

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

BETWEEN:

NORM RINGSTAD, in his capacity as the Project Assessment Director for the Tulsequah Chief Mine Project, SHEILA WYNN, in her capacity as the Executive Director, Environmental Assessment Office, THE MINISTER OF ENVIRONMENT, LANDS AND PARKS and THE MINISTER OF ENERGY AND MINES AND MINISTER RESPONSIBLE FOR NORTHERN DEVELOPMENT

**APPELLANTS
(Appellants/Respondents on Cross-Appeal)**

AND:

THE TAKU RIVER TLINGIT FIRST NATION and MELVIN JACK, on behalf of himself and all other members of the Taku River Tlingit First Nation

**RESPONDENTS
(Respondents/Appellants on Cross-Appeal)**

AND:

REDFERN RESOURCES LTD.

**RESPONDENT
(Appellant/Respondent on Cross-Appeal)**

AND:

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PART I – STATEMENT OF FACTS

1. The First Nations Summit (the “Summit”) adopts the statement of facts as set out by the Respondent, the Taku River Tlingit First Nation (the “Tlingit”) in its factum.

Background

2. The Summit is an association of some 140 First Nations in British Columbia. Since its establishment in 1990, the Summit’s primary focus has been the development and implementation of a framework for treaty negotiations in British Columbia.

3. At the urging of the Summit, the governments of Canada and British Columbia agreed to appoint a joint three-party Task Force, which produced a unanimous report on June 28, 1991 (the “Task Force Report”), which stated at page seven:

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.

4. There are currently 53 First Nation groups participating in British Columbia treaty negotiation process, representing 122 *Indian Act* bands (114 in B.C. and eight in the Yukon) and about two-thirds of all Aboriginal people in British Columbia. Because some First Nations negotiate at common tables, there are currently 42 sets of negotiations underway. One First Nation is in negotiations to finalize a treaty, and 34 tables are negotiating agreements-in-principle. No treaties have yet been concluded.

5. Since the establishment of the treaty negotiation process, the Summit and the governments of Canada and British Columbia have continued to meet and work together as the three principals of the process. In that capacity, the three principals have continued to discuss and try to resolve various problems respecting treaty negotiations.

6. The Summit applied for leave to intervene in this case in order to bring to the attention of this honourable Court the perspective of those First Nations in British Columbia engaged in the treaty negotiation process. Further, by hearing from the Summit, this Court will have the benefit of hearing the perspective of each of the three principals engaged in the British Columbia treaty process.

7. The Summit was granted leave to intervene by Order of Bastarache J. on May 28, 2003.

PART II – ISSUES ON APPEAL

8. The Summit will restrict its submissions to the following issue in this appeal, as was stated in the Appellants' factum at paragraph 19:

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

9. In order to address the issue properly, the Summit will break it down into the following components:

- a) What is the nature and purpose of section 35(1) of the *Constitution Act*, 1982 and does it include Aboriginal interests which have not been proven by the court?
- b) Is there a fiduciary duty on the Provincial Crown in respect of Aboriginal interests or rights which have not been proven by the court and if so, when is it triggered and what is its scope and content?

PART III – ARGUMENT

10. This Intervener submits that the issues raised in this appeal could have a substantial impact on the British Columbia treaty negotiation process, and thereby affect the interests of its member First Nations that are attempting to negotiate treaties.

11. This Intervener fears a decision that the Provincial Crown does not have a constitutional or fiduciary duty to consult with First Nations and to seek to accommodate Aboriginal interests in circumstances where First Nations have claimed, but not yet proven

in court, their Aboriginal rights and/or title. It is submitted that such a ruling will have an adverse effect on the fairness and impartiality of the treaty process and on the entire treaty process itself.

12. The Summit will argue that the Learned Chambers Judge was correct in her finding that the Provincial Crown has both a constitutional and fiduciary duty to consult with First Nations and to seek to accommodate Aboriginal interests where First Nations have claimed, but not yet proven, their Aboriginal rights and/or title.

(i) The Nature and Purpose of Section 35(1)

13. The Appellants maintain that prior to the judicial or treaty determination of Aboriginal rights, the Provincial Crown owes only a duty of “fair dealing” with Aboriginal peoples. This Intervener submits that no such duty exists in law. Further, this Intervener respectfully submits the imposition of a duty of fair dealing, and not a fiduciary one, on the Provincial Crown, would not accord with the purposes of s. 35 of the *Constitution Act, 1982*.

Appellant’s Factum, para. 103.

14. In this Intervener’s respectful submission, imposing a duty of fair dealing during the time prior to a final determination of rights and title fails to cure the faults the Appellant maintains are in the decision below. Provincial decision makers would still be obliged to take all Aboriginal uses and interests into consideration in decision making and aboriginal people would still, using the logic of the appellants, have to ‘prove’ those interests or rights.

Appellant’s Factum, para. 110.

15. The crux of the Appellant’s argument is found in the quotation cited at paragraph 111 of its factum. This Intervener respectfully submits that the words of Madam Justice McLachlin (as she then was) were in dissent and not adopted by the majority of this Court. Appellant’s Factum, para. 111.

16. This Intervener further submits that section 35 of the *Constitution Act, 1982* concerns the recognition and affirmation of those things necessary for the survival of Aboriginal societies and provides for just settlement of the claims of Aboriginal peoples. Fundamentally, s. 35(1) of the *Constitution Act, 1982* does not concern justifying infringements of Aboriginal rights. There are positive measures required on the part of government in recognizing and affirming these rights. S. 35 is a “solemn commitment that must be given meaningful content.”

R. v. Sparrow 1 S.C.R. 1075 at p. 1108.

17. In *Sparrow*, this Court outlined three purposes of s. 35: to provide a constitutional base for negotiations, to afford constitutional protection against provincial legislative power, and to provide for a **just settlement for Aboriginal peoples**.

R. v. Sparrow, supra at p. 1105-1106.

18. Further, in *R. v. Van der Peet*, Chief Justice Lamer stated the purpose of s. 35(1) is the “protection and reconciliation” of pre-existing Aboriginal interests. For this reason, he notes “the test for identifying the Aboriginal rights recognized and affirmed by s.35 (1) must be directed at identifying the crucial elements of those pre-existing distinctive societies”. From these two quotes, it is submitted that it is clear that the survival of Aboriginal societies is a primary value that ought to shape s. 35 interpretation.

R. v. Van der Peet [1996] 2 S.C.R. 507 at para 44.

19. In *Van der Peet*, the Court set a test for what constitutes an Aboriginal right:

[I]n order to be an Aboriginal rights an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right.”

R. v. Van der Peet, supra, at para 46.

20. Chief Justice Lamer went on to explain that an activity protected under s. 35 is one that makes a culture “*what it is*”. It is submitted that if an activity is integral to the distinctive culture of a people, this suggests that without it, their distinctive culture would not be what it is. This is an important aspect of s.35 for Aboriginal peoples.

R. v. Van der Peet, supra, at para 55, 71.

21. As argued above, the survival of Aboriginal societies is dependent on Aboriginal peoples' ability to enjoy rights that are **integral** to their distinctive culture. However, there are a number of barriers to enjoyment of these rights, and, hence, the survival of Aboriginal societies. Firstly, the Appellant argues that each Aboriginal group must prove the existence of each and every right in court, or complete negotiation of a treaty, in order to have their constitutionally protected rights recognized. Secondly, Aboriginal rights may be infringed upon by government action that is "justified" in accordance with the analysis set out in *R. v. Sparrow*. Finally, there is no legal requirement that remedial measures must be taken to reinstate rights that would have been protected under s. 35 had they not been "extinguished" prior to 1982. This appears to be the case even if such rights were integral to the distinctive culture of a particular group and extinguished primarily for reasons of racial discrimination.

R. v. Sparrow, supra, at page 1120.

Delgamuukw v. British Columbia [1997] 3 S.C.R. 1010, at para 160-169, 172.

22. It is submitted that these barriers to Aboriginal peoples' enjoyment of their most important rights are highly significant. The time prior to signing a treaty or proving Aboriginal rights in court is a precarious one for Aboriginal peoples. Without a fiduciary duty of consultation on the part of the Crown, Aboriginal peoples may have no tool for gaining recognition by governments or third parties of existing rights. It is the Intervener's submission that safeguards are necessary to ensure Aboriginal cultures are able to survive during these times. Further, only such safeguards can properly ensure that the purposes of s. 35 are achieved. With respect, without them, no just settlement of the claims of Aboriginal peoples could be possible.

23. This Intervener submits that in cases such as this, denying the existence of Aboriginal rights and protection for Aboriginal interests unproven in court forces First Nations to litigate to prove each and every right that would offer protection from encroachment by industry and government. In *Campbell v. British Columbia (Attorney General)*, Justice Williamson noted that that this court has referred to s.35 as a

“framework” within which the prior existence of Aboriginal peoples may be reconciled with the sovereignty of the Crown. He stated that this:

can mean nothing other than that there are existing Aboriginal rights which have not yet been so reconciled. In much of Canada these rights were reconciled through the negotiation of treaties. In most of British Columbia they were not.

Campbell v. British Columbia (Attorney General) [2000] 4 C.N.L.R. 1 (B.C.S.C.) at para 167-168.

24. Given the potential number of rights that could be held by First Nations and the complex inter-relationships between those rights, the scope of the litigation may be extensive. As argued later in this factum, this court and other courts have encouraged First Nations to negotiate rather than litigate.

25. The appellant argues in paragraph 91 of its factum that Ministerial decisions are political in nature, completed after weighing the competing interests of various stakeholders. This court in *Sparrow* sanctioned challenges by First Nations to such political decisions:

By giving Aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that Aboriginal rights are affected.

Sparrow, supra, at p. 1110.

26. In paragraph 60 of its factum, the Appellant cites Chief Justice Lamer in *R. v. Gladstone* for the purpose of arguing that limits placed on Aboriginal rights are an equal part of the reconciliation of Aboriginal societies with the broader political community. As the quoted passage from *Gladstone* indicates, we respectfully submit that this is only the case where those limits are of **sufficient importance**.

Appellant’s factum, para. 60.

27. Paragraph 116 of the Appellant’s factum calls for a reasonable balancing of Aboriginal interests and the other legitimate objectives of the Crown for the economic

and social development of the Province. It is this Intervener's submission that Aboriginal interests will always be compromised if balanced against the interests of the Province.

28. In respect of paragraphs 78 and 79 of the Appellant's factum, this intervener's submits that imposing a fiduciary duty on the Provincial Crown to recognize and affirm Aboriginal rights unproven in court, where there is evidence of such rights, would properly acknowledge the purposes of s. 35. This Intervener respectfully submits that to do otherwise would leave s. 35 an empty provision.

29. This Intervener supports the position of the Respondent Taku River Tlingit First Nation in paragraphs 70 and 71 of its factum. This case calls for the imposition of a fiduciary duty to protect important land-based interests. It is this Intervener's respectful submission that to deny a fiduciary duty in this circumstance would limit s. 35 to justifications of government infringement instead of recognizing and affirming Aboriginal rights.

30. A lack of interim protection for Aboriginal interests allows governments to exploit confusion over indigenous rights and lands in its own favour. A similar case to the one presently before this court was considered recently by the Inter-American Court of Human Rights in *The Mayagna (Sumo) Indigenous Community of Awas Tingni vs. the Republic of Nicaragua*. Though the *Awas Tingni* decision is not binding on this court, this Intervener encourages upon this court the reasoning in that decision.

The Mayagna (Sumo) Indigenous Community of Awas Tingni vs. the Republic of Nicaragua (2001), Inter-Am. Ct. H.R. Ser. C No. 79.

31. In *Awas Tingni*, the State of Nicaragua was found in violation of the *American Convention on Human Rights* for leaving the territorial rights of an indigenous community uncertain. Official recognition of their communal property had not been attained, and was prejudiced by the grant of a logging concession. The court made its finding despite finding there were overlapping aboriginal claims to the lands in question. The Government of Nicaragua was ordered, as an interim measure, to abstain from any acts that might lead agents of the State or third parties to affect the "existence, value, use

or enjoyment of the property located in the geographic area where the members of the Mayagna (Sumo) Awas Tingni Community live and carry out their activities...”.

The Mayagna (Sumo) Indigenous Community of Awas Tingni vs. the Republic of Nicaragua, supra, at para. 103, 173.

32. In arriving at their decision, the court noted the following:

[T]he close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.

The Mayagna (Sumo) Indigenous Community of Awas Tingni vs. the Republic of Nicaragua, supra, at para. 149.

33. Jurisprudence on s. 35 is still in its early stages. While this court explored the scope of s. 35 in *Sparrow* “for the first time”, its decision should not exhaust the scope and content of that provision. It is submitted that in *Sparrow* this court recognized and emphasized the importance of context and a case-by-case approach to s. 35.

Sparrow, supra, at p. 1082, 1111.

34. It is respectfully submitted that the interpretation of s. 35 suggested by the Appellant is even less generous than the plain reading of s. 35. This Intervener submits that s. 35 should be interpreted in a generous, liberal and remedial way, with doubtful expressions resolved in favour of First Nations.

R. v. Sparrow, supra, at p. 1106-1107.

(ii) Fiduciary Duty

Generally

35. Dickson J. set out what has been described as the fundamental principle of the fiduciary doctrine as follows:

“...where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary.”

Guerin v. R., [1984] 2 S.C.R. 335 at 384.

36. It is submitted that fiduciary doctrine is used in the context of the Crown and Aboriginal people to at least limit and monitor the power of the Crown over Aboriginal *sui generis* interests.

37. In *Sparrow*, this Court extended fiduciary doctrine beyond the issue of land surrenders, finding that

..the government has the responsibility to act in a fiduciary capacity with respect to Aboriginal peoples. The relationship between the government and Aboriginals is trust-like rather than adversarial and contemporary recognition and affirmation of Aboriginal rights must be defined in light of this historic relationship.

Sparrow, supra at 1108.

The Fiduciary Duty of the Province

38. This Intervener submits that the seminal statement above, is applicable to both the Federal and Provincial Crowns.

39. Although *Sparrow* as a fishing case dealt specifically with the Federal – Aboriginal relationship, *Delgamuukw* considered a much broader range of interests falling under both federal and provincial jurisdiction. *Delgamuukw* established that there was a Provincial duty to consult with First Nations where matters within provincial jurisdiction had the potential to infringe upon Aboriginal rights or title. Lamer C.J.C. held that “there is always a duty of consultation”, with the scope and nature of the duty varying depending on the circumstances. The Court went on to say that consultation must always be in good faith, with the intention of substantially addressing Aboriginal concerns and in some cases may go beyond consultation and require the consent of an Aboriginal nation, “particularly when provinces enact hunting and fishing regulations in relation to Aboriginal lands”.

Delgamuukw, supra at para 186.

40. The British Columbia Court of Appeal held that,

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. [emphasis added]

Haida Nation v. British Columbia (Minister of Forests), [2002 BCCA 147 at para. 34 (“*Haida I*”).

41. The Appellants submit that the relationship between the provincial Ministers making resource allocation decisions and First Nations with “undetermined Aboriginal interests” who may be affected by the decisions, ought not to be characterized as fiduciary.

Appellant’s Factum, para. 24(b)

42. The Summit acknowledges what this Court has recently made clear, that the Crown’s fiduciary duty “does not exist at large, but in relation to specific Indian interests”.

Wewaykum Indian Band v. Canada, [2002] SCC 79 at para. 81.

43. Furthermore, this Court in *Wewaykum* held that in order to determine whether the Crown’s fiduciary duty is engaged, the obligation or interest at issue “...and whether or not the Crown had assumed discretionary control in relation thereto sufficient to ground a fiduciary obligation” must be considered.

Supra at para 83.

44. This Intervener submits that the case at bar is precisely the situation that should invoke the fiduciary doctrine; the Tlingits filed their Comprehensive Land Claim in 1984 with the Federal government, have been engaged in treaty negotiations with both provincial and federal governments since 1993 and clearly have material interests at stake in the Tulsequah Chief Mine Project (the “Project”) approval process. The Federal government agreed to accept the Tlingits’ claim for negotiation in 1984 on the basis of a preliminary determination that the Tlingits have Aboriginal rights within their claimed territory.

Reasons for Judgment, Kirkpatrick J. at para. 130.

45. The duty of both the Provincial and Federal Crown to negotiate in good faith in the context of treaty negotiations was articulated in *Gitanyow First Nation v. Canada*.

Williamson J. reviewed the process whereby the British Columbia treaty process came into being. The Court noted

...That when Canada, the Province, and the Summit executed the British Columbia Treaty Commission Agreement in September 1992, they included a provision that the June 28, 1991 Report of the British Columbia Task Force could be used as an aid to interpretation. The Task Force Report said at page 18:

“Important to the relationship between the Crown and Aboriginal peoples is the concept of the fiduciary duty owed by the Crown. This duty is rooted in history and reflects the unique and special place of Aboriginal peoples in Canada. The treaty-making process will define and clarify the terms of the new relationship between the Crown and Aboriginal people but it cannot end the Crown’s fiduciary duty. The determination of the extent to which the fiduciary duty continues to exist is a matter for the courts.”

Gitanyow First Nation v. Canada, [1999] 3 C.N.L.R. 89 (B.C.S.C.) at para. 38.

46. In considering whether the duty of the Crown to Aboriginal people included the province (a point which Williamson J. noted was not conceded to by the province), the Court noted “There is only one Crown. The Crown “is not and has never been divisible”. The Court concluded that the duty to negotiate in good faith, based upon the fiduciary relationship applies equally to Provincial and Federal Crowns.

Gitanyow, *supra* at para. 46, quoting Southin J.A., in dissent, in *B.C. (A.G.) v. Mount Currie Indian Band*, [1991] 4 C.N.L.R. at 36 (C.A.), writing upon a point not disputed by the majority and para. 53.

47. The Court in *Gitanyow* considered the Provincial Crown’s submission that it should not be subject to a fiduciary duty to Aboriginal people, because as government, it has a duty to balance the competing interests of other parties as well. The argument was dismissed as untenable, relying on *Sparrow*, where this Court held,

We find the “public interest” justification to be so vague as to provide no meaningful guidance and so broad to be unworkable as a test for the justification of a limitation on constitutional rights.

Gitanyow, *supra* at para.60. *applying Sparrow*

The Fiduciary Paradox

48. The Summit is mindful of the paradox that invoking the fiduciary of the Crown presents: the perpetuation of the unequal power of the Crown vis-à-vis Aboriginal people,

dependent as mere beneficiaries, on the mercy and honour of the Crown. Juxtaposed over this duty is the reality that is unlike the typical private law fiduciary relationship, where the fiduciary protects the beneficiary from unscrupulous third parties and acts in its best interests or bears the consequences, Aboriginal people consistently find themselves seeking the courts' assistance in upholding the Crowns' fiduciary duties.

49. The Summit submits that notwithstanding the aforementioned dilemma, the fiduciary concept remains critical as a means for restraining governmental action and protecting Aboriginal rights, particularly given Lamer C.J.C.'s description of "British Columbia's persistent refusal to acknowledge the existence of Aboriginal title...until relatively recently".

Delgamuukw, supra at para. 106

50. This historical position of the Provincial Crown stands in stark contrast to this Court's comments in *Sparrow*, *supra* at 1108 that "...the relationship between the Government and Aboriginals is trust-like, rather than adversarial...". It is submitted that one of the reasons for this anomaly is that as in the case at bar, the Crown frequently attempts to limit the concept of fiduciary duty to the justificatory stage, *after* a breach, infringement or other improper dealing with Aboriginals occurs.

51. In response to the submission of the Appellants Ringstad et al as stated at paragraphs 65 and 66, this Intervener submits that since *Sparrow*, whether consultation by the Crown has taken place with First Nations has been a component of the justification test. This Intervener submits that clearly, this principle assumes a duty to consult **prior** to infringement. Furthermore, this Intervener submits that to wait to consult until the justification stage, after infringement has taken place, would result in the compromise of Aboriginal interests, perhaps irrevocably so. This would, it is submitted, encourage litigation as opposed to negotiation.

52. As stated above, an approach of waiting for infringement and then using s. 35 to justify government infringement, instead of as a means to recognize and affirm Aboriginal rights appears to be the preferred approach of government.

53. The result will be that Aboriginal people are consistently placed in the position of seeking the assistance of the court. In the case at bar, the application is to obtain direction with respect to the exercise of government discretion under a consultation process. Other examples include the defence of quasi-criminal offences where an Aboriginal right is alleged, or the adjudication of Aboriginal rights/title claims in civil court.

54. The high standard of proof required to satisfy the court of the existence of Aboriginal rights and title, places Aboriginal people in the position of having to justify their own existence. The litigation process can be demeaning especially to Elders and Chiefs and is notoriously costly and time-consuming. The effect of Aboriginal rights litigation both “in economic...[and] human terms...” was recognized by Lamer C.J.C. in his well-known concluding paragraph in *Delgamuukw*.

The Need to Negotiate

55. In *Delgamuukw*, Lamer C.J.C. noted that...s. 35(1) provides a solid constitutional base upon which subsequent negotiations can take place... *And*

...Moreover, the Crown is under a moral, if not a legal duty to enter and conduct those negotiations in good faith...

...through negotiated settlements...we will achieve...a basic purpose of s.35(1) – “the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown”.

Delgamuukw at para. 186

56. Numerous decisions of the Courts have articulated or repeated this seminal principle.

MacMillan Bloedel Ltd. v. Mullin et al., [1985] 2 C.N.L.R. 58 at 77; *Pacific Fishermen’s Defence Alliance v. Canada*, [1987] 3 F.C.J. No. 170 (T.D.). para. 21 per Dube J; *Delgamuukw v. British Columbia*, [1993] 5 C.N.L.R. 1 at para. 290 (B.C.C.A.); *Nunavik Inuit v. Canada (Minister of Canadian Heritage)*, [1998] 4 C.N.L.R. 68 at para. 40-50 (Fed.Ct.T.D.); *R. v. Marshall*, [1999] 3 S.C.R. 533 at para. 22; *Gitanyow v. British Columbia*, [1999] 3 C.N.L.R. 89 at para. 1, 63 (B.C.S.C.); *Paul v. British Columbia (Forest Appeals Commission)*, [2001] BCCA 411 at para.

106; *Xeni Gwet'in First Nation v. British Columbia*, [2002] 4 C.N.L.R. 306 at para. 136 (B.C.C.A.); *Taku River First Nation v. British Columbia*, [2002] 2 C.N.L.R. 312 at para. 174 (B.C.C.A.).

57. This Intervener's members, all of whom are engaged in the treaty negotiation process have heeded the Court's admonition.

58. Since its inception in May 1993, the Treaty Commission has allocated approximately \$222 million in negotiation support funding to more than 50 First Nations of which \$177 million is provided as loans and \$45 million as contributions.

British Columbia Treaty Commission Annual Report, 2002 at 25.

Triggering the Duty to Consult

59. The Summit approaches this issue from the perspective of First Nations engaged in treaty negotiations.

60. The Summit submits that a First Nation which is or has been part of treaty negotiations should be deemed to have sufficiently put the Crown (both Provincial and Federal) on notice of its claims and to have overcome the initial evidentiary hurdle of establishing what was described by Lambert J.A. as a good *prima facie* case. Lambert J.A. went on to confirm that he was *not* saying that with less than a good *prima facie* case, there was no obligation to consult.

"Haida I" supra at para. 50, 51.

61. Lambert J.A.'s approach was adopted by Tysoe J.A., where the claims of the First Nations were considered in the context of a judicial review application. The starting point for the court there was that each of the petitioning First Nations asserted Aboriginal rights and title within the area at issue and were all at Stage 4 of their respective treaty negotiations.

Gitksan First Nation et al. v. British Columbia (Minister of Forests), 2002 BCSC 1701.

62. Tysoe J. noted that it was deposed that information submitted by a First Nation engaged in the treaty process, in which Aboriginal rights and title are asserted is used by the Province to identify topics for negotiation as opposed to "evaluating or assessing

whether the information is sufficient to meet the legal criteria for the proof of Aboriginal rights and title”. The Summit acknowledges that the goal of interest-based treaty negotiations, as an alternative to litigation, is not to define Aboriginal rights and title, but to seek mutually agreeable accommodation.

Gitxsan, *supra* at para. 38; *Affidavit of Herb George*, para. 9,10.

63. Looking to the language and analysis of *Haida*, and applying it to the facts before him, Tysoe J. equated

- i) “reasonable possibility”(of establishing Aboriginal title/rights) to mean a *prima facie* case;
- ii) “reasonable probability” (of establishing Aboriginal title/rights) to mean a good *prima facie* case; and
- iii) “substantial probability” (of establishing Aboriginal title/rights) to mean a strong *prima facie* case.

Gitxsan, *supra* at para. 75.

64. In this Intervener’s submission, this analysis provides a workable solution and sets an appropriate threshold for assessing Aboriginal interests.

65. In answer to the factum of the Intervener Business Council of British Columbia et al. at paragraphs 28, 30, 31 and 32 and its concern that the finding of a Provincial fiduciary duty to consult could trigger a flood of claims, it is submitted that the analysis above addresses this concern as it would eliminate any frivolous or unsubstantiated claims. This Intervener makes the same response to paragraph 59 of the Respondent Redfern Resources Ltd.’s factum and to the Appellants Ringstad et al.’s paragraph 97. It is respectfully submitted that this does not equate to the granting of a veto, as feared by Ringstad et al.

Scope and Content of the Duty to Consult

66. It is submitted that the Crown’s duty to consult with an affected First Nation, prior to proof of its claim, is triggered regardless of the strength of a First Nation’s asserted

claim. It is further submitted that the scope and content of the duty of consultation should be determined in light of, *inter alia*, the following principles:

- (a) There is always a duty of consultation and the requirements of that consultation will vary with the circumstances, such as the nature of the Aboriginal right and the potential infringement of the right (*Delgamuukw, Taku, Haida*);
- (b) The Crown is required to explain the need for a particular conservation [or other] measure (*R. v. Sampson* (1995), 16 B.C.L.R. (3d) 226 (B.C.C.A.));
- (c) The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that Aboriginal peoples are provided with all necessary information in a timely way so that they have the opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action. (*Halfway River*);
- (d) The Crown has a legally enforceable duty to First Nations to consult with them in good faith and it must endeavor to seek workable accommodations between the Aboriginal interests and the short term and long term objectives of the Crown and other parties, and that obligation extends to both the cultural and economic interests of First Nations. (*Haida*);
- (e) Consultation must be undertaken with the genuine intention of substantially addressing the concerns of First Nations. (*Mikisew Cree First Nation v. Canada*, [2002] 1 C.N.L.R. 169 F.C.T.D.);
- (f) Non-Aboriginal economic concerns or "economic forces" alone will not be sufficient for the Crown to justify an infringement and do not remove the Crown's duty to consult. (*Haida*);
- (g) First Nations are entitled to a distinct consultation process apart from public forums or general public or stakeholder consultations (*Mikisew Cree First Nation*);
- (h) The concept of reasonableness applies to the duty to consult. (*R. v. Nikal*, [1996] 3 C.N.L.R. 178 (S.C.C.));
- (i) The shortness of time is not sufficient to obviate the duty of consultation: see *R. v. Noel*, [1995] 4 C.N.L.R. 78 (N.T.T.C.) at p. 95, *Mikisew* at para. 132 and *Haida No. 1* at para. 55. (Tysoe J. in *Gitksan* case, 2002, par. 91) – although this may go to reasonableness or emergency.

67. It is submitted that clearly the result of these and other developments in the case law have not been to prevent or chill development, but rather to protect Aboriginal interests and facilitate treaty negotiations.

Effect on Treaty Negotiations and Interim Measures

68. Statements of Intent by respective First Nations in the treaty process setting out their asserted territory and the basis for their claim are filed in order that a preliminary determination can be made to accept a claim for negotiation.

Affidavit of Herb George, para. 6 and British Columbia Treaty Commission Annual Reports

69. Enforcing interim protection of existing but unproven rights would be in keeping with the British Columbia Treaty Commission's acknowledgement that land protection is an important component of treaty negotiations,

“The Treaty Commission continues to... urge the parties to negotiate more interim measure agreements, especially for land and resource protection, planning and management.”

British Columbia Treaty Commission Annual Report 2002 at 9.

70. Consultation between First Nations and the province, and the obligation of the province to seek accommodation of Aboriginal interests, which continues alongside and independent of treaty negotiations, serves as one source of interim measure until the conclusion of treaties. With respect, if the Crown is correct in its submissions, this Intervener submits that the effect will be to compromise the foundation of the British Columbia Treaty Process and force many First Nations to instead pursue litigation.

71. Recommendation 16 of the Report of the British Columbia Task Force states that:

The parties negotiate interim measures agreements before or during the treaty negotiations when an interest is being affected which could undermine the process.

72. The treaty process is a long and arduous process and as a result, many of the Summit's members have become concerned the resources which form the subject matter at the negotiating table are being alienated in the interim. It is submitted that this concern is what interim measures agreements should be intended to address.

73. With few exceptions, First Nations have found government to be reluctant to conclude effective, interest-based interim measures. This was the experience of the Tlingit who proposed to the Review Committee as a mitigative option, that an interim measure be negotiated at their treaty table. That option was not even addressed in the Recommendations Report. The Learned Chambers Judge concluded “that there was inadequate (and perhaps no) assessment of evidence produced by or on behalf of the Tlingits”.

Reasons for Judgment para. 72 and 85

74. If there is no Provincial fiduciary duty to consult or seek to accommodate First Nations before proof in court or conclusion of treaty, than this Intervener fears that the effect may well be to shift the focus back to the positional approach of litigation as opposed to the interest-based efforts to reach practical accommodations on an interim basis.

Affidavit of Herb George, para. 11, 12.

Supervisory Role of the Court

75. The Summit submits that if this Court finds that there is a legal duty of consultation, prior to proof of Aboriginal rights and title, then what will be achieved, *inter alia* is the injection of legal obligation into what is currently a primarily policy driven treaty process .

76. The Court in *Gitanyow*, *supra*, at paragraph 61, affirmed the supervisory role of the court “to assist in determining the duties of the parties involved in the [treaty] process. This was in response to the Crown’s argument that the British Columbia treaty process was not amenable to court supervision. The Court held that notwithstanding “...judicial encouragement of political negotiation...” as facilitated by the Treaty Commission, the court maintained its “duty to enforce fiduciary obligations”.

77. The Summit submits that this Court’s articulation of the duties of the Crown to consult has the potential to revitalize the treaty negotiation process in British Columbia by ensuring that there is a clear legal obligation and thus an enforceable legal remedy, in the event that the subject matter of negotiations becomes subject to alienation to third parties.

Conclusion

78. This Intervener agrees that the treaty negotiations proceeding in British Columbia offer the best opportunity for lasting reconciliation. A recognition of the duty of the province to consult with Aboriginal peoples before Aboriginal peoples are forced to go to court to prove their rights will encourage the Aboriginal peoples to negotiate and does not shift any burden of proof.

79. The suggested provincial duty of ‘fair dealing’ does not address the intention of section 35 and does nothing to recognize and affirm the Aboriginal rights of the Aboriginal peoples of British Columbia. Such a suggested duty is unknown to the law of Aboriginal rights or section 35 and carries no remedy for breach.

80. In *Sparrow* this court said that

“And there can be no doubt that over the years the rights of the Indians were often honoured in the breach...”

Sparrow, supra at p. 1103.

and

“For many years, the rights of the Indians to their Aboriginal lands—certainly as legal rights—were virtually ignored.”

Ibid.

81. With respect, the position of the Appellants would again result in the legal rights of the Aboriginal peoples being ignored.

82. Section 35 (1)

“...represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of Aboriginal

rights....Section 35 (1), at the least, provides a solid constitutional base upon which subsequent negotiations can take place. It also affords Aboriginal peoples constitutional protection against provincial legislative power.”

Sparrow, supra at p. 1105.

83. Further, it represents

“a solemn commitment that must be given meaningful content.”

Sparrow, supra at p. 1108.

84. The cost of negotiation of treaties and the cost of litigating Aboriginal rights are both extremely high and complicated. Both are time consuming. The requirement for consultation before proof in court recognizes that s. 35 is not an empty promise and ensures that the legal rights of the Aboriginal people are not ignored. Such an approach recognizes the affirmative nature of s. 35 and that s. 35 is about recognition and affirmation of Aboriginal rights and not about ways to infringe Aboriginal rights.

85. The years of frustration borne from a failure by government to recognize the existence of Aboriginal rights have given way to a genuine attempt by this Intervener’s members to negotiate. Section 35 should not be construed so as to give rise to more years of frustration borne of a need to prove in court every Aboriginal right before it is protected.

PART IV - ORDERS SOUGHT

86. It is submitted that the Appeal should be dismissed.

July 22, 2003

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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