

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

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 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 HAIDA NATION and GUUJAAW,
on their own behalf and on behalf of all members of the Haida Nation

RESPONDENTS
(Appellants)

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to the Order of Iacobucci J. made November 24, 2003

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INTRODUCTION

1. This factum should be read in conjunction with Canada's factum filed July 21, 2003 in *Norm Ringstad v. Taku River Tlingit First Nation et al.* ("Taku") SCC No. 29146.

2. At issue in this appeal, *The Minister of Forests and Weyerhaeuser v. Haida* SCC No. 29419, is whether the Appellant British Columbia (the "Province") and/or Weyerhaeuser Company Ltd. ("Weyerhaeuser") have a legal obligation to consult with the Respondent Haida Nation (the "Haida") about potential aboriginal rights, including title, and possible infringement thereof, prior to issuing a replacement or transfer of Tree Farm Licence ("TFL") 39. In other words, does the Crown and/or private industry have a legal obligation to consult with aboriginal groups as to asserted, but unproven, aboriginal rights and title and, if so, is that obligation enforceable by an aboriginal group prior to it proving an aboriginal right or title, and *prima facie* infringement?

Court of Appeal Reasons at paras. 8, 9, Joint Record of the Appellants, Vol. I, pgs. 52, 53

3. Contrary to the finding of the Court of Appeal for British Columbia ("Court of Appeal"), Canada submits that there is no free-standing fiduciary, constitutional or other independent obligation to consult that is enforceable by an aboriginal group where they have claimed, but not established, aboriginal rights.

4. In answer to the question in this appeal, where the Crown is exercising a discretionary power of decision under a statutory regime that provides for or permits consultation and where an aboriginal group has claimed but not established aboriginal rights, Canada submits that there is a requirement on the Crown, both provincial and federal, to act in good faith and to seriously consider those potential aboriginal rights (this is referred to by Canada as the "*ex ante* requirement to consult"). This requirement will arise when an aboriginal group asserts an aboriginal right, as is the case here, or where it is reasonably within the decision maker's knowledge that an aboriginal right may exist.

5. As submitted by Canada in *Taku* (at paras. 3, 4 and 34), where the Crown is exercising a discretionary power of decision under a statutory regime with respect to

land or resources over which an aboriginal group asserts aboriginal rights under section 35 of the *Constitution Act, 1982*, R.S.C. 1985, App. II, No. 44, the constitutional values and purpose behind section 35 and the honour of the Crown are relevant to a consideration of how the Crown must exercise that statutory power. In such circumstances, the statutory regime will be interpreted to require the Crown to seriously consider the aboriginal rights claimed, absent a clear expression to the contrary.

6. The content of the requirement will vary depending on the circumstances. It will often, but not always, include face-to-face meetings. In fulfilling this requirement the Crown must seriously consider not only the potential aboriginal rights but, as well, the interests of the public and other stakeholders which would reasonably be expected to be affected by the Crown's decision. In assessing whether the limited *ex ante* requirement to consult has been met in particular circumstances, the Court should focus on the Crown's conduct.

7. Applying these principles to the circumstances and the statutory regime in this appeal, it is submitted that the applicable statutory provisions (quoted in part at paras. 13 to 17 hereof) can be interpreted to provide for or permit a limited *ex ante* requirement to consult in accordance with the principles set forth by Canada in its factum in *Taku*, particularly paras. 3 to 5, 34 to 42 and 46 to 62.

8. In the circumstances of this appeal, where the Haida assert that they have aboriginal rights, specifically title, over the land in question and as the TFL is a form of tenure granting significant rights over timber on the land, it is reasonable to conclude that the replacement or transfer of the TFL must be a topic of consultation in order to fulfill the limited *ex ante* requirement to consult.

9. Canada submits that private industry does not have a legal requirement to consult that is enforceable by an aboriginal group. That is not to say, however, that the Crown cannot impose requirements on private industry to consult with aboriginal groups prior to or as part of the Crown exercising a statutory power of decision. The Crown can and does impose such requirements. The Province has done so in this case.

PART I – STATEMENT OF FACTS

10. Canada generally agrees with the facts as set forth in the factum of the Province, particularly paragraphs 5 to 11 and 13 to 25. As well, Canada agrees with the statement of further developments as set forth at paragraphs 26 to 28 of the Province's factum and in the "Developments Since Judgment by B.C. Court of Appeal" filed under cover of letter dated November 7, 2003.

11. As referred to in paragraph 12 of the Province's factum, the Petition filed by Haida on January 13, 2000 was for a declaration that the replacement of TFL 39 is invalid or, alternatively, for *certiorari* to quash the replacement.

Amended Petition, Joint Record of the Appellants, Vol. 1, pgs. 189, 190

12. Canada says that the following further facts will also assist in deciding the issues in this appeal.

13. The applicable statutory provisions are found in the British Columbia *Forest Act*, R.S.B.C. 1996, c. 157 (the "*Forest Act*") and the *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159 (the "*Forest Practices Code*").

14. TFL 39 in favour of Weyerhaeuser was replaced (a defined term under the applicable legislation) in 2000. Section 36 of the *Forest Act* deals with replacement of a TFL. Section 36(3)(d) and (7) provide in material respects:

36 (3) A tree farm licence offered under this section must

(d) include other terms and conditions, consistent with this Act and the regulations, the *Forest Practices Code of British Columbia Act* and the regulations and the standards made under that Act, set out in the offer.

(7) If an offer made under this section is not accepted, the existing tree farm licence continues in force until its term expires, after which it has no further effect.

15. At the time of the decision to transfer TFL 39, section 54(1) of the *Forest Act* stipulated that a TFL could not be transferred between corporations without the consent of the Minister. Section 54(1) and (4) read:

(1) The minister's prior written consent must be obtained for

(a) the disposition of an agreement or an interest in an agreement,

(b) the change, or the acquisition or disposal, in one or a series of transactions, of control of a corporation that is the holder of an agreement or of another corporation that, directly or indirectly, controls that corporation,

(c) the amalgamation of a corporation, that is the holder of an agreement with another corporation, and

(d) the disposition of private land in the area subject to a tree farm licence or woodlot licence, or an interest in that private land.

(4) The minister or the minister's delegate may attach conditions to a consent given under subsection (1), and the person who is the subject of the consent must comply with the conditions.

Section 54 of the *Forest Act* now reads as set out in the Haida's factum at page 71.

16. Section 35(1)(d) and the definition of "cultural heritage resource" in section 1 of the *Forest Act* are also notable. Briefly, they recognize the importance of addressing aboriginal interests in the TFL.

17. The preamble to the *Forest Practices Code* provides, in part:

Whereas British Columbians desire sustainable use of the forests they hold in trust for future generations;

And Whereas sustainable use includes

(c) balancing economic, productive, spiritual, ecological and recreational values of forests to meet the economic, social and cultural needs of peoples and communities, including First Nations, . . .

Therefore Her Majesty, . . . enacts as follows...

18. In August 1999, the Province informed the Haida that MacMillan Bloedel Limited ("MB") (Weyerhaeuser's predecessor company) had requested the Minister's consent to transfer TFL 39 to Weyerhaeuser, and that public meetings would be held to identify social and economic impacts that a change in control may have on potentially affected people and communities.

Affidavit of Douglas Caul, Joint Record of the Appellants Vol. IV, pg. 548

19. The Province informed the Haida in August and September of 1999, that it intended to replace TFL 39. In September 1999, the Province sent MB a replacement offer, stating the following as to the Haida's asserted aboriginal rights and title:

You will be aware that we are involved with litigation and negotiation with the Haida Nation on their assertions of aboriginal rights and title. If it is determined that the timber on any of the land is encumbered by a court of competent jurisdiction, the TFL may have to be amended to reflect the extent of any such encumbrance as may be so determined. We also acknowledge that mutually agreeable arrangements may be reached, which would include the licensee and local communities, that may result in the need to amend the TFL agreement.

Affidavit of Brad Harris, Joint Record of the Appellants, Vol. III, pgs. 451 and 457

20. In September 1999, the Haida made submissions to the Public Review Chairperson on the proposed transfer. The Haida requested assurances that if the transfer proceeded it would be subject to the Haida's claims to aboriginal rights and title and that Weyerhaeuser would not claim compensation if lands were removed from TFL 39 as a result of negotiations between the Province and the Haida.

Affidavit of Ernie Collison, Joint Record of the Appellants, Vol. II, pg. 288

21. In October 1999, the Province approved the transfer of control of TFL 39 from MB to Weyerhaeuser.

Affidavit of Ernie Collison, Joint Record of the Appellants, Vol. II, pg. 288

22. In November of 1999, Weyerhaeuser accepted the replacement offer and the Province issued the replacement of TFL 39 to Weyerhaeuser in February 2000.

Affidavit of Brad Harris, Joint Record of the Appellants, Vol. III, pg. 452

23. On November 14, 2002, after the Court of Appeal judgment subject of this appeal, the Haida commenced an action in the Supreme Court of British Columbia claiming aboriginal title and rights to the Queen Charlotte Islands. That action is in the pre-trial stages.

PART II - ISSUES

24. The issues are as set out by the Province at paragraphs 29 and 30 of its factum. Canada is bound to accept the issues as framed by the parties but, nevertheless, submits that the issues on appeal may be fairly stated as follows (and as set out in para. 2 of Canada's factum filed in *Taku*).

How may any *ex ante* requirement to consult, if it exists, be defined and applied in a manner that allows the Crown, both provincial and federal, to strike a workable balance between its proprietary interests and statutory duties, its obligations to First Nations, and the public interest at large?

25. The Constitutional Question stated by the Court on July 3, 2003 reads as follows:

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 R.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

A. The Limited *Ex Ante* Requirement to Consult Under the Statutory Regime

26. The Crown, both provincial and federal, should always act towards aboriginal people in a manner consistent with the constitutional values and purpose behind section 35 of the *Constitution Act, 1982*, (namely, the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown: *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 141 [Canada's Authorities, Tab 2]), and consistent with the honour of the Crown. This principle will manifest itself in two primary ways. First, the applicable statutory regime should be interpreted in accordance with this principle. Second, the Crown's actions in the exercise of a statutory power of decision should be judged in light of this principle.

27. As stated above, prior to the establishment of an aboriginal right (the "pre-proof stage") the proper focus is on the Crown's conduct in the context of the applicable statutory regime. The Court of Appeal fell into error when it suggested that the protection of aboriginal rights, including title, is the focus of the inquiry prior to the establishment of a right.

28. Contrary to the decision of the Court of Appeal, at the pre-proof stage there is no fiduciary or constitutional duty to consult with aboriginal groups or to accommodate potential aboriginal rights that may exist. It is both unnecessary and inappropriate to resort to fiduciary law or a constitutional duty at this early stage. Prior to the establishment of an aboriginal right or title, all parties operate in an environment of uncertainty, namely, uncertainty as to whether there is an existing aboriginal right and its content, uncertainty as to the rights holders in some cases, and uncertainty regarding the implications of the proposed activities on the alleged aboriginal right.

29. Where an aboriginal right or title may exist and the Crown is exercising a statutory power of decision that may infringe that potential right, the statutory regime under which the power is being exercised should be read, if it reasonably can be, to

include a limited *ex ante* requirement to seriously consider potential aboriginal rights, as explained in paragraphs 4, 5, and 46 to 62 of Canada's factum in *Taku*.

30. In those instances where a statutory regime, properly interpreted, precludes consultation at the pre-proof stage (which, it is submitted, is not the case here), then an aboriginal group would need to proceed to prove an aboriginal right, and *prima facie* infringement thereof, prior to the Crown being legally obliged to justify the infringement. The existence and sufficiency of prior consultation by the Crown will then form part of the justificatory analysis.

31. Proof of an aboriginal right is required as a prerequisite to challenging the constitutionality of a statutory provision.

32. The statutory regimes in these appeals illustrate how the above stated approach can be applied. The applicable statutory provisions in *Taku* required that the Ministers make a discretionary decision after engaging in a consultation process under the British Columbia *Environmental Assessment Act*, R.S.B.C. 1996, c. 119. Therefore, in *Taku*, it is fairly straightforward to read into the applicable statute and the mandatory statutory consultation process undertaken by the Crown, a requirement to take an aboriginal group's assertions and interests seriously.

33. In contrast to the statutory regime in *Taku*, the statutory provisions applicable in this appeal do not expressly provide for consultation with aboriginal groups or other interested parties at the TFL replacement or transfer stage within the *Forest Act*. Moreover, there is little discretion for the Minister to refuse to issue the TFL replacement if certain criteria are met.

34. However, section 36 (replacement) and section 54 (transfer) of the *Forest Act* provide the Minister with authority to attach conditions to a TFL replacement or transfer. The conditions must be consistent with the *Forest Act* and the *Forest Practices Code*. The Minister must include conditions in a replacement and may attach conditions to a transfer.

35. The *Forest Act*, particularly section 35(1), and the preamble to the *Forest Practices Code* make it clear that recognition shall be given to the economic, social and cultural needs of First Nations or aboriginal groups. Canada submits that the requirement to impose conditions on a replacement and the discretion to impose conditions on a transfer, together with the clear legislative direction to consider aboriginal interests are sufficient to find that the applicable statutory regime provides for or permits the application of the limited *ex ante* requirement to consult.

36. In the circumstances of this appeal, where the Haida assert that they have aboriginal rights, specifically title, over the lands in question and as the TFL, covering approximately 25% of the lands, is a form of tenure granting significant rights over timber on the land, it is reasonable to conclude that the replacement or transfer of the TFL must be a topic of consultation in order to fulfill the limited *ex ante* requirement to consult.

37. If, contrary to the foregoing, the Court were to find that the applicable statutory provisions, properly interpreted, preclude consultation then there is no obligation to consult that is enforceable prior to proof of an aboriginal right. The Haida would be required to prove their claim of aboriginal rights, including title, and any infringement thereof, prior to the Province having to justify a *prima facie* infringement of the rights.

38. It is important to remember that even where a statutory regime does not provide for or permit a limited *ex ante* requirement to consult in the pre-proof stage, an aboriginal group is not without legal rights or a potential remedy. An interlocutory injunction remains a powerful remedy available to aboriginal groups in appropriate circumstances (where there is a strong *prima facie* case or a serious question to be tried, where irreparable harm is established, and where the balance of convenience favours the aboriginal position).

B. The Nature and Content of the Limited *Ex Ante* Requirement to Consult

39. Canada does not take a position as to the appropriate form or content of consultation under the applicable provincial statutory regime and in the circumstances existing in this appeal. Nor does Canada take a position on the sufficiency of the actions of the Province in fulfilling any obligation to the Haida in the circumstances existing in this appeal.

40. Canada has submissions, however, as to the principles that ought to apply to the limited *ex ante* requirement to consult. As stated in *Delgamuukw*, *supra*, at para 168, the nature and content of the Crown's limited *ex ante* requirement to consult will vary with the circumstances. All of the circumstances must be considered but factors that may affect the content of the *ex ante* requirement include:

- a) the nature of the potential aboriginal right;
- b) the strength of the claim;
- c) the likelihood of the potential infringement;
- d) the severity of the potential infringement; and
- e) the imminence of the potential infringement.

41. In appropriate circumstances, the scope of the *ex ante* requirement to consult may also be tempered by the urgency, in the sense of an imminent threat to life or property, and importance of the Crown objective and by the implications of delaying the decision in question on third parties.

***Klahoose First Nation v. British Columbia (Minister of Forests)*, [1996] 1 W.W.R. 757, [1995] BCJ No. 2033 (B.C.S.C.); appeal dismissed, at para. 20 [Canada's Authorities, Tab 6]**

42. In many cases, the Crown will have to:

- a) ensure the aboriginal group is provided with relevant information in a timely manner;
- b) inform itself of the concerns of the aboriginal group;
- c) engage the aboriginal group regarding the project so the aboriginal group has an

- opportunity to articulate its concerns on the effects of the proposed action;
- d) seriously consider the representations of the aboriginal group; and
- e) seriously consider opportunities for mitigating potentially deleterious effects on the aboriginal group.

43. At one end of the spectrum - where an aboriginal rights claim is relatively weak and/or where the potential infringement is minor - the Crown's *ex ante* requirement to consult may require no more than providing adequate notice, gathering and sharing relevant information and acting in a procedurally fair manner towards the aboriginal group. Where the Crown must act with urgency, in the sense of an imminent threat to life or property, even these minimal elements may not be in place prior to the alleged infringement.

44. At the other end of the spectrum - where an aboriginal rights or title claim is strong, where the potential infringement is imminent and severe, and where the Crown is not required to act urgently - the Crown's *ex ante* requirement to consult would require more of the Crown in seriously considering the concerns of the aboriginal group.

45. The Crown's *ex ante* requirement to consult does not include a requirement to obtain the consent of the aboriginal group in question. Nor does the limited *ex ante* requirement to consult include a substantive requirement to accommodate, in the sense of ensuring the plan of action minimizes the potentially deleterious effects on the aboriginal group, unless the failure to do so is arbitrary or in bad faith. To equate consultation with accommodation of potential aboriginal rights or consent of the aboriginal group is clearly inappropriate in the pre-justification context where rights remain uncertain.

46. In reviewing whether the *ex ante* requirement to consult has been met, the Crown's determination of what is required to meaningfully address the concerns of the aboriginal group should not be set aside by the courts unless the Crown's conduct is arbitrary or the Crown has acted in bad faith. The standard of review is further explained in Canada's factum in *Taku* at paras. 63 to 65.

47. The Court has made it clear that the concept of reasonableness will form an integral part of any assessment of consultation between the Crown and aboriginal groups. The requirement of reasonableness implies that consultation must be a "two-way street".

Eastmain Band v. Canada (Federal Administrator), [1992] F.C.J. No. 1041 (F.C.A.) at para. 28, [Canada's Authorities, Tab 3]

R. v. Badger, [1996] 1 S.C.R. 771, [Canada's Authorities, Tab 9]

R. v. Nikal, [1996] 1 S.C.R. 1013 at pg. 1065, [Canada's Authorities, Tab 12]

Kelly Lake Cree Nation v. Canada, [1999] 3 C.N.L.R. 126, [1998] BCJ No. 2471 (B.C.S.C.) at para. 243, [Canada's Authorities, Tab 5]

Heiltsuk Nation v. British Columbia (Minister of Sustainable Resource Management), [2003] B.C.J. No. 2169 (B.C.S.C.), [Province's Authorities, Tab 11A]

48. As stated by Finch J.A. (now CJ) in *Halfway River First Nation v. British Columbia (Ministry of Forests)* (1997), 39 B.C.L.R. (3d) 227 (B.C.S.C.), affirmed on appeal, (1999), 64 B.C.L.R. (3d) 206, 1999 BCCA 470 (B.C.C.A.) at para. 161, [Province's Authorities, Tab 11]:

...There is a reciprocal duty on Aboriginal Peoples to express their interests and concerns once they have had the opportunity to consider the information provided by the Crown, and to consult in good faith by whatever means are available to them. They cannot frustrate the consultation process by refusing to meet or participate, or by imposing unreasonable conditions.

49. Canada therefore submits that if aboriginal groups refuse to reasonably or meaningfully participate in a reasonable consultation process, they may forego their right to be consulted.

50. Moreover, the Crown's *ex ante* requirement to consult does not necessarily require the Crown to create a distinct process of consultation with the interested aboriginal group. The question to be answered is whether, in all of the circumstances, the Crown's *ex ante* consultation process with the interested aboriginal people is reasonable and adequate and is consistent with the Crown acting in good faith and having seriously considered the potential impact of the Crown actions on claimed aboriginal rights, including title.

C. The Court of Appeal Erred in Finding a Fiduciary and Constitutional Duty to Consult and Accommodate

51. The following submissions are further to those made by Canada at paras. 29 to 33 of its factum in *Taku*, as to why the limited *ex ante* requirement to consult is not a constitutional or fiduciary duty.

52. The Court of Appeal made three fundamental errors in finding that the Crown has a constitutional and fiduciary duty to consult the Haida when aboriginal rights or title have been asserted, but before they have been proven to exist.

(i) No Authority to Support a Free-standing Duty of Consultation

53. It is submitted that the Court of Appeal misconstrued the judgments of this Court in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, [Canada's Authorities, Tab 13], *R. v. Gladstone*, [1996] 2 S.C.R. 723, [Canada's Authorities, Tab 10] and *Delgamuukw*, *supra*, in saying they support the existence of an independent duty of consultation prior to the proof of aboriginal rights.

54. The judgments of this Court in *Sparrow*, *Gladstone* and *Delgamuukw* raise consultation in the context of the requirement that an infringement of established aboriginal rights must be justified by the Crown. These judgments do not create a duty of consultation per se. Rather, they raise consultation as one of the factors to take into account in determining whether the Crown can justify an infringement of an established aboriginal right.

55. *Sparrow*, *Gladstone* and *Delgamuukw* speak of consultation as a prelude to infringement, wholly within the context of the justification test. The jurisprudence of this Court has not established a free-standing duty of consultation independent of an established right and its *prima facie* infringement.

Thomas Isaac, "The Crown's Duty to Consult and Accommodate Aboriginal People", (2003) Vol. 61, Part 6, *The Advocate*, pg. 865 at pg. 871 [Canada's Authorities, Tab. 16]

(ii) No Plenary Fiduciary Duty

56. The Court of Appeal incorrectly equated the fiduciary or trust-like relationship between the Crown and aboriginal peoples with specific fiduciary duties to particular aboriginal groups that can arise in certain circumstances.

57. At paras. 34 and 36 of the judgment under appeal, the Court of Appeal states:

The trust-like relationship is now usually expressed as a fiduciary duty owed by both the federal and provincial Crown to the aboriginal people. Whenever that fiduciary duty arises, and to the extent of its operation, it is a duty of utmost good faith.

...
So the whole trust-like relationship and its concomitant fiduciary duty permeates the whole relationship between the Crown, in both of its sovereignties, federal and provincial, on one hand, and the aboriginal peoples on the other...

Court of Appeal Reasons, Joint Record of the Appellants, Vol. I, pgs. 71 to 72

58. This Court has repeatedly made the distinction between the finding of a fiduciary relationship and a fiduciary obligation. “[N]ot all obligations existing between the parties to a fiduciary relationship are themselves fiduciary in nature”: *Wewaykum Indian Band v. Canada*, 2002 SCC 79, para. 83 citing *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, [Canada’s Authorities, Tab 15] .

59. In *M.K. v. M.H.*, [1992] 3 S.C.R. 6, at page 65, [Canada’s Authorities, Tab 7], this Court outlined the essence of the fiduciary relationship, the duty of loyalty, but emphasized that “not every legal claim arising out of a relationship with fiduciary incidents will give rise to a claim for breach of fiduciary duty...”

60. This Court has also clarified that:

...It is necessary, then, to focus on the particular obligation or interest that is the subject matter of the particular dispute and whether or not the Crown had assumed discretionary control in relation thereto sufficient to ground a fiduciary obligation.

***Weywakum, supra*, at para. 83**

61. As such, in order to find a fiduciary duty on the Crown to a particular aboriginal group, the Court must find something more than the existence of the general fiduciary relationship between the Crown and aboriginal peoples. This would include establishing that in exercising its discretionary powers pursuant to the *Forest Act*, the Crown took on a fiduciary role and a corresponding fiduciary obligation to act in the best interests or for the benefit of the aboriginal group (found in, *Guerin v. The Queen*, [1984] 2 S.C.R. 335, [Canada's Authorities, Tab 4], *Apsassin v. The Queen*, [1995] 4 S.C.R. 344, [Canada's Authorities, Tab 1]); that the Crown has interposed itself as the exclusive intermediary to deal with the interests of the aboriginal group in a way that invokes responsibility in the nature of a private law duty (such as in *Osoyoos Indian Band v. Town of Oliver*, [2001] 3 S.C.R. 746, [Canada's Authorities, Tab 8]); or that the Crown undertook to act on the aboriginal group's behalf (such as in *Weywakum, supra*).

62. The Court of Appeal did not examine whether the indicia necessary to find a fiduciary duty were present in the circumstances of the appeal.

63. The Court of Appeal did not conclude that the Crown undertook, either expressly or by implication, to administer the *Forest Act* and deal with the lands subject to that Act in such a way as to benefit solely, or to act in the best interests of, the Haida. Nor did the Court of Appeal find that the Crown had interposed itself as the exclusive intermediary to deal with the interests of the Haida or in a manner that reflects a private law duty or to act on their behalf.

64. Canada submits that the indicia of a fiduciary duty are not present in the circumstances of this appeal. The Crown did not undertake, either expressly or by implication, to administer the *Forest Act* and deal with the lands subject to that Act in such a way as to benefit solely, or to act in the best interests of, the Haida. The Crown did not interpose itself as the exclusive intermediary to deal with the interests of the Haida in a manner that reflects a private law duty or to act on their behalf.

***Weywakum supra*, at paras. 83, 86 and 91 to 93**

65. The Crown was acting entirely in its public law capacity when making decisions pursuant to the *Forest Act*. In that capacity, the Crown was required to balance a variety of interests, including interests particular to aboriginal groups, as referred to in the preamble to the *Forest Practices Code*.

(iii) Asserted Constitutional Rights Do Not Have the Same Force and Effect as Established Constitutional Rights

66. The Court of Appeal, in its consideration of section 35 of the *Constitution Act, 1982*, confused claimed constitutional rights with established constitutional rights.

67. At para. 37 of the judgment under appeal, the Court of Appeal stated that:

It would be contrary to that guiding principle [government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples: *Sparrow supra* at para. 1108] to interpret section 35(1), which reads in this way:

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

as if it required that before an aboriginal right could be recognized and affirmed it first had to be made the subject matter of legal proceedings; then proved to the satisfaction of a judge of competent jurisdiction; and finally made the subject of a declaratory or other order of the court.

Court of Appeal Reasons, Joint Record of the Appellants, Vol. I, pg. 72

68. The Court of Appeal is correct to say that section 35(1) recognizes and affirms existing aboriginal rights. The term "existing" means those rights that were in existence and not extinguished when the *Constitution Act, 1982* came into effect: *Sparrow, supra*, at pg. 1091.

69. Prior to the proof of a claimed aboriginal right, however, it is uncertain whether and to what extent that aboriginal right exists. If, for example, the claimed right is subsequently found to not exist, there can be no infringement and equally no duty to consult.

70. In describing the “timing fallacy” at paras. 41 and 42 of the Court of Appeal Reasons, the Court of Appeal has committed a content fallacy. The constitutional and fiduciary duties to consult, described by the Court of Appeal are premised on the existence of an underlying aboriginal right. Section 35 does not contain a stand-alone right to consultation and cannot serve as the legal basis for a free-standing obligation to consult.

Court of Appeal Reasons, Joint Record of the Appellants, Vol. I, pgs. 75, 76
***TransCanada Pipelines Ltd. v. Beardmore (Township)* (2000), 186 D.L.R.**
(4th) 403 (Ont. C.A.) at para. 112, [Canada’s Authorities, Tab 14]

71. As Thomas Isaac writes in his article, “The Crown’s Duty to Consult and Accommodate Aboriginal People”, *supra*, at pg. 872:

Thus, the use of a *prima facie* case of Aboriginal title, for example, cannot, by its very nature, provide the rights and entitlement of proven Aboriginal title. To suggest otherwise runs opposite to all of the SCC decisions to date in this area which clearly require rights to be proven.

72. The Court of Appeal incorrectly assumes that all claimed aboriginal rights will be shown to be existing aboriginal rights. With respect, that is logically and factually incorrect.

73. If upheld, the Court of Appeal approach could lead to a finding that the Crown has breached a duty to consult in relation to what may later be shown to be a non-existent aboriginal right. It is not that a requirement to consult arises only after a right is proven, as part of the justification process, but, rather, that there is no sound basis for the Court to find and enforce a constitutionally protected duty to consult without proof that the constitutionally protected aboriginal right exists in the first place.

D. Response to Submissions Made by the Haida

74. In this appeal, the existence of the asserted rights and title remain uncertain. The Haida overshoot the mark when they say at para. 67 of their factum that the Crown has a fiduciary duty to consult. While Canada agrees that a specific Indian interest

coupled with the Crown undertaking discretionary control can give rise to a fiduciary duty in some circumstances, the Haida are premature in saying at para. 68 of their factum that the interest in this appeal is the “unextinguished Aboriginal Title and Rights of the Haida”. The very point on appeal is that the asserted rights and title have not been proven and, as such, at this stage of the proceedings there is nothing that can give rise to constitutional or fiduciary obligations or remedies.

75. At paras. 65 to 68 of their factum, the Haida start by asserting that they have aboriginal rights and title over the specified lands, then make the unjustified leap from making assertions to treating them as existing rights and so capable of supporting fiduciary and constitutional duties.

76. At para. 83 of their factum, the Haida submit that the context of this appeal is similar, but not identical, to that in *Guerin, supra*. That is incorrect. In *Guerin, supra*, the Musqueam Band had a vested interest in reserve lands that had been surrendered for lease, and the Crown had a corresponding legal duty to act in the Musqueam Band's best interests. This duty arose from the statutory provisions providing for the surrender of the reserve lands and the surrender itself.

77. The Court held that the Crown had not fulfilled the terms of surrender for lease and had not acted in the best interests of the Musqueam Band when agreeing to alternate terms on their behalf. The Crown exercised discretionary control over an Indian interests, namely the Musqueam Band's interest in the surrendered reserve lands. The Crown had a duty to ensure that the lease entered into was on terms agreed to by the Musqueam Band, and no other terms. The Court found that the Crown's conduct was in breach of its specific fiduciary duty.

78. In this appeal, the Haida have asserted rights and title, but they have not, to this point, established that they have aboriginal rights or that the Crown has undertaken to act in their best interests.

79. Contrary to the Haida's submissions at para. 112 of their factum, section 35 does not prevent unjustified infringements of potential aboriginal rights before they occur. It

recognizes and affirms existing aboriginal rights and, together with section 52, affords a remedy for an actual unjustified infringement of an existing right.

E. The Limited *Ex Ante* Requirement to Consult Applies Only to the Crown

80. In its factum in *Taku*, Canada submits that the Court does not need to consider whether the *ex ante* requirement to consult would apply to provincial legislatures and Parliament in the enactment of statutes or regulations. This submission applies in this appeal as well.

81. The Haida submit at para. 66 of their factum that a duty to consult and, in their words, accommodate arises when a representative of the Crown contemplates an exercise of discretion with knowledge that the exercise of discretion may infringe aboriginal rights and title.

82. Canada submits that any *ex ante* requirement to consult that is imposed by the Court should be limited, in this context, to Crown officials exercising a discretionary decision making power under a statutory regime.

83. The requirement should not be extended to those who act on a quasi-judicial or judicial basis in making decisions.

84. In the early years, the Imperial Crown dealt with the aboriginal people in Canada and, following negotiation, struck accords with them. The provincial legislatures and the federal Parliament later assumed the role and responsibilities previously held by the Imperial Crown. The federal Crown has exclusive legislative jurisdiction over "Indians and lands reserved for Indians" under s. 91(24) of the *Constitution Act, 1867* R.S.C. 1985, App. II No. 5. However, that does not oust historical provincial responsibilities towards aboriginal peoples. Both the federal and provincial Crown may have a limited *ex ante* requirement to consult arising under a statutory regime in circumstances where the exercise of a statutory power of decision may affect potential aboriginal rights.

Delgamuukw, supra, at pgs. 1108 to 1109

Wewaykum, supra, at para. 82

85. This limited *ex ante* requirement to consult does not extend to private industry. The historical relationship between the Crown and aboriginal people is unlike any other, both as to its origins and as to its nature and evolution. Further, the Crown, through Her government and legislatures, has executive and legislative powers over aboriginal people, resources and land that others do not.

86. The Crown, both provincial and federal, exercises its executive and legislative authority to achieve a wide variety of objectives and in doing so, must balance various competing interests. The exercise of a statutory power, together with the need to interpret and apply that statutory power of decision in a manner consistent with constitutional values and purpose, including those behind section 35 of the *Constitution Act, 1982* and with the honour of the Crown, is what gives rise to and shapes the limited *ex ante* requirement to consult that applies to the Crown only.

87. Canada agrees with the submissions made by the Province at paras. 122 to 132 of its factum that there is no requirement on private industry, such as Weyerhaeuser, to consult with an aboriginal group that is enforceable by an aboriginal group at the pre-proof stage. Private industry does not have the same historical and fiduciary relationship with aboriginal people as does the Crown. Further, private industry does not normally exercise a statutory decision making role pursuant to legislative authority.

88. It is ultimately the Crown who must consider and account for aboriginal interests that may be affected by its actions. Weyerhaeuser is the recipient of a licence granted by the Crown. While it is clearly prudent for Weyerhaeuser to inform itself of aboriginal interests and concerns, and to impart information to aboriginal groups, it is not a statutory decision maker.

***R. v. Marshall No. 1*, [1999] 3 S.C.R. 456, at para. 43, [Canada's Authorities, Tab 11]**

89. It is open to the Crown to impose participatory or other obligations on private industry to consult with aboriginal groups as part of a decision-making or approval process. In fact, TFL 39 sets out consultation requirements for Weyerhaeuser. Those obligations are enforceable by the Crown.

F. The Remedy Granted by the Court of Appeal

90. Canada agrees with the judicial caution exercised by the Court of Appeal in the remedy granted in this case, namely a declaration as to rights, but not quashing or setting aside the TFL: Court of Appeal Reasons, Joint Record of the Appellants, Vol. I, pg. 87, 160 to 61 and 171. This is consistent with Canada's submissions in *Taku* at para. 66 where it is submitted that courts should grant relief only to the extent necessary to do justice between the parties.

91. Canada's disagreement with the judgment of the Court of Appeal concerns the source and extent of the *ex ante* requirement to consult as articulated by the Court of Appeal. As submitted by Canada's factum in *Taku* at paras. 66 to 74, the *ex ante* requirement to consult:

- a) ought properly to be founded in the applicable statutory regime by interpreting and applying the statutory power of decision in a manner consistent with the constitutional values and purpose behind section 35, and with the honour of the Crown. The requirement is not an independent or free-standing duty, and
- b) entails consultation, but not a substantive requirement to accommodate, in the sense that the Crown is not required to ensure that the plan of action minimizes any potentially deleterious effects on the aboriginal group, unless the failure to do so could be described as patently unreasonable or in bad faith. The factors to consider and steps to take are set out at paragraphs 39 and 41 hereof.

92. If, in a given case, a Court determines that an *ex ante* requirement to consult has been breached, then the appropriate remedy at the pre-proof stage is for the Court to make a declaration to that effect.

93. In this Petition, the Haida sought a declaration that TFL 39 is invalid or, alternatively, an order of *certiorari* to quash the replacement and transfer of TFL 39.

94. The Court of Appeal, even in finding for the Haida, declined to grant the relief sought. Instead, the Court of Appeal granted a declaration that the Crown and Weyerhaeuser have legally enforceable duties to consult with the Haida and to seek workable accommodations.

Court of Appeal Additional Reasons at para. 104, Joint Record of the Appellants, Vol. 1, pg. 160

95. The Court of Appeal is correct in saying that the proper time to determine the validity of the TFL is at the same time as the determination of aboriginal rights and title, *prima facie* infringement and justification.

Court of Appeal Reasons at para. 59, Joint Record of the Appellants, Vol. I, pg. 86

96. The aim of any remedy granted by the Court should be to encourage a negotiated resolution of outstanding issues between the Crown, the Haida, and Weyerhaeuser.

G. A Concluding Point

97. In its judgment, the Court of Appeal developed

[A]n alternative framework for dealing with the reconciliation of claims to constitutionally protected aboriginal title and aboriginal rights, and the public interest, both aboriginal and non-aboriginal, in the elusive economic prosperity of the primary industries of the province.

Court of Appeal Reasons at para. 11, Joint Record of the Appellants, Vol. I, pg. 53

98. The Court of Appeal made it clear that the *animus* behind this alternative framework was the Court's concern as to what the Crown might do. In this regard, the Court of Appeal stated at para. 10:

...If the Crown can ignore or override aboriginal title or aboriginal rights until such time as the title or rights are confirmed by treaty or by judgment of a competent court, then by placing impediments on the

treaty process the Crown can force every claimant of aboriginal title or rights into court and on to judgment before conceding that any effective recognition should be given to the claimed aboriginal title or rights, even on an interim basis.

Court of Appeal Reasons, Joint Record of the Appellants, Vol. I, pg. 53

99. The Court of Appeal provided no basis for raising the possibility of the Crown "placing impediments on the treaty process". The courts should always presume that the Crown will act in good faith.

R. v. Badger, supra, at para. 41

100. In fact, the Province has led a great deal of evidence that it has engaged the Haida in discussions regarding aboriginal rights and title and that the Province has ensured that these claimed aboriginal rights and title are considered in the forestry process, including at the management plan and cutting permit stages. Aboriginal rights that are recognized and affirmed are not absolute even once they are proven to exist. They must be reconciled with Crown sovereignty and balanced with competing interests.

Delgamuukw, supra, at pg. 1109

101. Again, the remedy of an interlocutory injunction exists to protect claimed rights prior to their proof. The Court of Appeal acknowledged the availability of this remedy as a "valuable interim process" but stated that the process is "not necessarily suitable for balancing competing interests in every case". The Court of Appeal did not provide an explanation why interlocutory injunctions were "not necessarily suitable" and why the "alternative framework" was necessary. It is submitted that the remedy of injunction is a powerful and inherently flexible tool to address apprehended harm to asserted rights prior to any such rights being established.

Court of Appeal Reasons at paras. 12 to 14, Joint Record of the Appellants, Vol. I, pgs. 54, 55

102. Canada submits that the *ex ante* requirement to consult combined with the interlocutory injunction remedy is wholly sufficient to reconcile and balance the competing interests at issue prior to the proof of claimed aboriginal rights, including title. Put otherwise, there is no need for the Court to create or invoke a novel "alternative framework", especially one that might have far reaching and unforeseen consequences.

103. The *ex ante* requirement to consult put forth by Canada, grounded as it is in the applicable statutory regime, is preferable over the alternative framework developed by the Court of Appeal and supported by the Haida in striking a workable balance between the Crown's proprietary interests and statutory duties, its obligations to aboriginal people, and to the public interest at large when considering potential aboriginal rights and possible infringement thereof as against other factors, such as resource development. Canada's approach will ensure consultation in most cases where aboriginal rights are asserted; it will minimize reliance on litigation as a means of determining the nature and scope of aboriginal rights; and, through declaratory remedies, it will also foster negotiations to resolve aboriginal rights claims.

H. The Constitutional Question (reproduced at para. 25 hereof)

104. The Province and Weyerhaeuser submit that the Constitutional Question should be answered in the negative (Province's factum, para.137; Weyerhaeuser's factum, para. 121). The Haida submit that the Question need not be answered (the Haida's factum, para. 207).

105. It has already been submitted by Canada that prior to an aboriginal group establishing an aboriginal right or title and any infringement thereof that the Court finds is unjustifiable, the limited *ex ante* requirement to consult is grounded in the applicable statutory regime. This limited *ex ante* requirement is not a constitutional duty under section 35 of the *Constitution Act, 1982*, nor a fiduciary duty, at the pre-proof stage.

106. Further and as already submitted, if a statutory regime, properly interpreted, does not permit consultation with aboriginal groups about potential aboriginal rights, and any

infringement thereof, prior to the establishment of those rights, then the aboriginal group must proceed to prove their claim.

107. Section 35(1) of the *Constitution Act, 1982* reads:

The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

108. Asserted but unproven rights that are disputed may or may not be "existing". The possible existence of an aboriginal right cannot be the basis for a remedy under section 52 of the *Constitution Act, 1982*.

109. The *Constitution Act, 1982*, section 52(1) reads:

The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

110. Section 52 provides a remedy to those who possess, not those who claim, rights. Where an aboriginal right is proven and firmly established, the remedy offered by section 52 comes into effect.

111. A section 52 remedy is not available on the basis of an unproven claim to a section 35 aboriginal or treaty right. It is necessary to prove the existence of a section 35 right, to establish its nature and scope (section 35 rights are site and fact specific), and to establish an unjustified infringement, in order to obtain a constitutional remedy. A section 52 remedy is not available outside the *Sparrow* framework. Put another way, proof of an aboriginal right is required as a prerequisite to challenging the constitutional validity of a statutory provision.

***Marshall, supra*, at para. 112**

112. It is submitted that the Constitutional Question does not need to be answered in this appeal. However, if the Court finds that the Constitutional Question needs to be answered, then it should be answered in the negative.

PART IV – COSTS

113. Canada does not seek costs in this appeal, and submits that Canada should not be responsible for any party's or intervener's costs.

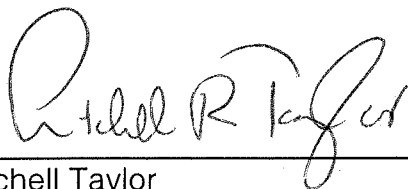
PART V – NATURE OF ORDER SOUGHT

114. Canada respectfully requests that this appeal be determined in accordance with the foregoing principles.

115. Canada further respectfully submits that the Constitutional Question does not need to be answered. If, however, the Court finds that the Constitutional Question needs to be answered, it should be answered in the negative.

All of which is respectfully submitted.

Dated at Vancouver, British Columbia this ^{23rd} day of December 2003.



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PART VI – TABLE OF AUTHORITIES

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PART VII – LEGISLATION RELIED ON**Legislation****Cited at Paragraph**

<i>Constitution Act, 1867</i> , R.S.C. 1985, App. II, No. 5, s. 91(24)	84
<i>Constitution Act, 1982</i> , R.S.C. 1985, App. II, No. 44, ss. 35, 52	5, 26, 66, 68, 70, 79, 86, 105, 107, 108, 109, 110, 111
<i>Environmental Assessment Act</i> , R.S.B.C. 1996, c. 119	32
<i>Forest Act</i> , R.S.B.C. 1996, c. 157, ss. 1, 35, 36, 54 (as amended)	13, 14, 15, 16, 33, 34, 35, 61, 63, 64, 65
<i>Forest Practices Code of British Columbia Act</i> , R.S.B.C. 1996, c. 159, preamble	13, 14, 17, 34, 35, 65