**

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PART I—STATEMENT OF FACTS

1. The British Columbia Cattlemen’s Association (the “Cattlemen’s Association”) takes no position respecting the facts of this appeal

PART II—POINTS IN ISSUE

2. The issues are those set out by the Appellant Province of British Columbia in its factum at paragraphs 29 and 30, and include the following constitutional question (the “Constitutional Question”) as stated by this Court on July 3, 2003:

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

PART III—ARGUMENT

INTRODUCTION

3. The Cattlemen’s Association respectfully submits that the British Columbia Court of Appeal (the “Court of Appeal”) erred in holding that the Crown owes a general fiduciary and constitutional duty to consult aboriginal people who have claimed, but have not proven, aboriginal rights. The Cattlemen’s Association further submits that the Court of Appeal erred in holding that a private party, in this case Weyerhaeuser Company Limited (“Weyerhaeuser”), has fiduciary or constitutional duties to aboriginal people that are similar to those duties owed by the Crown to aboriginal people.

Haida Nation v. B.C. (Min. of Forests), [2002] 2 C.N.L.R. 121 (B.C.C.A.) at paras. 34, 36, 48, 49, 55, and 58 (“*Haida No. 1*”) [Appeal Reasons for Judgment, Joint Record of the Appellants, Vol. 1, pp. 48-88]; and *Haida Nation v. B.C. (Min. of Forests)*, [2002] 4 C.N.L.R. 117 (B.C.C.A.) at paras. 61-73, 92, 100, 103 and 129 (“*Haida No. 2*”) [Appeal Reasons for Judgment, Joint Record of the Appellants, Vol. 1, pp. 101-177].

4. The Cattlemen’s Association submits that the Crown’s duty to consult aboriginal people is not a singular static legal concept, as suggested by the Court of Appeal in this case. Rather, the Cattlemen’s Association submits that the Crown’s duty to consult aboriginal people is best understood as existing on a spectrum and that the meaning and effect of such Crown duty requires a case by case analysis and will depend on the circumstances under which such duty to

consult arose. This Court's earlier decisions respecting aboriginal and treaty rights recognized and affirmed under subsection 35(1) of the *Constitution Act, 1982*, Sched. B, *Canada Act 1982* (U.K.), 1982, c. 11 ("s. 35(1)") and the general principles underlying Canadian constitutional and administrative law provide a sound basis upon which to understand the Crown's duties to consult and, where appropriate, accommodate aboriginal people.

5. The Cattlemen's Association further submits that the Crown's duties to consult and accommodate aboriginal people are solely Crown duties and need not, and should not, apply to private parties. With the exception of the Court of Appeal's decisions in *Haida No. 1* and *Haida No.2*, there is no legal precedent in Canada for holding that private parties owe a duty to consult, and seek workable accommodations with, aboriginal people, and more generally, that private parties can owe any constitutional duties to other private parties. Additionally, the Cattlemen's Association submits that, for policy and practical reasons, no legal obligations to consult and accommodate aboriginal people should apply to private parties.

The Cattlemen's Association

6. The Cattlemen's Association represents approximately 1,400 beef cattle producers in British Columbia.

Affidavit of Duncan Barnett, paras. 3-4 [Tab 5 of Authorities of Intervener, British Columbia Cattlemen's Association].

7. The objectives of the Cattlemen's Association are to:

- (a) promote, encourage, develop and protect the cattle industry in the Province of British Columbia;
- (b) represent the producers of cattle in all matters in which they are generally interested;
- (c) work with associations, societies and organizations having objects similar to those of the Cattlemen's Association;

- (d) work with federal and provincial governments to ensure the enactment of necessary legislation and the enforcement thereof, and the improvement of transportation and market conditions in connection with the industry;
- (e) be proactive on beef issues relating to the public and the government; and
- (f) enhance strategic alliances within the beef industry and maintain a credible broad-based beef organization.

Affidavit of Duncan Barnett, *supra*, at para. 3.

The British Columbia Beef Cattle Industry

8. The amount of beef cattle sold in 2002 in B.C. was worth approximately \$270 million in farm gate receipts. The capital investment in land, equipment and livestock of the ranching industry in B.C. is well in excess of \$1.5 billion, with the overall value of the ranching industry to B.C.'s economy being significantly higher. However, ranches can vary greatly in size and sophistication – from large commercial operations to smaller, family-run operations, which comprise approximately 80% of Cattlemen's Association members. Many Cattlemen's Association members find it necessary to work off the farm or ranch.

Affidavit of Duncan Barnett, *supra*, at paras. 9-10.

9. Cattle producers use a combination of fee simple land and Crown tenures. For most cattle producers, their fee simple land serves only a portion of their needs and primarily is required to produce forage to sustain the cowherd over the winter. Cattle producers are dependent on assured access to Crown lands and resources, including water, for seasonal grazing. Security of tenures over Crown lands and resources is critical to the continued viability of the beef cattle industry.

Affidavit of Duncan Barnett, *supra*, at para. 13.

10. Approximately 10 million hectares of rangeland in B.C. are used for livestock grazing. Of this, approximately 1 million hectares are privately owned, 0.2 million hectares are Crown lease lands, and 8.8 million hectares are Crown lands held under grazing licenses or permits.

Affidavit of Duncan Barnett, *supra*, at para. 15.

11. Most ranches rely on a number of different tenures of varying types and terms, which are required to be renewed more or less frequently. Each ranch is a unique, interlocking mix of natural resource assets, including various Crown tenures.

Affidavit of Duncan Barnett, *supra*, at paras. 13, 29, 30.

Relationship Between Cattlemen's Association Members and Aboriginal Communities

12. Unlike the forest industry, ranchers do not usually engage directly in extensive discussions with aboriginal communities respecting existing or proposed ranching operations. Most ranchers have not had to deal directly with aboriginal legal issues or the requirements of consultation and accommodation. Ranches and aboriginal communities are often located close to, or adjacent to, each other. Most have developed good working relationships. Because of the limited nature and size of most ranches, most Cattlemen's Association members do not have the financial resources, the knowledge, or skills to consider and analyze aboriginal rights matters, including determining the extent to which their proposed land use gives rise to a duty to consult, and how to actually undertake consultation and accommodation processes. The British Columbia Ministry of Forests has traditionally dealt with these issues.

Affidavit of Duncan Barnett, *supra*, at paras. 33 - 35.

Impact of *Haida No. 1* and *Haida No. 2*

13. *Haida No. 1* and *Haida No. 2* have caused a great deal of concern among Cattlemen's Association members, because these decisions suggest that in addition to Weyerhaeuser, all private parties may have legally enforceable duties to consult and accommodate aboriginal people similar to those of the Crown. Cattlemen's Association members make use of Crown land and resources as an essential part of their businesses and livelihood and rely on various forms of Crown tenure, renewed on a periodic basis, for access to such Crown land and resources. The Cattlemen's Association submits that the application of the Crown duties to consult and accommodate to private parties is simply not practical and could not be effectively implemented.

Affidavit of Duncan Barnett, *supra*, at paras. 37-45.

THE FACTS IN THIS CASE AND THE JUSTIFICATION ANALYSIS

14. The Crown's duty to consult aboriginal people was first raised by this Court within the context of the justification analysis required for Crown infringement's of aboriginal rights under s. 35(1).

R. v. Sparrow, [1990] 1 S.C.R. 1075 at 1119 [Book of Authorities of Province of British Columbia, Tab 28].

15. The s. 35(1) justification analysis is only engaged when an aboriginal right is proven to "exist" for the purposes of s. 35(1).

Sparrow, supra, at 1095; *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para. 44 [Book of Authorities of Province of British Columbia, Tab 29].

16. In this case, the Respondent Haida Nation has not proven that it possesses "existing" aboriginal rights under s. 35(1). Therefore, any basis upon which the Crown owes a duty to consult the Haida Nation cannot be based on the s. 35(1) justification analysis and the corresponding duty to consult contained therein. On this basis, the Cattlemen's Association agrees with the arguments set out in the Appellant Province of British Columbia's factum.

17. Under the Constitution of Canada and the common law, only the Crown can infringe existing aboriginal rights under s. 35(1). Therefore, the analysis used to determine and justify infringements of existing aboriginal rights under s. 35(1), which can include the appropriate standard of consultation applies only to the Crown, and not to private parties.

Sparrow, supra, at 1109-1110.

18. Notwithstanding that the Cattlemen's Association agrees with the Appellant Province of British Columbia's factum as it relates to the facts and circumstances of this case, the Cattlemen's Association submissions in this factum relate to a broader understanding of the Crown's duty to consult and, in appropriate circumstances, accommodate aboriginal people and how, in any event, any independent duties to consult or accommodate aboriginal people cannot apply to private parties.

THE CROWN'S DUTIES TO CONSULT AND ACCOMMODATE ABORIGINAL PEOPLE

The Crown's Duty to Consult Aboriginal People

19. Contrary to the finding of the Court of Appeal, the Cattlemen's Association submits that the Crown's duty to consult aboriginal people is not founded on the Crown's fiduciary relationship with aboriginal people, but rather is best understood as existing on a spectrum. The fiduciary element of the duty to consult is but one of a number of sources for the Crown's duty to consult aboriginal people.

Haida No. 1, supra, at paras. 34-36, 55; *Haida No. 2, supra*, at paras. 61-73, 92, 93.

20. The Cattlemen's Association submits that there are at least four potential sources of the Crown's duty to consult aboriginal people. When each source of the Crown's duty to consult aboriginal people is engaged will depend on the circumstances, including the aboriginal right at issue, whether such aboriginal right is proven or unproven, and whether the fiduciary relationship between the Crown and aboriginal people is applicable. The potential source or sources of the Crown's duty to consult will affect the nature and degree of the consultation required and will, in any event, vary with the circumstances. The different sources of the Crown's duty to consult dictate different standards of consultation along the consultation spectrum.

21. Regardless of which potential source to which the Crown's duty to consult may attach, such sources do not apply to private parties. The Cattlemen's Association submits that outlining the potential sources of the Crown's duty to consult is helpful because it sets out the full consultation spectrum that has been contemplated by this Court in its decisions respecting s. 35(1) to date.

22. The Cattlemen's Association submits that the four sources of the Crown's duty to consult are as follows in order of the lowest to the highest standard of consultation required:^{*}

^{*} This point is more fully elaborated upon in A. Knox and T. Isaac, "The Crown's Duty to Consult Aboriginal People", (2003) 41:1 Alb. L.Rev. 49 at 57, [Tab 6 of Authorities of Intervener, British Columbia Cattlemen's Association].

- (a) the Crown's duty to be fair to all of its subjects and general administrative law principles applicable to all Canadians – not dependent on proven, existing aboriginal rights;
- (b) the honour of the Crown in dealing with aboriginal people - not dependent on proven, existing aboriginal rights;
- (c) the justification test for Crown infringements of “existing” aboriginal and treaty rights as set out in s. 35(1) – must have proven, existing aboriginal rights to be engaged, as discussed above at paragraphs 14 - 18; and
- (d) the requirement of the Crown, as a fiduciary, to consult with aboriginal people in circumstances where it can be shown that a fiduciary relationship exists – must trigger the Crown's fiduciary responsibilities to be engaged.

23. The first potential source of the Crown's duty to consult aboriginal people is the Crown's common law duty to be fair in its dealings with its subjects. This Crown duty of fairness applies to Crown interactions with Canadians, including aboriginal people. The concept of consultation is a component of the fair procedures to be used by bodies exercising public authority, and therefore, by its very nature, cannot apply to private parties.

Stanley de Smith, The Lord Woolf and Jeffrey Jowell, *Judicial Review of Administrative Action*, 5th ed. (London: Sweet & Maxwell, 1995), 431, 440, 441 [Tab 2 of Authorities of Intervener, British Columbia Cattlemen's Association]; and *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 22, 30 [Book of Authorities of Province of British Columbia, Tab 2].

24. This first source of the Crown's duty to consult aboriginal people requires the Crown to deal with *bona fide* aboriginal interests, like the interests of non-aboriginal people in appropriate circumstances, in a meaningful and procedurally fair manner. Such *bona fide* interests can include *prima facie* claims of unproven aboriginal rights, but does **not** require the Crown to accommodate such unproven aboriginal rights and cannot impose limits on the Crown's authority to govern.

25. The Cattlemen's Association submits that this first source of the Crown's duty to consult cannot apply to private parties. Private parties do not owe general duties of procedural fairness

to other private parties, except as may be imposed upon them by legislation or governmental regulation.

26. The second source of the Crown's duty to consult aboriginal people is the Crown's special historic relationship with aboriginal people which forms a general responsibility on the Crown to treat aboriginal people honourably and take their rights seriously. This general responsibility of the Crown to aboriginal people has been referred to by this Court as being the 'honour of the Crown.'

Sparrow, supra, at 1110, 1114 and 1119.

27. The Cattlemen's Association submits that the concept of the honour of the Crown applies to all Crown relations with aboriginal people and is not limited to cases of proven aboriginal rights.

28. The very nature of the concept of the honour of the Crown dictates that private parties cannot owe such a duty, or one similar to it, to aboriginal people.

29. Both the first and second sources of the Crown's duty to consult, the duty to be fair and the honour of the Crown, are not dependent on proven aboriginal rights. However, both sources, when applied to situations of unproven aboriginal rights, cannot impair the Crown's legislative authority, but rather are limited to the lower standard of the consultation spectrum, which includes genuinely considering and addressing the views of aboriginal people and ensuring that there is an adequate information exchange between the Crown and the aboriginal people concerned. These first two sources of the Crown's duty to consult, when engaged in situations of claimed but unproven rights, impose no obligations on the Crown to accommodate such unproven aboriginal rights and cannot impair the Crown from governing so long as the basic minimum requirements of procedural fairness are met. These first two sources of the Crown's duty to consult apply only to the Crown and not to private parties.

30. The third source of the Crown's duty to consult aboriginal people, the justification analysis under s. 35(1), requires, by its very nature, an aboriginal right to be proven. Without a proven aboriginal right, the threshold of consultation remains as noted above at paragraph 29. However, if an aboriginal right is proven and the Crown's duty to consult is engaged as

contemplated under s. 35(1), the Crown will have both procedural and substantive duties imposed upon it, including duties to mitigate, accommodate, and consult, as the case may be, in respect of the potential or judicially determined interference with the proven aboriginal right at issue.

31. The Cattlemen's Association submits that the s.35(1) justification analysis only applies to governmental actions or regulations, cannot apply to private parties and, therefore, cannot serve as a basis to impose any duties to consult on private parties.

Sparrow, supra, at 1119.

32. In this case, the Court of Appeal made a declaration that included a requirement for the Crown and Weyerhaeuser to consult and seek workable accommodations with the Haida Nation. The Cattlemen's Association submits that the Court of Appeal erred in making such declaration, in part, by ordering workable accommodations in circumstances where no aboriginal rights have been proven and no aboriginal rights are "existing" within the meaning of s. 35(1).

33. The fourth source of the Crown's duty to consult aboriginal people can be based on the Crown's fiduciary relationship with aboriginal people. In appropriate circumstances, fiduciaries can owe a duty to consult their beneficiaries, by way of making full disclosure of relevant information

M. Ellis, *Fiduciary Duties in Canada*, Toronto: Carswell, 2002 (looseleaf), 1-6.1, 3-9 – 3-12, and 4-5 [Tab 3 of Authorities of Intervener, British Columbia Cattlemen's Association]; see generally *Guerin v. Canada*, [1984] 2 S.C.R. 335 [Book of Authorities of Province of British Columbia, Tab 9].

34. The Cattlemen's Association submits that the Court of Appeal erred in holding that the Crown and by implication Weyerhaeuser, in this case, owed a general fiduciary duty to consult the Haida Nation. This conclusion is not supported in Canadian law. As this Court has already affirmed, the Crown is not required to act in a fiduciary capacity with respect to all of its interactions with aboriginal people. Even where a fiduciary relationship is determined to exist between the Crown and aboriginal people, this Court has held that not every aspect of the relationship between the Crown and aboriginal people takes the form of a fiduciary relationship. The Court of Appeal's characterization of the Crown's duty to consult as a fiduciary duty is, therefore, overly broad and not supported by the earlier decisions of this Court.

Wewaykum Indian Band v. Canada, 2002 SCC 79, [Book of Authorities of Province of British Columbia, Tab 35]).

35. The Cattlemen's Association submits that the fiduciary relationship is between the Crown and aboriginal people in circumstances where fiduciary obligations arise, such fiduciary relationship cannot apply to private parties and, therefore, cannot serve as a basis to apply a general duty to consult aboriginal people to private parties.

The Crown's Duty to Accommodate Aboriginal People

36. The Cattlemen's Association submits that the Court of Appeal erred in declaring that both the Appellant Province and Weyerhaeuser owed a duty to seek workable accommodations with the Respondent Haida Nation on the basis of the Haida Nation's claimed, but unproven, aboriginal rights.

Haida No. 1, supra, at paras. 58, 60; and *Haida No. 2, supra*, at paras. 104, 107.

37. The Cattlemen's Association submits that although the Crown's duty to consult aboriginal people can apply, in appropriate circumstances and, to a limited degree, to claimed but unproven aboriginal rights, any duty of the Crown to seek workable accommodations with aboriginal people must be based on existing proven aboriginal rights, and cannot be triggered by a mere *prima facie* claim of aboriginal rights.

38. The Cattlemen's Association submits that, like the duty to consult, any general duty to accommodate aboriginal people rests solely with the Crown and not private parties, unless imposed by legislation or by governmental regulation on private parties.

39. Accommodation of aboriginal rights by the Crown requires a substantive and meaningful adaptation or reconciliation of legislation or governmental actions with such aboriginal rights. In order for aboriginal groups to receive the benefits of accommodation, aboriginal rights to which accommodation by the Crown may be required, must be proven and existing for the purposes of s. 35(1). To require the Crown to accommodate unproven aboriginal rights provides no certainty or stability to governmental regulation, and undermines this Court's test for determining the application of s. 35(1), which requires an aboriginal right to be proven or "existing" before such rights can be deemed to be interfered with and infringed.

40. This Court has confirmed that in order for aboriginal people to rely on s. 35(1) and aboriginal rights, they must prove that the aboriginal rights claimed and are, therefore, “existing” within the meaning of s. 35(1). This burden rests solely with the aboriginal person or group claiming the right.

Sparrow, supra, at 1091-1093.

41. If a mere *prima facie*, unproven and not “existing” within the meaning of s. 35(1), claim of an aboriginal right is all that is required for an aboriginal group to prevent some Crown action or decision from applying to such aboriginal group, or for that aboriginal group to receive some form of accommodation of such claimed but unproven right, it is not apparent what additional benefit would accrue to the aboriginal group for the great cost and expense of proving such right

42. In discussing accommodation and aboriginal title, this Court clearly placed accommodation within the context of the justification analysis to be used in respect of infringements of proven, “existing” aboriginal rights:

Under the second part of the justification test, these legislative objectives are subject to accommodation of the aboriginal peoples’ interests. This accommodation must always be in accordance within the honour and good faith of the Crown. Moreover, when dealing with a generalized claim over vast tracts of land, accommodation is not a simple matter of asking whether licences have been fairly allocated in one industry, or whether conservation measures have been properly implemented for a specific resource. Rather, the question of accommodation of “aboriginal title” is much broader than this.

Delgamuukw v. B.C., [1997] 3 S.C.R. 1010, at para. 203 [Book of Authorities of the Province of British Columbia, Tab 6].

PRIVATE PARTIES AND THE CROWN’S DUTIES TO CONSULT AND ACCOMMODATE ABORIGINAL PEOPLE

43. The Cattlemen’s Association submits that the Court of Appeal erred in holding that a private party, in this case Weyerhaeuser, holds a duty to consult and seek workable accommodations with aboriginal people, in this case the Haida Nation. The Cattlemen’s Association submits that there is no legal basis to support the imposition of such duties on private parties in Canadian law.

44. While the facts in this case relate to forestry, the replacement of a Tree Farm Licence, and the application of the Crown’s duty to consult to a private party, Weyerhaeuser, the

Cattlemen's Association's intervention in this appeal is based, in part, on the possibly significant implications of an affirmation of the Court of Appeal's decision in this matter to members of the Cattlemen's Association, and other private parties generally.

Consultation and Accommodation as being Crown Obligations

45. Private parties are occasionally involved in Crown consultation processes with aboriginal people. On some occasions, such private party involvement in consultation may be voluntary, and on other occasions may be required by the Crown. In any event, such private party involvement in Crown consultation with aboriginal people is, however, aimed at assisting the Crown in complying with its duties, as they may be, to aboriginal people. Any involvement by a private party in Crown consultation processes is not in respect of any independent duty by private parties to consult or accommodate aboriginal people, but rather is based on Crown policy or legislative requirements for such private party involvement.

46. The Cattlemen's Association submits that no duty to consult can apply to private parties based on s. 35(1), except where such duties are imposed by legislation or by governmental regulation.

Applying Constitutional Duties to Private Parties

47. All of this Court's decisions respecting s. 35(1) to date have focused solely on alleged governmental infringements of aboriginal or treaty rights. The Cattlemen's Association submits that only the Crown and its various governmental agencies can infringe aboriginal or treaty rights under s. 35(1) and that private parties cannot infringe such rights. If private parties interfere with the exercise of aboriginal or treaty rights on Crown land, the appropriate and available remedy for aboriginal people in the case of inadequate consultation, accommodation or some other related matter, is against the Crown, who in turn may impose such requirements as may be necessary on private parties to meet the Crown's obligations to aboriginal people.

48. This Court has already expressly stated that s. 35(1) applies to governmental action and legislation:

The constitutional recognition afforded by the provision [s. 35(1)] therefore gives a measure of control over *government* conduct and a strong check on *legislative* power. [Emphasis added.]

Sparrow, supra, at 1110.

49. The Cattlemen's Association submits that the Constitution of Canada governs the affairs of governments and does not apply *per se* to private parties. For example, commenting on why the *Canadian Charter of Rights and Freedoms* only applies to governments, this Court stated:

Government is the body that can enact and enforce rules and authoritatively impinge on individual freedom. Only government requires to be constitutionally shackled to preserve the rights of the individual. Others, it is true, may offend against the rights of individuals. This is especially true in a world in which economic life is largely left to the private sector where powerful private institutions are not directly affected by democratic forces. But government can either regulate these or create distinct bodies for the protection of human rights and the advancement of human dignity.

To open up all private and public action to judicial review could strangle the operation of society and [...] 'diminish the area of freedom within which individuals can act.'

McKinney v. University of Guelph, [1990] 3 S.C.R. 229 at 262 [Tab 1 of Authorities of Intervener, British Columbia Cattlemen's Association].

50. A nation's constitution regulates relations between its government and its private persons, and leaves the dealings between private persons to be regulated by government. The Cattlemen's Association submits that s. 35(1), like the whole of the Constitution of Canada, applies to governments in Canada and does not regulate relations between private persons:

...the *Charter*, **like most written constitutions**, was set up to regulate the relationship between the individual and the Government. It was intended to restrain government action and protect the individual. It was not intended in the absence of some governmental action to be applied in private litigation. [Emphasis added.]

RWDSU v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573 at 593 [Book of Authorities of Intervener, Attorney General of Ontario, Tab 21].

In deciding that the Charter does not extend to private action, the Supreme Court of Canada has affirmed the normal role of a constitution. A constitution establishes and regulates the institutions of government, and it leaves to those institutions the task of ordering the private affairs of the people.

Peter Hogg, *Constitutional Law of Canada*, looseleaf, vol. 2, (Toronto: Carswell, 1992), at 34.2(h), 34-25 [Tab 4 of Authorities of Intervener, British Columbia Cattlemen's Association].

Practical Implications of Imposing Crown Duties on Private Parties

51. The Cattlemen's Association submits that there are several important policy reasons not to extend the Crown's duty to consult aboriginal people and seek workable accommodations with them as private parties. The imposition of such Crown duties on private parties would be

impractical, unnecessary, inconsistent with the nature of the existing Crown duties, and undefinable.

52. It is submitted that the ‘single-window’ approach to aboriginal relations in Canada, namely through the Crown as intermediary with the rest of Canadian society, also applies to consultation and is evident in the existing jurisprudence of this Court. Such a ‘single-window’ approach, in addition to being legally correct, also makes practical sense in that it designates the one entity with power to infringe aboriginal and treaty rights and the duty to justify such infringement, as being ultimately responsible for all consultation and accommodation with aboriginal people. It allows that one entity, the Crown, to manage the overall consultation and accommodation required for any particular activity or project, and to engage in the balancing of interests that is inherent in this process.

53. The Cattlemen’s Association submits that, with only a handful of exceptions, Cattlemen’s Association members have neither the financial resources, nor the knowledge and skills, to consider and analyze aboriginal rights and title matters, as would be required for full and adequate consultation.

Affidavit of Duncan Barnett, *supra*, at paras. 35, 37.

54. The application of a duty to consult and accommodate aboriginal people similar to that of the Crown to private parties would result in unnecessary additional costs and create additional confusion. For example, there may be multiple range tenures over a given geographical area, involving a number of private parties, including aboriginal people. The imposition of a duty to consult and accommodate on private parties would require all of the parties involved in a matter to consult and accommodate with the aboriginal people affected, resulting in the expenditure of additional costs and resources not only by the private parties, but also by the aboriginal group(s) concerned as they attempt to respond to each private party.

55. Since aboriginal and treaty rights are held collectively, the Crown is a logical parallel representative of the “collective” to consult and accommodate regarding those rights. To involve individual private parties in this consultation would be costly, confusing and redundant for all parties, as each private party would bring a different approach to the consultation and accommodation. It is the Crown which is best placed to make these decisions.

56. The possibility that a private party may be liable in damages should it be found, perhaps years after the fact, not to have met its obligations to consult is also an indicator that such a duty is impractical. Business enterprises, particularly small enterprises like the majority of ranches, simply do not have the resources to cope with such liability or even the threat of such liability.

57. The imposition of the duty of consultation and accommodation on the Crown leaves the necessary flexibility for involvement by private parties where appropriate, but places overall responsibility on the Crown, where it belongs.

58. It is the public duty of the Crown, in appropriate circumstances, to accommodate and balance the interests of aboriginal people with private parties. It would be inappropriate for private parties to undertake such an important function.

59. This Court has confirmed that the balancing of aboriginal and public interests is best accomplished by the Crown. Inherent in the obligations of consultation and accommodation are a balancing of the interests of particular groups and enterprises as well as the public interest. Private parties are particularly unsuited to take responsibility for balancing their interests with the interests of others and have no legal basis to do so.

R. v. Marshall, [1999] 3 S.C.R. 533, at paras. 40-42 [Book of Authorities of the Province of British Columbia, Tab 26].

60. Because private parties possess no authority to infringe aboriginal and treaty rights, private parties with a duty to consult and accommodate aboriginal people imposed upon them could not determine what to do as a result of any consultation, since it is the Crown, not any private party, that is the decision-maker in respect of any proposed infringement of aboriginal and treaty rights.

61. Members of the Cattlemen's Association, and other private parties, that depend on leases, permits, licences and other approvals on the Crown for their livelihood and way of life are entitled to rely on such should be able to depend on such leases, permits, licences and other approvals, including that the appropriate level of Crown consultation and where necessary, accommodation, with aboriginal people has occurred.

62. The Cattlemen's Association submits that under any scenario, private parties owe no general duties to consult or accommodate aboriginal people but, rather, such duties rest solely and appropriately with the Crown.

63. The Cattlemen's Association submits that if this Court finds that Weyerhaeuser does owe a duty to consult and accommodate the Haida Nation, then this duty should be limited to matters respecting the facts in this matter.

PART IV—SUBMISSIONS CONCERNING COSTS

64. The Cattlemen's Association does not seek costs in this appeal, and submits that the Cattlemen's Association should not be responsible for any party's or intervener's costs.

PART V—ORDER SOUGHT

65. The Cattlemen's Association respectfully requests that this appeal be allowed in accordance with the principles set out in this factum and that the Constitutional Question be answered in the negative.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14th day of January, 2004.

Thomas Isaac
McCarthy Tétrault LLP
Counsel for the British Columbia Cattlemen's
Association

PART VI—TABLE OF AUTHORITIES

<u>Description</u>	<u>Cited at Paragraph</u>
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