

**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

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Attorney General of Quebec
Attorney General of Nova Scotia
Attorney General of New Brunswick
Attorney General of Manitoba
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Intervenors

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British Columbia on behalf of Her Majesty the Queen in
Right of the Province of British Columbia
Pursuant to Rule 42 of the Rules of the Supreme Court of Canada**

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PART I

FACTS

Introduction

1. This is an appeal from the judgment of the British Columbia Court of Appeal (BCCA), pronounced August 19, 2002. The BCCA initially gave reasons for judgment on February 27, 2002 (“*Haida No. 1*”), and delivered supplemental reasons on August 19, 2002 (“*Haida No. 2*”). The Court below held that the Province has constitutional and fiduciary obligations to consult with the Haida Nation regarding the potential infringement of claimed but as yet unproven aboriginal rights and title prior to the replacement of Tree Farm Licence No. 39 (“TFL 39”), and the approval of the transfer of TFL 39 from MacMillan Bloedel Limited to Weyerhaeuser Company Limited (“Weyerhaeuser”). The BCCA also found that Weyerhaeuser has legally enforceable duties to consult with the Haida and to seek to accommodate their interests.

***Haida v. British Columbia (Minister of Forests) (Haida No. 1)*, 2002 BCCA 147, Reasons, Lambert J.A., paras. 48 and 60, Appellants’ Record, Vol. I, pp. 80 & 87; *Haida v. British Columbia (Minister of Forests) (Haida No. 2)*, 2002 BCCA 462, Reasons, Lambert J.A., para. 104; Finch, C.J., paras. 129 & 115, Appellants’ Record, Vol. I, pp. 160, 166 & 171.**

2. This case raises the important question of how the exercise by the Province of its constitutional powers and statutory duties for the management of Crown lands and natural resources is to be reconciled with claims by First Nations of aboriginal rights and title which have not yet been established. It raises similar issues to those in *Ringstad et al v. Taku River Tlingit First Nation*, which the BCCA applied when it decided *Haida*.

***Haida No. 1*, Reasons, Lambert J.A., paras. 27-29, Appellants’ Record, Vol. I, p. 67; *Ringstad et al. v. Taku River Tlingit First Nation*, 2002 BCCA 59; SCC File No. 29146.**

3. According to the BCCA, the source of the Provincial Crown’s constitutional and fiduciary obligation to consult lay in “the trust-like relationship and concomitant fiduciary duty” which permeated the whole relationship between the Crown, whether federal or provincial, and aboriginal peoples. It was a duty to protect the interests of aboriginal peoples, and not subordinate their interests to others to whom the Crown owed no fiduciary duty.

***Haida No. 1*, Reasons, Lambert J.A., paras. 33-36, Appellants’ Record, Vol. I, p. 71; *Haida No. 2*, Reasons, Lambert J.A., para. 62, Appellants’ Record, Vol. I, p. 135.**

4. The Appellants submit that the Crown's obligation to consult with First Nations whose claims of aboriginal rights or title have not been judicially determined or settled by treaty is neither a fiduciary nor constitutional duty. Rather, the Province has a duty of fair dealing, which has its source in administrative fairness, reasonableness in decision making, and the honour of the Crown. This duty permits decision makers to strike a reasonable balance between the public interest at large, and the mitigation of any potential impacts of Crown sanctioned activities on claimed aboriginal interests. The Appellants also submit that any legal obligation to consult, and to seek reasonable accommodation of aboriginal interests is vested in the Crown, rather than private industry.

The Queen Charlottes

5. The Queen Charlotte Islands are an archipelago composed of about 150 islands off the west coast of British Columbia. There are two main islands separated by a narrow stretch of water known as Skidegate Channel. The archipelago is about 250 kilometres long and about 80 kilometres wide at its widest part, and has a total area of about 5800 square kilometres.

**Affidavit of Kathleen Pearson, para. 4, Appellants' Record, Vol. I, p. 262;
Ministry of Sustainable Resource Management, Map, Que en Charlotte Islands, May 2003, Appellants' Book of Authorities ("ABA") Tab 48.**

Tree Farm Licence 39

6. MacMillan Bloedel Limited logged on the Queen Charlotte Islands since World War I, and acquired TFL 39 in 1961. Weyerhaeuser Co. Ltd. (Weyerhaeuser) became the holder of TFL 39 on November 1, 1999, when it acquired MacMillan Bloedel Limited. Block 6 of TFL 39 is located on the Queen Charlotte Islands. Block 6 contains both old growth and second growth forests, including spruce, cedar, and hemlock, portions of which have been logged off. TFL 39 grants the holder exclusive rights to harvest timber from Block 6.

**Chambers Judge's Reasons, Halfyard J., para. 6, Appellants' Record, Vol. I, p. 7;
Affidavit of Joseph Ducksworth, sworn April 4, 2000, Exhibit "C", Appellants' Record, Vol. IV, p. 627.**

7. However, before harvesting any Crown timber in TFL 39, Weyerhaeuser must apply to the District Manager of forests for cutting permits. Before issuing a cutting permit, the District Manager must be satisfied that the applicant has complied with the Licence, and that operations under the cutting permit will be consistent with the Licence, higher level plans, the management plan in effect for TFL 39 and the operational plans approved for the areas in the cutting permit. The District Manager may consult with the Haida and impose conditions in a cutting permit to address aboriginal interests.

**Affidavit of Brad Harris, sworn Feb. 25, 2000, Exhibit "E", Appellants' Record, Vol. III, pp. 489-492;
Forest Act, RSB C, 1996, c. 157, s. 35(1)(e)(f), Appendix 3.**

8. Although TFLs are not renewable, the *Forest Act* provides for their periodic replacement. This provides the licensee with the security of tenure required to support its investment, and permits the Minister the opportunity to offer amended terms at regular intervals. Under s. 36 of the *Forest Act*, the Minister has a very limited discretion to decline to offer the licensee a replacement TFL.

***Forest Act*, R.S.B.C. 1996, c. 157, ss. 33, 35 and 36, Appendix 3.**

9. In 1981 and 1995, the Minister of Forests offered, and MacMillan Bloedel accepted, replacements of TFL 39. In September 1999 the Minister sent MacMillan Bloedel an offer to replace TFL 39. On February 10, 2000, after Weyerhaeuser acquired MacMillan Bloedel, the Minister of Forests issued the replacement of TFL 39 to Weyerhaeuser.

Chambers Judge's Reasons, Halfyard J., para. 6(e -g), Appellants' Record, Vol. I, pp. 8-9.

10. The Haida people claim aboriginal rights and title to the entire Queen Charlotte Islands and surrounding waters and airspace. TFL 39, Block 6 constitutes about one-quarter of the area claimed by the Haida Nation.

**Chambers Judge's Reasons, Halfyard J. para. 59(a), Appellants' Record, Vol. I, p. 44;
Council of the Haida Nation et al, Statement of Claim, Appellants' Record, Vol. II, pp. 211-224.**

11. In February 1995, the Haida, in a prior proceeding, applied to set aside the Minister's replacement of TFL 39, which took effect on March 1, 1995. On November 7,

1997, the Court of Appeal held that the aboriginal title claimed by the Haida Nation, if it existed, would constitute an encumbrance pursuant to s. 28 (now s. 35) of the *Forest Act*.

***Haida Nation v. British Columbia (Minister of Forests)* (1997), 153 DLR (4th) 1, [1997] BCJ No. 2480 (BCCA) (QL) (leave to appeal to SCC dismissed [1998] SCCA No. 1), ABA Tab 10;**
***Forest Act*, RSBC 1979, c. 140, s. 28(1)(b), as am. SBC 1982, c. 12, s. 8 and SBC 1988, c. 37, s. 9 (RSBC 1996 c. 157, s. 35(1) (b)), ABA Tab 39.**

The Haida Petition

12. On January 13, 2000, the Haida Nation commenced these proceedings by petition for judicial review. They sought to set aside the transfer of TFL 39 from MacMillan Bloedel to Weyerhaeuser, and the Minister's decisions to replace TFL 39 in 1981, 1995, and 2000.

Chambers Judge's Reasons, Halfyard J., para. 6, Appellants' Record, Vol. I, p. 7; *Judicial Review Procedure Act*, RSBC 1996 c. 241, ABA Tab 44.

13. On July 10, 2000, Edwards J., on application by the Province, and by consent of the parties, referred to the trial list all matters which required a determination of the existence and scope of the Haida's aboriginal rights and title. Thus, the Chambers Judge was not required to determine the existence and scope of Haida aboriginal rights or title, whether those rights had been infringed, or whether the Crown had justified any such infringement.

Order of Edwards J., pronounced July 10, 2000, Appellants' Record, Vol. II, p. 205.

The Chambers Judgment

14. On November 21, 2000, Mr. Justice Halfyard dismissed the Haida's petition. He found that the law does not presume the existence of aboriginal rights. The Chambers Judge held that to find that the Provincial Crown was under a fiduciary obligation to treat Crown lands as burdened by the Haida's asserted aboriginal title, would shift the onus to the Province to disprove the Haida assertions and to justify infringements prior to the proof of rights, and infringement of those rights.

Chambers Judge's Reasons, Halfyard J., paras. 17 and 27-29, Appellants' Record, Vol. I, pp. 18, 27-28.

15. The Chambers Judge also found that the Minister was under no constitutional or fiduciary obligation to consult with the Haida because the existence and scope of any such duty to consult pursuant to s. 35 of the *Constitution Act, 1982* could not be determined until after the nature and extent of aboriginal title or rights was first established.

Chambers Judge's Reasons, Halfyard J., para. 34, Appellants' Record, Vol. I, p. 30.

16. Although the Chambers Judge found that the Minister had failed to consult with the Haida regarding the replacement of TFL 39, he found that the Crown and Weyerhaeuser had taken some steps to address Haida concerns respecting forestry, and that the Province had engaged in relevant negotiations with the Haida.

Chambers Judge's Reasons, Halfyard J., paras. 38, 63, 64, Appellants' Record, Vol. I, pp. 31, 46-47.

17. For the Crown, those steps included:

- a. negotiations with the Haida and Canada toward an interim measures agreement on forestry issues;
- b. the deferral, for up to 20 years, of timber harvesting in 14 Haida Protected Areas identified by the Council of the Haida Nation. Six of those protected areas are located within TFL 39, Block 6, and represent approximately 25% of its timber harvesting land base;
- c. the development, by agreement among the Crown, the Haida and licensees, of operational guidelines for the management of culturally modified trees (CMTs).

**Affidavits of Douglas Caul, Appellants' Record, Vol. IV, p. 542 & Vol. V, p. 840;
Affidavit of Joseph Duckworth, Appellants' Record, Vol. IV, p. 574.**

British Columbia Court of Appeal: *Haida No. 1*

18. On February 27, 2002, the BCCA allowed the Haida's appeal from the judgment of Halfyard J. Lambert J.A., for the BCCA, held that:

- a. By virtue of the BCCA's prior decision in *Haida Nation v. British Columbia (Minister of Forests)*, (1997) 153 D.L.R. (4th) 1, it was not open to the Court to grant a declaration that the Haida's unproven title was a legal or equitable encumbrance on the Crown's title, or to grant a remedy for the Crown ignoring such an encumbrance.

Haida No. 1, Reasons, Lambert J.A., paras. 3-5, Appellants' Record, Vol. I, pp. 50-51.

b. *Ringstad et al v. Taku River Tlingit First Nation, supra*, articulated the general principles that bound the BCCA in *Haida*.

Haida No. 1, Reasons, Lambert J.A., paras. 27-29, Appellants' Record, Vol. I, pp. 67-69.

c. The Crown Provincial and Weyerhaeuser have now, and had in 1999 and 2000, and earlier, a legally enforceable duty to the Haida people to consult with them in good faith and to endeavour to seek workable accommodations between the aboriginal interests of the Haida people, on the one hand, and the short term and long term objectives of the Crown and Weyerhaeuser to manage TFL 39 and Block 6 in accordance with the public interest, both aboriginal and non-aboriginal, on the other hand.

Haida No. 1, Reasons, Lambert J.A., para. 60, Appellants' Record, Vol. I, p. 87.

d. The obligation to consult and seek accommodation arose from the following circumstances:

i. The Province had fiduciary obligations of utmost good faith to the Haida people with respect to the Haida claims to aboriginal title and aboriginal rights;

ii. The Province and Weyerhaeuser were aware of the Haida claims to title and rights over TFL 39 and Block 6 through evidence supplied by the Haida and through further evidence available to them on reasonable inquiry, an inquiry which they were obliged to make; and

iii. The claims of the Haida to aboriginal title and rights to all or some significant part of TFL 39 and Block 6 were supported by a good *prima facie* case.

Haida No. 1, Reasons, Lambert J.A., para. 49, Appellants' Record, Vol. I, p. 80.

e. As a result, both the Province and Weyerhaeuser had a duty to consult with the Haida about accommodating their cultural and economic interests.

Haida No. 1, Reasons, Lambert J.A., para. 49, Appellants' Record, Vol. I, p. 80.

f. The scope of the consultation and the strength of the obligation to seek accommodation are proportional to the potential soundness of the claim for aboriginal title and rights.

Haida No. 1, Reasons, Lambert J.A., para. 51, Appellants' Record, Vol. I. p. 82.

The Second Hearing and *Haida No. 2*

19. After delivery of the judgment in *Haida 1*, Weyerhaeuser sought, and was granted, a rehearing on the question of its obligation to the Haida. Weyerhaeuser, supported by the Crown, argued that the question of whether Weyerhaeuser owed a duty to consult and accommodate the Haida had not been raised or argued at any stage of the proceedings in either the BCSC or BCCA. Both Weyerhaeuser and the Crown also argued that if the question was properly before the BCCA, then any legal obligation to consult prior to the determination of aboriginal rights and title rested only on the Crown.

20. On May 16, 2002, the BCCA granted intervenor status to the Council of Forest Industries, the Business Council of British Columbia, the British Columbia Chamber of Commerce, the BC Cattlemen's Association and the Squamish First Nation.

Haida No. 2, Reasons, Lambert J.A., paras. 20, 104(3), Appellants' Record, Vol. I, pp. 112, 161.

21. On August 19, 2002, the BCCA delivered supplemental reasons for Judgment: *Haida Nation v. B.C. and Weyerhaeuser*, 2002 BCCA 462 ("*Haida 2*"). All three judges wrote opinions. Chief Justice Finch and Mr. Justice Lambert concurred in the result that:

The Crown provincial had in 2000, and the Crown and Weyerhaeuser have now, legally enforceable duties to the Haida people to consult with them in good faith and to endeavor to seek workable accommodation between the aboriginal interests of the Haida people, on the one hand, and the short term and long term objectives of the Crown and Weyerhaeuser to manage TFL 39 and Block 6 in accordance with the public interest, both aboriginal and non-aboriginal, on the other hand.

Haida No. 2, Reasons, Lambert J.A., para. 104; Finch C.J., para. 129, Appellants' Record, Vol. I, pp. 160 & 171.

22. Mr. Justice Lambert and Chief Justice Finch expressed different opinions on the source of Weyerhaeuser's duty to consult. Lambert J.A. found three sources:

- a. the *Forest Act* and TFL 39 imposed obligations on the licensee to consult with the Haida, which carried with it an obligation to seek accommodation;
- b. Weyerhaeuser took TFL 39 with “knowing receipt” of the Crown’s breach of its fiduciary obligation, and as a constructive trustee, owed a third party fiduciary duty to the Haida people;
- c. because Weyerhaeuser has the power to choose how to carry out day-to-day operations under its exclusive licence to cut timber, and could invoke a justification defense regarding those operations, it had an obligation to consult when decisions were made and alternatives were being chosen which might impact on the Haida’s aboriginal title or rights.

Haida No. 2, Reasons, Lambert J.A., paras. 60, 71-72 and 92-93, Appellants’ Record, Vol. I, pp. 134, 140, 152-153.

23. Chief Justice Finch found that the issuance by the Minister of the TFL in breach of the Crown’s duty to consult meant that Weyerhaeuser had received the licence subject to a legal defect. That defect could only be remedied by the participation of both Weyerhaeuser and the Crown in consultation with the Haida.

Haida No. 2, Reasons, Finch C.J., paras. 121 and 123, Appellants’ Record, Vol. I, pp. 168 & 169.

24. Mr. Justice Low, dissenting, found that there was no basis in law for a mandatory order against Weyerhaeuser in this proceeding.

Haida No. 2, Reasons, Low J.A., paras. 131, 134 and 138, Appellants’ Record, Vol. I, pp. 172, 173, 175.

25. On March 20, 2003 this Court granted the applications of the Province and Weyerhaeuser for leave to appeal.

Developments Since *Haida 2*

26. Since the Court below decided *Haida 2*, the Province has taken a number of measures relating to the accommodation of Haida interests, or First Nations interests generally. By Order in Council No. 204, approved and ordered March 6, 2003, the Lieutenant Governor in Council renewed the designation of the Haida Protected Area of Duguusd under s. 169 of the *Forest Act*, to December 31, 2004. During that time, no

timber harvesting will take place within the Duguusd Designated Area, which comprises 28% of the Queen Charlotte Timber Supply Area.

**OIC 204/2003, BC Gaz. 2003.II.140, BC Reg. 73/2003;
OIC 1054/2001, BC Gaz. 2001.II.748, BC Reg. 284/2001;
OIC 599/2001, BC Gaz. 2001.II.361, BC Reg. 161/2001;
OIC 1687/2000, BC Gaz. 2000.II.994, BC Reg. 394/2000;
OIC 516/2000, BC Gaz. 2000.II.331, BC Reg. 102/2000;
OIC 1376/1999, BC Gaz. 1999.II.677, BC Reg. 326/99;
ABA Tab 45.**

27. On February 28, 2003, the Province entered into the Haida Gwaii/Queen Charlotte Island Land Use Planning Framework Agreement with the Haida, pursuant to which the Haida and the Province are jointly chairing a strategic land use planning process for the Queen Charlotte Islands.

**Haida Gwaii/Queen Charlotte Island Land Use Planning Framework Agreement,
ABA Tab 50.**

28. The Province has appropriated a total of \$95,000,000.00 for forestry revenue sharing with First Nations throughout British Columbia over the period 2003 to 2005. The Legislature has enacted the *Forestry Revitalization Act*, SBC 2003, c. 17 to take back twenty percent of the annual allowable cut from replaceable licences throughout the province. The Minister of Forests will re-allocate a portion of the timber taken back to provide direct awards of forest tenures to First Nations. The Province has embarked upon the process of negotiating interim forestry development agreements with First Nations.

***Forest (First Nations Development) Amendment Act*, SBC 2002, c. 44, ABA Tab 40;
Forestry Revitalization Act, SBC 2003, c. 17, ABA Tab 41;
Forest Statutes Amendment Act, SBC 2003, c. 32, ABA Tab 43;
Forest (Revitalization) Amendment Act, SBC 2003, c. 30, ABA Tab 42;
British Columbia, Legislative Assembly, *Official Report of Debates of the Legislative Assembly (Hansard)*, 3rd Session, 37th Parliament, Volume 7, Number 7 at 3244 (07 May 2002)
British Columbia, Legislative Assembly, *Official Report of Debates of the Legislative Assembly (Hansard)*, 3rd Session, 37th Parliament, Volume 7, Number 8 at 3284 (08 May 2002)
British Columbia, Legislative Assembly, *Official Report of Debates of the Legislative Assembly (Hansard)*, 4th Session, 37th Parliament, Volume 13, Number 5 at 5639 (26 March 2003)
British Columbia, Legislative Assembly, *Official Report of Debates of the Legislative Assembly (Hansard)*, 4th Session, 37th Parliament, Volume 13, Number 6 at 5679 (27 March 2003)
British Columbia, Legislative Assembly, *Official Report of Debates of the Legislative Assembly (Hansard)*, 4th Session, 37th Parliament, Volume 13, Number 9 at 5748 (31 March 2003)**

British Columbia, Legislative Assembly, *Official Report of Debates of the Legislative Assembly (Hansard)*, 4th Session, 37th Parliament, Volume 16, Number 2 at 6917 (26 May 2003): [Unofficial version – official version not published at date collected]
Forestry Plan, News Release and Backgrounder, www.for.gov.bc.ca/mof/plan
ABA Tab 49.

PART II

ISSUES ON APPEAL

29. This case raises the following issues:
- a. Does the Provincial Crown owe fiduciary, constitutional or other duties to consult First Nations and to accommodate claimed aboriginal title and rights before those rights have been judicially determined?
 - b. If such duties exist, what standard of review, and what tests apply to determine if the decision makers have met their duty?
 - c. Do licensees of the Crown owe fiduciary or other legal duties of consultation and accommodation to First Nations with respect to the potential infringement of claimed, but unproven rights?

30. On July 4, 2003, Justice Gonthier stated the following Constitutional Question:

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

PART III

ARGUMENT

Introduction

31. The Appellants submit that the Court below erred in finding that the Provincial Crown owed a constitutional and fiduciary duty to consult and to seek workable accommodations with First Nations, and in finding the source of that obligation in an all pervasive fiduciary obligation of the Crown to protect First Nations' interests.

Haida No. 1, Reasons, Lambert J.A., at paras. 33-36, Appellants' Record Vol. I, pp. 71-72;

Haida No. 2, Reasons, Finch CJBC, at para. 113, Appellants' Record Vol. I, p. 165.

32. When statutory decision makers make resource allocation decisions at the stage when aboriginal rights and title have been asserted, but not yet established, the Crown owes a duty of fair dealing which requires it to take seriously the concerns raised by First Nations. That duty has its source in established principles of administrative law, reasonableness in decision making, and the honour of the Crown. However, the Crown, in managing the lands and resources of the Province in the public interest, has not taken upon itself any obligation to exercise its discretionary powers only in the best interests of a First Nation. Nor, before the determination of a disputed claim of aboriginal rights and title, and the extent of infringement of any such rights, is the Crown's constitutional and fiduciary obligation of justification engaged.

33. The extent of the Crown's obligation to consult, and to seek interim accommodations, will vary with the legal and factual context of each case. That context will include the nature of the statutory decision, and its potential impact on the particular rights asserted by the First Nation. Before a First Nation has established the aboriginal rights or title that it claims, and a Court has determined the extent to which those rights have been unjustifiably infringed, the duty to accommodate does not include a legal obligation to pay compensation for asserted infringements. At this stage, accommodation will focus on the amelioration of the impacts of Crown sanctioned activities on aboriginal land uses or cultural interests.

34. The legal and factual context in this case includes the following factors:

a. The Minister of Forests made decisions to approve the replacement of TFL 39, and to consent to the transfer of TFL 39 from MacMillan Bloedel Ltd. to

Weyerhaeuser. Under section 36(2), the Minister has a very limited discretion to decline to offer a replacement, and may only do so where rights under the existing tree farm licence are under suspension, or where the holder of the TFL is in breach of its obligations under the licence, the *Forest Act*, or the *Forest Practices Code* of British Columbia. In the case at bar, there was no basis, under s. 36 of the *Forest Act*, for the Minister to decline to offer a replacement TFL.

***Forest Act*, RSBC, 1996, c. 157, ss. 36, 54, Appendix 3.**

b. The Minister made his decisions at a time when the Haida had asserted, but not yet established their claim of aboriginal rights and title. The Haida claim aboriginal title to all of the lands and resources of the Queen Charlotte Islands and the adjacent waters.

c. MacMillan Bloedel had logged on the Queen Charlottes since World War I, and it held TFL 39 since 1961.

d. The Chambers Judge found that there were legitimate issues in dispute with respect to the Haida claim of aboriginal title to Block 6, particularly concerning the lands more than one kilometer inland from shore, and that a great deal of additional evidence would have to be presented and assessed before questions of title and infringement could be resolved.

Chambers Judge's Reasons, Halfyard, J., para. 50, Appellants' Record, Vol. I, p. 38.

e. Since this Court rendered its judgment in *Delgamuukw*, there have been no trial decisions in British Columbia defining the scope and extent of aboriginal title. Accordingly, there is an unresolved question of whether aboriginal title, where it exists, is confined to relatively small areas, such as village sites and immediately adjacent lands where a First Nation is able to show exclusive use and occupancy, or whether it extends to large tracts of Crown land.

f. Although the Courts below found that the Minister had not consulted with the Haida with respect to the replacement of TFL 39, both the terms of the licence, and the Ministry's consultation policy, provided for consultation with the Haida regarding operational forestry planning, and before timber harvesting activities took place "on the ground".

The Haida Claim

35. In a separate action the Haida claim aboriginal title to all of the Queen Charlotte Islands, the surrounding waters, and the air space. The waters claimed include the entire Dixon Entrance, the Hecate Straits halfway to Vancouver Island, and westward into the ocean depths. The Haida claim includes the right to the exclusive use, occupation and benefit of the land, inland waters, seabed, archipelagic waters and air space.

Council of the Haida Nation et al, Statement of Claim, Appellants' Record, Vol. II, p. 211.

36. The Haida contended that the TFL replacements should be declared invalid or, alternatively, quashed, on the basis that, prior to issuing any tenure in the area claimed by the Haida, the Province must take into account the claimed aboriginal title of the Haida. They maintained that their asserted claim of aboriginal title constituted a legal or equitable encumbrance on provincial title to Crown timber, and that the Crown was under a fiduciary obligation to treat the timber as being encumbered by Haida title until the Crown established it was not so encumbered. Alternatively, they contended that the Minister breached a fiduciary duty owed by the Provincial Crown to the Haida not to replace TFL 39 without first consulting with them.

Further Amended Petition, paras. 1 and 2, Appellants' Record, Vol. II, p. 197; Chambers Judge's Reasons, Halfyard J., para. 10, Appellants' Record, Vol. 1, pp. 11-12.

37. The Haida argued that if the Province failed to negotiate a reconciliation of their claimed title and Crown title prior to issuing tenure or making a management decision, it trespassed upon Haida title and breached its constitutional and fiduciary obligations.

38. Thus, the Haida sought declarations of invalidity and certiorari to quash the TFL replacements, not upon proof of an unjustified infringement of existing aboriginal title, in accordance with the four part test in *Delgamuukw v. British Columbia*, but rather on the basis that the Minister's decision infringed upon their assertion of rights and title.

Further Amended Petition, paras. A & B, Appellants' Record, Vol. II, pp. 196-197; Amended Notice of Constitutional Question, Appellants' Record, Vol. II, p. 204.

39. As the Haida acknowledge, most of the lands of British Columbia are subject to similarly broad claims of aboriginal title. Extensive areas are claimed by First Nations

involved in the BC treaty process. In addition, there are title claims by Bands outside the treaty process.

**Affidavit of Kathleen Pearson, Exhibit “J”, Appellants’ Record, Vol. II, p. 271;
Affidavit of Edward John, Exhibit “C” p. 4(4), 5A, Appellants’ Record, Vol. V, pp.
836, 837;
Treaty Negotiation in BC, Statements of Intent, Map, June 2002, ABA Tab 47.**

Implications of Judgment of British Columbia Court of Appeal

40. The decision of the BCCA effectively requires the Crown to proceed as if the Haida were presumed to have the title they claim.

41. The BCCA found that the duty to consult in order to seek accommodation of claimed aboriginal title is supported by the Haida’s good prima facie case to “all or some significant part of the area covered by TFL 39 and Block 6”. The Court below made this finding even though the issues of the existence and scope of the Haida’s title, infringement and justification had been moved to the trial list, and the Chambers Judge had found that there were legitimate issues in dispute regarding the claim of aboriginal title to the lands in Block 6.

***Haida No. 1, Reasons, Lambert J.A., paras. 24, 49, 50, Appellants’ Record, Vol. I, pp. 64, 80-82;*
Affidavit of Shauna McRanor, Appellants’ Record, Vol. II, p. 327 – Vol. III, p. 420;
*Chambers Judge’s Reasons, Halfyard J., para. 50, Appellants’ Record, Vol. I, p. 38.***

42. It is extremely difficult for administrative decision makers to determine with any certainty where aboriginal title exists in British Columbia. The courts have held that determinations of aboriginal rights and title generally do not lend themselves to summary proceedings.

***Taku River Tlingit First Nation v. Tulsequah Chief Mine Project, [1999] BCJ No. 984 (BCSC) (QL), aff’d [1999] BCJ No. 1665 (BCCA) (QL), ABA Tab 33;*
*Kelly Lake Cree Nation v. Canada (Ministry of Energy and Mines), [1998] BCJ No. 3207 (BCSC) (QL), ABA Tab 12.***

43. In applying the “prima facie case” threshold in the *Gitksan* case, Mr. Justice Tysoe found that even though on the evidence there were conflicting and overlapping claims of aboriginal title to some of the lands in question, First Nations were not required to show a good prima facie case with respect to all the area claimed. It was sufficient if they could show a prima facie case with respect to part of the lands claimed.

Gitksan and other First Nations v. British Columbia (Minister of Forests), 2002 BCSC 1701, [2002] BCJ No. 2761 (BCSC) (QL) at p. 16, para. 74, ABA Tab 8.

44. The practical result of the low threshold of the “prima facie case” test is that decision makers must either treat all claimed lands as potentially subject to aboriginal title and negotiate “accommodations” of First Nations cultural and economic claims over the entire claimed territory, or attempt to determine the strength of the claim to specific portions of the territory. That is a task for which foresters, and other resource managers are neither equipped, nor qualified by their training, education or experience.

45. The BCCA characterized the imposition of a freestanding constitutional and fiduciary duty of consultation and accommodation as an alternative remedy to the interlocutory injunction. According to the Court below, the obligation arises where the First Nation can make out a good *prima facie* case of rights or title. However, the BCCA did not preclude the possibility that the obligation to consult might arise where there was something less than a good *prima facie* case. The practical result is that a First Nation may be able to set aside a resource allocation decision by alleging either a failure to consult, or inadequate consultation and accommodation respecting asserted title, without having met the traditional three part test for an interlocutory injunction, and in particular, without having met the burden of showing irreparable harm, and that the balance of convenience favours the First Nation.

***Haida No. 1*, Reasons Lambert J.A., paras. 11-14, 51, Appellants’ Record, Vol. I, pp. 53-55 & 82;
RJR MacDonald Inc. v. Canada (Attorney General), [1994] 1 SCR 311, [1994] SCJ No. 17 (Q.L.) at p. 17 -21, paras. 57-81, ABA Tab 30.**

46. These practical difficulties are compounded by the fact that there are 198 registered Indian Bands in British Columbia. Some Bands are organized as First Nations, or other political entities. Each Band or First Nation has its own social and political objectives.

47. Because British Columbia’s economy is heavily dependent on resource development, much of the day to day work of government relates to land and resource management. Core functions of the Provincial Government include granting, renewing, replacing and managing a variety of tenures including forest tenures, grazing leases, water licenses, mineral and oil and gas tenures.

48. Decision-makers must retain the ability to make timely resource allocation decisions pending the resolution of disputed claims of aboriginal rights and title. In the interim, any remedy should encourage all parties to the treaty process to continue to strive for workable means of reconciling aboriginal title with Crown sovereignty.

Factum of the Province, Ringstad et al. v. Taku River Tlingit, SCC No. 29146 at paras. 128-130.

49. In *Haida No. 2*, Lambert, J.A. characterized the range of infringing actions as extending from passage of the *Forest Act*, through the issuance of the TFL to the granting of cutting permits. It is submitted that any suggestion that the Crown owes a freestanding and enforceable constitutional fiduciary obligation to consult with every First Nation with respect to every proposed enactment that may affect their claimed rights or title is in error. At a practical level, the capacity of the legislature and the executive to perform the functions of government would be substantially impaired. As a matter of legal principle, there is no pre-legislative right to be consulted.

***Haida No. 2, Reasons, Lambert J.A., para. 84, Appellants' Record, Vol. I, pp. 147-148;*
*Authorson v. Canada. (Attorney General), 2003 SCC 39, [2003] SCJ No. 40 (QL) at pp. 8-9, paras. 37-41, ABA Tab 1.***

50. Further, a duty to accommodate First Nations' assertions of title before tenures are issued or renewed, and before land management decisions are made has the potential to stifle economic development and to reduce the incentives for progress in treaty negotiations, unless the ambit of that duty is carefully defined.

The Duty of Fair Dealing

51. The Appellants submit that prior to the judicial or treaty determination of disputed aboriginal rights, the Provincial decision makers owe a duty of fair dealing with aboriginal peoples which requires them to take into consideration the potential impact of resource decisions upon aboriginal interests. This duty has its source in the principles of administrative fairness and reasonableness in decision-making. It requires decision makers to take First Nations' interests seriously.

52. An administrative decision that affects "the rights, privileges or interests of an individual", triggers the application of the duty of fairness.

Cardinal v. Director of Kent Institution, [1985] 2 SCR 643, at p. 653, ABA Tab 4;

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817, [1999] SCJ No. 39 (QL) at p. 12, para. 20, ABA Tab 2.

53. The duty of fair dealing includes both consultation and consideration of the interests raised by aboriginal peoples. Fairness to aboriginal peoples is a governing consideration in defining the unique contemporary relationship between the Crown and Canada's aboriginal peoples.

Delgamuukw et al v. The Queen, [1997] 3 SCR 1010, [1997] SCJ No. 109 (QL) at p. 61, para. 204, ABA Tab 6.

54. This Court has held that the concept of reasonableness forms an integral part of the *Sparrow* test for justification.

R. v. Nikal, [1996] 1 SCR 1013, [1996] SCJ No. 47 (QL) at p. 31, para. 110, ABA Tab 27.

55. The Appellants submit that where, before a disputed claim of aboriginal rights or title is resolved, decision makers provide reasonable opportunities for consultation, and consider the potential impacts of Crown sanctioned activities on aboriginal interests before those activities proceed, the duty of fair dealing will be satisfied.

56. Any judicial review of statutory decisions for administrative fairness or reasonableness ought not to impose a higher standard upon government, prior to the determination of disputed rights, than would constitutional review, where questions of the existence, scope and infringement of s. 35 rights are all in issue.

Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038 at p. 1049(d-j), ABA Tab 31.

57. So long as the decision maker has applied the appropriate procedures, has had regard to the relevant considerations, and the reasons, when taken as a whole, support the decision, it should be upheld.

Suresh v. Canada (Minister of Citizenship and Immigration), [2002] 1 SCR 3, [2002] SCJ No. 3 (QL) at pp.14-15, para. 38, ABA Tab 32;
Law Society of New Brunswick v. Ryan, 2003 SCC 20, [2003] SCJ No. 17 (QL) at p. 13, para. 47, ABA Tab 18.

58. The duty of fair dealing has several components. It includes the duty to inform and consult, the duty to consider aboriginal interests, and permits the decision maker to balance competing interests.

(a) The Duty to Inform and Consult

59. Aboriginal peoples should be consulted prior to decisions which may affect their ongoing cultural interests and land uses. While all such activities may not be integral to the distinctive culture, and therefore may not be constitutionally protected aboriginal rights, administrative fairness and the potential for a connection between these activities and s. 35 rights requires that First Nations have the opportunity to make their concerns known regarding the effects of a proposed development on their interests, even before the scope and extent of disputed aboriginal rights have been determined.

***R. v. Van der Peet*, [1996] 2 SCR 507, [1996] SCJ No. 77 (QL) at pp. 18, 19 & 25-26, paras. 30, 33 and 51-55, ABA Tab 29;
Baker v. Canada (Minister of Citizenship and Immigration), *supra*, at p. 12, para. 20, ABA Tab 2.**

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

***Halfway River First Nation v. British Columbia (Minister of Forests)* (1999), 178 DLR (4th) 666, [1999] BCJ No. 1880 (BCCA) (QL) at p. 32, para. 161, ABA Tab 11;
Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management), 2003 BCSC 1422, [2003] BCJ No. 2169 (BCSC) (QL) at pp. 38-44, paras. 104-118, ABA Tab 11A;
Kelly Lake Cree Nation v. Canada (Minister of Energy and Mines), [1998] BCJ No. 2471 (QL) at p. 25, para. 165, ABA Tab 13;
R. v. Nikal, *supra* at p. 31, para. 110, ABA Tab 27.**

61. The Appellants submit that, prior to a determination of the existence and scope of the Haida title, the Crown's duty of consultation must be measured against a standard of reasonableness which includes the nature of the decision within the legislative scheme, the opportunities for further consultation at later stages in the resource management process, the potential for immediate and direct impacts on Haida activities, and the long term relationship between the Province and the Haida.

***Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 at p. 669(c-f), ABA Tab 16;
Baker v. Canada (Minister of Citizenship and Immigration), *supra*, at pp. 12-14, paras. 21, 23 – 25, ABA Tab 2;
R. v. Nikal, *supra*, at p. 31, para. 110, ABA Tab 27.**

62. Not every Provincial resource allocation decision has a direct or immediate impact on aboriginal activities on the ground. Resource and land development decisions

may be made incrementally in some circumstances, and have escalating implications for “on the ground” activities. Decisions may be guided by regional and provincial planning processes. Further, there may be a body of information available to decision makers regarding aboriginal land uses and cultural interests that have been obtained in ongoing consultations with the affected group. The broad position and concerns of a particular aboriginal group may be well known to decision makers.

***Ontario (Minister of Municipal Affairs and Housing) v. TransCanada Pipelines Ltd.* (2000), 186 DLR (4th) 403, [2000] OJ No. 1066 (OCA) (QL) at p. 32, paras. 121-122, (leave to appeal to SCC dismissed, [2000] SCCA No. 264 (QL)), ABA Tab 21.**

63. In this case, the Minister made decisions to transfer and replace a TFL. Because the replaceable tenure system is based on the provision of long term stability in order to attract and maintain large investments in capital and infrastructure, the Minister’s discretion to decline to replace an existing TFL is limited to enumerated circumstances where the license holder is in breach of its obligations to the Crown. There is, however, some measure of discretion in regard to the terms of the tenure replacement.

***Forest Act, RSBC 1996 c. 157, ss. 33 – 36, Appendix 3;*
Affidavit of Brad Harris, sworn Feb. 25, 2000, paras. 4-29, Appellants’ Record, Vol. III, p. 450.**

64. The TFL replacement does not authorize the harvesting of timber. Before any timber is cut, the tenure holder must first secure a cutting permit. The Province has consulted, and continues to consult with the Haida prior to authorizing any cutting permits or other operational plans which would affect the Haida’s ongoing land use and cultural interests.

***Affidavit of Brad Harris, sworn Feb. 25, 2000, Exhibit “E”, Appellants’ Record, Vol. III, pp. 489-492;*
***Affidavit of Allison Bond, Exhibit “G”, Appellants’ Record, Vol. VI, p. 986;*
Affidavit of Ernie Collison, Exhibit “B”, Appellants’ Record, Vol. II, p. 291.****

65. The Haida had made known their position that they did not want any forestry tenures issued or renewed anywhere in the Queen Charlotte Islands without their consent. That consent would be predicated upon the accommodation of Haida claimed title to the satisfaction of the Haida. The Haida vision of accommodation would require compensation for timber harvesting, and control by the Haida of harvesting management. Their position required that Haida title be presumed to exist, to the extent they claimed, and that they be accommodated accordingly.

Further Amended Petition, Appellants’ Record, Vol. II, p. 195;

Affidavit of Ernie Collison, Exhibit “J”, Appellants’ Record, Vol. II, p. 309; Chambers Judge’s Reasons, Halfyard J., paras. 27, 50, Appellants’ Record, Vol. I, pp. 27, 38; Council of the Haida Nation et al, Statement of Claim, Appellants’ Record, Vol. II, p. 211.

66. The Haida were fully aware of the statutory process and timelines for the replacement of TFL 39.

Affidavit of Ernie Collison, Appellants’ Record, Vol. II, p. 273.

67. In these circumstances the Province fulfilled the duty to consult by informing the Haida of its intention to replace TFL 39 and by providing further opportunities for consultation with the Haida at the operational level.

(b) The Duty to Consider Aboriginal Interests

68. Before the determination of constitutional issues, decision makers are guided by government policy regarding consultation with aboriginal peoples who claim aboriginal rights and title. Additionally, the ongoing land use and cultural interests of aboriginal peoples provide the foundation for section 35 rights. Even prior to a determination that these activities constitute rights protected by s. 35, these activities and interests are factors for consideration by decision makers.

Affidavit of Allison Bond, Exhibit “G”, Appellants’ Record, Vol. VI, p. 986; Affidavit of Ernie Collison, Exhibit “B”, Appellants’ Record, Vol. II, p. 291. Suresh v. Canada (Minister of Citizenship and Immigration), supra, at pp. 14-15, paras. 38, 39, 41, ABA Tab 32; Forest Act, supra, s. 36(3)(d), Appendix 3; R. v. Van der Peet, supra, at pp. 18, 19 and 24-26, paras. 30-33 and 46, 55, 57, ABA Tab 29.

69. Decision makers must consider:

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

Affidavit of Allison Bond, Exhibit “G”, Appellants’ Record, Vol. VI, p. 986; Affidavit of Ernie Collison, Exhibit “B”, Appellants’ Record, Vol. II, p. 291.

(c) Balancing Interests

70. The constitutional norms and values which underlie section 35, not only call for a consideration of aboriginal interests, they also permit government to pursue objectives of

compelling and substantial importance to the community as a whole. Those objectives include such policy considerations as regional economic development, and the development of agriculture, forestry and mining. Those activities generate employment, and produce provincial revenues that benefit all British Columbians.

***R. v. Van der Peet, supra*, at pp. 19-21, paras. 31, 36, ABA Tab 29;
Delgamuukw et al v. The Queen, supra, at pp. 50 & 60, paras. 165, 202, ABA Tab 6;
R. v. Gladstone, [1996] 2 SCR 723, [1996] SCJ No. 79 (QL) at pp. 24, 28, paras. 63, 73, 75, ABA Tab 24.**

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

***Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] SCJ No. 33 (QL) at p. 21, para. 76, ABA Tab 15;
Suresh v. Canada (Minister of Citizenship and Immigration), supra, at p. 13, para. 31, ABA Tab 32;
Wewaykum Indian Band v. Canada, 2002 SCC 79, [2002] SCJ No. 79 (QL) at p. 28, para. 96, ABA Tab 35.**

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

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

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

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

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

74. The Province disputes the Haida title claim. Pending the resolution of that dispute, there can be no full reconciliation of the Haida demand for control of tenure allocation and management, with the Province's legislative and constitutional authority. However, in the interim, statutory decision makers may reconcile specific Haida land use and cultural interests, taking those interests into consideration in forestry planning and operational decisions.

75. The Haida were and are consulted with respect to forest development plans and cutting permits. The record demonstrates that the Province takes those considerations seriously. Through past consultations with the Haida, the Province has taken various steps to mitigate the effects of harvesting including: the protection of Duguusd under the *Forest Act*, the de facto protection, through the deferral of logging approvals for many years, for all 14 Haida protected areas, which collectively account for 30% of the harvestable volume of timber on the Queen Charlotte Islands. Six of the 14 Haida protected areas are located within TFL 39, Block 6.

Affidavits of Douglas Caul, Appellants' Record, Vol. IV, p. 542 and Vol. V, p. 840; Ministry of Sustainable Resource Management, Map, Queen Charlotte Islands, May 2003, ABA Tab 48.

76. In addition, under TFL 39, the District Manager may impose conditions in a cutting permit to address an aboriginal interest. Further, the District Manager may refuse to issue a cutting permit if, in his opinion, it would result in an unjustified infringement of an aboriginal interest. The Province has engaged, at the Haida's request, in an inventory of old growth red cedar on the Queen Charlotte Islands. It has recently entered into an agreement with the Haida to conduct a joint strategic land use planning process for the Queen Charlotte Islands, which will address Haida interests in such matters as the protection of old growth cedar, and areas of high cultural, or environmental value.

Affidavit of Brad Harris, February 25, 2000, Exhibit "E," TFL 39, ss. 8.07 – 8.11, Appellants' Record, Vol. III, p. 491; Haida Gwaii/Queen Charlotte Island Land Use Planning Framework Agreement, ABA Tab 50, ABA Tab 50.

77. The terms of the TFL 39 replacement offered to Weyerhaeuser in 1999 did include provisions providing for consideration of aboriginal interests in the management of TFL 39. In addition, if a court of competent jurisdiction determines that operations

under TFL 39 unjustifiably infringe an aboriginal right or title, the Regional Manager or District Manager may vary, suspend, or refuse to issue a cutting permit and, by agreement, the TFL may be amended.

Affidavit of Brad Harris, February 25, 2000, and Exhibit “A,” & Exhibit “E,” TFL 39, ss. 2.27(f), 2.33, 8 and 10, Appellants’ Record, Vol. III, pp. 456, 479, 482 & 489-494;

Affidavit of Joseph Duckworth, sworn April 4, 2000, Appellants’ Record, Vol. IV, p. 574.

78. The initial grant, and subsequent replacement of a tree farm licence is only one stage in a series of strategic and operational forestry planning decisions which ultimately culminate in the issue of cutting permits, and the harvesting of Crown timber. There were and are opportunities for consultation at various levels, including the management plan, forest development plan, and cutting permit stages.

Affidavit of Brad Harris, February 25, 2000, and Exhibit “A” & Exhibit “E,” TFL 39, ss. 2.27(f), 2.33, 8 and 10, Appellants’ Record, Vol. III, pp. 456, 479, 482 & 489-494;

Forest Act, RSBC, 1996, c. 157, s. 35(1)(e)(f), Appendix 3.

79. The Minister’s decision to offer Weyerhaeuser the TFL 39 replacement, when examined in its full legal and factual context, which includes the opportunities and requirements for consultation at the operational level, allowed for the balancing of Haida cultural interests and land uses with the public policy considerations involved in the management of timber harvesting in British Columbia.

Standard of Review

80. In every case where a statute delegates power to an administrative decision maker, the Court must begin by determining the standard of review on the pragmatic and functional approach.

Dr. Q. v. College of Physicians and Surgeons of British Columbia, 2003 SCC 19, [2003] SCJ No. 18 (QL) at pp. 6 & 7, paras. 21 and 25, ABA Tab 7.

81. The pragmatic and functional approach requires weighing a number of factors in order to determine the appropriate standard of review in any given case. The statutory framework, the purpose of the statute, the relative expertise of the decision maker, and the nature of the problem are relevant to the issue of curial deference.

Dr. Q. v. College of Physicians and Surgeons of British Columbia, supra., at pp. 8-10, paras. 26- 35, ABA Tab 7.

82. The purpose of the *Forest Act* is directly related to the Provincial constitutional responsibility to manage the land and resources of British Columbia for the good of all British Columbians. The decision at issue is not protected by any privative clause. However, the fact that the decision maker is the Minister of Forests, and that he is engaged in a resource allocation decision, where he has some expertise relative to the courts, is a factor militating in favour of deference.

***Baker v. Canada (Minister of Citizenship and Immigration)*, supra, at p. 22, para. 59, ABA Tab 2.**

83. The threshold determinations that the Provincial decision makers must make in relation to aboriginal interests are primarily factual. They must consider the nature of the ongoing aboriginal land use and cultural interests, and the concerns raised by aboriginal peoples whose interests may be affected by the decision. The decision makers must then consider whether those concerns can and have been taken into account in the decision making process.

***Suresh v. Canada (Minister of Citizenship and Immigration)*, supra, at p. 15, para. 39, ABA Tab 32.**

84. Administrative decision makers cannot be expected to make definitive legal determinations of the existence or scope of asserted aboriginal rights. In an administrative context the inquiry is primarily factual and does not involve the application or interpretation of legal rules. It thus attracts deference by the reviewing court.

***Baker v. Canada (Minister of Citizenship and Immigration)*, supra, at p. 22, para. 60, ABA Tab 2;
Kitkatla Band v. BC (2000), 183 DLR (4th) 103, [2000] BCJ No. 86 (BCCA) (QL) at p. 18, para. 90 (a)-(b) (Leave to appeal to SCC on this issue dismissed [2000] SCCA No. 122), ABA Tab 14.**

85. The indeterminate nature of the rights in this case and the requirement for balancing competing interests militate in favour of deference. Provided the Minister has had regard to all relevant considerations, the Court should not engage in reweighing those considerations. Only if the Court finds that the Minister's decision is unreasonable, when examined in its whole context, should the Court interfere.

Suresh v. Canada (Minister of Citizenship and Immigration), *supra*, at pp. 13-15, paras. 32-38 and 40, ABA Tab 32;
Law Society of New Brunswick v. Ryan, *supra*, at p. 14, para. 56, ABA Tab 18;
Dr. Q. v. College of Physicians and Surgeons of British Columbia, *supra*, at p. 10, para. 39, ABA Tab 7.

86. Where a court finds that a statutory decision breaches the principles of administrative fairness, by reason of a failure to consult, or to consider aboriginal interests, it has the discretion to grant an appropriate remedy, after taking into account the interests of the First Nation, the Crown and any affected third parties. That remedy may include a declaration, an order setting aside the impugned decision, or an order remitting the matter with directions. The Court also retains the discretion to refuse to grant any relief.

Judicial Review Procedure Act, RSBC 1996, c. 241, ss. 5, 6, 7 and 8, ABA Tab 44.

87. The focus of the remedy for breach of the Crown's duty of fair dealing would be the impugned decision itself, rather than the constitutional validity or applicability of the enabling legislation. The Appellants submit that where a First Nation challenges the constitutional validity or applicability of legislation on grounds that it contravenes disputed s. 35 rights, a determination of that question requires the application of the four part *Sparrow* test.

88. This engages the Court in determining whether any interference with the asserted right is justified, and places the unanswered question of the scope and location of disputed rights squarely in issue. That issue can only be determined after a trial.

Source of Crown's Duty is Neither Fiduciary or Constitutional

89. The Appellants submit that where aboriginal rights have been asserted but not proven, well established principles of administrative law provide a sound basis for consultation, and for the consideration of aboriginal interests in administrative decision making. The imposition of fiduciary and constitutional obligations of consultation and accommodation before the constitutional rights asserted by the claimants have been determined is contrary to principle, and to previous decisions of this Court.

90. The Crown is not required to act in a fiduciary capacity in all aspects of its relationship with First Nations. Even where a fiduciary relationship exists, not every aspect of the relationship between the fiduciary and beneficiary takes the form of a fiduciary obligation.

***Wewaykum Indian Band v. Canada, supra*, at p. 25, para. 83, ABA Tab 35;
Lac Minerals Ltd. v. International Corona Resources Ltd., [1989] 2 SCR 574 at p. 597,
ABA Tab 17.**

91. Unlike *Guerin*, where the Federal Crown had assumed an obligation to act for the benefit of a band upon the surrender of reserve lands, provincial ministers, in making resource allocation decisions, have neither assumed the duty to exercise discretionary powers in the best interests of a First Nation, nor are they performing a function “in the nature of a private law duty”. A decision to replace a tree farm license, or consent to the transfer of control of a license, is quintessentially a public duty.

***Guerin v. Canada*, [1984] 2 SCR 335, ABA Tab 9;
Wewaykum Indian Band v. Canada, supra, at p. 26, para. 85, ABA Tab 35.**

92. Further, the fiduciary duty of protection of specific Indian interests, where the Crown interposes itself between the Indians and third parties, is unique to the Federal Crown. The Provincial Crown is not constitutionally required to act solely on behalf of the Haida to protect specific, identified aboriginal interests.

***Wewaykum Indian Band v. Canada, supra*, at p. 28, para. 97, ABA Tab 35;
Mitchell v. Peguis Indian Band, [1990] 2 S.C.R. 85 at p. 143, ABA Tab 19;
Constitution Act, 1867 (U.K.), RSC 1985, App. II No. 5, ss. 91(24), 92, 92A,
Appendix 1;
British Columbia Terms of Union, Article 13, 1871 (UK), RSC 1985, App. II, No. 10,
ABA Tab 36;
Factum of the Province, Ringstad et al. v. Taku River Tlingit, SCC # 29146 paras.
25-81.**

93. The imposition of a fiduciary duty for the protection of unproven aboriginal interests on the provincial Crown strains the division of powers, and is inconsistent with the duties of the Province for the management and disposition of its natural resources.

94. The *Constitution Act, 1867*, vested the control, management and disposition of Crown lands and resources in the provinces. The Fathers of Confederation intended that the development of resources on these lands would provide a source of revenue for the provinces to carry out their constitutional functions.

G. La Forest, *Natural Resources and Public Property under the Canadian Constitution*, (Toronto: University of Toronto Press, 1969), ABA Tab 46; *Constitution Act, 1867* (U.K.), RSC 1985, App. II No. 5, ss. 92(5), 109, Appendix 1.

95. In 1982, the amendment of the *Constitution Act, 1867* by the addition of s. 92A confirmed the exclusive legislative authority of the provinces in relation to the development, conservation and management of non-renewable natural resources and forestry resources. S. 92A(6) provides that nothing in s. 92A derogates from any powers or rights that the legislature or government of a province had immediately before the coming into force of that section.

***Constitution Act, 1982* (U.K.), RSC 1985, App. II No. 5, s. 92A, Appendix 1.**

96. At the same time, s. 35(1) of the *Constitution Act, 1982* recognized and affirmed existing aboriginal and treaty rights. The Appellants submit that both constitutional provisions must be given effect, and that s. 35 ought not be applied so as to undermine the balance of federalism, or to prevent government from regulating the development and management of natural resources in the Province. One part of the Constitution cannot be abrogated or diminished by another part of the Constitution.

***New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319 at p. 373 (d-f), ABA Tab 20.**

97. The purpose of s. 35 is the reconciliation of Crown sovereignty and aboriginal rights. That reconciliation must address and balance both the constitutional rights, powers and responsibilities of the Province under ss. 92 and 92A, and the fact of prior occupation by aboriginal peoples.

***R. v. Van der Peet, supra*, at p. 20, para. 36, ABA Tab 29.**

98. The development and management of British Columbia lands and resources is a sovereign responsibility of the Provincial Crown. While aboriginal title is an interest based in the prior occupation of aboriginal peoples, it is an interest which crystallizes after the exercise of sovereignty. Chief Justice Lamer stated in *Van der Peet*:

[36] ...aboriginal title is the right of aboriginal people to land arising from the intersection of their pre-existing occupation of the land with the assertion of sovereignty over that land by various European nations. The substance and nature of aboriginal rights to land are determined by this intersection:

...While different nations of Europe respected the right of natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in the possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy.

It is, similarly the reconciliation of pre-existing aboriginal claims to the territory that now constitutes Canada, with the assertion of British sovereignty over that territory, to which the recognition and affirmation of aboriginal rights in s. 35(1) is directed.

R. v. Van der Peet, supra, at p. 20, para. 36, ABA Tab 29;
Delgamuukw et al. v. The Queen, supra, at p. 44, para. 145, ABA Tab 6;
Constitution Act, 1867, supra, s. 92, Appendix 1.

99. The Haida argue that the Province has no right to use the lands, waters and resources they claim until the Province has negotiated the Haida's consent to the Province's proposed use. It is this claim which the BCCA has held that the Province must seek to accommodate before issuing a forest tenure replacement or approving the transfer of control of a tenure.

Haida No. 1, Reasons of Lambert J. A. at para. 60 and Haida No. 2, Reasons of Lambert J.A. at para. 75, 76, 81, 84, Appellants' Record, Vol. I, pp. 87, 142, 145, 147.

100. The Haida claim and the fiduciary and constitutional duty to protect aboriginal interests prior to the determination of rights imposed by the BCCA are not compatible with the Crown's sovereign rights as owner of the soil to grant tenures, and the exclusive legislative powers of the Province under ss. 92 and 92A to manage the lands and resources of British Columbia in the public interest. Those lands and resources provide the financial underpinning of the Province's economy and support services which benefit all British Columbians, including the Respondents.

101. The constitutionalization of aboriginal rights in 1982 does impose some restraint on Provincial Crown action. Aboriginal rights, including title, may be infringed by provincial legislation. However, the infringement of aboriginal title by the Province in

the course of the exercise of its powers under ss. 92 and 92A must, since 1982, meet the test of justification.

R. v. Sparrow, [1990] 1 SCR 1075 at p. 1109(b-g), ABA Tab 28;
R. v. Cote, [1996] 3 SCR 139, [1996] SCJ No. 93 (QL) at p. 25, para. 74, ABA Tab 23;
Delgamuukw et al. v. The Queen, supra, at pp. 48-49, paras. 160, 162, ABA Tab 6.

102. However, the implications of the judgment of the Court below go further. When the court requires that the Crown must seek to accommodate broad and as yet undetermined claims to lands and resources which cover virtually the entire province before the Province may grant or manage resource tenures, the court is not simply ensuring that the exercise of provincial government powers does not infringe protected aboriginal rights. It is derogating from the power of the province to dispose of and manage lands and resources in British Columbia.

New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly), *supra*, at pp. 390-393, ABA Tab 20.

103. The reconciliation mandated by s. 35 does not mean that the Crown may not enact laws in relation to its lands and resources without first obtaining the approval of each affected First Nation, or that every tenure and land management decision must have the prior approval of First Nations. Reconciliation must take into account both the interests of aboriginal peoples and the reality of Crown sovereignty.

Reconciliation Prior to Determination of Aboriginal Rights

Constitutional Question

104. The Haida asked the BCCA to find that the *Forest Act* and the decisions to replace TFL 39 were of no force or effect pursuant to s. 52 of the *Constitution Act, 1982* because they violated s. 35 of the *Constitution Act, 1982* where the Province had failed to consult and accommodate the Haida regarding their asserted aboriginal rights and title.

Amended Notice of Constitutional Question, Appellants' Record, Vol. II, p. 203; *Constitution Act, 1982* (U.K.), RSC 1985, App. II No. 44, ss. 35, 52, Appendix 2.

105. Without expressly answering the Constitutional Question before the Court, the BCCA found that:

- a) The Province owed and had breached a constitutional duty to consult and seek accommodation of the Haida's claimed rights prior to judicial determination of those contested rights.

Haida No. 1, Reasons of Lambert, J. A. at paras. 29, 38-40, 58, Appellants' Record, Vol. I, pp. 68, 73-75;

Haida No. 2, Reasons of Lambert J.A. and Finch CJBC at paras. 74, 75 113, 115, Appellants' Record, Vol. I, pp. 141-142, 165-166.

- b) While the question of the validity of the statutory provisions and the decision taken pursuant to those provisions would be best decided after the determination of the scope and substance to the Haida's claimed rights, it was within the Court's jurisdiction to provide such a remedy at any time.

Haida No. 1, Reasons of Lambert, J. A. at paras. 54, 62; Haida No. 2, Reasons of Finch CJBC at paras. 115, 116, Appellants' Record, Vol. I, pp. 83, 87, 166.

106. The BCCA decision means that reviewing Courts must determine the constitutional validity of statutes or government action on the basis of either:

- a) an assessment of the adequacy of Provincial "justification" measures, without benefit of a factual determination regarding the scope and extent of the claimed rights or,
- b) A free standing aboriginal right to be consulted and accommodated prior to the establishment of the substantive aboriginal rights in issue.

107. The Province submits that the imposition of a constitutional and fiduciary duty to consult and seek accommodation of the asserted aboriginal rights claimed by the Haida is inconsistent with the jurisprudence of this Court. It may also produce uncertainty regarding the validity of British Columbia land and resource laws, and decisions made pursuant to those statutes.

108. The four part test first established in *Sparrow*, and consistently applied by this Court requires that the constitutional validity of a statute or governmental action which is alleged to unjustifiably infringe aboriginal rights or title be determined after the Court has addressed all four parts of the test.

109. The test requires that reviewing Courts must first determine the specific rights protected by s. 35, and find an infringement of such rights before deciding whether the

impugned legislation or government action is constitutionally inconsistent with the particular aboriginal right in question. The government then has the opportunity to justify the infringement. To move directly to a review of the sufficiency of government “justification” in order to determine constitutional validity turns this test on its head.

***R. v. Sparrow, supra*, at pp. 1110-1113, 1119, ABA Tab 28;**

110. The determination of the scope and content of the particular aboriginal right in issue in each case is necessarily the first step in the *Sparrow* analysis. While prior government regulation of an aboriginal right is not determinative of the content and scope of the right, the substance and nature of aboriginal rights cannot be defined absent a consideration of infringement and justification.

***R. v. Van der Peet, supra*, at pp. 20-25, paras. 36, 51-53, ABA Tab 29;
Cheslatta, Carrier Nation v. British Columbia, 2000 BCCA 539, [2000] BCJ No. 2030 (BCCA) (QL) at p. 6, paras 18, 19, ABA Tab 5;
R. v. Gladstone, supra, at p. 12, para. 23, ABA Tab 24.**

111. Reconciliation of Crown sovereignty with aboriginal rights requires that questions of infringement and justification are decided after the claimants have established their aboriginal rights. As Madam Justice McLachlin (as she then was) commented, in dissent, with regard to the treaty rights asserted in *R. v. Marshall (No. 1)*:

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

***R. v. Marshall*, [1999] 3 SCR 456, [1999] SCJ No. 55 (QL) at p. 39, paras. 109-113, ABA Tab 25.
See also: Delgamuukw, supra, at p. 50, para. 167, ABA Tab 6.**

112. This point is particularly relevant to aboriginal title claims. The Court below has imposed a fiduciary and constitutional obligation to seek to accommodate aboriginal title claims before the scope and extent of those claims has been determined. The result is “a right of broad and undefined scope” to consultation and accommodation.

113. In *Ontario (Minister of Municipal Affairs and Housing) v. TransCanada Pipelines Ltd.*, the Ontario Court of Appeal held that it was only after a First Nation had established an infringement of an existing aboriginal or treaty right through an appropriate hearing that the duty of the Crown to consult with First Nations was a factor for the Court to consider in the justificatory phase of the proceeding. After reviewing the authorities, Borins J.A. for the Court concluded at para. 120:

[120] ... As the decisions of the Supreme Court illustrate, what triggers a consideration of the Crown's duty to consult is a showing by the First Nation of a violation of an existing Aboriginal or treaty right recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*. It is at this stage of the proceeding that the Crown is required to address whether it has fulfilled its duty to consult with the First Nation if it intends to justify the constitutionality of its action.

***Ontario (Minister of Municipal Affairs and Housing) v. TransCanada Pipelines Ltd.*, supra, at pp. 31-32, paras. 112-120, ABA Tab 21.**

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

***British Columbia (Minister of Forests) v. Westbank First Nation* (2000), 191 DLR (4th) 180, [2000] BCJ No. 1613 (BCSC) (QL) at p. 14, paras. 84-85, ABA Tab 3; see also: *Cheslatta, Carrier Nation v. British Columbia*, supra, at p. 8, para. 20, ABA Tab 5;
Haida Nation v. British Columbia (Minister of Forests), (BCSC) (QL) at pp. 9 and 10, paras. 28-29 and 33-34, Appellants' Record, Vol. I, p. 5;
Kelly Lake Cree Nation v. Canada (Minister of Energy and Mines), [1998] BCJ No. 2471 (BCSC) (QL) at pp. 24-25, paras. 160-165, ABA Tab 13;
And see also *Tsawwassen Indian Band v. Canada (Minister of Finance)* (1998), 145 FTR 1, [1998] FCJ No. 370 (FCTD) (QL) at pp. 24 and 25, paras. 122-132, aff'd [2001] FCJ No. 516 (FCA) (QL), ABA Tab 34.**

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

***R. v. Sparrow*, supra, at p. 1119, ABA Tab 28.**

No Independent Aboriginal Right to Consultation and Accommodation

116. If the constitutional validity of provincial statutes or governmental action is to be impugned on the basis of an independent aboriginal right to be consulted and accommodated which is protected by s. 35 of the *Constitution Act, 1982*, the Haida cannot demonstrate that such a right exists.

117. In *R. v. Van der Peet* this Court clearly enunciated the test for determining what aboriginal activities are protected by s. 35. This Court defined the test as:

[46] In light of the suggestion of *Sparrow, supra*, and the purposes underlying s. 35(1), the following test should be used to identify whether an applicant has established an aboriginal right protected by s. 35 (1): in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.

***R. v. Van der Peet, supra*, at p. 24, para. 46, ABA Tab 29.**

118. The Haida presented no evidence, and never argued that the right to be consulted and accommodated met the *Van der Peet* test. Nor could they make such an argument. The right to be consulted by the Crown could only have arisen after contact and, in the case of the Province, after confederation.

***R. v. Van der Peet, supra*, at pp. 26-27, 29, paras. 55, 60, 61, 71, ABA Tab 29.**

119. There are sound practical and policy reasons for seeking to accommodate aboriginal interests. However, there is no right protected by s. 35(1) of the *Constitution Act, 1982*, either at the stage aboriginal title is asserted, or when it has been established, which compels government, as a matter of fiduciary or constitutional obligation, to negotiate the accommodation of aboriginal interests.

***Re Perry et al. v. Ontario* (1997), 33 O.R. (3d) 705, [1997] OJ No. 2314 (OntCA.) (QL) at pp. 15, 19, 21 & 22, ABA Tab 22.**

120. In summary, the BCCA's finding of a constitutional and fiduciary duty of consultation and accommodation of claimed, but unproven aboriginal rights and title is not consistent with the jurisprudence of this Court or the purpose of s. 35 of the *Constitution Act, 1982*. Furthermore, it has the potential to result in findings of constitutional invalidity of legislation or governmental action before the court has considered the necessary evidentiary and legal foundation for any such remedy.

121. For all of these reasons, the Appellants submit that until the Haida have established the aboriginal rights and title that are in dispute, no fiduciary or constitutional obligation of consultation and accommodation should be imposed upon the Provincial Crown.

Weyerhaeuser Does Not Owe the Haida a Legal Duty of Consultation and Accommodation

122. The Appellants submit that the characteristics of aboriginal title, and the Crown's responsibilities for the management of the lands and resources of the Province make consultation a legal obligation unique to the Crown.

123. One of the defining features of aboriginal title is that it is inalienable, except to the Crown.

Guerin v. The Queen, supra, at p. 382, ABA Tab 9;
Delgamuukw et al v. The Queen, supra, at p. 36, para. 113, ABA Tab 6.

124. The aboriginal rights recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*, including aboriginal title, may be infringed by the federal and provincial governments. However, the Crown must, since 1982, justify the infringement of existing aboriginal rights or title.

Delgamuukw et al v. The Queen, supra, at p. 48, para. 160, ABA Tab 6.

125. In order to justify the infringement of existing aboriginal rights, it is the Crown that bears the burden of demonstrating that the infringement is in furtherance of a compelling and substantial legislative objective, and that the infringement is consistent with the special fiduciary relationship between the Crown and aboriginal peoples.

Delgamuukw et al v. The Queen, supra, at pp. 48-50, paras. 161-165, ABA Tab 6.

126. This Court has held that the legislative objectives which may justify the infringement of aboriginal title are governmental objectives relating to the development of the Province and its natural resources, or the management and conservation of those resources.

Delgamuukw et al v. The Queen, supra, at p. 50, para. 165, ABA Tab 6.

127. Previously, this Court has discussed consultation between the Crown and First Nations as one of the elements of justification for the infringement by legislation, or governmental action, of existing aboriginal rights or title.

***R. v. Sparrow, supra*, at pp. 1102, 1110, 1119, ABA Tab 28;**

***Delgamuukw et al v. The Queen, supra*, at pp. 50-51, paras. 166-168, ABA Tab 6;**

***R. v. Marshall (No. 2)*, [1999] 3 SCR 533, [1999] SCJ No. 66 (QL) at pp. 16-17, paras. 43-44, ABA Tab 26;**

***R. v. Gladstone, supra*, at p. 30, para. 84, ABA Tab 24.**

128. In no case has this Court decided, or even suggested, that the legal duty of consultation and accommodation rests on any party other than the Crown.

129. That is consistent with the principle that the duty to consult, where rights have been established, has its source in the Crown's fiduciary obligations of justification, and with the fact that the duty is typically engaged when the Crown is making decisions regarding the allocation of Crown lands and resources.

130. Similarly, before aboriginal rights have been determined, fairness in administrative decision making, and the honour of the Crown require that statutory decision makers consult with First Nations, and take seriously the concerns they raise respecting the impact of resource allocation decisions on asserted aboriginal interests. At both stages, the legal obligation to consult, and where appropriate, to seek workable accommodations, is tied to the Crown's duties and responsibilities for resource management, and therefore resides with the Crown, rather than with private actors.

131. The Appellants acknowledge that there are practical benefits for Weyerhaeuser, and for the Crown, if Weyerhaeuser participates in consultation activities. In fact, the Crown has, as a matter of contract with Weyerhaeuser, imposed obligations upon the licensee to consult, and to propose measures intended to accommodate aboriginal interests in the forestry planning process.

Affidavit of Brad Harris, February 25, 2000, Exhibit "A" and Exhibit "E," TFL 39, ss. 8.07 – 8.11, Appellants' Record, Vol. III, pp. 457 & 491.

132. However, any legal obligation to consult and to seek workable accommodations that may be enforceable by the Haida, remains with the Crown. The Appellants submit

that the imposition of “free standing” obligations of consultation and accommodation on licensees of the Crown, and other private actors, only serves to create uncertainty, and will discourage economic development in the province.

Conclusion

133. A provincial duty of fair dealing which recognizes the need for decision-makers to take into account ongoing aboriginal land uses and cultural interests prior to making decisions regarding the allocation of Crown lands and resources is reasonable. Its performance permits the balancing of aboriginal interests and other public policy considerations pending the negotiation of treaties. The Crown’s obligation to consult, and to take seriously aboriginal concerns where it is likely that government action may affect those interests does more than simply meet the requirements of fairness. It also satisfies the honour of the Crown by providing for the reasonable consideration of aboriginal interests in the decision-making process.

134. In short, and to paraphrase Justice L’Heureux Dube in *Baker*, the duty of fair dealing permits decision-makers to make resource allocation decisions in a manner that is within the margin of manoeuvre contemplated by the Legislature, in accordance with the rule of law, in line with general principles of administrative law governing the exercise of discretion, and which is consistent with the Constitution.

***Baker v. Canada (Minister of Citizenship and Immigration)*, supra, p. 21, para. 53, ABA Tab 2.**

PART IV

COSTS

135. This Court granted the Appellants leave to appeal on terms that the Appellants pay the party and party costs of the Respondents, Council of the Haida Nation and Guujaaw in any event of the cause.

**PART V
NATURE OF ORDER SOUGHT**

136. That this appeal is allowed.

137. That the Constitutional Question be answered in the negative.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the City of Victoria, this day of September 2003.

PAUL J. PEARLMAN, Q.C.

KATHRYN KICKBUSH

Solicitors for the Appellants, The Minister
of Forests and the Attorney General of
British Columbia

PART VI

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