

PART I
STATEMENT OF FACTS

Introduction

1. The following organizations (collectively, the “Business Coalition”) were granted leave to intervene by order of Bastarache J. on May 28, 2003:

- (a) Business Council of British Columbia;
- (b) Aggregate Producers Association of British Columbia;
- (c) British Columbia & Yukon Chamber of Mines;
- (d) British Columbia Chamber of Commerce;
- (e) British Columbia Wildlife Federation;
- (f) Council of Forest Industries; and
- (g) Mining Association of British Columbia.

Each member of the Business Coalition is an umbrella organization comprising a large number of individuals and corporations who carry on business in the province of British Columbia. All Business Coalition members represent individuals and businesses who depend upon grants, licences and permits issued by the Province of British Columbia (the “Provincial Crown”) or whose operations are influenced by decisions concerning the use of Provincial Crown land.

Relevant background to Business Coalition intervention

2. Virtually the entire Province of British Columbia is subject to claims of aboriginal rights or title asserted pursuant to s. 35 of the *Constitution Act, 1982* (“s. 35 rights”). In many areas of the Province, two or more aboriginal groups assert overlapping claims of aboriginal rights or title. The members of the Business Coalition, and, more generally, the citizens of British Columbia, are directly affected by the decision under appeal, which imposes upon the Provincial Crown an obligation to consult and seek to accommodate claimed rights in circumstances where an aboriginal right is asserted, but not yet established. The judgment of the B.C. Court of Appeal has exacerbated the uncertainty, confusion and delay for those whose businesses or livelihoods depend on grants, permits, licences or interests from the Provincial Crown.

3. The decision of the Court of Appeal in the decision under appeal has been applied by other judges in British Columbia. For example, in *Gitksan First Nation v. British Columbia (Minister of Forests)*, 2002 BCSC 1701, the petitioning aboriginal groups challenged the Minister's approval of a transfer of shares in a forest company (Skeena Cellulose Inc.) which held certain licences under the B.C. *Forest Act*. Tysoe J. of the British Columbia Supreme Court noted that the decision of the Court of Appeal in the case under appeal, as well as subsequent decisions in *Haida Nation v. British Columbia (Minister of Forests)*, 2002 BCCA 147 and 2002 BCCA 462, were binding on him. He accordingly granted a declaration that the Provincial Crown had a "legally enforceable duty to each of the petitioning First Nations to consult with them in good faith and to endeavour to seek workable accommodations between the aboriginal interests of each of the petitioning First Nations on the one hand, and the short-term and long-term objectives of the Crown and Skeena to manage such of the lands covered by the licences issued to Skeena under the *Act* as are claimed by the petitioning First Nations in accordance with the public interest, both aboriginal and non-aboriginal, on the other hand". Although Tysoe J. did not quash the decision approving the change of control of Skeena, he granted the Petitioners liberty to re-apply for that relief "in the event that any of the Petitioners do not believe that the Minister is fulfilling the duty which I have declared".

4. The Business Coalition sought leave to intervene in this case in order to bring to this Court's attention the interests of the private sector in respect of the issues stated by the Appellants. In the Business Coalition's submission, judicial notice should be taken of the effects on the private sector of the uncertainty and impediments to a healthy resource economy advanced by the judgment under appeal.

5. In all other respects, the Business Coalition adopts the Statement of Facts in the Appellants' Factum.

Position of the Business Coalition on this appeal

6. The Business Coalition supports the position of the Appellants and the Respondent Redfern Resources Ltd. that the decision under appeal is wrong in law and should be set aside.

PART II

QUESTIONS IN ISSUE

7. The Business Coalition agrees with the questions as stated in the Appellant's Factum, namely:

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

If the duty is not constitutional or fiduciary, how may it be defined and applied in a manner which allows the Provincial Crown to strike a workable balance between its proprietary interests and statutory duties, its obligations to First Nations, and the public interest at large?

PART III

ARGUMENT

Introduction

8. The Business Coalition takes the position that the Provincial Crown owes no freestanding, enforceable duty to reach accommodations with aboriginal groups who have claimed, but not yet proven, aboriginal rights or title. Where an aboriginal group has made out a prima facie case of aboriginal rights, and can establish irreparable harm if those rights are infringed by Provincial Crown action, the courts will grant injunctive relief. If the aboriginal group cannot satisfy the test for injunctive relief, but aboriginal rights or title are ultimately established through court decisions or treaty, remedies will be available if those rights have been infringed unjustifiably. This Court has recognized that aboriginal rights are not absolute, and that they can be infringed by both the Federal and Provincial Crown. If infringement of aboriginal rights or title is not justified, compensation will be the appropriate remedy in most cases.

9. The difficulty with the decision under appeal is that it imposes on the Provincial Crown an obligation to consult and reach workable accommodations with aboriginal groups in circumstances where injunctive relief has not been sought or where such relief has been sought and denied. British Columbia courts are now granting what amount to mandatory injunctions requiring government action, without requiring that the aboriginal groups in question meet the criteria for such extraordinary relief. Aboriginal groups are circumventing the strictures of

injunction law by seeking judicial review of administrative decisions. The result is that the Provincial Crown is hampered in making decisions concerning the development of natural resources, and private actors are prevented from obtaining or exercising the government grants or permits needed to carry on business in the Province.

10. It is submitted that the recognition and accommodation of aboriginal rights and title do not require the courts to ignore the rules relating to interim relief. The apprehension of immediate harm can be addressed by the law relating to injunctions. If aboriginal groups do not meet the test for injunctive relief, the appropriate remedy for infringement of aboriginal rights or title can be determined later, after such rights have been established and when the court decides whether there has been unjustified infringement.

Effect of decision of the Court of Appeal in the case at bar

11. In her reasons in the Court below, Rowles J.A. confirmed that the Ministers were required to accommodate the Tlingit's concerns, based on the Provincial Crown's constitutional and fiduciary obligations. She said (emphasis added):

[190] In the case before us, the chambers judge was not required to make a specific determination of the nature of specific aboriginal rights the Tlingits claimed to have or the boundaries of any lands over which they might be found to have aboriginal title. Instead, the question was whether the Ministers of the Crown "had effectively addressed the substance of the Tlingits' concerns with respect to when, and on what terms and conditions, the mineral rights to be exploited by Redfern should be developed." ...

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

[199] The Crown did not argue, either before the chambers judge or before this Court, that the substance of the Tlingits' concerns had been met or accommodated prior to or through the issuance of the Project Approval Certificate. Had steps been taken to accommodate the concerns the Tlingits had raised throughout the environmental review process under the EAA, for example, by a change in the location of the road from the mine and through insertion of terms and conditions in the Project Approval Certificate, there might have been a live issue as to whether the Ministers' issuance of the Project Approval Certificate constituted an infringement of the Tlingits' aboriginal rights. However, the Crown did not raise

such an argument and, considering the material before the chambers judge, it is difficult to see how such an argument could be made successfully....

[207] In keeping with the assumption that the Ministers of the Crown will consider afresh the matter of the issuance of the Project Approval Certificate, I would remit the matter for reconsideration by the Ministers. In effect, the Ministers are directed by this judgment to revisit the question of the issuance of the Project Approval Certificate, bearing in mind these reasons for judgment, including the division of powers question under the Constitution Act, 1867 that was explored in the recent decision of this Court in *Paul, supra*, and the decisions of the Supreme Court of Canada concerning the Crown's constitutional and fiduciary obligations to aboriginal people in relation to matters that may affect their aboriginal rights.

It is apparent from these passages that the Court of Appeal's decision requires Ministers of the Crown to "address the substance" of an aboriginal groups' complaints, and to "accommodate their concerns", even before any aboriginal rights or title have been established. In a subsequent decision, Maczko J. of the British Columbia Supreme Court cited the decision under appeal for the proposition that "[t]he right or title does not have to be established before the responsibility to consult and accommodate arises": *Lax Kw'alaams Indian Band v. British Columbia. Minister of Sustainable Resource Management*, 2002 BCSC 1075, at para. 17.

12. Recently, this Court allowed the Provincial Crown's appeal in the *Paul* case cited by Rowles J.A. (*Attorney General of British Columbia et al. v. Paul*, S.C.C. File No. 28974, June 11, 2003), casting doubt on the order made by the Court of Appeal as expressed in para. 207 of the Reasons of Rowles J.A.

13. The decision under appeal grants a form of veto to aboriginal groups concerning decisions relating to the use of Provincial Crown land. As explained in the Appellant's Factum and in the Factum of the Respondent Redfern Resources Inc., there was elaborate consultation with the Respondent the Taku River Tlingit First Nation (the "Tlingit"). It became apparent that only relocation of the proposed road into the mine-site would be acceptable to the Tlingit. It is submitted that to require accommodation at this stage of the decision-making process is unworkable and contrary to this Court's decisions. The *Gitksan* decision, *supra*, illustrates the ongoing uncertainty, created by the decision under appeal, about the status of decisions of Ministers of the Provincial Crown. The result is that development and exploitation of natural

resources in the Province has been stymied. In the absence of a decision in support of the Province's position on this appeal, that development can be paralysed.

14. It is no answer to say that there is no prejudice to third parties because the delay is only temporary, since claims of aboriginal rights and title will ultimately be resolved by treaty or by judgment. The delay inherent in relying on a court judgment or treaty has been demonstrated by past events, epitomized by the result in *Delgamuukw v. The Queen* [1997] 3 S.C.R. 1010 ("*Delgamuukw*"). The new trial ordered by this Court has yet to be heard. As for the treaty process, while some negotiations appear to be making progress, certain aboriginal groups are reducing their focus on the treaty process in favour of relying upon demands for accommodation of asserted rights based on court decisions such as the one under appeal. The result is a series of quasi-negotiations over asserted rights every time a development activity is proposed in an aboriginal group's claimed area of interest. Such mini-negotiations can act as a deterrent to *bona fide* treaty negotiations because they may provide short-term benefits to an aboriginal group or its leaders, but they never bring true resolution to outstanding claims.

15. In the decision under appeal, the Court of Appeal held that the Provincial Crown owes a fiduciary obligation as soon as aboriginal rights are asserted. The Court below failed to analyze the inconsistency of this analysis with this Court's jurisprudence, which makes it clear that aboriginal rights are not absolute, and that the Provincial Crown is entitled to balance the needs of other sectors of society in deciding how natural resources should be exploited. For example, this Court explained in *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, that Ministers of the Provincial Crown are entitled to balance the interests of aboriginal groups with those of other affected parties (see esp. paras. And 63-66 and 76. See also *R. v. Nikal*, [1996] 1 S.C.R. 1013). As will be explained in more detail below, the Court of Appeal's decision does not accord with provincial constitutional powers or with this Court's approach to aboriginal rights and title.

Provinces have constitutional powers in respect of the management of natural resources that conflict with any overriding constitutional or fiduciary duty to aboriginal groups

16. The rights and obligations enshrined in the Canadian Constitution confirm that the Provincial Crown cannot owe an independent, enforceable constitutional or fiduciary obligation

to aboriginal groups upon the assertion of aboriginal rights. It is submitted that whether unproven claims of aboriginal rights or title impose obligations on the Provincial Crown should be resolved by reference to the division of powers contained in the *Constitution Act, 1867*. The Provincial Crown's exclusive right to manage, in the public interest, the natural resources of the Province is not fully compatible with the trust relationship of a fiduciary to only one of those interests.

Section 92A of the *Constitution Act*

17. The allocation of legislative powers between Parliament on the one hand and the Provincial Legislatures on the other was originally expressed in sections 91 and 92 of the *Constitution Act, 1867*. Provincial legislative powers over natural resources were augmented in 1982, when section 92A was added by the *Constitution Act, 1982*. Section 92A provides, in part, as follows:

92A. (1) In each province, the legislature may exclusively make laws in relation to

- (a) exploration for non-renewable natural resources in the province;
- (b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and
- (c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

Export from provinces of resources

(2) In each province, the legislature may make laws in relation to the export from the province to another part of Canada of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy, but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada.

Authority of Parliament

(3) Nothing in subsection (2) derogates from the authority of Parliament to enact laws in relation to the matters referred to in that subsection and, where such a law of Parliament and a law of a province conflict, the law of Parliament prevails to the extent of the conflict.

Section 92A is exclusive in subsection (1). While section 92A(2) is exclusive it is subject to a disabling condition which recognizes federal jurisdiction. This is expressly recognized in subsection (3) of section 92A.

18. The true construction to be given section 92A is assisted by a consideration of its deemed location in the *Constitution Act, 1867*. Appendix 5 to the Revised Statutes of Canada, 1985, adopted a placement following section 92 and preceding section 93, which deals with education. It will be noted that subsection (1) of section 92A and the first paragraph of section 93 make use of the same conferring language:

93. In and for each Province the Legislature may exclusively make Laws in relation to ...

92A (1) In each province, the legislature may exclusively make laws in relation to ...

The effect of this language and placement is to confirm that s. 92A creates freestanding provincial legislative authority.

Section 92A confirms existing powers

19. Significantly, s. 92A(b) specifically preserves the existing powers of the Provinces. Subsection 6 provides as follows:

Existing powers or rights

(6) Nothing in subsections (1) to (5) derogates from any powers or rights that a legislature or government of a province had immediately before the coming into force of this section. (49)

One commentator has noted that by this subsection, “section 92A adds to provincial powers; it does not reduce them in any way”. More specifically, ss. 92A(2) and (3) “represent a confirmation and an enhancement of the legislative powers of the producing provinces”.

Moull, “The Legal Effect of the Resource Amendment—What’s New in Section 92A?”, in Meekison, Romanow and Moull, *Origins and Meaning of Section 92A: the 1982 Constitutional Amendment on Resources*, The Institute for Research on Public Policy (Montreal: 1985), at pp. 40, 47

See also Cairns, Chandler and Moull, “Constitutional Change and the Private Sector: The Case of the Resource Amendment” (1986), 24 *Osgoode Hall Law Jo.* 299-313, at pp. 300-302; Ballem, “Oil and Gas under the New Constitution” (1983), 61 *Can. Bar Rev.* 547-558, at pp. 548-9

20. Since Confederation, the Provinces have had the authority to regulate the exploitation of natural resources on Provincial Crown land pursuant to ss. 92(5) of the *Constitution Act, 1867*, which confers on the Provinces the exclusive power to make laws in respect of “[t]he Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon”. As Professor Moull explained, “[b]efore section 92A, a provincial government could exercise broad powers over Crown-owned resources within its jurisdiction that were its property under section 109. The proprietary rights available by virtue of section 109 were supplemented by the legislative powers conferred by section 92(5)...”. Section 92A specifically extended these legislative powers, so that a Province’s ability to regulate is not limited to resources owned by the Provincial Crown.

Moull, *supra*, at pp. 48, 50-53, 59

21. In addition, the amending formula included in s. 38 of the *Constitution Act, 1982* provides that any amendment that affects the proprietary rights or any other rights or privileges of the legislature or government of a province has no effect without the approval of the Senate, the House of Commons and the legislative assembly in question. As Professor Moull has pointed out, the provincial legislative powers over natural resources conferred by s. 92A “can be altered or taken away only by resort to the new amending formula, which was also part of the 1982 constitutional patriation accord”.

Moull, *supra*, at p. 34; see also Ballem, *supra*, at p. 558

22. These provisions confirm that the addition of s. 92A was not intended to derogate from existing proprietary interests of the Provinces, nor their ability to regulate the exploitation of natural resources on Provincial Crown land. More significantly, they confirm that the Provinces have independent constitutional powers to regulate the exploitation of natural resources within provincial boundaries, including those resources which may be encumbered by aboriginal interests, subject of course to s. 91(24).

Interpretation of Sections 92 and 92A with Section 35

23. It is submitted that aboriginal rights affirmed in s. 35 of the *Constitution Act, 1982* cannot take precedence over the Provincial Crown's existing constitutional powers and obligations. All parts of the Canadian Constitution should be given effect. This means that the powers conferred by ss. 92(5) and 92A of the *Constitution Act, 1867* should not be subordinated to the rights affirmed in s. 35 of the *Constitution Act, 1982*. In other words, s. 35 should not be interpreted in a manner that "trumps" the powers conferred on the Provinces in other constitutional documents.

24. As this Court has explained, one constitutional document, or one part of a constitutional document, should not be interpreted in a way that limits another constitutional document or part. In *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319 at 373, McLachlin J. (as she then was), stated: "[i]t is a basic rule...that one part of the Constitution cannot be abrogated or diminished by another part of the Constitution". For example, in *Reference re Bill 30, An Act to Amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1149, this Court held that powers conferred under s. 93 of the *Constitution Act, 1867* were not subject to attack on the grounds that they did not conform with the *Charter of Rights and Freedoms*. Section 93 of the *Constitution Act, 1867* represented a negotiated compromise at the time of Confederation, defining specific privileges in favour of Roman Catholic separate schools. The rights and privileges conferred under s. 93 were immune from Charter review because the whole of s. 93 represented a fundamental compromise of Confederation in relation to denominational schools. Wilson J., for the majority, said (at pp. 1197-8) that, "[i]t was never intended, in my opinion, that the Charter could be used to invalidate other provisions of the Constitution, particularly a provision such as s. 93 which represented a fundamental part of the [1198] Confederation compromise." It is submitted that the provinces and federal government arrived at a similar negotiated compromise in respect of the management of natural resources in s. 92A of the *Constitution Act, 1982*.

Remedy should be deferred until justification stage, except in case of irreparable harm

25. This Court's jurisprudence makes it clear that aboriginal rights are not absolute, and that Provincial governments must balance aboriginal claims with other aspects of the public interest. For example, in *R. v. Sparrow*, [1990] 1 S.C.R. 1075 this Court recognized that s. 35 rights

would be capable of expropriation, so long as fair compensation was available. In that case, this Court said that such considerations inform the justification analysis (at p. 1119; emphasis added):

Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include: whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented. This list is not exhaustive.

See also *Calder v. Attorney General of British Columbia*, [1973] S.C.R. 313, at p. 353

26. This Court has acknowledged that aboriginal rights may be infringed by provincial legislation: *R. v. Coté*, [1996] 3 S.C.R. 139, at para. 74; *Delgamuukw* at para. 160. Significantly, the Crown's fiduciary duty to aboriginal peoples "does not demand that aboriginal rights always be given priority" (*Delgamuukw*, at para. 162). As Chief Justice Lamer explained, "[a]boriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are a part": *R. v. Gladstone*, [1996] 2 S.C.R. 723, at para. 73.

27. More recent decisions of this Court are of constitutional significance in the present appeal. In *R. v. Marshall* [1999] 3 S.C.R. 456 ("*Marshall No. 1*") and *R. v. Marshall* [1999] 3 S.C.R. 533 ("*Marshall No. 2*"), the issue was the characterization and interpretation of a colonial agreement, found to be a treaty, and relied upon by the accused Mi'kmaq as a defence to his conviction under federal fishery regulations. He was successful in *Marshall No. 1* and his acquittal was ordered. An intervener applied for a re-hearing. In *Marshall No. 2* the Court denied the application but in doing so circumscribed the rights under the treaty. In doing so, this Court apparently approved the following passage from the judgment of Cory, J. in *R. v. Nikal*, *supra* (quoted at para. 27 of *Marshall No. 2*):

With respect to licensing, the appellant [aboriginal accused] takes the position that once his rights have been established, anything which affects or interferes with the exercise of those rights, no matter how insignificant, constitutes a prima facie infringement. It is said that a licence by its very existence is an infringement of the aboriginal right since it infers that government permission is needed to exercise the right and that the appellant is not free to follow his own or his band's discretion in exercising that right.

This position cannot be correct. 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. Section 1 of the *Canadian Charter of Rights and Freedoms* is perhaps the prime example of this principle. Absolute freedom without any restriction necessarily infers a freedom to live without any laws. Such a concept is not acceptable in our society.

28. Another recent and relevant case is *Mitchell v. Minister of National Revenue*, [2001] 1 S.C.R. 911. The *Mitchell* case illustrates why it is inappropriate to grant a remedy before the aboriginal right in question has been established. Mr. Mitchell, a Mohawk residing in Canada south of the St. Lawrence River, purchased goods in the United States. Returning to Canada he claimed he was exempt from payment of Canadian custom duties by reason of his aboriginal and treaty rights to bring goods across the boundary for trade, personal and community use. The trial court held he had an aboriginal right to an exemption. This Court ultimately concluded that Mr. Mitchell had not established an aboriginal right to bring goods across the Canada-U.S. border for the purposes of trade. But on the theory embraced by the Court of Appeal in the case at bar, Mr. Mitchell's aboriginal community, the Mohawk of Akwesasne, would have had rights to be consulted and accommodated from the moment they asserted an aboriginal right to trade.

29. The *Mitchell* case also reveals reasons for caution in granting interim remedies based on asserted unproven rights. As this Court explained (at para. 38-39 and 51), the onus of proof remains on the aboriginal group or individual who asserts a claim of aboriginal rights or title. Moreover, difficulties of proof do not negate the operation of general evidentiary principles. The relevance of the *Mitchell* decision for present purposes is three-fold: first, it demonstrates the Court's readiness to consider the strengths and weaknesses of an unproven claim to aboriginal rights. Second, it brings some sense of reality to the weight to be given oral evidence. Third, it rejects the proposition that an unproven claim to an aboriginal right could override or impede the exercise by government of a specific and revenue-generating head of constitutional power.

30. The caution expressed in *Mitchell* was recently endorsed and applied by the Federal Court of Appeal in *Canada v. Benoit*, 2003 FCA 236, at para. 23-5, where that Court reversed

the order of the trial court that the respondents had a treaty right to immunity from taxation. On the analysis of the Court of Appeal in the case under appeal, however, Canada owed a duty to consult with and accommodate the respondents as soon as they asserted a treaty right to be immune from taxation.

31. Other decisions of this Court confirm that the mere assertion of a right, which is not ultimately established, does not give rise to an entitlement to interim consultation and accommodation. For example, in *R. v. Nikal, supra*, Mr. Nikal was charged with fishing without a licence, contrary to the *British Columbia Fishery (General) Regulations*. Mr. Nikal contended that the mere requirement of a licence constituted a *prima facie* infringement of his s. 35 rights. On the theory adopted by the Court of Appeal in the case at bar, however, the Federal Crown would have been obliged to consult with and accommodate Mr. Nikal's Band, the Wet'suwet'en, in respect of any licensing scheme as soon as they asserted an aboriginal right to fish.

32. The Court of Appeal's theory would have led to similar, immediately enforceable consultation rights in *R. v. Van der Peet*, [1996] 2 S.C.R. 507, *R. v. NTC Smokehouse Ltd.*, [1996] 2 S.C.R. 672, and *R. v. Pamajewon*, [1996] 2 S.C.R. 821, where aboriginal rights to sell fish and to gamble were asserted but not ultimately established.

33. This Court's decision in *Kitkatla, supra* is also relevant. There, the Kitkatla Band asserted aboriginal rights within an area included in a forest licence and expressed concerns over culturally modified trees and native heritage sites within the area to be harvested. The provincial Minister issued a site alteration permit under the *B. C. Heritage Conservation Act*, which would allow harvesting in an area of interest to the Band. The Band's applications for judicial review and an appeal to the British Columbia Court of Appeal were unsuccessful, and this Court dismissed the Band's further appeal. Apart from the result the following observations on this Court's decision in *Kitkatla* are relevant:

- (a) *Kitkatla* (at paras. 46-7) echoes concerns expressed in *Mitchell* about the indiscriminate use of oral evidence. These two decisions clarify *Delgamuukw* on this topic;
- (b) Overlapping claims diminish the weight of both (see para. 49 of *Kitkatla*);

- (c) Regulation of the interests of both native and non-native peoples is not precluded by the assertion of unproven interests under s. 35 of the *Constitution Act, 1982*, but is governed by the application of well-known jurisprudence relating to the division of legislative powers (see section F of *Kitkatla*);
- (d) The corollary is that rights claimed but not established are subject to the balancing analysis referred to in para. 64 of *Kitkatla*. Although s. 92A is not referred to; Lebel, J. found s. 92(13) of the *Constitution Act, 1867* (Property and Civil Rights) a sufficient source of provincial power as is evident from these extracts (emphasis added):

63 Consequently, any heritage conservation scheme inevitably includes provisions to make exceptions to the general projection the legislation is intended to provide. Such a permissive provision strikes a balance among competing social goals.

H. *Effect of the Provisions*

64 Having looked at the purpose of these provisions, I turn now to consider their effects. Sections 12(2)(a) and 13(2)(c) and (d) grant the Minister a discretion to allow the alteration or removal of aboriginal heritage objects....in the present case, the permit granted to the respondent Interfor allowed it to cut 40 out of about 120 standing CMTs within seven identified cutblocks....In other words, the effect here is the striking of a balance between the need and desire to preserve aboriginal heritage with the need and desire to promote the exploitation of British Columbia's natural resources.

I. *Effect on Federal Powers*

65the Court must then determine whether the pith and substance of ss. 12(2)(a) and 13(2)(c) and (d) fall within a provincial head of power or if, rather, they fall within a federal head of power. If the Court characterizes these provisions as a heritage conservation measure that is designed to strike a balance between the need to preserve the past while also allowing the exploitation of natural resources today, then they would fall squarely within the provincial head of power in s. 92(13) of the *Constitution Act, 1867* with respect to property and civil rights in the province.

66 On the other hand, one cannot escape the fact that the impugned provisions directly affect the existence of aboriginal heritage objects, raising the issue of whether the provisions are in fact with respect to Indians and lands reserved to Indians, a federal head of power under s. 91(24) of the *Constitution Act, 1867*. In

considering this question, the Court must assess a number of factors. First, the Court must remember the basic assumption that provincial laws can apply to aboriginal peoples; First Nations are not enclaves of federal power in a sea of provincial jurisdiction: see *Cardinal v. Attorney General of Alberta*, [1974] S.C.R. 695. The mere mention of the word “aboriginal” in a statutory provision does not render it *ultra vires*

The significance of *Kitkatla* case lies in its explicit recognition of the need and desire to promote the exploitation of British Columbia’s natural resources.

34. Another recent and relevant decision, *Wewaykum Indian Band v. Canada* [2002] SCC 79, is described at length in the Appellants’ Factum. This Court’s reasons confirm that not all obligations existing between the parties to a fiduciary relationship are themselves fiduciary, and that, in particular, not every obligation owed by the Crown to an aboriginal group is fiduciary in nature.

35. These examples illustrate that it is unworkable to construe s. 35 as creating an enforceable obligation on the Crown to accommodate asserted but not yet proven rights. To give priority to asserted rights prevents the Provincial Crown from striking the balance described by this Court. One obvious practical difficulty is how to restore the *status quo* if the aboriginal right in question is not ultimately established, or if infringement of an established right is found to have been justified. If third party interests have been negatively affected in the interim, how are those third parties to be compensated?

Immediate concerns about irreparable harm can be addressed by injunctive relief

36. It is submitted that in the case at bar, there is no justification for granting what amounts to a mandatory injunction requiring the immediate accommodation of asserted aboriginal rights. When considering a request for an extraordinary interim remedy, the Court should examine the components of the test for granting interim injunctive relief, as set out by this Court in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Second, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

37. If an aboriginal group can establish a *prima facie* right, and establishes that the right has been infringed or is in imminent danger of infringement, ordinary civil remedies such as injunctions are available. It may be remembered that in order to obtain an injunction, a plaintiff need not prove its claim on a balance of probabilities. The first prong of the test for the grant of an injunction requires only a serious question to be tried or a strong *prima facie* case. Absent proof sufficient to meet even this hurdle, however, it is inappropriate to grant what amounts to injunctive relief.

38. The distinction between aboriginal rights and aboriginal title is relevant to this analysis. Aboriginal rights are grounded in aboriginal culture and need not be attached to a particular geographical area. As this Court explained in *R. v. Van der Peet, supra*, an aboriginal right must be part of a practice, custom or tradition which was, prior to the contact with Europeans, an integral part of the distinctive aboriginal society of the aboriginal people in question. Thus, in the event that provincial legislation or regulation infringes established aboriginal rights, the justificatory analysis described in *R. v. Sparrow* will be engaged. If an aboriginal right is immediately threatened, however, and there is the risk of irreparable harm, an aboriginal group may seek injunctive relief through the courts.

39. Conversely, while some claims of aboriginal title may be linked with integral cultural practices that would constitute aboriginal rights, many claims of title are unrelated to aboriginal rights. As this Court said in *Delgamuukw, supra*, aboriginal title “confers the right to use land for a variety of activities, not all of which need be aspects of practices, customs and traditions which are integral to the distinctive cultures of aboriginal societies” (per Lamer C.J. at para. 111). Some aspects of aboriginal title may, of course, overlap with aspects of aboriginal rights. In such cases, interim remedies would be available to the aboriginal group that can establish the potential for irreparable harm if their aboriginal rights are infringed. In general, however, aboriginal title is essentially economic in nature. Like other economic interests, interference with aboriginal title can be compensated in damages. Thus, to the extent that an aboriginal group ultimately establishes aboriginal title and infringement of that title, and the Crown cannot justify the infringement, the appropriate remedy will be in the form of compensation from the infringing government actor.

40. This was made clear by Chief Justice Lamer in *Delgamuukw*, where he analyzed how the justificatory analysis would apply to infringement of aboriginal title. First, this Court explained that “the range of legislative objectives that can justify the infringement of aboriginal title is fairly broad”, at para. 165). Lamer C.J. said (emphasis added):

[165]...In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title....

[167] The exclusive nature of aboriginal title is relevant to the degree of scrutiny of the infringing measure or action. For example, if the Crown's fiduciary duty requires that aboriginal title be given priority, then it is the altered approach to priority that I laid down in *Gladstone* which should apply. What is required is that the government demonstrate (at para. 62) "both that the process by which it allocated the resource and the actual allocation of the resource which results from that process reflect the prior interest" of the holders of aboriginal title in the land...this might entail, for example, that governments accommodate the participation of aboriginal peoples in the development of the resources of British Columbia, that the conferral of fee simples for agriculture, and of leases and licences for forestry and mining reflect the prior occupation of aboriginal title lands, that economic barriers to aboriginal uses of their lands (e.g., licensing fees) be somewhat reduced.

[169] Second, aboriginal title, unlike the aboriginal right to fish for food, has an inescapably economic aspect, particularly when one takes into account the modern uses to which lands held pursuant to aboriginal title can be put. The economic aspect of aboriginal title suggests that compensation is relevant to the question of justification as well, a possibility suggested in *Sparrow* and which I repeated in *Gladstone*. Indeed, compensation for breaches of fiduciary duty are a well-established part of the landscape of aboriginal rights: *Guerin*. In keeping with the duty of honour and good faith on the Crown, fair compensation will ordinarily be required when aboriginal title is infringed. The amount of compensation payable will vary with the nature of the particular aboriginal title affected and with the nature and severity of the infringement and the extent to which aboriginal interests were accommodated....

41. Ultimately, if unjustified infringement of the Petitioners' aboriginal title were found, compensation could be ordered to address any negative economic effects on the aboriginal groups in question. Nothing in *Delgamuukw* leads to the conclusion that aboriginal groups with

as yet undefined rights or title can, on an interim basis, veto economic development in the public interest.

Policy considerations militate against freestanding duty to consult and accommodate before aboriginal rights are established

42. Policy considerations favour a decision by this Court that the exercise of provincial powers conferred by the *Constitution Act, 1867* does not give rise to an enforceable duty to consult and seek to reach accommodation with aboriginal groups where aboriginal rights are asserted:

- (a) Such a decision would remove one of the present obstacles to treaty negotiation created by the expectations of aboriginal groups relying on the decision under appeal;
- (b) Treaty remains the preferred solution. Recognition that s. 35 rights must be considered in conjunction with the exercise of provincial powers under ss. 92 and 92A of the *Constitution Act, 1867* will promote the treaty process and encourage reconciliation;
- (c) The alternative to treaty is a judgment of a court of competent jurisdiction. Where it becomes apparent that unproven claims will not be compensated in advance, aboriginal groups with strong claims will pursue them knowing that compensation will be available if unjustified infringement has taken place. In the meantime, injunctive relief is always available to prevent irreparable harm prior to the conclusion of litigation.

Conclusion

43. The Court of Appeal erred in declaring that the Provincial Crown has an enforceable constitutional and fiduciary duty to consult and seek to accommodate that arises on the assertion of aboriginal rights under s. 35 of the *Constitution Act, 1982*. Judicial consideration of such a duty is premature at the stage of assertion and is properly part of the justificatory process once a *prima facie* infringement has been proved. The Business Coalition submits that there can be no justiciable issue between the Provincial Crown and an aboriginal group with respect to the duty to consult and seek to accommodate until the *prima facie* infringement is proved. Once a *prima facie* infringement is established, it is appropriate to consider whether the infringement is justified; in the justification analysis, the Provincial Crown may raise, as a defence, its efforts to consult with and accommodate the aboriginal group in question. The fact that consultation is relevant in the justificatory analysis does not translate into a new and enforceable duty to consult

before any *prima facie* infringement is established. The Business Coalition submits that the new, positive obligation created by the Court of Appeal is not part of the rights that were recognized and affirmed by s. 35 of the *Constitution Act, 1982*.

PART IV

SUBMISSIONS ON COSTS

44. The Appellants have been ordered, as a condition of leave, to pay the costs of the Respondents Melvin Jack and the Taku River Tlingit First Nation. In these circumstances, the Business Coalition submits that it should not be required to pay the costs of any party. Pursuant to the order of Bastarache J. on May 28, 2003, the various interveners shall pay to the Appellants and Respondents any additional disbursements occasioned to them by the intervention. The Business Coalition will, in accordance with this order, pay any disbursements attributable to its intervention.

PART V

NATURE OF ORDER SOUGHT

45. The Business Coalition supports the Appellant's request for an order that the appeal be allowed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Charles F. Willms
Counsel for the Interveners
Business Coalition

PART VI

TABLE OF AUTHORITIES

	PARA. NO.
Cases	
<i>A.G.B.C. et al. v. Paul</i> , S.C.C. File No. 28974, June 11, 2003.....	11,12
<i>Calder v. Attorney General of British Columbia</i> , [1973] S.C.R. 313.....	25
<i>Canada v. Benoit</i> , 2003 FCA 236.....	30
<i>Delgamuukw v. British Columbia</i> , [1997] 3 S.C.R. 1010.....	14,26,33,39,40,41
<i>Gitksan First Nation v. British Columbia</i> , 2002 BCSC 1701.....	3,13
<i>Haida Nation v. British Columbia (Minister of Forests)</i> , 2002 BCCA 147.....	3
<i>Haida Nation v. British Columbia (Minister of Forests)</i> , 2002 BCCA 462.....	3
<i>Kitkatla Band v. British Columbia</i> , 2002 SCC 31	15,33
<i>Lax Kw'alaams Indian Band v. British Columbia</i> , 2002 BCSC 1075	11
<i>Manitoba v. Metropolitan Stores (MTS) Ltd.</i> , [1987] 1 S.C.R. 110	36
<i>Mitchell v. M.N.R.</i> , [2001] 1 S.C.R. 911.....	28,29,30
<i>New Brunswick Broadcasting Co. v. Nova Scotia</i> , [1993] 1 S.C.R. 319.....	24
<i>Ref. re Bill 30, An Act to Amend the Education Act (Ont.)</i> , [1987] 1 S.C.R. 1149	24
<i>R. v. Coté</i> , [1996] 3 S.C.R. 139	26
<i>R. v. Gladstone</i> , [1996] 2 S.C.R. 723	26,40
<i>R. v. Marshall</i> [1999] 3 S.C.R. 456 (“ <i>Marshall No. 1</i> ”)	27
<i>R. v. Marshall</i> [1999] 3 S.C.R. 533 (“ <i>Marshall No. 2</i> ”)	27
<i>R. v. N.T.C. Smokehouse Ltd.</i> , [1996] 2 S.C.R. 672.....	32
<i>R. v. Nikal</i> , [1996] 2 S.C.R. 1013	15,27,31
<i>R. v. Pamajewon</i> , [1996] 2 S.C.R. 821	32
<i>R. v. Sparrow</i> , [1990] 1 S.C.R. 1075	25,38,40

R. v. Van der Peet, [1996] 2 S.C.R. 50732,38
Wewaykum Indian Band v. Canada, 2002 SCC 7934

Articles

Ballem, “Oil and Gas under the New Constitution” 19,21
(1983), 61 *Can. Bar Rev.*547-558, at pp. 548-9

Cairns, Chandler and Moull, “Constitutional Change and the Private Sector 19
The Case of the Resource Amendment” (1986), 24 *Osgoode Hall Law Jo.* 299-313

Moull, “The Legal Effect of the Resource Amendment- 19,20,21
What’s New in Section 92A?”, in Meekison, Romanow and Moull,
*Origins and Meaning of Section 92A: the 1982 Constitutional Amendment
on Resources*, The Institute for Research on Public Policy (Montreal: 1985)