

Summaries of Facta for Supreme Court of Canada Haida Case (2004)

Appellant: Weyerhaeuser Company Ltd.

Appellant: Minister of Forests & Attorney General of BC (British Columbia)

Respondent: Council of the Haida Nation

First Nation Interveners

- ▶ First Nations Summit
- ▶ Dene Tha' First Nation
- ▶ Haisla Nation
- ▶ Squamish Indian Band and Lax Kw'alaams Indian Band
- ▶ Tenimgyet (Art Matthews, Gitxsan Hereditary Chief)

Government Interveners

- ▶ the Attorney General of Canada
- ▶ the Attorney General of Alberta
- ▶ the Attorney General of Nova Scotia
- ▶ the Attorney General of Ontario
- ▶ the Attorney General of Saskatchewan

Third Party Interveners

- ▶ BC Cattlemen's Association
- ▶ Business Council of British Columbia and others (Business Interveners)
- ▶ Village of Port Clements

MEMO

February 16, 2004

TO: Hugh Braker, Braker and Company
Arthur Pape, Pape & Salter
First Nations Summit Task Group

FROM: Jonathan Sarin, Braker and Company

RE: *Minister of Forests et al v. Council of the Haida Nation et al*
Weyerhaeuser Company Ltd. v. Council of the Haida Nation et al
Supreme Court of Canada Registry No.: 29419
Summary of the factum of the Appellant Weyerhaeuser Company
Limited
Our File No.: SUMMIT-03-03

Hugh Braker asked that I summarize the factum of the Appellant Weyerhaeuser Company Limited ("Weyerhaeuser") filed in the above-captioned matter. I trust the summary given below will be of assistance. Please contact me at Braker and Company's Vancouver office if you have any questions.

Summary

Background

This case raises the issue of the relationship between aboriginal title claims and third party (i.e., Weyerhaeuser's) rights and obligations. Under the BC *Forest Act*, the Minister of Forests (the "Minister") granted a replacement tree farm licence to Weyerhaeuser to conduct timber harvesting activities on Crown land in the Queen Charlotte Islands. The BC Court of Appeal held Weyerhaeuser has an independent legal obligation to consult and make reasonable efforts to accommodate the Haida in the circumstances. Weyerhaeuser appeals from this portion of the Court of Appeal's judgment and also supports the Crown's appeal to the extent that the Court of Appeal has imposed obligations on the Crown to consult and accommodate unproven aboriginal interests that may be inconsistent with Weyerhaeuser's licence rights.

Issue 1 – Did Weyerhaeuser as a license holder operating on Crown land have an independent obligation to consult with and make reasonable efforts to accommodate the asserted but unproven aboriginal rights of the Haida?

Position: No.

Argument 1: None of the Court's decisions to date suggest that the obligation of consultation may be imposed on third party licensees.

Argument 2: The foundation for consultation and accommodation duties is the honour of the Crown and the Crown's fiduciary relationship with aboriginal people. These sources do not support an extension of duties to third parties.

Argument 3: A third party is unable to weigh or measure aboriginal claims. It is also unable to lead evidence of justification of its actions under the *Sparrow* test, which applies only to the Crown.

Argument 4: The appropriate interim remedy to invoke when unproven claims are advanced to challenge licence rights is the interlocutory injunction.

Argument 5: None of the potential sources relied on to establish an obligation on Weyerhaeuser to consult with and accommodate the interests of the Haida in fact support this obligation.

- None of the provisions of the *Forest Act* and TFL 39 require a licensee to independently consult with First Nations.
- Weyerhaeuser's had no "knowing receipt" of trust property that makes them liable for breach of trust. The doctrine does not apply in these circumstances.
- Third parties can not rely on justification as a defence against an action for infringement. Justification, including the element of consultation, is a public law concept that applies only to actions by the Crown.

Issue 2 – If not, did Weyerhaeuser have such an obligation on the basis that the Provincial Crown had breached its own obligations to the Haida and that without an order against Weyerhaeuser, an order against the Crown would be ineffective?

Position: No.

Argument 1: The licence provisions gave the Crown sufficient authority to require Weyerhaeuser to consult the Haida on operational matters and to withhold cutting permits if necessary.

Argument 2: The Provincial Government could legislate to allocate part of the timber to the Haida.

Issue 3 – Were there Procedural Defects in the Court of Appeal's Decision?

Position: Yes.

Argument 1: The Court of Appeal should never have dealt with this issue at all. This was a judicial review proceeding seeking relief against a Crown decision-maker.

Argument 2: The concept of an interim declaration is logically non-comprehensible.

Argument 3: The *Judicial Review Procedure Act* does not provide the authority for the Court to make an interim declaration.

Argument 4: In substance, the Court of Appeal's order is a form of mandatory injunction, but the Court of Appeal did not consider any of the appropriate tests for such an order.

MEMO

February 4, 2004

TO: Hugh Braker, Braker and Company
Arthur Pape, Pape & Salter
First Nations Summit Task Group

FROM: Jonathan Sarin, Braker and Company

RE: *Minister of Forests et al v. Council of the Haida Nation et al*
Weyerhaeuser Company Ltd. v. Council of the Haida Nation et al
Supreme Court of Canada Registry No.: 29419
Summary of the factum of the Appellants, 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
Our File No.: SUMMIT-03-03

Hugh Braker asked that I summarize the factum of the Appellants, 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 (the Appellants), filed in the above-captioned matter. I trust the summary given below will be of assistance. Please contact me at Braker and Company's Vancouver office if you have any questions.

Summary

Background

This is an appeal from two judgments of the British Columbia Court of Appeal (BCCA) that held that the Province of British Columbia has constitutional and fiduciary obligations to consult with the Haida Nation regarding potential infringements of their aboriginal rights and title and to seek workable accommodations between these aboriginal interests, on one hand, and the objectives of the Crown in managing land and resources in the interest of the public at large on the other hand. This dispute arose in the context of the Province of British Columbia's replacement of Tree Farm Licence No. 39 ("TFL 39") on the Queen Charlotte Islands ("Haida Gwaii"), and the approval of the transfer of TFL 39 from MacMillan Bloedel Limited to Weyerhaeuser Company Limited. The BCCA also found that Weyerhaeuser has legally enforceable duties to consult with the Haida and to seek to accommodate their interests. Seeking enforcement of the duty of consultation and accommodation stated by the BCCA is an alternative remedy to the interlocutory injunction.

In this case, the Haida have not yet proven their aboriginal rights and title in court. However, they claim aboriginal rights and title to all of Haida Gwaii and surrounding

waters and airspace. TFL 39, Block 6 constitutes about one-quarter of the area claimed by the Haida.

Issue 1 – Does the Provincial Crown owe fiduciary, constitutional or other duties to consult First Nations and to accommodate claimed aboriginal title and rights before those rights have been judicially determined?

Position: The Appellants say that the Crown's obligation to consult with First Nations whose claims of aboriginal rights or title have not been judicially determined or settled by treaty is neither a fiduciary nor constitutional duty. Rather, the Appellants say that the Province has only a duty of fair dealing with the Haida in this case. The duty of fair dealing has its source in administrative fairness, reasonableness in decision making, and the honour of the Crown. The duty of fair dealing is not a fiduciary or constitutional duty.

Argument: The Appellant's arguments focus on the practical difficulties in accommodating unproven aboriginal rights, the adverse effects of the BCCA's decisions on economic development and treaty negotiations, that the BCCA's decisions are inconsistent with Supreme Court of Canada jurisprudence, and that the Provincial Crown (as opposed to the Federal Crown) does not owe a fiduciary duty to protect specific Indian interests when making resource allocation decisions. The purpose of s. 35 is the reconciliation of Crown sovereignty and aboriginal rights. That reconciliation must address and balance both the constitutional rights, powers and responsibilities of the Province to manage Crown lands and resources, and the fact of prior occupation by aboriginal peoples.

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

Issue 2 – What standard of review, and what tests apply to determine if a Minister has met their duty of fair dealing?

Position: The Appellant says that the Court should only interfere with the decision of a Minister in a case such as this if the Minister's decision is unreasonable. Provided the Minister has had regard to all relevant considerations, the Court should not reweigh those considerations.

The Appellant also says that a Court may grant relief to a First Nation when the duty of fair dealing has been breached.

Argument: The indeterminate nature of the rights in this case and the requirement for balancing competing interests militate in favour of deference to the Minister's decision.

Issue 3 – Does Weyerhaeuser owe fiduciary or other legal duties of consultation and accommodation to First Nations with respect to the potential infringement of claimed, but unproven rights?

Position: The Appellant says that consultation is a legal obligation unique to the Crown.

Argument: In no case has the Supreme Court of Canada decided that the legal duty of consultation and accommodation rests on parties other than the Crown. This is consistent with the principle that the duty to consult, where rights have been established, has its source in the Crown's fiduciary obligations of justification, and with the fact that the duty is typically engaged when the Crown is making decisions regarding the allocation of Crown lands and resources. Similarly, before Aboriginal rights have been determined, the duty of fair dealing is tied to the Crown's duties and responsibilities for resource management, and therefore resides with the Crown, rather than with private actors. Weyerhaeuser has a duty to consult that is imposed by contract only.

MEMO

February 16, 2004

TO: Hugh Braker, Braker and Company
Arthur Pape, Pape & Salter
First Nations Summit Task Group

FROM: Jonathan Sarin, Braker and Company

RE: *Minister of Forests et al v. Council of the Haida Nation et al
Weyerhaeuser Company Ltd. v. Council of the Haida Nation et al*
Supreme Court of Canada Registry No.: 29419
Summary of the factum of the Respondents Council of the Haida
Nation and Guujaaw
Our File No.: SUMMIT-03-03

Hugh Braker asked that I summarize the factum of the Respondents Council of the Haida Nation and Guujaaw (collectively, the "Haida") filed in the above-captioned matter. I trust the summary given below will be of assistance. Please contact me at Braker and Company's Vancouver office if you have any questions.

Summary

The factum of the Respondents Council of the Haida Nation and Guujaaw (the "Haida") responds to both the factum of British Columbia and the factum of Weyerhaeuser.

Response to the Factum of the Appellant British Columbia

Issue 1 – Does the Provincial Crown have a fiduciary and constitutional duty, prior to final judicial determination of Aboriginal Title and Rights, but upon notice of a good prima facie case of same, to consult with Aboriginal Peoples in good faith and seek workable accommodations of their Aboriginal interests?

Position: Yes

Argument: The facts which triggered the fiduciary and constitutional duty to consult and accommodate in *Haida 1* were the Province's notice of unextinguished Aboriginal Title and Rights, supported by a good *prima facie* case.

Argument: The Province's position that the consultation duty engages only after title and rights are proven is at odds with *Delgamuukw*, which held that Aboriginal Title is founded upon the prior occupation of Canada by Aboriginal Peoples, and **not upon Crown recognition.**

Argument: The duty to consult is not confined to the strict ambit of the justification analysis set out in *Sparrow*.

Argument: The Royal Proclamation recognized and affirmed the pre-existing rights of Aboriginal Peoples to their territories.

Argument: The Duty to Consult and Accommodate is a logical evolution in the law concerning the Crown's fiduciary obligations.

Argument: Since *Delgamuukw*, it cannot be said that Aboriginal Rights and Title in BC are unknown or unrecognizable without further litigation.

Argument: Prior court decisions have held that a fiduciary obligation can still exist, even when there is a conflict between the Crown's fiduciary duties to Aboriginal Peoples and its obligation to manage resources in the public interest.

Argument: Section 109 of the *Constitution Act, 1867* indicates that if aboriginal title has not been extinguished, those lands are not available to the Province as a source of revenue.

Argument: The Province's position that it owns all land unless a First Nation proves Aboriginal title is another version of the outdated *terra nullius* argument.

Argument: Both the provincial and federal Crown are subject to fiduciary obligations.

Argument: The Province's argument that consultation is only relevant to justify infringement after rights have been proven is inconsistent with the rationale of s. 35, which include a responsibility to protect rights arising from the special trust relationship with Aboriginal peoples. Lack of proof of rights does not mean the right and duty do not exist.

Argument: By the time a court has ruled that Aboriginal Title or Rights exist and that infringement has occurred, there will be little left to consult about.

Argument: Preventing unjustified infringements before they occur is consistent with the Court's approach to *Charter* rights.

Argument: The duty to consult can encourage negotiation and minimize litigation.

Issue 2 – Does the Crown's duty require that its representatives address substantively the interests of the Aboriginal People, including their cultural and economic interests?

Position: Yes.

Argument: The strength of the obligation to seek an accommodation is proportional to the potential soundness of the claim for Aboriginal title and Aboriginal rights.

Argument: The parameters of the duty to seek workable accommodations can be informed by the elements of the justification analysis.

Argument: The objective of consultation is to attempt to reach an accommodation by agreement.

Argument: In *Delgamuukw*, the content of the consultation duty was linked to the nature of Aboriginal Title, which includes the right to *exclusive use*, the right to *choose to what uses land can be put*, and that lands held pursuant to Aboriginal title have an *inescapable economic component*.

Response to the Factum of the Appellant Weyerhaeuser

Issue 3 – Did the Court of Appeal err by including Weyerhaeuser, as the recipient of a forest tenure that had been granted in breach of the Crown’s obligations to the Haida, in a declaration that was issued under the Judicial Review Procedure Act (JRPA)?

Position: No

Argument: There is no jurisdictional reason why the Court of Appeal could not include Weyerhaeuser in the declaration. The Court of Appeal’s decision to issue a declaration which included Weyerhaeuser was an exercise of discretion. The Court of Appeal’s order was within the scope of orders permitted by s. 10 of the *JRPA*. As well, the jurisdiction to make such an order also existed independently of the *JRPA*. The declaration against Weyerhaeuser complied with the principles governing declaratory relief and was the appropriate order in the circumstances.

Argument: There was no breach of procedural fairness with respect to Weyerhaeuser.

Argument: Justice could not be done in this case without a declaration against Weyerhaeuser. It is possible under the *JRPA* to make “necessarily ancillary” orders. Because the tenure has been issued to Weyerhaeuser, the Province no longer has unfettered power to accommodate the Haida.

Argument: The obligation of Weyerhaeuser was a reasoned and appropriate holding in the circumstances of this case, from which a number of workable principles emerge that could circumscribe the categories of third parties to whom the obligation to consult and accommodate would extend. No general obligation on third parties was created by the Court of Appeal.

Argument: A remedy which included Weyerhaeuser was consistent with the purposes that underlie recognition and affirmation of aboriginal rights in s. 35(1) of the *Constitution*.

MEMO

February 13, 2004

TO: Hugh Braker, Braker and Company
Arthur Pape, Pape & Salter
First Nations Summit Task Group

FROM: Jonathan Sarin, Braker and Company

RE: *Minister of Forests et al v. Council of the Haida Nation et al*
Weyerhaeuser Company Ltd. v. Council of the Haida Nation et al
Supreme Court of Canada Registry No.: 29419
Summary of the factum of the Intervener First Nations Summit
Our File No.: SUMMIT-03-03

Below is a summary of the factum of the Intervener First Nations Summit, filed in the above-captioned matter. I trust this summary will be of assistance. Please contact me at Braker and Company's Vancouver office if you have any questions.

Summary

Background

The First Nations Summit (the "Summit") is an Aboriginal organization comprised of a majority of First Nations and Tribal Councils in British Columbia. The Summit represents the interests of and supports First Nations working to negotiate treaties and address issues of common concern. The Summit contends that First Nations and the treaty negotiation process will be strengthened if the BC Court of Appeal's order is upheld in this case, 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 a new relationship based on mutual trust, respect and understanding.

Issue 1 – 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?

Position: Yes.

Argument 1: Defining the Crown's fiduciary duty in this way would promote the two purposes of s. 35 of the *Constitution Act, 1982*: to provide a constitutional base for negotiations, and protection for Aboriginal peoples' distinct culture and relationship to land.

Both purposes of s. 35 would be frustrated if the Court accepts 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 for several reasons:

1. The Appellant's argument is fundamentally based on the denial of aboriginal rights rather than their recognition and affirmation. It is also inconsistent with the respect and good faith required for negotiations to succeed.
2. The Appellant's 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.
3. Given the extent of resource development in BC, First Nations and Courts lack the resources to define every Aboriginal right to be protected. The Appellant's argument would increase economic uncertainty and social discord, and undermine s. 35's protective and reconciliation purposes.
4. The Appellant's argument promotes litigation rather than negotiations. Courts have urged negotiations.
5. The Appellant's argument is based on a narrow and technical reading of *Sparrow*. The Court did not write *Sparrow* with the intention of exhaustively defining the Crown's fiduciary duties in all circumstances.

Argument 2: An analysis of the **purpose** 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. The Crown's fiduciary duty towards Aboriginal peoples to protect them in the enjoyment of their aboriginal rights and title stems from the **historical fact** that Aboriginal peoples were once independent, self-governing entities in possession of most of the lands now making up Canada.

Argument 3: Basing the Crown's duty to consult and accommodate based on the fact of the existence of vulnerable Aboriginal interests is also consistent with the principles of fiduciary law.

Argument 4: Legal principles, including those in respect of the Crown's fiduciary obligations, continue to be affirmed and applied by the 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.

Argument 5: Substituting a fiduciary duty with a "duty of fair dealing" promoted by the Appellant would allow governments to conduct business as usual.

Argument 6: The duty to protect Aboriginal interests pursuant to the fiduciary relationship was reflected in constitutional instruments long before the enactment of s. 35.

Argument 7: Interlocutory injunctions are insufficient to protect Aboriginal Interests. They involve only win-lose options for parties, are not well tailored to protect constitutional values, are often unavailable at the authorization stage of a project, and are

based on the assumption that specific aboriginal rights will need to be adjudicated whenever a First Nation seeks protection for vulnerable Aboriginal interests.

Issue 2 – 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?

Position: The Crown's fiduciary duty in a case like this includes two inter-related components – consultation and accommodation. The consultation process should be jointly designed by the Crown and Aboriginal people. Accommodation requires that the Crown refuse to authorize proposals that would (1) undermine or endanger Aboriginal interests or (2) alienate or encumber interests that need to be secured for First Nations to sustain themselves as an Aboriginal people.

Argument 1: The decisions in *Delgamu'ukw* and *Adams* support the contention that consultation is always mandated.

Argument 2: Accommodation is intended to fulfill the Crown's obligation to exercise its authority so as to protect and foster the sustainability of Aboriginal peoples.

Argument 3: The Court of Appeal was correct to define and enforce the Crown's fiduciary duty to consult and accommodate. However, 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.

Argument 4: 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. The appropriate standard of review is "correctness".

Argument 5: The remedy for breach of the Crown's duty should be to require the Crown and proponent to take the necessary steps to correct the legal defect in the authorization, by fulfilling their fiduciary obligations.

Issue 3 – Do proponents or licensees have corresponding legal obligations in circumstances like this case?

Position: Yes

Argument: Weyerhaeuser was correctly designated a fiduciary by the Court of Appeal. Corporations have been designated fiduciaries in other commercial circumstances. In this case it requires Weyerhaeuser to put in place accommodation measures and provides a legal foundation for remedies to prevent the company from retaining profits from an authorization granted in breach of the Crown's duties.

MEMO

March 1, 2004

TO: Hugh Braker, Braker and Company
Arthur Pape, Pape & Salter
First Nations Summit Task Group

FROM: Jonathan Sarin, Braker and Company

RE: *Minister of Forests et al v. Council of the Haida Nation et al*
Weyerhaeuser Company Ltd. v. Council of the Haida Nation et al
Supreme Court of Canada Registry No.: 29419
Summary of the factum of the Intervener Dene Tha' First Nation
Our File No.: SUMMIT-03-03

Hugh Braker asked that I summarize the factum of the Intervener Dene Tha' First Nation ("Dene Tha'") filed in the above-captioned matter. I trust the summary given below will be of assistance. Please contact me at Braker and Company's Vancouver office if you have any questions.

Summary

Dene Tha' is a First Nation located in Alberta and is a signatory to *Treaty 8*. Dene Tha' states its ability to exercise its *Treaty 8* rights to hunt, fish and trap is affected by the large presence of oil and gas, forestry, and other activities within its Traditional Territory and is contingent on its ability to be consulted effectively by the Province of Alberta.

Issue: Does the Crown in Right of British Columbia owe a constitutional and fiduciary duty to consult with First Nations and to seek to accommodate their rights, prior to a final judicial determination of those rights?

Position: The Crown in Right of British Columbia ("British Columbia") owes fiduciary and constitutional duties to consult with First Nations and to seek to accommodate their rights whenever there is the potential that Crown action or decision making may infringe rights, whether they take the form of aboriginal rights, title or treaty rights. This duty is engaged prior to a First Nation's rights being judicially determined.

Argument 1: Both treaty and non-treaty rights are protected by s. 35(1) of the *Constitution Act, 1982*.

Argument 2: There is nothing in *Sparrow* that suggests that the Crown's constitutional and fiduciary duties only arise if an aboriginal right is judicially determined. A number of cases have dealt with the issue of potential infringement of rights.

Argument 3: The position of the provinces of Alberta and British Columbia affords First Nations minimal protection beyond what any person affected by Crown decisions would have through administrative law.

Argument 4: An “after-the-fact” approach to consultation ignores the requirements that aboriginal and treaty rights be minimally impaired and that, after conservation, aboriginal and treaty rights must be given priority over non-aboriginal uses of land. This approach also fails to give proper guidance to Crown decision makers.

Argument 5: Courts have already held that the Crown has a constitutional and fiduciary duty to consult with Treaty First Nations without requiring those First Nations to have their rights judicially determined.

Argument 6: The consultation that is mandated by s. 35 within the treaty context must be informed by a nation-to-nation relationship.

Argument 7: The importance of the promises with respect to hunting, fishing and trapping rights made in *Treaty 8* in the have already been outlined by the Supreme Court of Canada in the *Horseman* case.

Argument 8: It can not be correct that *Treaty 8* First Nations received only the chance to prove the right to hunt, fish and trap in exchange for surrendering vast portions of their territory.

Argument 9: If the Crown is allowed to wait until aboriginal and treaty rights are proven in court before consulting, there may well be nothing left to consult about.

Argument 10: Alberta’s position results in giving itself unfettered ability to exercise power to the detriment of First Nations’ rights to hunt, fish and trap.

Argument 11: If consultation is required only after aboriginal or treaty rights are proven in court, this dishonours the Crown and does not respect the solemn promises made in treaties like *Treaty 8*.

Argument 12: First Nations are required to provide sufficient information about the right and its potential infringement to the decision maker, not to prove or otherwise have the right judicially determined before a decision maker will have constitutional obligations to carry out.

Argument 13: The substantive duties within s. 35 distinguish the tasks facing the Crown in the context of s. 35 from the procedural obligations contained within the administrative law “duty of fair dealing” put forth by the Attorney General of British Columbia.

Argument 14: The “duty of fair dealing” does not take into account that a right of constitutional significance has priority over ordinary legal principles.

Argument 15: The interlocutory injunction process is not always suitable for resolving disputes involving aboriginal and treaty rights. Injunction orders can be in place for long periods of time, are litigation based remedies (when negotiation is preferable), are “winner take all” remedies, and may not be available in law to First Nations to restrain the Crown or its agents.

Argument 16: The guidelines for consultation and accommodation should be:

- (1) The obligations of the Crown are both procedural and substantive.
- (2) Both the cultural and economic concerns of First Nations are at stake.
- (3) The doctrine of minimal impairment, aboriginal priority, the aboriginal perspective, the honour of the Crown, reconciliation, and ensuring First Nations have sufficient resources for the consultation process must be taken into account.
- (4) Consultation must be meaningful, in good faith, and with the intention of substantially addressing the concerns of aboriginal peoples.

Argument 17: Consultation must take the form of a dialogue, in which information is discussed and shared prior to a decision being made. Accommodation involves avoiding infringement of rights or minimizing any potential infringement.

Argument 18: The duty to consult entails:

- (1) The decision maker provides a First Nation with information on an ongoing basis.
- (2) A First Nation is given adequate time to analyze information and give input.
- (3) Consultation with First Nations is more extensive than with other stakeholders.
- (4) The Crown cannot delegate its consultation obligation to third parties.
- (5) Consultation must be in good faith.
- (6) Ongoing dialogue.
- (7) The decision maker must provide written reasons for any decision.

Argument 19: The duty to accommodate requires:

- (1) An assessment of the nature of the potential impact or infringement.
- (2) The decision maker must be prepared to modify a particular decision or even to decide that a particular activity will not be allowed.
- (3) All relevant factors are considered.
- (4) Infringement should be avoided where possible.
- (5) If infringement is necessary, it should be minimized.
- (6) If infringement cannot be avoided, there should be compensation.

MEMO

March 3, 2004

TO: First Nations Summit Task Group
Hugh Braker, Braker and Company

FROM: Jonathan Sarin, Braker and Company

RE: *Minister of Forests et al v. Council of the Haida Nation et al*
Weyerhaeuser Company Ltd. v. Council of the Haida Nation et al
Supreme Court of Canada Registry No.: 29419
Summary of the factum of the Intervener Haisla Nation
Our File No.: SUMMIT-03-03

A summary of the factum of the Intervener Haisla Nation filed in the above-captioned matter is given below.

Summary

The Haisla Nation, also known as the Kitamaat Indian Band, has its territory in northwestern coastal British Columbia. One large forestry company holds a Tree Farm Licence covering the majority of Haisla Nation traditional territory. Other logging companies also operate in Haisla Nation traditional territory. The Haisla Nation is currently involved in treaty negotiations.

Issue – Is s. 35 limited to providing redress following lengthy adversarial proceedings as in *Sparrow*?

Position: No. There is a protective aspect of s. 35 as well.

Argument: Other constitutional provisions have been elaborated over time. It is open to the Court to develop fuller protections for s. 35(1) rights. To endorse a consultation and accommodation requirement would be in accordance with the protective purposes of s. 35.

Argument: The position that s. 35 has no legal implications or relevance until an Aboriginal nation establishes the existence of an aboriginal right through litigation also conflicts with “purposive”, “liberal” and “remedial” readings of s. 35, which have been endorsed by the Courts

Argument: If there is no obligation to consult that is enforceable prior to proof of an aboriginal right, this would in some cases force Aboriginal nations into years of litigation.

Issue – Does the Unique Nature of Aboriginal Rights Require Unique Options to Protect these Rights?

Position: Yes. The *sui generis* (unique) nature of aboriginal rights, including title, requires a *sui generis* approach to the remedial options available to protect these rights.

Argument: Aboriginal rights are difficult and expensive to prove in court.

Argument: Aboriginal title cannot be captured by traditional real property concepts, so the protection of aboriginal title need not and should not rely solely upon traditional remedial concepts such as injunctions. British Columbia and Weyerhaeuser advocate this method of protecting rights pending trial, comfortable in the knowledge that this method has proved singularly ineffective to afford protection to aboriginal rights in the past.

Issue – Does the Judgment of the BC Court of Appeal encourage Negotiated Settlements, as Opposed to Litigation?

Position: Yes.

Argument: As stated in *Delgamuukw*, it is only through negotiated settlements that the purposes of s. 35(1), including the reconciliation of the pre-existence of distinctive aboriginal societies with the assertion of Crown sovereignty, can be achieved.

Argument: The judgment of the BC Court of Appeal in this case is consistent with the direction of the Supreme Court of Canada in that it encourages government and Aboriginal nations to make a good faith effort and reach agreements with respect to decisions that have the potential to infringe Aboriginal rights.

Argument: The judgment of the BC Court of Appeal in this case would increase incentives for progress in treaty negotiations.

Argument: Once committed to treaty negotiations, Aboriginal nations are prevented from litigating to protect their aboriginal rights. If the Crown was under no pre-litigation obligation to consult, Aboriginal nations would have no way to prevent continuing infringement of their rights, and governments would have no incentive to negotiate.

Argument: Once rights are defined through litigation, there is much less room for negotiation.

Issue – Will Economic Development in the Province be Hindered?

Position: No.

Argument: Since *Taku River* was decided two years ago, there have been changes in legislation and forestry policy and the development of Interim Measures Agreements with First Nations. The economy of British Columbia has not ground to a halt as a result.

MEMO

March 3, 2004

TO: First Nations Summit Task Group
Hugh Braker, Braker and Company

FROM: Jonathan Sarin, Braker and Company

RE: *Minister of Forests et al v. Council of the Haida Nation et al*
Weyerhaeuser Company Ltd. v. Council of the Haida Nation et al
Supreme Court of Canada Registry No.: 29419
Summary of the factum of the Intervener Squamish Indian Band and
Lax Kw'alaams Indian Band
Our File No.: SUMMIT-03-03

A summary of the factum of the Intervener Squamish Indian Band and Lax Kw'alaams Indian Band (the "Bands") filed in the above-captioned matter is given below.

Summary

Issue 1 – Does the Provincial Crown have a fiduciary and constitutional duty, prior to final judicial determination of Aboriginal Title and Rights, but upon notice of a good prima facie case of same, to consult with Aboriginal Peoples in good faith and seek workable accommodations of their Aboriginal interests?

Position: Yes

Argument 1: The decision of the BC Court of Appeal enables and assists the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown as is required by s. 35. It does this by (a) establishing a practical basis for involvement of aboriginal communities in determining the disposition of their traditional lands and resources; and (b) establishing a legal basis for judicial supervision of reconciliation through consultation and accommodation of aboriginal interests.

Argument 2: The government will have no incentive to deviate from the *status quo* of development and extraction without a fiduciary and constitutional duty to consult. The Court of Appeal's judgment has already had an immediate practical effect in encouraging positive reconciliation agreements.

Argument 3: Reconciliation is more than a determination of rights. It requires that aboriginal people achieve social and economic benefits in their communities, related to the land which they have traditionally used and occupied.

Argument 4: If the Province and industry have no legally enforceable obligation to consult and accommodate, First Nations will be excluded from economic opportunities pending the conclusion of treaties.

Argument 5: A process-only duty, with no substantive rights, will not lead to fair negotiations.

Argument 6: Courts have stated that there is a need for remedies to assist the parties where negotiations are not progressing.

Argument 7: Interlocutory injunctions have not been an effective remedy. (1) An aboriginal title action must already be started to invoke this remedy. (2) Once an injunction is granted, or denied, the winner has little incentive to negotiate further in respect of that issue. (3) Courts have been reluctant to grant injunctions on the basis it might cripple industry in British Columbia. (4) Courts are also deterred from issuing injunctions by the fact that injunctions may be in place for a long time. (5) The fact that First Nations may have a very strong case is not relevant to the injunction test. (6) First Nations must now show 'uniqueness', or 'special factors' for a particular site before an injunction will be granted. (7) Courts are reluctant to grant injunctions on the basis that the loss of present-day resources and economic activities can be compensable in monetary damages; however, this ignores the social and cultural aspects of aboriginal title, confuses monetary compensation with development of a sustainable economy, and offers no guarantee that proper compensation will be given to First Nations in the future. (8) Injunctive relief is not available against the Crown. (9) First Nations are necessarily deterred from seeking an injunction by the requirement for an undertaking as to damages.

Argument 8: Judicial Review of a fiduciary duty to consult and accommodate is a flexible process, offers a wide range of remedies suitable to the reconciliation process, applies only to a particular issue and process, and does not take a long time. Accommodation does not require or assume a total award to a First Nation.

Argument 9: The Court of Appeal's decision has had positive results to date in British Columbia.

Argument 10: The Crown's duty of fair dealing is simply an expression of the Crown's fiduciary obligations, which exist both prior to and after a judicial determination of Aboriginal rights and title. Administrative law and fiduciary principles are not incompatible.

Issue 2 – Did the Court of Appeal err by including Weyerhaeuser, as the recipient of a forest tenure that had been granted in breach of the Crown's obligations to the Haida, in a declaration that was issued under the *Judicial Review Procedure Act (JRPA)*?

Position: No

Argument 1: If Weyerhaeuser had no duty to consult, the Crown would lack effective power to address any of the Haida's concerns, or to accommodate them.

Argument 2: The Bands support the reasoning of the BC Court of Appeal with respect to "knowing receipt" and that Weyerhaeuser received a licence that suffered from a fundamental legal defect.

Argument 3: Weyerhaeuser's duty to consult derived from the Crown's duty on public lands.

Argument 4: The objection that Weyerhaeuser lacked sufficient knowledge of the existence of the Crown's fiduciary obligation and of its breach wrongly assumes that ignorance of the state of the law is relevant.

Argument 5: If Weyerhaeuser were to ignore the fiduciary duty owed to the Haida, this would result in their unjust enrichment, contrary to the principles of equity.

MEMO

March 1, 2004

TO: Hugh Braker, Braker and Company
Arthur Pape, Pape & Salter
First Nations Summit Task Group

FROM: Jonathan Sarin, Braker and Company

RE: *Minister of Forests et al v. Council of the Haida Nation et al*
Weyerhaeuser Company Ltd. v. Council of the Haida Nation et al
Supreme Court of Canada Registry No.: 29419
Summary of the factum of the Intervener Tenimgyet, also known as
Art Matthews, Gitxsan Hereditary Chief
Our File No.: SUMMIT-03-03

Hugh Braker asked that I summarize the factum of the Intervener Tenimgyet, also known as Art Matthews, Gitxsan Hereditary Chief ("Tenimgyet"), filed in the above-captioned matter. I trust the summary given below will be of assistance. Please contact me at Braker and Company's Vancouver office if you have any questions.

Summary

The Gitxsan are currently in negotiations under the BC Treaty Process, and are also negotiating with the Crown with respect to significant resource allocation decisions in and affecting their territory.

Issue – Does the Crown in Right of British Columbia owe a constitutional and fiduciary duty to consult with First Nations and to seek to accommodate their rights, prior to a final judicial determination of those rights?

Position: Yes

Argument: The Supreme Court of Canada has consistently made it clear that the recognition of aboriginal rights can no longer be deferred and requires the Crown to act now so as to ensure any interference with these rights can be justified, even at the price of social and economic change.

Argument: The Appellants say Crown recognition and affirmation of aboriginal and treaty rights should be deferred until they are recognized by the courts. Given the delay, costs and uncertainties attached to the judicial process, this would render the promise of s. 35, as well as the concepts of consultation and accommodation, hollow and largely meaningless.

Argument: The Appellants position would involve the Crown and Aboriginal peoples in a process of systematic dispute and litigation.

Argument: What the process of consultation and any ultimate accommodation must consist of will depend on a variety of factors, including the strength of the Aboriginal rights claim, the existence of options for making the decision without risking the infringement of Aboriginal rights, the cost of meeting the accommodation measures sought by the Aboriginal group and the potential severity of the infringement.

Argument: to hold the duty to consult and accommodate applies to the Crown when making potentially rights-infringing decisions, regardless of prior judicial recognition of the rights in question, is consistent with well-established constitutional principles, including:

- (a) the purpose of s. 35, which is to remedy the historic failure to respect aboriginal and treaty rights;
- (b) the principle of constitutionalism, which requires the Crown to found all of its actions and decisions in some legitimate constitutional basis (including s. 35);
- (c) the constitutional principle of respect for minorities, which mandates the Crown to respect their unique interests (including rights).

Argument: There has been a historical recognition of Aboriginal land ownership and laws in the case law and in constitutional documents. S. 35 is a specific rejection of assimilationist policies.

Argument: Aboriginal title encompasses the right of aboriginal communities to decide on the use to which their lands will be put. It is essential that the Crown consult and seek workable accommodations if it is to fulfill its s. 35 obligations in this regard.

Argument: No other constitutional rights come into existence only once they are recognized by a Court.

Argument: If the Crown takes a flexible approach to consultation and accommodation that respects non-traditional aboriginal interests, the likelihood of settling Aboriginal claims through negotiations will increase significantly.

Argument: The Crown's arguments that administrative decision-makers on the ground are unable to adequately assess the strength of rights claims and that rights matters are intrinsically complex and thus not well-suited for administrative decision making processes are flawed for the following reasons: (1) they fail to recognize it is the Crown's fault that the historical facts grounding rights claims have been obscured or lost through the Crown's failure to deal seriously with these rights; (2) it is the Crown that has created a complex web of competing rights, interests and expectations in aboriginal lands and resources without first obtaining meaningful consent from the aboriginal peoples or at

least instituting mechanisms to accommodate their rights; and (3) it is the Crown that created the inadequate administrative decision making processes in the first place.

Argument: The Crown's argument that the modification of decision making schemes would stretch the fabric of our constitutional framework is in error. Consultation guidelines would help appropriately structure a decision maker's discretion.

Argument: In many respects, Crown decision makers enjoy a special expertise and flexibility relative to the Courts.

Argument: A "pre-proof" duty to consult and accommodate will fuel the treaty negotiation process.

MEMO

January 14, 2004

TO: Hugh Braker, Braker and Company
Arthur Pape, Pape & Salter
First Nations Summit Task Group

FROM: Jonathan Sarin, Braker and Company

RE: *Minister of Forests et al v. Council of the Haida Nation et al*
Weyerhaeuser Company Ltd. v. Council of the Haida Nation et al
Supreme Court of Canada Registry No.: 29419
Summary of the Factum of The Attorney General of Canada
Our File No.: SUMMIT-03-03

Hugh Braker asked that I summarize the factum of the intervener The Attorney General of Canada ("Canada") filed in the above-captioned matter. I trust the summary given below will be of assistance. Please contact me at Braker and Company's Vancouver office if you have any questions.

Summary

Issue 1 – Is There a Requirement to Consult Prior to the Time When Rights are Proven?

Position: There is sometimes a requirement to consult prior to the establishment of an aboriginal right (the "pre-proof stage"), and it does exist with respect to the Haida in this case. However, the protection of aboriginal rights, including title, is not the focus of inquiry at this stage. There is no fiduciary or constitutional duty to consult with aboriginal groups or to accommodate potential aboriginal rights that may exist. Instead, the proper focus is on the Crown's conduct in the context of the applicable statutory regime.

Argument 1: Both the provincial and federal Crown should always act towards aboriginal people in manner consistent with the constitutional values and purpose behind s. 35 of the *Constitutional Act, 1982*. Therefore, the statutory regime under which power is being exercised should be read, if it reasonably can be, to include a limited *ex ante* consultation requirement (the requirement to act in good faith and to seriously consider potential aboriginal rights) as explained in paragraphs 4, 5, and 46 to 62 of Canada's factum in *Taku*. In this case, the *ex ante* requirement to consult is founded upon the Minister's authority to attach conditions to a TFL replacement or transfer and provisions in the *Forest Act* and the *Forest Practices Code* that make it clear that recognition shall be given to the economic, social and cultural needs of First Nations or aboriginal groups.

Argument 2: It is both unnecessary and inappropriate to resort to fiduciary law or a constitutional duty at the pre-proof stage because of the environment of uncertainty with respect to the existence of rights and the implications of the proposed activities on those rights.

Argument 3: Even where a statutory regime does not provide for or permit a limited *ex ante* requirement to consult at the pre-proof stage, interlocutory injunctions are still available in appropriate circumstances.

Issue 2 – What is the Nature and Content of Canada’s Proposed Ex Ante Requirement to Consult?

Position: Canada makes submissions only as to the principles that ought to apply to the limited *ex ante* requirement to consult. Canada takes a spectrum approach to this requirement, where the content of the requirement would vary with the circumstances. Factors that may affect the content of the *ex ante* requirement include:

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

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

The requirement does not include a requirement to obtain the consent of an aboriginal group, or to accommodate their interests unless the failure to do so is arbitrary or in bad faith (see Argument 1 below).

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

If an aboriginal group refuses to reasonably or meaningfully participate in a reasonable consultation process, they may forego their right to be consulted (see Argument 2 below).

Argument 1: To equate consultation with accommodation of potential aboriginal rights or consent of the aboriginal group is clearly inappropriate in the pre-justification context where rights remain uncertain.

Argument 2: The concept of reasonableness stated by Courts implies that consultation must be a “two-way street” between the Crown and aboriginal people.

Issue 3 – Did the Court of Appeal Err in Finding a Fiduciary and Constitutional Duty to Consult and Accommodate?

These submissions are further to those made by Canada at paras. 29 to 33 of its factum in *Taku*.

Position: There is no constitutional and fiduciary duty to consult and accommodate when aboriginal rights or title have been asserted but not been proven to exist.

Argument 1: There is no authority to support a free-standing duty of consultation. The judgments in *Sparrow*, *Gladstone*, and *Delgamuukw* only raise consultation as one of the factors to take into account in determining whether the Crown can justify an infringement of an established aboriginal right.

Argument 2: Not all obligations existing between the parties to a fiduciary relationship are themselves fiduciary in nature. In order to find a fiduciary duty on the Crown to a particular aboriginal group, the Court must find something more than the existence of a general fiduciary relationship. In this case the indicia of a fiduciary duty are not present. The Crown did not undertake to administer the *Forest Act* and deal with the lands subject to that Act in such a way as to benefit solely, or to act in the best interests of, the Haida. The Crown did not interpose itself as the exclusive intermediary to deal with the interests of the Haida in a manner that reflects a private law duty or to act on their behalf.

Argument 3: Asserted constitutional rights do not have the same force and effect as established constitutional rights. If upheld, the Court of Appeal approach could lead to a finding that the Crown has breached a duty to consult in relation to what may later be shown to be a non-existent aboriginal right. It is not that a requirement to consult arises only after a right is proven, as part of the justification process, but, rather, that there is no sound basis for the Court to find and enforce a constitutionally protected duty to consult without proof that the constitutionally protected aboriginal right exists.

Issue 4 – Responses to Submissions Made by the Haida

Position: Canada says the Crown had no fiduciary duty to consult with the Haida. Section 35 does not prevent unjustified infringements of potential aboriginal rights.

Argument 1: In this appeal, the existence of asserted rights and title remain uncertain. There is nothing that can give rise to constitutional or fiduciary obligations or remedies. The Haida have no “existing rights” within the meaning of s. 35 (1) of the *Constitution Act, 1982* capable of supporting fiduciary and constitutional duties.

Argument 2: The context of this appeal is different from that in *Guerin*.

Issue 5 – Does the Limited Ex Ante Requirement to Consult Apply to Private Industry?

Position: Canada submits that any *ex ante* requirement to consult that is imposed by the Court should be limited, in this context, to Crown officials exercising a discretionary decision making power under a statutory regime. The limited *ex ante* requirement to consult does not extend to private industry.

Argument 1: Private industry does not partake in the historical relationship between the Crown and aboriginal peoples. Further the Crown has executive and legislative powers over aboriginal people, resources and land that others do not.

Argument 2: The Crown can impose obligations to consult on private industry.

Issue 6 – Was the Remedy Granted by the Court of Appeal correct?

Position: Canada disagrees with the judgment of the Court of Appeal with respect to the source and extent of the *ex ante* requirement to consult. Canada says that the requirement ought to be founded in the applicable statutory regime by interpreting and applying the statutory power of decision in a manner consistent with the constitutional values and purpose behind section 35, and with the honour of the Crown. The requirement is not a free-standing duty. Canada also says that the requirement entails consultation, but not a substantive requirement to accommodate, in the sense that the crown is not required to ensure that the plan of action minimizes any potentially deleterious effects on the aboriginal group, unless the failure to do so could be described as patently unreasonable or in bad faith. If, in a given case, a Court determines that an *ex ante* requirement to consult has been breached, then the appropriate remedy at the pre-proof stage is for the Court to make a declaration to that effect.

Argument: See Canada's factum in *Taku*, at paras. 66 to 74.

Issue 7 – Is Canada's Approach Sufficient to Protect Aboriginal Interests and Reconcile and Balance Competing Interests?

Position: The *ex ante* requirement to consult put forward by Canada combined with the interlocutory injunction remedy is wholly sufficient to reconcile and balance the competing interests at issue prior to the proof of claimed aboriginal rights, including title. No alternative framework is necessary.

Argument 1: The Courts should always presume that the Crown will act in good faith. The province has ensured that claimed rights and title of the Haida are considered in the forestry process.

Argument 2: The remedy of interlocutory injunction is available. The Court of Appeal did not provide an explanation as to why interlocutory injunctions were "not necessarily

suitable for balancing competing interests in every case” and why the “alternative framework” was necessary.

Argument 3: Canada’s approach will ensure consultation in most cases where aboriginal rights are asserted; it will minimize reliance on litigation as a means of determining the nature and scope of aboriginal rights; and, through declaratory remedies, it will also foster negotiations to resolve aboriginal rights claims.

Issue 8 – How should the Constitutional Question be Answered?

On July 4, 2003 Gonthier J. stated the following constitutional question:

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

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

MEMO

January 9, 2004

TO: Hugh Braker, Braker and Company
Arthur Pape, Pape & Salter
First Nations Summit Task Group

FROM: Jonathan Sarin, Braker and Company

RE: *Minister of Forests et al v. Council of the Haida Nation et al*
Weyerhaeuser Company Ltd. v. Council of the Haida Nation et al
Supreme Court of Canada Registry No.: 29419
Summary of the Factum of The Attorney General of Alberta
Our File No.: SUMMIT-03-03

Hugh Braker asked that I summarize the factum of the intervener The Attorney General of Alberta ("Alberta") filed in the above-captioned matter. I trust the summary given below will be of assistance. Please contact me at Braker and Company's Vancouver office if you have any questions.

Summary

Alberta states that the constitutional question set by Mr. Justice Gonthier on July 3, 2003 should be answered in the negative. That question reads:

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

Issues

Issue 1

Is there a Free-Standing Duty to Consult?

Position: A violation of the duty to consult is not a free-standing ground upon which government action may be challenged. What triggers a consideration of the Crown's duty to consult is a showing by the First Nation of a violation of an existing s. 35(1) right.

Argument 1: Alberta submits that the decisions of the Supreme Court of Canada in *R. v. Sparrow*, *R. v. Gladstone*, and *Delgamuukw v. British Columbia* do not suggest that a

duty to consult may be imposed on government outside the context of the justification process that arises as a consequence of an infringement of an aboriginal or treaty right.

Argument 2: Alberta adopts its argument in *Taku River First Nation v. Tulesequah Chief Mine Project*.

Argument 3: Alberta submits that Lambert J.A.'s approach to interpretation of s. 35 results in great uncertainty in relation to when and to what degree there is a duty to consult. This uncertainty may manifest itself in the reluctance of business to initiate economic development of resources.

Argument 4: Alberta asks that the approach of the Ontario Court of Appeal in *Trans Canada Pipelines Ltd. v. Beardmore (Township)* be adopted. In that case, the Court rejected the existence of a free-standing duty to consult.

Issue 2

Can the requirement of aboriginal consultation be a prior restraint on legislative action?

Alberta briefly states that there can be no prior restraint on bills introduced into the legislatures. Alberta does not state that aboriginal consultation in fact constitutes a prior restraint on legislative action.

Argument: Alberta submits that bills are only subject to the legislative process of readings and passage. It is only after bills are passed into law that they would be subject to constitutional constraint.

Issue 3

If the Court finds a duty consult is owed in this case, should this be limited to aboriginal rights?

Position: Alberta submits that the Court should limit any decision to Aboriginal rights and not make a determination that impacts treaty rights.

Argument 1: Alberta adopts its arguments in the *Taku River* case.

Argument 2: Alberta submits that there is no duty to consult in areas that are the subject of treaty as there is no infringement of a treaty right. For example, a reading of Treaty 6 as modified by the Natural Resources Transfer Agreement – a constitutional document (schedule 2 of the *Constitution Act, 1930*) – results in it being unnecessary to justify government action under the *Sparrow* test.

Argument 3: A close reading of *Halfway River First Nation v. British Columbia (Minister of Forests)* does not negate Alberta's position on this issue.

Argument 4: Madame Justice Southin of the BC Court of Appeal recognized the distinction between consultation in aboriginal title and treaty jurisdictions in *Taku River*.

Issue 4

Would a free-standing duty to consult apply to third parties?

Position: Any duty to consult must be that of the Crown and not third parties.

Argument 1: In general, Alberta adopts the arguments of the Appellants, the Minister of Forests and the Attorney General of British Columbia and Weyerhaeuser on this issue.

Argument 2: Crown consultation is part of the *Sparrow* justification process. The justification test contemplates legislative or regulatory action that cannot be imposed on non-governmental entities.

Argument 3: The reconciliation of the overall public interest with aboriginal rights should be the responsibility of government, not a third party.

Issue 5

Would a consultation requirement unduly interfere with the Province of Alberta's ownership and legislation with respect to natural resources?

Position: Yes

Argument: There are currently 176,000 active industrial and agricultural dispositions in relation to Crown land. Eighteen thousand new dispositions are added each year of which twelve thousand are related to oil and gas.

Issue 6

Does the doctrine of knowing receipt apply to impose a duty to consult on Weyerhaeuser?

Position: No

Argument 1: Alberta adopts the argument of Weyerhaeuser in relation to "knowing receipt".

Argument 2: The doctrine requires constructive knowledge of breach of the duty. This would lead to uncertainty in relation to when the duty to consult is imposed on third parties. This would be unworkable and could impact industrial and commercial development of natural resources.

Argument 3: As the issuer of disposition, the Crown has the power to impact third parties. The Crown can impose conditions on approval holders.

Issue 7

Can the Provincial Crown or courts adequately assess consultation and accommodation in the absence of a proven Aboriginal right and an infringement?

Position: No

Argument: It is difficult, if not impossible, to assess whether consultation and accommodation have been adequate. Adequacy would be dependent on the nature of the Aboriginal right and the nature of the infringement.

Issue 8

Can justification be a defence to an action for infringement as set out in the decision of Lambert J.A.?

Position: No

Argument: It is the government that can provide the justification for infringement including whether there has been adequate consultation.

MEMO

January 7, 2004

TO: Hugh Braker, Braker and Company
Arthur Pape, Pape & Salter
First Nations Summit Task Group

FROM: Jonathan Sarin, Braker and Company

RE: *Minister of Forests et al v. Council of the Haida Nation et al*
Weyerhaeuser Company Ltd. v. Council of the Haida Nation et al
Supreme Court of Canada Registry No.: 29419
Summary of the Factum of The Attorney General of Nova Scotia
Our File No.: SUMMIT-03-03

Hugh Braker asked that I summarize the very short factum of the intervener The Attorney General of Nova Scotia ("Nova Scotia") filed in the above-captioned matter. I trust the summary given below will be of assistance. Please contact me at Braker and Company's Vancouver office if you have any questions.

Please note that this factum contains two glaring mathematical errors that undermine one of their arguments. I have included a short section at the end discussing these errors.

Summary

Nova Scotia submits that the suggested constitutional and fiduciary duty of consultation and accommodation based upon claimed but unproven aboriginal rights must be rejected. Nova Scotia does not provide any argument on this point.

Issue: What is the land area that should be subject to the fiduciary or constitutional duty of consultation?

In the alternative, Nova Scotia addresses the issue of the land area that should be subject to the fiduciary or constitutional duty of consultation.

Position: Nova Scotia's position is that any duty to consult based upon an asserted claim of native rights should be limited to those areas and those activities in those areas where there is a substantial probability of native success at trial.

Argument 1: Nova Scotia says that the chambers judge held that the Haida might have a good claim to some of Tree Farm Licence (TFL) 39, Block 6. Despite this, the British Columbia Court of Appeal appears to have endorsed a duty to consult in relation to the whole of TFL 39, Block 6. Nova Scotia submits that the Court of Appeal's finding is overbroad.

Argument 2: The “metes and bonds” of Block 6 were not fixed by reference to potential native claims or rights. To designate the whole of Block 6 as the subject of the Court’s declaration is to arbitrarily encompass lands of potentially vast extent and subject them to constitutional constraints that are without evident foundation.

Argument 3: Nova Scotia says that the Province of Nova Scotia is not quite four times the size of Haida Gwaii and that an area the size of TFL 39, Block 6 is about 7% of the area of the Province of Nova Scotia. Nova Scotia says that the suggestion that a duty to consult arising from an aboriginal claim to a relatively localized area is applicable to a territory well in excess of the localized area would have disturbing implications for Nova Scotia. Such a duty would be an unprecedented encumbrance on the machinery of government, capture innumerable private actors, and would be unworkable.

Mathematical Errors

Argument 3 above is undermined by two mathematical errors.

Nova Scotia says that Haida Gwaii has a total area of approximately 5800 square kilometers and that the Province of Nova Scotia’s total land area of 53,338 square kilometers is not quite four times the size of Haida Gwaii. This is obviously in error. Given Nova Scotia’s own figures, The Province of Nova Scotia’s 53,338 square kilometers makes it 9.20 times as big as Haida Gwaii.

Nova Scotia also says that Block 6 of TFL 39 encompasses about one quarter of Haida Gwaii, or approximately 1450 square kilometers. Nova Scotia says that an area the size of TFL 39, Block 6, is about 7% of the area of Nova Scotia. This also is clearly in error. 1450 square kilometers is only 2.72% of the Province of Nova Scotia’s total land area of 53,338 square kilometers.

MEMO

January 7, 2004

TO: Hugh Braker, Braker and Company
Arthur Pape, Pape & Salter
First Nations Summit Task Group

FROM: Jonathan Sarin, Braker and Company

RE: *Minister of Forests et al v. Council of the Haida Nation et al*
Weyerhaeuser Company Ltd. v. Council of the Haida Nation et al
Supreme Court of Canada Registry No.: 29419
Summary of the Factum of The Attorney General of Ontario
Our File No.: SUMMIT-03-03

Hugh Braker asked that I summarize the factum of the intervener The Attorney General of Ontario ("Ontario") filed in the above-captioned matter. I trust the summary given below will be of assistance. Please contact me at Braker and Company's Vancouver office if you have any questions.

Summary

Ontario says that the primary issue raised in this case is whether provinces have a freestanding enforceable legal and equitable duty to consult with aboriginal peoples upon the assertion of a s. 35 right.

On July 4, 2003 Gonthier J. stated the following constitutional question:

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

Ontario submits that the constitutional question be answered in the negative.

Issue 1

Should assertions of s. 35 rights be addressed within the existing s. 35 framework or pursuant to a *sui generis* aboriginal law fiduciary framework?

Position: Section 35 of the *Constitution Act, 1982* provides a comprehensive legal framework, in terms of both scope and content, for the consideration of aboriginal rights, including assertions of aboriginal rights.

Argument 1: Unlike fiduciary obligations, s. 35 applies equally to all government actors yielding a uniform legal approach in dealing with assertions of aboriginal rights.

Argument 2: Section 35 promotes the reconciliation of aboriginal and non-aboriginal interests in a way that fiduciary law is not equipped to do.

Argument 3: While the Supreme Court of Canada (“SCC”) has described s. 35 obligations as being fiduciary in nature, on the basis that fiduciary concepts are a “guiding principle” to describe the nature of s. 35 constitutional protection, this does not make s. 35 rights synonymous with *Guerin*-type fiduciary situations.

Argument 4: It would be unprecedented to deal with asserted s. 35 rights pursuant to fiduciary law, but with established s. 35 rights pursuant to the existing s. 35 legal framework. In *TransCanada Pipelines v. Beardmore (Township)* the Ontario Court of Appeal concluded that issues of consultation with respect to asserted s. 35 rights should be dealt with exclusively within the existing s. 35 legal framework.

Argument 5: It is problematic to assess the sufficiency of justificatory steps required before the precise nature and scope of the relevant s. 35 right or rights is known.

Argument 6: Ontario’s favoured approach to s. 35 is congruent with *Charter* interpretation.

Argument 7: Ontario submits that, in practice, upon the assertion of a s. 35 right, prudent governments take reasonable steps in good faith to assess whether there is a valid concern regarding the potential infringement of the asserted right. If the government determines that an asserted right exists, justificatory steps by the government are warranted.

Argument 8: In Ontario, there are unsubstantiated or unmeritorious s. 35 rights assertions. The creation of a free-standing duty to consult irrespective of the merits of the claim has the potential to encourage a “whole spectrum of possible complaints” so as to seriously restrict and delay government operations.

Argument 9: In those instances where s. 35 rights assertions merit a government taking justificatory steps, the correct standard for assessing the government’s response to an asserted aboriginal right is the reasonableness standard.

Argument 10: Failure to take adequate justificatory steps, including consultation, leaves the Crown exposed to potential liability or constitutional infirmity for an unjustified infringement of a s. 35 right. Such failure is also relevant to questions of interim relief.

Issue 2

What is the proper approach to address asserted aboriginal rights pending their ultimate determination? Ontario says that this is the central issue.

Position: Preservation of asserted s. 35 rights can be attained pursuant to existing common law interlocutory remedies within the s. 35 legal framework and does not require the creation of an independently enforceable fiduciary duty. A s. 35 rights claimant should be required to seek an interlocutory injunction if the claimant wants to preserve its asserted interests at an interim stage.

Argument 1: This is the approach to interlocutory relief in constitutional cases that has been adopted in the *Charter* context (*RJR-MacDonald v. Canada (Attorney General)*).

Argument 2: Ontario says that the SCC should adopt the BC Court of Appeal's approach in *MacMillan Bloedel v. Mullen (Meares Island)* where the Court granted the Band's request for an interlocutory injunction. Ontario says also that it is open to the courts to contextualize the test for interlocutory injunctions to take account of unique aboriginal interests.

Argument 3: A breach of s. 35 can only be declared after the full s. 35 legal framework is applied, that is after issues of existence of the asserted rights, infringement of the rights, and justification of infringement have been dealt with.

Issue 3

Did the Provincial Crown have a fiduciary duty with respect to the lands at issue in this case?

Position: Provincial Crowns are not in a general fiduciary relationship with aboriginal peoples and, in any event, fiduciary relationships do not necessarily give rise to fiduciary duties. In this case, a fiduciary duty with respect to the lands at issue had not been established and therefore there was no legal basis for the Court of Appeal's declaration based on a breach of fiduciary duty.

Argument 1: There is a special historic relationship between the federal Crown and Aboriginal peoples. This began with the Imperial Crown's relationship with Aboriginal peoples and continued with the federal Crown's exclusive constitutional jurisdiction over Indians and lands reserved for Indians.

Argument 2: Exclusive federal jurisdiction provides the federal Crown with a much broader constitutional capacity to take actions that are capable of establishing a fiduciary duty.

Argument 3: Provinces must act in a fiduciary-like capacity when they undertake actions that infringe or are likely to infringe a constitutionally protected aboriginal or treaty right.

However, outside of s. 35(1) rights, the provinces are not subject to fiduciary obligations to aboriginal peoples unless they take specific steps that create a duty.

Argument 4: Even if the provinces are in a general fiduciary relationship with aboriginal peoples, not all interactions between parties in a fiduciary relationship result in fiduciary obligations. It is only upon the establishment of a fiduciary duty that an independently enforceable legal obligation to consult with respect to the beneficiary's interests can be established. In this case, a fiduciary duty with respect to the lands at issue had not been established and therefore there was no legal basis for the Court of Appeal's declaration based on a breach of fiduciary duty.

Issue 4

Are the government and third parties responsible for compliance with s. 35, and may the government rely on the activities of third parties to demonstrate justification of any infringements?

Position: Governments are responsible for compliance with s. 35, but may rely on the activities of third parties to demonstrate justification of any infringements

Argument: s. 35 constrains government action. However, governments have numerous third parties involved in day-to-day operations on Crown lands. The conduct of these third parties is reviewed through various mechanisms. For this reason, governments should be allowed to rely on the actions of third parties in the justification analysis.

***Minister of Forests et al v. Council of the Haida Nation and
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Factum Summary of the Intervener Attorney General of Saskatchewan

Saskatchewan adopts the facts as set out by B.C. and Weyerhaeuser and submits that another important factual consideration is that the tree farm licence in issue has been in place since 1961, prior to the constitutional protections of s. 35(1). Saskatchewan does not suggest that any government action prior to 1982 is immune from a s. 35(1) challenge, but submits that governments cannot be expected to meet constitutional standards that did not exist at the time when they (first) acted.

Saskatchewan submits that the heart of this appeal is whether B.C. has a constitutional duty to consult with First Nations asserting Aboriginal rights and title to lands covered by a tree farm licence, prior to agreeing to replace or transfer the licence where B.C. "...disputes the existence, extent or scope of the asserted..." Aboriginal interests.

Saskatchewan takes the position that any constitutional duty to consult with First Nations must be based upon existing, adjudicated Aboriginal or treaty rights. It goes on to state that the duty to consult is part of the *Sparrow* justificatory test and is engaged only in the face of *prima facie* infringement of an existing Aboriginal or treaty right.

Furthermore, Saskatchewan submits there is no free-standing constitutional duty to consult in the face of asserted, unproven rights, arising from the fiduciary duty between the Crown and First Nations. Saskatchewan submits that the Court of Appeal erred in finding the existence of such a duty and suggests this resulted from the Court's failure to understand the dichotomy between private and public law fiduciary duties.

Saskatchewan submits that when the issue of sufficiency of consultation with First Nations arises at an interlocutory stage of proceedings, the well-established equitable principles setting out interlocutory relief should be applied.

Saskatchewan does not agree with B.C.'s position that any duty to consult which exists at this stage arises solely from administrative law principles. Saskatchewan agrees with Rowles J.A. in *Taku* that rights exist prior to a court saying so. If a right exists, then according to *Sparrow*, there may be an obligation to consult and for consultations to be effective, they must take place prior to infringement. Saskatchewan agrees with B.C. that there is no need to create a separate constitutional duty in order to ensure that consultation takes place prior to infringement because the *Sparrow* test already achieves this result. Saskatchewan argues that prior jurisprudence demonstrates that consultation is simply one of the factors that may be considered as part of justification "Nothing more. Nothing less."

Saskatchewan's interest in this appeal arises in part because several First Nations from that province have alleged their Aboriginal title was not fully extinguished when they entered into treaty; further, the Metis Nation of Saskatchewan has asserted its claim of unextinguished title over approximately one-quarter of the province.

MEMO

February 2, 2004

TO: Hugh Braker, Braker and Company
Arthur Pape, Pape & Salter
First Nations Summit Task Group

FROM: Jonathan Sarin, Braker and Company

RE: *Minister of Forests et al v. Council of the Haida Nation et al*
Weyerhaeuser Company Ltd. v. Council of the Haida Nation et al
Supreme Court of Canada Registry No.: 29419
Summary of the Factum of the BC Cattlemen's Association
Our File No.: SUMMIT-03-03

Hugh Braker asked that I summarize the factum of the intervener the British Columbia Cattlemen's Association filed in the *Haida* case. I trust the summary given below will be of assistance. Please contact me at Braker and Company's Vancouver office if you have any questions.

Summary

The Cattlemen's Association's interest in this appeal stems from its members' dependence on Crown tenures for seasonal grazing and the potential effect of the BC Court of Appeal's decisions in *Haida No. 1* and *Haida No. 2* on these tenures. These decisions of the Court of Appeal suggest that Cattlemen's Association members may have legally enforceable duties to consult and accommodate aboriginal interests on Crown lands.

Issue 1 – Does the Crown have a constitutional duty to consult before an aboriginal group has proven that it possesses “existing” aboriginal rights under s. 35?

Position: The Crown does not owe a constitutional duty to consult aboriginal people who have claimed, but have not proven, aboriginal rights.

Argument: The constitutional duty to consult aboriginal people arises only within the content of the justification analysis required for Crown infringement of aboriginal rights set out in *Sparrow*. That justification analysis is only engaged when an aboriginal right is first proven to exist for the purposes of s. 35(1) of the *Constitutional Act, 1982*. In this case the Haida have not proven that it possesses “existing” aboriginal rights under s. 35 (1).

Issue 2 – Do private parties have a constitutional duty to consult before an aboriginal group has proven that it possesses “existing” aboriginal rights under s. 35?

Position: No.

Argument: Under the Constitution and the common law, only the Crown can infringe existing aboriginal rights under s. 35(1). Therefore, the justification analysis, including whether the appropriate standard of consultation was met, applies only to the Crown, not private parties.

Issue 3 – What are the sources of the Crown’s duty to consult aboriginal peoples and how does this affect the Crown’s duty to consult?

Position: There are at least four potential sources of the Crown’s duty to consult aboriginal peoples. When each source of the duty to consult is engaged will depend on the circumstances, including the aboriginal right at issue, whether such aboriginal right is proven or unproven, and whether the fiduciary relationship between the Crown and aboriginal people is applicable. The potential source or sources of the Crown’s duty to consult will affect the nature and degree of consultation required and will, in any event, vary with the circumstances. As a result, different standards of consultation may apply along a “consultation spectrum”. None of these sources apply to private parties.

The four sources of the Crown’s duty to consult are as follows in order of the lowest to the highest standard of consultation required:

- (a) the Crown’s duty to be fair to all of its subjects and general administrative law principles applicable to all Canadians – this duty is not dependent on proven, existing aboriginal rights. It does not require the Crown to accommodate unproven aboriginal rights and cannot impose limits on the Crown’s authority to govern;
- (b) the honour of the Crown in dealing with aboriginal people – this duty is not dependent on proven, existing aboriginal rights. It also does not require the Crown to accommodate unproven aboriginal rights and cannot impose limits on the Crown’s authority to govern;
- (c) the justification test for Crown infringements of “existing” aboriginal and treaty rights as set out in s. 35(1) – there must be proven, existing aboriginal rights in order for this duty to be engaged; and
- (d) the requirement of the Crown, as a fiduciary, to consult with aboriginal people in appropriate circumstances.

Argument 1: To require the Crown to accommodate unproven aboriginal rights provides no certainty or stability to governmental regulation

Argument 2: To require the Crown to accommodate unproven aboriginal rights would undermine the Court’s test for determining the application of s. 35(1) set out in *Sparrow*,

which requires an aboriginal right to be proven or “existing” before such rights can be deemed to be interfered with and infringed.

Issue 4 – Does a private party hold a duty to consult and seek workable accommodations with aboriginal people?

Position: No.

Argument 1: There is no legal basis to support the imposition of such duties in Canadian law.

Argument 2: No duty to consult can apply to private parties based on s. 35(1), except where such duties are imposed by legislation or by governmental regulation.

Argument 3: If private parties interfere with aboriginal or treaty rights, there is a remedy against the Crown, who in turn may impose necessary requirements on private parties.

Argument 4: A nation’s constitution regulates relations between its government and its private persons, and leaves the dealings between private persons to be regulated by government. The Constitution (including s. 35) does not apply to private parties. The Court has made statements to this effect in a number of decisions.

Argument 5: a ‘single-window’ approach to aboriginal relations, including consultation, is preferable, namely through the Crown as intermediary with the rest of Canadian society. This is consistent with judicial decisions and makes practical sense since one entity is ultimately responsible for management of consultation and accommodation, and to balance interests inherent in the process.

Argument 6: For the most part, Cattlemen’s Association members have neither the financial resources, nor the knowledge and skills, to consider and analyze aboriginal rights and title matters, as would be required for full and adequate consultation.

Argument 7: Multiple private consultations would result in unnecessary additional costs and create additional confusion.

Argument 8: Consultation requirements would result in increased liability for small enterprises found in breach of these requirements. Small enterprises do not have the resources to bear this liability.

Argument 9: It is the public duty of the Crown to accommodate and balance the interests of aboriginal people with private parties. It would be inappropriate for private parties to undertake this function.

Argument 10: Private parties could not determine what to do as a result of any consultation, since it is the Crown, not any private party, that is the decision-maker in respect of any proposed infringement of aboriginal and treaty rights.

Argument 11: Members of the Cattlemen's Association and other private parties that depend on leases, permits, and other approvals should be entitled to rely on them, including that the appropriate level of Crown consultation and where necessary, accommodation, with aboriginal people has occurred.

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**Factum Summary of the Intervener Business Council of British Columbia et al.
("Business Interveners")**

The Business Interveners are made up of the same group of organizations intervening in *Taku*, except that in this appeal they do not include the B.C. Wildlife Federation.

The Business Interveners take issue with the decision of the Court of Appeal and its imposition on private parties with an obligation to consult with and seek to accommodate First Nations. It submits that the judgment has placed an onerous burden on private parties who are in no position to assess Aboriginal claims and has created significant uncertainty about the obligation of third parties and the security of their tenures.

The Business Interveners submit that there is no legal obligation on private parties to consult with or accommodate Aboriginal interests and that such an obligation is unworkable. The Interveners predict that the Court of Appeal's decision, "if upheld, will lead to financial instability and institutional paralysis..." which in the Interveners submission will affect the whole country.

The Business Interveners support the position of B.C. that its constitutional and fiduciary duties are not engaged before Aboriginal rights and title have been determined. It goes on to note that similarly, there is no obligation to pay compensation in respect of asserted infringements.

The Business Interveners also support the position of Weyerhaeuser that the Court of Appeal erred in identifying the sources of a private duty to consult and accommodate. Further, the Business Interveners agree that the principles relating to interlocutory injunctions should apply to determine the rights and obligations of the various parties pending resolution of Aboriginal claims.

The Interveners argue that if there is a constitutional or fiduciary duty on the Crown to consult and accommodate, that duty cannot be lawfully delegated by the Crown to private parties and that even if it can, such an obligation can only be enforced by the Crown, not by First Nations.

The Business Interveners refer to Supreme Court of Canada jurisprudence that Charter remedies must be fair to the party against whom the order is made and submit that similar considerations apply in Aboriginal rights case. The Interveners submit that before an appropriate and just remedy can be crafted, the right(s) must be determined, infringement(s) reviewed and fairness to all parties considered.

