FILE NO. 29419

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF 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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PART I – FACTS

1. The First Nations Summit (the "Summit") accepts the facts in the Respondent's Factum.

2. The Summit is a provincial Aboriginal organization comprised of a majority of First Nations and Tribal Councils in British Columbia. Since its establishment in 1990 the Summit's primary focus has been to facilitate the reconciliation of the prior existence and rights of First Nations with the sovereignty of the Crown, by representing the interests of, and supporting, First Nations working to negotiate treaties and address issues of common concern throughout the province.

3. Through the leadership and initiative of the Summit, the governments of Canada and British Columbia and the Summit appointed senior officials of the three parties to a Joint Task Force which produced a unanimous report (the "Task Force Report,") that concluded:

> As history shows, the relationship between First Nations and the Crown has been a troubled one. This relationship must be cast aside. In its place, a new relationship, which recognizes the unique place of aboriginal people and First Nations in Canada, must be developed and nurtured. Recognition and respect for First Nations as self-determining and distinct nations with their own spiritual values, histories, languages, territories, political institutions and ways of life must be the hallmark of this new relationship.

Report of the British Columbia Claims Task Force, June 28, 1991, at p. 16

4. The Task Force Report concluded that this objective must be achieved by the negotiation of modern treaties, so that First Nations, Canada and B.C. could "establish a new relationship based on mutual trust, respect and understanding". The parties accepted the Task Force's recommendations and established a treaty process facilitated by the B.C. Treaty Commission, pursuant to a Resolution of the Summit and parallel federal and provincial legislation.

5. This process is significant. There are 53 First Nation groups involved in negotiations, representing about 70% of the First Nations population in B.C. No treaties have been concluded through the process, which has been operational for about 10 years. To date, First Nations have borrowed more than $200 million to finance their own participation, although the B.C. government has committed chief negotiators to only 15 of 42 sets of negotiations.

"Where Are We?" 2003 Annual Report of the B.C. Treaty Commission, pages 12, 37 and 40.

6. The Summit has intervened to provide its concerns and perspective about the Crown's fiduciary duty to consult and accommodate. That duty applies to all Aboriginal peoples.

7. For First Nations, negotiating reconciliation is proving to be a long and arduous task. In the interim the governments are continuing to authorize third-party developments throughout the

province. As in this case, many of those government decisions alienate or environmentally endanger lands and resources, thereby threatening First Nations' traditional cultural and economic activities or raising fears that by the time treaties can be concluded, the base of lands and resources needed to sustain them as Aboriginal peoples will no longer be available. The Task Force agreed on the need for agreements to prevent interests being affected that could undermine the process.

Task Force Report, supra, pages 63-5.

8. Aboriginal peoples have a present and urgent need to ensure their own sustainability. This underlies their concerns to protect the ecological integrity and availability of the territorial lands, waters and other resources on which they rely to sustain their collective way of life and identity, now and into the future (hereinafter "Aboriginal interests" or "Haida interests"). If Aboriginal interests are not protected and sustained, Aboriginal rights and title that are recognized and affirmed by s. 35 will be meaningless.

9. From the Summit's perspective, if this Court accepts the argument that the Crown had no duty to consult and accommodate Haida interests, the treaty process will be endangered, and Aboriginal interests that support First Nations will also be threatened. Conversely, First Nations and the negotiation process will be strengthened if the Court of Appeal's order is upheld, because the consultation procedures and accommodation agreements that would result from the Crown fulfilling its fiduciary duties will provide building blocks for modern treaties and the new relationship called for by the Task Force Report.

PART II - ISSUES

10. This appeal raises the following issues:

(a) Does the Crown have a fiduciary duty to consult Aboriginal peoples and accommodate Aboriginal interests, in the absence of a judicial determination that a specific Aboriginal right will be infringed, in circumstances like this case?

(b) What is the content of that duty, when is it triggered, how should it be enforced, what is the test for determining breach or compliance and the standard of review, and what are the proper remedies for breach?

(c) Do proponents or licensees have corresponding legal obligations in circumstances like this case?

11. The following Constitutional Question has been stated:

Is s. 36 of the *Forest Act,* R.S.B.C. 1996, c.157, of no force or effect to the extent that the replacement of T.F.L. No. 39 violated any rights 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

1. INTRODUCTION AND SUMMARY OF SUBMISSIONS

12. The Summit supports the Respondent's position that the Court of Appeal's order should be upheld , and makes the following submissions:

a) There is an urgent need to protect Aboriginal interests, while at the same time encouraging negotiation and discouraging litigation. In cases like this, defining and enforcing the Crown's fiduciary duty can promote that result, whereas existing remedies like interlocutory injunctions will not.

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b) The Court of Appeal was correct to (1) declare that the Crown and Weyerhauser had a fiduciary duty to consult and accommodate, and (2) fashion a remedy that protected Haida interests and promoted the purposes of s. 35.

c) The Crown is in a fiduciary relationship with Aboriginal peoples, and always has a legal duty to protect Aboriginal interests whether or not Aboriginal rights have been judicially determined. The fiduciary relationship and its protective obligations flow from Canadian history, the principles of Aboriginal rights law and Canada's constitution.

d) There is always a fiduciary duty to consult and accommodate when the Crown is deciding whether to exercise a power that may harm Aboriginal interests. That duty is constitutionally mandated. It was triggered in this case by the government's consideration of the application to replace the TFL.

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e) Here, the Crown's fiduciary duty has two components. First, it must consult in order to inform itself about the proposal, the effects on Aboriginal interests, the significance of those effects and ways to mitigate them. This should be done through a neutrally administered process in which the government, First Nation and proponent participate. Second, it must ensure that Aboriginal interests are protected and accommodated. There should be negotiations among the parties to try to agree on accommodation measures.

f) If the Crown chooses to exercise its powers in the absence of agreement on accommodation but has not satisfied its fiduciary duty, there will be a fundamental legal defect in any authorization it grants.

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g) When Weyerhauser applied for the TFL, it had a legal duty to participate in the consultation process and do its part to ensure the effective accommodation of Haida interests. The Court of Appeal was right to designate Weyerhauser as a fiduciary having a duty to participate in a non-adversarial manner in the negotiation and implementation of accommodation measures that should have been in place before the TFL was replaced.

2. THE APPELLANT'S APPROACH WOULD DEFEAT THE PURPOSES OF S. 35

13. This appeal provides an opportunity for the Court to define the Crown's fiduciary duty to consult and accommodate in a case like this, so as to promote the purposes of s. 35. As this Court has explained, the decision to recognize and affirm Aboriginal rights in the *Constitution Act, 1982* was intended to reverse the prevailing pattern by which governments virtually ignored Aboriginal

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peoples' legal rights to their traditional lands. That decision was a solemn commitment that must be given meaningful content. In order to fulfill that commitment and those purposes, s. 35 operates in two ways.

R v Sparrow, [1990] 1 SCR 1075 at 1103-5, 1110 ("Sparrow").

14. **First, it provides a solid constitutional base for negotiations**. It is settled that negotiated settlements are the mechanism for achieving the basic purpose of s. 35 – the reconciliation of the prior existence of Aboriginal societies with the sovereignty of the Crown.

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Delgamu'ukw v British Columbia, [1997] 3 SCR 1010 at para. 186 ("*Delgamu'ukw"*)

15. **Second, constitutional recognition and affirmation was intended to provide protection for Aboriginal peoples' distinct culture and relationship to land.** As recently explained in *Powley,* s. 35 was enacted to provide the protection that Aboriginal communities require for the survival of their culture and relationship to the land:

> [17]…The inclusion of the Metis in s. 35 represents Canada's commitment to recognize and value the distinctive Metis cultures, which …the framers of the *Constitution Act, 1982* recognized **can only survive if the Metis are protected along with other aboriginal communities.** [37] The pre-contact test in *Van der Peet* is based on the **constitutional affirmation that aboriginal communities are entitled to continue those practices, customs and traditions that are integral to their distinctive existence or relationship to the land**… [45]...Section 35 represents a new promise: **a constitutional commitment to protect practices that were historically important features of particular aboriginal communities…** (emphasis added)

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R. v Powley, [2003] SCR 43 (QL) at para. 17, 37 and 45. ("*Powley"*)

16. In order to achieve its protective purpose, s. 35 sanctions challenges to social and economic policy objectives embodied in legislation or administrative action, when those constitute *de facto* threats to Aboriginal interests or rights, even if the objectives appear superficially neutral.

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Sparrow, supra, at 1110

17. For several reasons, the Court of Appeal was correct that **both** purposes would be frustrated if they accepted the Appellant's argument that every First Nation must prove their aboriginal rights in court before the Crown has a fiduciary duty to protect Aboriginal interests.

18. First, the Appellant's argument is fundamentally based on the **denia**l of Aboriginal rights rather than their recognition and affirmation. It is based on the premise that there are no Aboriginal interests that require legal protection until a court determines that Aboriginal rights will be infringed. By supporting this argument, the intervener Attorneys General have reverted to the discredited argument that s. 35 is an empty box until each Aboriginal people proves otherwise, which makes a mockery of this unique constitutional provision.

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19. From the Summit's perspective, the Appellant's argument is profoundly adversarial rather than trust-like. It amounts to a denial that First Nations are distinct peoples with constitutionally protected rights and a unique relationship to their territories. It is the opposite of the recognition and affirmation promised by s. 35, and is also inconsistent with the respect and good faith required for negotiations to succeed.

> *Luuxhon v The Queen (No. 2),* Unreported B.C.S.C., March 23, 1999.

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20. Second, the Appellant argues that the courts must define specific s. 35 rights so that government officials can know what infringements they can justifiably authorize. This focus on infringing rather than protecting Aboriginal rights is inconsistent with the protective purpose of s. 35 and the fiduciary relationship between the Crown and Aboriginal peoples.

> See also intervener factums: A.G. Canada, para. 53-5; A.G. Ontario, paragraphs 19-22 and 24; A.G. Alberta, para. 35 and 41; A.G. Quebec, para. 18 and 24-5.

21. Third, the Appellant's argument is not practicable. Given the extensive resource development in British Columbia, it will be impossible to protect all Aboriginal interests that are

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integral to First Nations' identity or relationship to land if that requires the courts to define every corresponding Aboriginal right. First Nations and the Courts lack the resources for such an enormous litigation agenda. The Appellant's argument would increase economic uncertainty and social discord, and undermine s. 35's protective and reconciliation purposes.

22. Also, the treaty process is the type of alternative to litigation that has been urged by the courts. But **the Appellant's argument promotes litigation rather than negotiations,** because if the courts must determine Aboriginal rights in order to trigger the Crown's fiduciary duties, First

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Nations will be forced to litigate instead of negotiate, in order to protect their Aboriginal interests.

23. The Appellant's argument is based on a narrow and technical reading of this Court's approach to defining fiduciary duty in *Sparrow*. This Court did not write *Sparrow* with the intention of exhaustively defining the Crown's fiduciary duties in all circumstances.

> *Doucet-Boudreau v Nova Scotia (Min. of Education)* [2003] SCC 62 (QL) at para. 24 ("*Doucet-Boudreau"*)

24. *Sparrow* was a summary prosecution for breach of a regulation that restricted Aboriginal

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fishing. Aboriginal rights were raised in defence. In that context this Court first decided that the fishing was the exercise of an existing s. 35 right, and then held that the charging regulation could not apply if it unjustifiably infringed the right, because that would be inconsistent with constitutional recognition and affirmation, and with the Crown's honour and fiduciary duty.

25. The circumstances of this case are entirely different. First, this is a judicial review of a government decision that authorized Weyerhauser to exploit substantial forest lands and resources within Haida territory, for many years. As illustrated by the evidence referred to in paragraph 48 below, the replacement of the TFL authorized industrial logging that threatens Haida interests. The Haida raised their Aboriginal rights and title in order to compel the Crown to fulfill its fiduciary duty to protect vulnerable Haida interests, not to obtain declarations defining their rights.

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26. Second, although the Haida's petition asserted that the TFL transfer would infringe s. 35 rights, and they filed affidavit evidence to prove that, the Crown applied to have all issues respecting Aboriginal rights severed from the judicial review and decided in a full trial. (Such applications are now routinely made and granted in British Columbia.)

27. Therefore this case **could not** have been decided by using the approach in *Sparrow*. The Court of Appeal was therefore right to conclude that the Crown's fiduciary obligations were triggered by decisions that put vulnerable Aboriginal interests at risk. It was appropriate to define

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the Crown's duty as of the time of the strategic-level decision to transfer the TFL, so there could be a remedy that was responsive to the problems about sustainability raised by that decision.

3. THE PURPOSE OF THE FIDUCIARY DUTY RESPECTING ABORIGINAL INTERESTS

28. The Court of Appeal was correct that the Crown's fiduciary duty in this case could be defined without adjudicating Haida aboriginal rights. A **purposive analysis** of the Crown's fiduciary relationship with Aboriginal peoples shows that the Crown had a fiduciary duty to consult and accommodate in the circumstances of this case. Purposive analyses are used by this Court to

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understand the objectives underlying legal provisions or principles, and to ensure an appropriately large and liberal interpretation of constitutional mandates respecting interests, rights or duties.

Hunter v Southam [1984] 2 SCR 145 at 155-7; *R. v Big M Drug Mart* [1985] 1 SCR 295 at 344.

29. This case requires a purposive analysis of Haida interests that are intended for constitutional protection. If those are not protected and sustained, the Haida's Aboriginal rights would become meaningless. The case also requires a purposive analysis of the Crown's fiduciary relationship with Aboriginal peoples, in order to define the fiduciary duty to consult and accommodate.

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30. The Crown's fiduciary relationship with Aboriginal peoples is a central principle of the law of Aboriginal rights. A purposive analysis of that principle must begin with understanding that the doctrine of aboriginal rights was developed in response to historical facts and circumstances:

Aboriginal rights are rights held by aboriginal peoples, not by virtue of Crown grant, legislation or treaty, but 'by reason of the fact that aboriginal peoples were once independent, self-governing entities in possession of most of the lands now making up Canada'…

Peter Hogg, *Constitutional Law of Canada*, 4th ed. looseleaf, 27.5 (a)-(c); see also Brian Slattery, "Understanding Aboriginal Rights", (1987) 66 Can. Bar Rev., 727 at 732-3 and 741-53.

31. Colonial practices in North America were developed for pragmatic reasons. The European powers recognized that the Aboriginal peoples were in possession of their territories and had *de facto* ownership of and jurisdiction over those lands and resources:

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… [during the mid-18th century] both Great Britain and France felt that the Indian nations had sufficient independence and played a large enough role in North America for it to be good policy to maintain relations with them very close to those maintained between sovereign nations…England also wished to secure the friendship of the Indian nations by treating them with generosity and respect for fear that the safety and development of the colonies and their inhabitants would be compromised by Indians with feelings of hostility… This "generous" policy which the British chose to adopt also found expression in other areas. The British Crown recognized that the Indians had certain ownership rights over their land, it sought to establish trade with them which would rise above the level of exploitation and give them a fair return. It also allowed them autonomy in their internal affairs, intervening in this area as little as possible…

R. v Sioui, [1990] 1 SCR 1025 at 1053-55; see also *Task Force Report*, supra, at 6-7.

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32. The recognition of those circumstances underlay the development of legal principles in respect of Aboriginal title and its continuity:

In *Calder v A.G.B.C.* … this Court recognized aboriginal title as a legal right derived from the Indians' historic occupation and possession of their tribal lands …'[the original Indians inhabitants were] admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their discretion…'…The principle that a change in sovereignty over a particular territory does not in general affect the presumptive title of the inhabitants was approved by the Privy Council in *Amodu Tijani*… That principle supports the assumption implicit in *Calder* that Indian title is an independent legal right which, although recognized by the *Royal Proclamation of 1763*, nonetheless predates it…

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Guerin v The Queen, [1984] 2 SCR 355 at 376-8.

33. Pragmatic considerations could not be satisfied by a colonial policy that merely **acknowledged** the existing relationship of the Aboriginal peoples with their territorial lands. It was also necessary to give **assurances** that the European powers would not unilaterally decide to disturb the Aboriginal peoples' possession and use of their lands and resources:

…**British policy towards the native population was based on respect for their right to occupy their traditional lands**, a proposition to which the *Royal Proclamation of 1763* bears witness… (emphasis added)

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Sparrow, supra at 1103

These arrangements [in the *Royal Proclamation*] bear testimony to the acceptance by the colonizers of the principle that the aboriginal Peoples who occupied what is now Canada were regarded as possessing the Aboriginal right to live off their lands and the resources found in their forests and

streams to the extent they had traditionally done so. **The fundamental understanding – the *grundnorm* of settlement in Canada – was that the Aboriginal people could only be deprived of the sustenance they traditionally drew from the land and adjacent waters by solemn treaty with the Crown, on terms that would ensure to them and their successors a replacement for the livelihood that their lands, forests and streams had since ancestral times provided them**… (emphasis added)

R.. v Van der Peet, [1996] 2 SCR 507 at para. 272, (per McLachlin J., dissenting on other issues)

34. This policy of respect and protection, based on factual circumstances, was in turn reflected
10 in legal principles, including those in respect of the Crown's fiduciary obligations and the commitment to treaty making:

The Crown has a general fiduciary duty towards native people to protect them in the enjoyment of their aboriginal rights and in particular in the possession and use of their lands… (emphasis added)

"Understanding Aboriginal Rights", supra at 753

…we find that the words "recognition and affirmation" incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power…

20 *Sparrow,* supra, at 1109

35. These common law principles have continued to be affirmed and applied by this Court, because it is understood that **the economy, culture, way of life and survival of Aboriginal peoples are rooted in, and sustained by, their relationship to territorial lands and resources**. Furthermore, the evidence in *Calder* showed that Nisga'a territoriality and title were not unique, but were consistent with First Nations' ownership and use of territory throughout the coastal region.

Calder v A.G. British Columbia, [1973] SCR 313 at 328, 359-75 and 422; see also *Delgamu'ukw,* supra at para. 176-8; *R. v Adams,* [1996] 3 SCR 101 at para. 44-6; *R. v Dick,* [1983] 2 CNLR 134
30 (B.C.C.A) at 143-6

36. The Task Force Report agreed, at pages 24-5, that First Nations in British Columbia are sustained by their relationship to their territories:

For First Nations, hereditary title is the source of all of their rights within their traditional territories. The land, sea and resources have supported their families, communities and governments for centuries, and form the basis of the aboriginal spiritual, philosophical and cultural views of the world. Stewardship of the land, sea and resources is for the First Nations a sacred trust, with immense responsibilities to be exercised, with care and diligence, for the benefit of future generations.

40 37. The report of the Royal Commission on Aboriginal Peoples stressed the importance of the relationship of Aboriginal peoples to territorial lands and resources:

Aboriginal people have told us of their special relationship to the land and its resources. This relationship, they say, is both spiritual and material, not only one of livelihood, but of community and indeed of the continuity of their cultures and societies.

> …The use of the lands and natural resources has formed a central part of Aboriginal economies from time immemorial. For most Aboriginal communities, natural resources are the key to making a living, whether this takes the form of traditional subsistence activities or profit-seeking, wage-providing enterprises.
>
> For Indigenous peoples' continued existence — throughout the world — land is a prerequisite. It is essential because Indigenous peoples are inextricably related to land: it sustains our spirits and bodies; it determines how our societies develop and operate based on available environmental and natural resources; and our socialization and governance flow from this intimate relationship. Because of this intimate relationship, the land is rendered inalienable: it is a natural right, a right essential for the continued vitality of the physical, spiritual, socio-economic and political life and survival of the Indigenous peoples for generations to come.
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> *Report of the Royal Commission on Aboriginal Peoples,*1996, Vol 2, Part 2, pp. 448 and 850; Vol. 1, pp. 490-1; See also *Northern Frontier, Northern Homeland: Report of the Mackenzie Valley Pipeline Inquiry*, Vol. 1, pages 93-100.

38. This relationship has also been acknowledged by international organizations:

> 10. Throughout the life of the Working Group, indigenous peoples have emphasized the fundamental issue of their relationship to their homelands. They have done so in the context of the urgent need for understanding by non-indigenous societies of the spiritual, social, cultural, economic and political significance to indigenous societies of their lands, territories and resources for their continued survival and vitality. Indigenous peoples have explained that, because of the profound relationship that indigenous peoples have to their lands, territories and resources, there is a need for a different conceptual framework to understand this relationship and a need for recognition of the cultural differences that exist. Indigenous peoples have urged the world community to attach positive value to this distinct relationship.
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> Erica-Irene A. Daes, *Indigenous people and their relationship to their land*, 1999, report by Special Rapporteur, pages 6-8; see also Draft United Nations Declaration on the Rights of Indigenous Peoples, 1994/45, Articles 7, 10 and 25-30; see also *Mayagna (Sumo) Awas Tingni Community (Nicaragua),* 2001, Inter-Am. Ct. H.R. (Ser. L) No. 4 at para. 149.

39. Throughout British Columbia today, Aboriginal peoples' relationship to their lands continues to provide the material basis for their culture, economy and way of life, and the exercise of their Aboriginal rights. Those facts, along with the powers and protective obligations that were historically assumed by the Crown, underlie the fiduciary relationship and duty in a case like this.

4. ABORIGINAL INTERESTS ARE ALSO PROTECTED BY THE CONSTITUTION

40. The duty to protect Aboriginal interests pursuant to the fiduciary relationship is a **general principle** intended to apply throughout Canada as federal common law. It is an essential component of the unique constitutional relationship between the Crown and Aboriginal peoples. This protective principle was reflected in constitutional instruments long before the enactment of s. 35. For example, the *grundnorm* described by McLachlin C.J. was given expression and legal force by the *Royal Proclamation of 1763.*

Roberts v Canada, [1989] 1 SCR 322; "Understanding Aboriginal Rights", supra, at 732-41.

41. More important, the *Constitution Act, 1867* includes express provisions intended to safeguard Aboriginal interests. Section 91(24) gave Parliament exclusive legislative authority for "Indians and Lands Reserved for the Indians," primarily to protect Aboriginal interests from the competing interests of local majorities. S. 109 made provincial title to lands and resources subject to "any Trusts existing in respect thereof, and to any Interests other than that of the Province in the same." This gave constitutional force to the principles in the *Royal Proclamation,* by making Crown title expressly subject to Aboriginal interests and the Crown's fiduciary duties.

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Constitutional Law of Canada, supra at 27.1(a); *Delgamu'ukw* supra at para. 175-6; Slattery, Brian, "First Nations and the Constitution: A Question of Trust"(1992) 71 CBR 261 at 292; and see *Calder,* supra at 378-9: "[sections] 91(24), 109 and 92(5) must all be read and construed upon the assumption that these territorial rights of the Indians were strictly legal rights which had to be taken into account and dealt with in that distribution of property and proprietary rights made upon confederation between the federal and provincial governments" (per Hall, J.).

42. The effect of s. 109 is that Aboriginal title is not owned by the province, but is held by First Nations and encumbers the provincial Crown's title. The effect of s. 91(24) is that Aboriginal interests as well as Aboriginal title are within the subjects assigned exclusively to Parliament.

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Delgamu'ukw, supra at para. 174-6.

5. Declaring the Crown's Fiduciary Duty was Appropriate in this Case

43. The Crown has a fiduciary relationship with all Aboriginal peoples. That relationship has always been based on facts, not judicial determinations. As the Crown came to exercise effective control in regions across the country, the federal government entered into treaties in most of Canada east of the Rockies, based on the Aboriginal peoples' *de facto* relationship to their territories.

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Report of the Royal Commission on Aboriginal Peoples, supra, Vol. 1, pp. 122-32.

44. Since 1978, land claims agreements have been concluded in many parts of Canada. None required a prior adjudication of the nature or extent of the Aboriginal people's rights. The B.C. treaty process is also based on territoriality, not judicially defined rights. If Aboriginal peoples' *de facto* relationship to their territories can ground negotiations leading to constitutionally protected modern treaties - in which substantial lands, resources and governance powers are secured for First Nations – that relationship can also provide a basis for the Crown's fiduciary duty in this case.

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45. In a case like this, basing the Crown's duty to consult and accommodate on the facts respecting vulnerable Aboriginal interests is consistent with principles of fiduciary law. Fiduciary

duties are imposed by the courts when the fiduciary can unilaterally exercise a power or discretion so as to affect the beneficiary's **legal or practical interests**.

> *Frame v Smith* [1987] SCR 2 SCR 99, per Wilson J.; *International Corona Resources Ltd. v Lac Minerals* [1989] 2 SCR 574 at 597-60.

46. That is the approach used in *Wewaykum:*

> [83]…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.

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> *Wewaykum Indian Band v Canada,* [2002] SCC 79 at para. 74-80, 83.

47. That was the approach taken by Kirkpatrick J. in her decision in the *Taku River Tlingit* case, where she based the Crown's fiduciary duty on the significant Aboriginal interests at risk:

> [130] …the existence of aboriginal interests should inform governments who make decisions which are likely to affect those interests…**Given the extreme importance of [their] decision to the Tlingits, the Ministers should have been mindful of the possibility that their decision might infringe aboriginal rights.** Accordingly, they should have been careful to ensure that they 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. (emphasis added)

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48. The evidence shows that the decision to replace the TFL threatened Haida sustainability and rights in analogous ways:

> *For Haida traditional land use and the social, cultural and spiritual importance of the forest see Respondent's Record* ("RR"), Vol. 1, pp. 5-7 (Affidavit of Guujaaw, at par. 11-21), at par. 14: "According to oral tradition, Haida people have been born, have lived, and have been buried on Haida Gwaii for thousands of years…Haida culture and people are dependent upon the forests for our physical and spiritual well-being." See also RR, Vol. 2, pp. 276-282 (Affidavit of Nancy J. Turner, at par. 6-35 and 46-47): "Wild plants of forested areas are an integral and crucial part of Haida life and Haida values…All plants…are regarded in the traditional Haida world view as having a spiritual aspect, and to have the power to help humans…Trees especially are seen as having human and spiritual attributes…Western red-cedar is particularly important and critical to the maintenance of Haida culture, since it provides many of the necessities of traditional life." See also RR, Vol. 3, pp. 409-412 (Affidavit of Guujaaw dated May 31, 2000, at par. 5-11); See also RR, Vol. 2, pp. 205-210 (Affidavit of Marianne Boelscher, at par. 25-27 and 30-38).

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> *For importance of sustainable forestry to the Haida see* RR, Vol. 1, pp. 11 (Affidavit of Guujaaw, at par. 34): "When I am at one of these sites I can learn what type of cedar is needed to build a canoe, the manner in which the tree was felled so as to cause the least damage to the log…It is important that we be able to experience the environment that our ancestors worked in, including the forest they walked through, the trees they worked on, the smells, the natural lighting, the humidity and sounds such as bird calls. This is important to our people as we can feel a sense of communion with our ancestors in these places." See also Haida Nation Constitution in RR, Vol. 2, pp. 158 (Affidavit of Ernie Collison, Exhibit "A"); See also RR, Vol. 3, pp. 464 (Affidavit of Herbert L. Hammond dated June 5, 2000, at par. 43 and 45): "Protection of forest functioning must include protection of whole forest landscapes, and protection of forest landscape composition, structure, and functioning …Without this step, timber cutting operations are not ecologically sustainable, nor will they protect and maintain components of the forest, like water quality, fisheries, and old growth trees, that are important to the Haida."; See also RR, Vol. 3, pp. 444-445, (Affidavit of Ernie Collison dated May

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31, 2000, at par. 13), re the Haida development of a 1000 year cedar plan based on an inventory of old-growth cedar, in order to create cedar reserves to ensure sustainability and that future generations will be able to access cedar for their needs.

For impact of TFL 39 and past logging on Haida sustainability see RR, Vol. 3, pp. 412-413 (Affidavit of Guujaaw dated May 31, 2000, at par. 13): "The land on Haida Gwaii is extremely rich in its natural condition, and I have witnessed it becoming poorer as the lands are changed…The fate of our cultural heritage parallels the fate of the land, and this is why we are challenging the activities which the Province has authorized on Haida Gwaii." See also RR, Vol. 1, pp. 14-16 (Affidavit of Guujaaw, at par. 45-52); RR Vol. 2, pp. 284-285 (Affidavit of Nancy J. Turner, at par. 41-45; RR, Vol. 3, pp. 389-390 (Affidavit of Herbert Hammond, at par. 6-10); RR, Vol. 3, pp. 467-79 (Affidavit
10 of Herbert Hammond sworn June 5, 2000 at par. 54-83); RR, Vol. 4, pp. 347 (Affidavit of John Broadhead, at par. 19); RR Vol. IV, pp. 574-79 (Affidavit of Tom Green, at par. 22-34).

49. The Court of Appeal's order reflected their concern about the impacts on Haida interests that will result from the decision to replace the TFL. The replacement was **not** done on terms and conditions that address concerns about threats to Haida interests from continued road building and logging of the limited supply of old growth cedar. Neither the Chambers Judge nor the Court of Appeal considered that these sustainability problems would be effectively addressed through cutting permits or other operational decisions.

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50. If the Aboriginal interests that sustain an Aboriginal people's culture and economy are put at risk, the survival of that people is at risk. The primary purpose of the fiduciary duty to consult and accommodate is to prevent harm to Aboriginal interests **before** it occurs. The purposes of s. 35 will not be achieved if that duty is only defined and enforced **after** the harm occurs, when effective remedies are usually not unavailable.

6. THE FIDUCIARY DUTY TO CONSULT AND ACCOMMODATE

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51. It is submitted that the Crown's fiduciary duty in a case like this includes two inter-related components – consultation and accommodation. The Crown cannot fulfill its duty without satisfying both components.

52. This Court said in *Delgamu'ukw,* at para. 168, that there is always a requirement to consult when Aboriginal rights may be infringed. Consultation is constitutionally mandated, whether or not a First Nation is engaged in treaty negotiations. The requirement does not flow from statutory
40 provisions, although it will usually be triggered by a pending exercise of statutory power.

53. The decision in *Adams* goes further, requiring statutory regimes in respect of land and resources to provide rules for complying with the duty:

> …In light of the Crown's unique fiduciary obligations towards aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance. If a statute confers an administrative discretion which may carry significant consequences for the exercise of an aboriginal right, the statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of aboriginal rights…
>
> *R. v Adams,* supra at para. 54

54. There is no B.C. statutory regime that satisfies this requirement. Nor is there such a federal regime, although there is jurisdiction and a requirement for that, pursuant to s. 91(24). It is expected that such regimes will be negotiated and put in place through comprehensive land claims and self-government agreements, thereby providing certainty for all parties. In the absence of such regimes, the courts must define and enforce the duty to consult and accommodate.

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55. Consultation is intended to fulfil government's obligation to inform itself about the effects that a proposed development would have on an Aboriginal people. That may not always be obvious. As the Royal Commission explained, land is uniquely fundamental to Aboriginal identity:

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> Elders tell us that Aboriginal people have a special relationship to the land, that they belong to the land, which the Creator provided for them and their children. The Creator placed on the land all that Aboriginal people would need to survive in harmony and balance with nature. For Aboriginal people, land is deeply intertwined with identity.
>
> It is on this concept of territory that Aboriginal and non-Aboriginal people do not understand one another. Territory is a very important thing, it is the foundation of everything. Without territory there is no autonomy, without territory there is no home. The Reserve is not our home. I am territory. Language is territory. Belief is territory, it is where I come from. Territory can also vanish in an instant…
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> *Report of the Royal Commission on Aboriginal Peoples,*supra, Vol. 4, p. 137; Vol. 1, p.493.

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56. Many people would readily understand the social and cultural effect of building a super-highway through a schoolyard or between a church and its cemetery. But those same people may not have the knowledge or experience to understand the profound ecological, cultural or economic impacts caused by building a highway or pipeline through the traditional hunting grounds of an Aboriginal people or alongside their cultural trails, or by intrusive methods of industrial logging in traditional forest lands. The Aboriginal people have a role to play in providing that information and analysis, but they can only do so effectively if government is genuinely seeking to inform itself.

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> For analogous discussions of practices and institutions that are critical linch-pins that sustain a minority people and its culture, see *Mahe v Alberta,* [1990] SCR 342; *Lalonde v Ontario (Health Services Restructuring Commission),* 56 OR (3d) 505 (Ont. C.A.) at para. 180-1; *Doucet-Boudreau,* supra at para 26-9, 60 and 65.

57. In a case like this, the fiduciary duty is triggered when government is considering a development proposal that would affect lands or resources in an Aboriginal people's territory. At that stage the Crown must inform itself about the Aboriginal interests that will be affected, the significance of such effects, and how those could be mitigated. That should be done through a neutrally administered process dedicated to this purpose, in which the affected Aboriginal people, government and the proponent participate.

> *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage),* [2002] 1 CNLR 169 (FCTD) at para. 141 and 153-6.

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58. The time and resources required for consultation will vary with the circumstances. The Crown and the Aboriginal people should jointly design the process. The Aboriginal people must have the resources to be able to participate effectively. Compliance with consultation **procedures** would not by itself fulfill the fiduciary duty, which is ultimately substantive and intended to protect and accommodate Aboriginal interests.

59. Accommodation is intended to fulfil the Crown's obligation to exercise its authority so as to protect and foster the sustainability of Aboriginal peoples. Effective accommodation measures will vary with the circumstances. Principles for defining accommodation can be derived in large part from the reconciliation objective. As with reconciliation, the goal of accommodation is not to trade off or surrender Aboriginal interests and rights, but to ensure they will survive and can be effectively exercised. The minimal impairment principle may also provide guidance on the meaning of accommodation in some cases. Various types of measures could be used to provide for accommodation, including changes to the design or timing of a development, the creation of joint management regimes based on sustainability principles, or economic participation agreements.

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> *Osoyoos Indian Band v Oliver (Town)*,[2001] 3 SCR 911 at para 52; see also *Halfway River First Nation v British Columbia (Minister of Forests),* [1994] 4 CNLR 1 (B.C.C.A.) at para. 160 and 190.

60. At minimum, accommodation requires the Crown to refuse to authorize proposals that would (1) undermine or endanger Aboriginal interests or (2) alienate or encumber such interests that need to be secured for First Nations to sustain them as an Aboriginal people.

61. Accommodation measures should be designed and implemented through negotiations between the Crown and the affected Aboriginal people, in the same way that the reconciliation objective is to be achieved through negotiated agreements. In order for accommodation negotiations to be effective, the proponent will normally need to participate.

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62. If the Crown chooses to exercise its legal authority in the absence of an agreement on accommodation, any authorization that it grants will suffer from a fundamental legal defect if the Crown has **not** fulfilled its duty to consult and accommodate according to the standards of loyalty and prudence to which fiduciaries are held.

> *K.L.B. v British Columbia et al*, [2003] SCR 51 at [40]; *Regal (Hastings) Ltd. v Gulliver*, [1942] 1 All ER 378 at 361 and 389; *Toronto Dominion Bank v Uhren*, (1960) 32 WWR 61 (S.C.C.); *Lloyds Bank v Bundy*, [1974] 3 All ER 757.

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63. In the Appellant's factum at paragraphs 26-28 and 68-79, mention is made of the provincial government's own consultation policy, as well as various initiatives that are apparently alleged to accommodate Haida interests. The consultation policy was promulgated unilaterally, without consultation, and does not satisfy the Crown's duty. The issue in this appeal is not resolved because government has "considered" Haida concerns, or taken some mitigative steps, or acted rationally as opposed to arbitrarily. There was no consultation in this case. The courts below did not find that any initiatives effectively addressed the sustainability concerns.

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64. Although many resource developments have dislocated or marginalized Aboriginal peoples, there are also exceptions that demonstrate the value to all parties when Aboriginal interests are accommodated. The proposal to build a Mackenzie Valley pipeline was suspended in 1978 to provide time to conclude land claims agreements. Today most of the Dene and Metis in the Northwest Territories are participants in the new plan for such a pipeline. Phases of the James Bay hydro-electric project were delayed because of disputes about impacts on Aboriginal interests, but those matters have now been addressed in comprehensive agreements between the Cree and Quebec. After logging on Meares Island was enjoined, a unique joint management regime for logging in Clayoquot Sound was negotiated which is now operating successfully in that region.

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7. THE COURT OF APPEAL'S ORDER SHOULD BE UPHELD

65. The Court of Appeal's order was designed to promote a workable accommodation between the Aboriginal interests of the Haida and the objectives of the Crown and Weyerhauser. The order is consistent with constitutional values and reflects the fact that economic developments **can be** sustainable with respect to Aboriginal interests.

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66. In contrast, the Appellant's argument would allow the Crown to endanger Aboriginal interests unless a right is determined by the courts. The law of Aboriginal rights that was developed to **protect** Aboriginal interests is being invoked by the Appellant to **allow the Crown to put those**

very interests at risk at the hands of third parties. That is wrong. Section 35 was not enacted to accommodate the infringement of Aboriginal interests and rights.

67. The *Royal Proclamation*'s protective obligations were not made contingent on judicial determinations. It confounds the Crown's honour for the Appellant to **now** argue - when the Aboriginal people are vulnerable rather than the Crown - that governments have no fiduciary duty to protect Aboriginal interests until rights are defined by the courts. The Appellant's argument would allow governments to conduct their affairs as if parts of Canada were *terra nullius.* That cannot be right.

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68. The Appellant argues that the Crown only owes Aboriginal people a **duty of fair dealing,** requiring the **consideration** of First Nation concerns before statutory power is exercised. That would allow governments to conduct business as usual, by balancing those concerns against competing interests on the basis of majoritarian political agendas and economic market forces. The Appellant's argument seeks to turn the clock back, to a time before the major legal milestones in respect of the legal status of Aboriginal rights and title and the Crown's fiduciary relationship with Aboriginal peoples - including this Court's decisions in *Calder, Guerin, Sparrow* and *Delgamu'ukw*, and the enactment of s. 35 in 1982.

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69. Contrary to the Appellant's argument, the Province's title to lands and resources pursuant to s. 109, as well as its legislative authority under ss. 92 and 92A, are neither unencumbered nor exclusively available to support majoritarian interests. Furthermore, the limits on the province's title and legislative authority are not subject to justifiable infringement.

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> *Derrickson v Derrickson,* [1986] 1 SCR 285 at 296; *Hopton v Pamajawon,* [1994] 2 CNLR 61 (Ont. C.A.); *Corporation of Surrey v Peace Arch Enterprises Ltd.,* (1970) 74 WWR 380 (B.C.C.A.)

70. This appeal raises an urgent constitutional problem. The provincial government continues to argue that it has unencumbered title and authority, although it is settled that Aboriginal rights and title have not been surrendered or extinguished in B.C.. The factums by the intervener Attorneys General show that governments have not yet accepted this Court's admonishment that the Crown's relationship with the Aboriginal peoples should be trust-like rather than adversarial. The Appellants' argument would allow continued erosion of the fiduciary relationship and of Aboriginal interests intended for protection by s. 35. While there should be due respect for the responsibilities and priorities of governments, deference ends where the constitutional rights and interests that the courts are charged with protecting begin.

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…it is the high duty of this Court to ensure that the legislatures do not transgress the limits of their constitutional mandate and engage in the illegal exercise of power…

Amax Potash Ltd. v Saskatchewan, [1977] 2 SCR 576 (QL) at 10; see also *Doucet-Boudreau, supra* at paras 36, 40, 43, 55-59, 60-66, 69 and 83-85.

71. It is submitted that this Court should affirm the Crown's fiduciary duty to consult and accommodate, and uphold the Court of Appeal's order because the decision to replace the TFL was made in breach of that duty.

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8. ADVANTAGES TO BASING FIDUCIARY DUTY ON ABORIGINAL INTERESTS AT RISK

72. As the British Columbia Court of Appeal understood, there was a need in this case for orders to define and enforce the Crown's fiduciary duty to consult and accommodate. Such orders could not have been effective if they had to await a judicial determination of rights.

73. The Appellant argues that those orders should not have been made at this stage, and that interlocutory injunctions should be used preserve vulnerable Haida interests. In effect, the Appellant suggests that interlocutory injunctions should replace the Crown's fiduciary duty as the mechanism to protect Aboriginal interests. That argument is wrong.

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74. First, interlocutory injunctions will not promote reconciliation because they are inflexible remedies that involve win-lose options for the parties, thereby further entrenching an adversarial relationship between the Crown and First Nations. Second, interlocutory injunctions are not well tailored to protect the constitutional values raised by this appeal. As John Hunter explains, since 1990 interlocutory injunctions have rarely been granted to stop or delay economic developments that threatened Aboriginal interests and rights, primarily because the balance of convenience test tips the scales in favour of protecting jobs and government revenues. But as Kent Roach points out, the usual tests for deciding interlocutory injunctions – strength of the case, balance of convenience and preservation of the status quo – are not appropriate to promote the protection of constitutional interests and values. Third, in a case like this where the dispute concerns the strategic-level authorization of a development, interlocutory injunctions are often unavailable because they are considered premature at that stage. Fourth, reliance on interlocutory injunctions is based on the impracticable assumption that specific aboriginal rights will need to be adjudicated whenever a First Nation seeks protection for vulnerable Aboriginal interests.

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John Hunter, Q.C., "Advancing Aboriginal Title Claims after Delgamuukw: The Role of the Injunction," (June 2000) CLE; Kent Roach, *Constitutional Remedies in Canada,* November 1998 Ed'n, at 7-1 to 7-40; see also *RJR-Macdonald v Canada (A.G.)* [1994] 1 SCR 311.

75. The Court of Appeal fashioned a declaratory remedy as an alternative to an interlocutory injunction. It based the declaration on the Haida's *prima facie* case of Aboriginal rights and title. That approach was clearly supported by the trial judge's conclusion that there was no reasonable doubt that the Haida have very substantial land-related rights in the area within the TFL.

76. The Court of Appeal was correct to provide an effective remedy by defining and enforcing the Crown's fiduciary duty to consult and accommodate. However, it is respectfully submitted that such a remedy could also be based on the facts with respect to vulnerable Aboriginal interests, rather than on a *prima facie* case of rights within s. 35.

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77. It is submitted that legal confusion may be created if the fiduciary duty to consult and accommodate **must** be based on *prima facie* proof of Aboriginal rights in a case like this. When Aboriginal rights issues are referred to the trial list - which has become the general practice in British Columbia - there is a potential for legal confusion and endless litigation if orders to define and enforce the Crown's duty are based on *prima facie* proof of Aboriginal rights, but the merits of those rights are to be decided later in a separate proceeding.

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78. There are also practical problems with basing fiduciary duty on *prima facie* proof of Aboriginal rights, in cases like this. First, government officials who need to acknowledge and implement consultation and accommodation duties on the ground are not trained or resourced to make complex legal determinations. It does not make good sense to require those officials to apply legal tests to decide the "strength of the case" for Aboriginal rights. Second, most First Nations do not have the substantial resources needed to retain lawyers and experts to help them establish such a "case". Third, as discussed above, this approach assumes the ultimate need to adjudicate each Aboriginal right of every First Nation, in order for the Crown to fulfill its constitutional obligations. That is neither appropriate nor practicable.

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79. If the Crown carries out its fiduciary duty to consult and accommodate, the facts will be available about the practical and legal interests at risk, and ways that Aboriginal interests and the public interest should be reconciled in a particular case. In most cases we should expect agreement on accommodation measures to achieve that objective. For those cases where that does not occur, judicial review applications like this one should be used to determine whether the Crown's actions were consistent with its fiduciary duty. If interlocutory remedies need to be considered in the context of such an application, the record resulting from the consultation process will assist the court in granting orders that promote constitutional values.

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9. BURDEN OF PROOF AND STANDARD OF REVIEW

80. Whether or not the Crown has fulfilled its fiduciary duty to consult and accommodate should be determined **objectively** on the basis of the facts in each case, according to the civil burden of proof. When the evidence establishes that Aboriginal interests intended for protection are vulnerable to an exercise of statutory discretion, the Crown must prove that it satisfied the procedural and substantive aspects of its fiduciary duty. Because these are fiduciary obligations that are also constitutionally mandated, the appropriate standard of review is correctness.

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> *Lloyd Bank v Bundy,* supra; *Ross v New Brunswick School District No. 15,* [1996] 1 SCR 802 at para 31-2.

10. REMEDIES FOR BREACH OF THE CROWN'S DUTY

81. Because the constitution mandates the Crown's fiduciary relationship, a purposive approach to remedies is required, so that judicial orders will (1) promote the purposes that underlie that relationship and the enactment of s. 35, and (2) be effective. In a case like this, if the Crown has authorized a use of land or resources in breach of its fiduciary duty, the Court should grant a purposive remedy tailored to the circumstances of that case.

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> *Doucet-Boudreau,* supra at para. 25.

82. In circumstances like the *Taku River Tlingit* case, where agreement in principle was granted for a new development, and no measures were agreed or ordered to effectively protect and accommodate vulnerable Aboriginal interests, it was appropriate to quash the authorization.

83. In cases like this one, where there was a renewal of an authorization for an ongoing development, it was appropriate to require the Crown and proponent to take the necessary steps to correct the legal defect in the authorization, by fulfilling their fiduciary obligations at this stage.

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84. The Court of Appeal was correct to say that if in the future the Haida consider that the Crown and proponent have not fulfilled their obligations, further applications could be made to the Supreme Court of British Columbia, to require further steps or to challenge the TFL.

11. TENURE HOLDERS AND LICENSEES AS FIDUCIARIES

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85. When Weyerhauser sought the TFL, it was obliged to participate in developing measures to accommodate Haida interests of the sorts intended for constitutional protection. That was a **legal** obligation, so the proponent would not be seeking a statutory authorization that would have an improper purpose or effect. This is particularly important now, when governments are privatizing

their functions and delegating discretion to tenure holders. The obligation was also **practical**. As part of its due diligence, a proponent must be a non-adversarial participant in the consultation process and do its part to ensure the effective accommodation of vulnerable Aboriginal interests. Otherwise any authorization it acquires may suffer from a fundamental legal defect.

86. The Court of Appeal was correct to designate Weyerhauser as a fiduciary when it acquired the TFL. Corporations have been designated fiduciaries in other commercial circumstances. That was appropriate in this case because it requires Weyerhauser to participate in a non-adversarial manner to develop and implement accommodation measures that should have been in place **before** the replacement of the TFL. It also provides a legal foundation for remedies to prevent Weyerhauser retaining profits from an authorization granted in breach of the Crown's duties.

12. THE CONSTITUTIONAL QUESTION

87. The Summit agrees with the Respondent that it is not necessary to answer the Constitutional Question, because it is not necessary to challenge the constitutional applicability of the authorizing statute in a case like this. This is not a case like *Sparrow*, where the infringing regulation would otherwise support conviction for an offence, and would also continue to apply to the Defendant and others. Here the dispute concerns a particular Crown decision to authorize the use or alienation of lands and resources, and if that decision breached legal obligations, a remedy can be fashioned without resort to a declaration of the invalidity or inapplicability of the authorizing statute.

88. In the alternative, if this is incorrect because the enforcement of the Crown's fiduciary duty in such a case requires reliance on section 52 and a determination of the constitutional applicability of the authorizing statute, then the constitutional question should be answered in the affirmative. In that way the Court will prevent statutory authority being exercised in ways that would breach the Crown's fiduciary duty and be inconsistent with constitutional values.

PART IV – ORDER SOUGHT

89. It is submitted that the appeal should be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

January 19, 2004

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