

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

Appellant: British Columbia (Norm Ringstad et al)

Respondent: Taku River Tlingit First Nation

Respondent: Redfern Resources Ltd.

First Nation Interveners

- ▶ First Nations Summit
- ▶ Doig River First Nation
- ▶ Union of British Columbia Indian Chiefs

Government Interveners

- ▶ the Attorney General of Canada
- ▶ the Attorney General of Alberta

Third Party Interveners

- ▶ Business Council of British Columbia and others (Business Coalition)

Distributed at March 2004 First Nations Summit Meeting

Ringstad et al v. Taku River Tlingit v. Redfern Resources Ltd.
SCC No.: 29146

Factum Summary of the Appellant British Columbia

British Columbia submits that prior to the determination of rights, the obligation which the Provincial Crown owes is not fiduciary, and is best characterized as a duty of fair dealing.

British Columbia's factum addresses the following two issues:

1. that prior to judicial determination of Aboriginal rights or title, the Provincial Crown does not owe a fiduciary or constitutional duty of consultation and accommodation; and
2. if the duty to First Nations is not constitutional or fiduciary, how may it be defined and applied in a manner which allows the Provincial Crown to strike a workable balance between its proprietary interests and statutory duties, its obligations to First Nations, and the public at large?

In the overview of their argument, British Columbia submits that:

(a) not all aspects of the relationship between the Crown and First Nations attract fiduciary obligations.

(b) The Provincial Ministers and other decision makers do not owe a duty to act only in the best interests of First Nations who may be affected by their decisions. Prior to a determination of rights and title, the Crown's s. 35 justificatory fiduciary duty is not engaged.

(c) Until the nature and extent of specific Aboriginal interests are determined, British Columbia is not in a position to assess the extent of any *prima facie* infringement of Aboriginal rights or title, or to discharge the burden of justifying the infringement of Aboriginal rights or title.

(d) British Columbia's duty is only one of fair dealing prior to determination of rights and title. This includes the duty to inform First Nations and to consult with them regarding the potential impact of statutory decisions on Aboriginal interests. It also includes the duty to take Aboriginal uses and interests into consideration when making a decision. It is not a duty to ensure all First Nations' concerns have been substantially addressed, or to obtain the consent of First Nations to resource management decisions.

(e) If the decision makers have considered the correct factors, including potential impacts on Aboriginal interests, a reviewing court ought not to reconsider those factors. Provided the decision is not patently unreasonable, it should be upheld.

British Columbia makes the following arguments:

The Crown is not required to act as a fiduciary in all aspects of its relationship with First Nations and the existence and content of the obligation is dependent upon the circumstances. Where a fiduciary duty is imposed upon the Crown, it does not exist at large, but in relation to specific interests.

Where Crown obligations do exist, they will fall into one of two categories. The first is a protective fiduciary obligation, where the Crown must exercise its discretion in the best interests of a First Nation with respect to specific interests. The second is the Crown's fiduciary duty to justify the infringement of existing Aboriginal and treaty rights recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*.

The Provincial Crown, unlike the Federal Crown, has no constitutional duty to protect Aboriginal interests by interposing itself between First Nations and third parties. Further, the Province submits that it has no fiduciary obligation to protect Aboriginal interests in lands or resources over which First Nations have asserted but not yet proven title. British Columbia must balance competing interests and submits this militates against the imposition of a fiduciary obligation to protect indeterminate Aboriginal interests.

British Columbia argues that the Crown's fiduciary obligation is only engaged where the components of the *Sparrow* test with respect to proof of the right and its infringement are satisfied.

The underlying purpose of s. 35 is the reconciliation of Aboriginal rights with the sovereignty of the Crown. Aboriginal rights are not absolute. If they were, this would frustrate Provincial constitutional responsibility for the management and use of Crown lands for the good of all British Columbians. The *Sparrow* justification analysis recognizes the Crown cannot fulfill its balancing role and be held to the standard of a traditional fiduciary to act "solely for the benefit" of Aboriginal peoples. Even where the Crown's justificatory fiduciary duty is engaged, Aboriginal rights need not always be given priority.

British Columbia submits that it owes no fiduciary duty of consultation prior to the judicial determination of Aboriginal title. The requirements of the fiduciary duty are a function of the particular legal and factual context of each case. There are practical and conceptual problems with imposing a fiduciary obligation to justify a prima facie infringement of asserted, but unproven rights or title. Until a disputed claim of Aboriginal title is judicially determined, it is not possible to properly assess whether an infringing measure adequately reflects the prior interest of the holders of Aboriginal title.

Where rights or title are disputed, the onus of proving the right, and its infringement, is on the Aboriginal group making the claim. B.C. argues that holding the Provincial Crown to a fiduciary obligation to accommodate unproven claims, reverses that onus.

B.C. submits that the Court of Appeal erred by characterizing the Crown's obligation as an all encompassing fiduciary duty and that this characterization places Provincial decision-makers in the position of having to act in the "utmost good faith" for the benefit and protection of Aboriginal peoples, while at the same time discharging their statutory and constitutional duties for resource management. Such a broad fiduciary duty would effectively grant First Nations a veto before their rights and title were established.

B.C. argues that imposing a fiduciary obligation of protection of Aboriginal interests prior to any determination of Aboriginal rights or title, has the effect of undermining Provincial proprietary interests, and disturbs the balance of federalism.

The indeterminate nature of the rights in this case, the polycentric balancing that is required and the discretionary nature of the Ministers' decision-making powers militate in favour of a high degree of deference to the Ministers.

The Appellants point out that a large part of British Columbia's land base is claimed as Aboriginal title lands. If the full extent of the Provincial Crown's section 35 obligations arise on an assertion of Aboriginal rights, the result would be to require the Crown to assume that the entire province is subject to Aboriginal rights and title to the full extent claimed and provides legal entitlement before disputed rights are proven. B.C. argues such a position would reduce the incentive of Aboriginal people to negotiate.

In contrast, a duty of fair dealing provides the necessary incentive for both the Provincial Crown and Aboriginal communities to continue to pursue negotiated resolutions. B.C. submits that it met such a duty and that it satisfied an appropriate standard of review to the case at bar.

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Factum Summary of Taku River Tlingit First Nation

Taku considers the primary issue to be whether the Crown has enforceable fiduciary obligations notwithstanding that the Aboriginal rights asserted in the Petition had not been adjudicated. Taku notes that during the Environmental Assessment, many reports reflected the view that Taku Aboriginal rights would be impacted by the project.

The Fiduciary Duty

The positions of the Crown and Redfern are that the Crown's fiduciary obligation to constrain its actions on the basis of the recognition and affirmation of rights in section 35 is not triggered until the rights are adjudicated. This would enable governments to continue business as usual until then, legitimizing the same governmental practices that section 35 was enacted to end. Fiduciary duty is central to the effectiveness of the new constitutional protection for Aboriginal rights, because it is the legal mechanism for defining and enforcing that constraint.

Taku submits that the purpose of s. 35 is to require governments to act consistently with the recognition and affirmation of Aboriginal rights, not to authorize their infringement. This is the dominant, remedial purpose for adding this provision into the Constitution. The *Sparrow* justification only reflects that such rights are not absolute.

The Crown's fiduciary obligations arise before s. 35 rights are determined. It would be completely novel for a court to consider that a fiduciary's duty did not arise until judicially determined.

Taku submits that there is an additional fiduciary duty flowing from s. 35 that is triggered by threats to vulnerable Aboriginal interests rather than the adjudication of rights. Here the threat could compromise Taku's opportunity to achieve the objectives of s. 35 by the conclusion of a modern treaty.

In order for s. 35 to achieve its purposes, it is necessary to supplement the approach in *Sparrow* – which focuses on avoiding the infringement of rights – by defining a complementary fiduciary duty, to protect and accommodate the types of interests that are intended for protection by s. 35.

Section 35 rights are not the only source of the Crown's fiduciary obligations. Fiduciary obligations are triggered by the relationship of the parties and factual circumstances, not by judicial decisions. Fiduciary law supports the substance of the Minister's fiduciary duties that were upheld by the Courts below.

Taku interests are also protected by s. 109 of the Constitution Act, 1867 which the Supreme Court of Canada has said makes the Provincial Crown's title to lands and resources subject to all Aboriginal land-related rights.

Taku further submits that the Crown's obligations to Taku also flow from the constitutional principle of respect for and protection of minorities. Taku argues that the minority principle applies to Aboriginal people and is relied upon because the sustainability of the Taku as an Aboriginal people is at issue.

Taku submits that the Crown's fiduciary obligations had constitutional force because they were founded on sections 35 and 109, as well as the protection of minorities principle. Therefore statutory authority had to be exercised consistent with these obligations. The Crown's fiduciary duty is best satisfied by reaching agreement with Aboriginal people, but the duty does not amount to a veto.

Taku goes on to submit that the Crown is entitled to proceed without agreement of the affected Aboriginal group where it has acknowledged its duty and attempted to satisfy it procedurally and through bona fide efforts to address the substance of the concerns raised. Taku identifies as fundamental in this case the Crown's failure to acknowledge the existence of the duty and lack of effort to fulfill it.

Taku submits that the fiduciary duty to protect and accommodate Aboriginal interests can be defined and enforced without proving s. 35 rights. Aboriginal people have the initial burden of proving that Crown discretion threatens a particular interest intended for constitutional protection and then the burden shifts to the Crown to prove it satisfied its duties, under the standard of care required of fiduciaries. The standard of review both procedurally and substantively, is one of correctness. Taku submits that the Crown failed in satisfying both aspects of the duty.

Statutory and Administrative Law Issues

Taku submits that contrary to the argument advanced by the Crown and Redfern, the majority of the Court of Appeal did not concur with the conclusion of Southin J.A. on the statutory and administrative law issues. Taku notes that the majority of the Court of Appeal considered the fiduciary duty to be the central issue of the case; it was the only issue they wrote about and that they did not decide the statutory issue.

Even so, Taku agreed with the correctness of the approach of the trial judge in concluding that the standard of review for the merits of the Ministers' decision is reasonableness simpliciter. By reviewing *Environmental Assessment Act* decisions on this standard, courts can ensure that they are based on substantial evidence and logic.

Taku agreed with the findings of the trial judge that there had been a duty of procedural fairness which had been breached, thereby tainting the Ministers' decision.

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Factum Summary of the Respondent Redfern Resources Ltd.

Redfern supports the Crown's appeal. Redfern restates the first issue as:

1. Does the Provincial Crown have a constitutional or fiduciary obligation to consult which arises on the assertion of an Aboriginal right or title but is independent of the existence of the asserted Aboriginal right or title, such that enforcement of the obligation does not require proof, in accordance with the applicable standard of proof, that the asserted right or title exists?

Redfern also submits that the following additional issue is raised by this appeal:

- What is the standard of review on judicial review of the decision of a Minister of the Crown to issue a Project Approval Certificate under the EAA?

Redfern points out that the Court of Appeal has devised an interim remedy for the protection of Aboriginal rights which have been asserted but not yet proven. Redfern states that a breach of an Aboriginal right cannot be established without proving the existence of the right. Redfern submits that the Court of Appeal leaves undetermined the test for whether the Ministers have been appropriately "mindful" of Taku's Aboriginal rights.

Redfern goes on to argue that the Crown's interim fiduciary obligation must be defined in such a manner that:

- (a) the enforcement of the obligation does not give final effect to rights which have not yet been proven in accordance with the applicable standard of proof; and
- (b) the interests of the Crown and third parties such as Redfern, are taken into account in determining whether the obligation ought to be enforced .

Redfern submits that if the Aboriginal right at stake is not properly defined, it is impossible to determine whether there is an actual or threatened infringement, so as to engage the Crown's fiduciary obligation to justify the infringement, and that it is impossible to determine the content of the Crown's duties, if any.

Redfern says if the Crown has a fiduciary obligation, it ought to be defined independently of s.35 and the requirements for justifying an infringement of Aboriginal rights under that section.

Redfern argues that the *Environmental Assessment Act* is fully capable of accommodating Aboriginal interests and that the imposition of duties of a fiduciary or constitutional nature to protect those interests is unnecessary.

Redfern argues that the only obligations on the Crown prior to proof of Aboriginal rights and title, are those of good faith and statutory compliance and that the Crown met its good faith requirements and both the Crown and Redfern complied with the statute. Further, Redfern argues that it was unnecessary for the Court to recognize a fiduciary obligation arising independently of Aboriginal rights or title.

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Factum Summary of the Intervener First Nations Summit (the “Summit”)

The Summit represents the interests of approximately 140 B.C. First Nations with its primary focus being the development and implementation of a framework for treaty negotiations.

The Summit sought leave to intervene in this matter as a way to bring to the Court’s attention the perspective of B.C. First Nations negotiating treaty and to demonstrate the impact that the decision could have, should the Appellant Crown’s position be accepted and the Court of Appeal overturned.

The Summit submits that a ruling that there is no fiduciary or constitutional duty upon the Provincial Crown to consult and accommodate where Aboriginal rights and title are claimed but not yet proven, would have an adverse affect on both the fairness and impartiality of the treaty process.

In response to Canada’s argument that it only owes a duty of fair dealing with Aboriginal people, the Summit states that such an argument cannot be correct because it doesn’t accord with the purposes of s. 35(1). The Summit goes on to examine the scope and purposes of s.35(1).

Section 35 concerns the recognition and affirmation of Aboriginal interests and imposes positive obligations on the Crown. It is not concerned with justifying infringements.

The Summit submits that the survival of Aboriginal societies is dependent upon their ability to exercise the rights integral to their distinctive cultures. If the Crown’s argument is correct, the only way these rights may be protected and exercised unimpeded, is to prove each and every right in court. Such an argument is highly significant because if it is correct, it means that during the time prior to concluding treaty or proving rights in court and with no fiduciary duty upon the Crown, Aboriginal people have no tool to protect their s. 35 interests. The Summit submits that safeguards are necessary to ensure that the purposes of s. 35 can be achieved and without them, no just claims settlements are possible.

The Summit submits that the proper approach is that where there is evidence of Aboriginal rights, there is imposed upon the Crown a fiduciary duty to recognize and affirm those rights and thus satisfy the requirements of s.35. This is in contrast to the Appellant’s argument that s. 35 can be satisfied through justification of Crown infringement.

The Summit draws the Court’s attention to recent international law decisions which illustrate how the lack of interim protection of Aboriginal interests allows government to

exploit confusion over indigenous lands and rights to its own benefit. Although such decisions are not binding upon Canadian courts, they offer useful insight on the reasoning applied by international courts in adjudicating very similar issues. Decisions such as the Nicaraguan *Awes Tingni* show that this issue is much greater than simply one of land resource management and requires consideration of the basic human rights of indigenous people.

The Summit in its factum refers to the leading cases in support of its submission that fiduciary doctrine applies to both federal and provincial Crown to at least limit and monitor the power of the Crown over *sui generis* interests. Further, the duty of both Crowns to negotiate in good faith has been articulated by the courts.

The Summit goes on to argue that the facts of this case should clearly invoke a fiduciary duty: a land claim filed in 1984 on the basis of a preliminary determination of Aboriginal rights and title, treaty negotiations since 1993 and material interests at stake in the Tulsequah approval process.

The Summit notes that since *Sparrow*, whether consultation has taken place is part of the justification test; clearly this presumes that there is a duty to consult *prior* to infringement. To wait to consult until the justification stage, after infringement could result in the irrevocable compromise of Aboriginal interests. Such an approach, as advocated by the Crown, would result in s. 35 being used to justify infringement rather than as a means to recognize and affirm Aboriginal rights.

The Courts have articulated frequently and repeatedly the Crown is under a duty to enter and conduct negotiations in good faith in order to achieve the basic purpose of s. 35 – reconciliation. The Summit's members have heeded this direction and undertaken over the years in treaty negotiations, premised on a foundation of good faith, with funding support of approximately \$222 million.

The Summit submits that a First Nation engaged in treaty negotiations should be deemed to have put both provincial and federal Crown on notice of its interests and to have overcome the evidentiary hurdle referred to by the Court of Appeal in *Haida* as a good *prima facie* case. The Summit submits that the framework suggested by Tysoe J. in *Gitksan* provides a workable approach and sets the appropriate threshold for assessing Aboriginal interests.

The Summit goes to state the scope and content of the duty to consult should be determined in light of a variety of principles, as articulated in previous decisions. Further, the Summit submits that the case law shows that rather than chill development as feared by the Appellants, principled consultation has protected Aboriginal interests and facilitated treaty negotiations.

The Summit submits that interim protection of unproven treaty rights is harmonious with the principles of the B.C. Treaty process. If the Crown is correct in its approach, it is

feared that the effect will be to compromise the foundation of the treaty process and force the parties to instead litigate their interests.

The supervisory role of the Court to enforce fiduciary obligations, even in the context of treaty negotiations was acknowledged in *Gitanyow*. The Summit submits that if this Court finds there is a clear legal obligation to consult and therefore a legal remedy available in the event of breach, such a ruling has the potential to revitalize treaty negotiations based on a revised fair and clearly articulated framework.

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Factum Summary of the Intervener, the Doig River First Nation (“Doig”)

Doig is part of Treaty Eight with reserve lands in northeastern B.C. Doig’s position on the appeal is that the provincial Crown owes both a constitutional and fiduciary duty to consult with First Nations wherever there is the possibility that Aboriginal rights or title or treaty rights may be infringed by government action. Doig goes on to say that the duty is engaged prior to such rights being judicially determined.

Doig refers to the case law to refute the Crown’s claim that it has no constitutional duty to First Nations. It goes on to note that both Canada and B.C. have fiduciary duties to First Nations based on the Crown’s ability to affect First Nations’ interests.

Doig challenges the Crown’s position that the fiduciary duty arises only where the Crown is required to act in the best interests of First Nations. Doig relies on cases such as *Osoyoos Indian Band v. Oliver* for the proposition that the Crown’s fiduciary responsibility is not restricted to surrendered lands and arises whenever the Crown’s discretion may impair First Nations constitutionally protected interests. Doig distinguishes the *Wewaykum* decision because it dealt with reserve lands, not those claimed pursuant to treaty or Aboriginal right and s. 35(1) did not arise as an issue.

Doig points out from a practical perspective that if a First Nation must first prove its rights in order to engage the duty to consult, by the time such a judicial determination is made, the impact of development may very well have rendered the exercise of the right(s) impossible. Further, this places the First Nation in the position of seeking an injunction or a stay of the development, shifting the onus of justification upon the First Nation instead of the Crown.

Doig emphasizes the unique position of treaty nations in this appeal, anticipating that should the Crown be successful, it will attempt to limit the fiduciary obligations to treaty nations. Conversely, Doig posits that if unsuccessful, the Crown will seek to exclude treaty nations from the application of the ruling.

Doig submits that the existence of a treaty strengthens the fiduciary relationship¹ and is sufficient to put the Crown on notice and engage the fiduciary duty to consult. Doig distinguishes treaty from unproven Aboriginal rights and relies on the Court’s observations in *Badger* that because treaty rights form an integral part of the consideration for land surrender, it should be equally if not more important, to justify their *prima facie* infringement, compared to Aboriginal rights.

Doig goes on to state that the existence of treaty demonstrates an on-going formal relationship between a First Nation and the Crown, based on an exchange of covenants, reinforcing the duty of the Province to consult and accommodate prior to potential

¹ It undeniably brings the First Nation squarely within the protection of s. 35.

infringement of treaty rights. Doig also submits that Treaty 8 carries a strong economic component which further reinforces the on-going duties of the Crown since decisions made have the potential to enhance or impair a treaty nations' economic well-being.

Doig also responds in its factum to the argument advanced by Alberta that the Crown need not consult with First Nations when taking up lands for *bona fide* purposes where a treaty contemplates that land may be taken up for settlement or other purposes.

Doig's first response is that procedurally, Alberta's position should not be considered by the court since it relies on evidence not already before the court. Furthermore, the issue of lands taken up is currently before the courts in Alberta and Doig submits it is premature to consider the issue at the Supreme Court of Canada when litigation is still pending².

Doig summarizes Alberta's position as stating that s. 35(1) does not apply in respect of treaty nations where Crown infringement falls under the "taking up lands" provision of the numbered treaties.

Doig submits that if Alberta's position is heard by the Court, that it is unsupported by and contrary to, the case law. In reviewing the case law, Doig notes that in the rare cases where it may be found that land has been taken up in a manner "visibly incompatible" with the exercise of treaty rights, s. 35(1) still requires Crown action to satisfy the *Sparrow* justification test. This is because the taking up of land represents the complete elimination of the exercise of treaty rights in a particular location.

Doig submits that if Alberta's argument is correct, then entire provinces have arguably been taken up many times over by various interests, resulting in the conclusion that land use related treaty rights no longer exist in any province. Alberta relies on the *Cardinal* case in support of its argument and Doig responds that *Cardinal* misapplied the jurisprudence and is wrongly decided.

In its summary, Doig urges the court to confine the scope of its ruling and to leave for another day consideration of how the duty to consult and accommodate arises in relation to treaty nations, arguing that the issues were not fully canvassed in the courts below.

² Doig states in its factum at par. 79 that it responds to the argument set out in Alberta's Notice of Motion out of an abundance of caution and without having had the opportunity to review Alberta's factum. Alberta in its factum does not advance the "taking up lands" argument which Doig devotes a considerable portion of its factum addressing.

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Factum Summary of the Intervener Union of British Columbia Indian Chiefs (UBCIC)

The UBCIC represents the interests of a number of B.C. First Nations, most of which are not engaged in the B.C. Treaty process. UBCIC's argument is that the Supreme Court of Canada is being asked to endorse British Columbia's "business as usual" approach to Aboriginal rights and title. UBCIC summarizes the Crown's argument as that until a First Nation has proved its claims in court, the Crown owes no duty to consider Aboriginal interests and may proceed as if right and title do not exist.

UBCIC submits that the correct approach, which is consistent with the existing jurisprudence concerning s. 35(1), is that there exists a general fiduciary duty to accommodate Aboriginal rights and title. UBCIC notes that such an approach is required by the remedial nature of s. 35 and asks what purpose s. 35 would serve if the subject-matter under its protection is consumed and compromised through government decision-making and procedural delay as if Aboriginal rights do not exist.

UBCIC proposes a framework to guide administrative decision-making which has the potential to infringe s. 35, based upon the existing case law. It goes on to state that the framework is based upon principles which

- a) recognize and affirm Aboriginal rights and title; and
- b) make justification part of government's operations.

UBCIC points out that the Crown in its factum ignores the requirement that any infringement of s. 35 as a result of government's decision must be justified or else is unlawful and unconstitutional. Section 52(1) of the *Constitution* requires that all government action must conform to the Constitution and UBCIC submits that the Crown's position is contrary to this principle.

UBCIC cites key sections from Sparrow and Gladstone which refer to the Crown's pre-proof obligations in the face of s. 35 rights. It notes that one of the practical challenges faced by the Crown in meeting its obligations is a lack of structure or guidance in both federal and provincial legislation. This was noted by the SCC in Adams.

UBCIC makes reference to recent developments in international human rights law and foreign law which support the decision of the Court of Appeal and recognize that national governments often accept the existence of Aboriginal rights, but even so, ignore them. UBCIC submits that the Court of Appeal decision addresses the concerns raised in the international jurisprudence and creates a remedy.

UBCIC also takes a practical approach to its argument by illustrating the ways in which administrative decision makers may be better equipped than the courts to assess and

accommodate claims of Aboriginal rights and title in the first instance. It refers to technical support, access to the legal advice of the Attorney-General and the fact that some decision makers hold their positions for significant periods of time and thereby develop familiarity and expertise on relevant issues. UBCIC emphasizes that where decision makers are given discretion to interfere with Aboriginal rights and title, such discretion must be properly structured in accordance with the law.

UBCIC acknowledges that its proposed approach to Aboriginal rights and title does not preclude the substantive role of the courts, but instead imposes a burden on the Crown which the courts can enforce. Further, the courts are always available to undertake a full and final determination of Aboriginal rights and title.

UBCIC also submits that the legal argument it makes, in support of the decision of the Court of Appeal, reinforces the treaty process, not undermines it, as the Crown says in its factum. UBCIC makes the point that a regime requiring the Crown to accommodate Aboriginal interests on an on-going basis will help to build a more positive relationship between the parties and promote fair treatment. This in turn may create incentive for both the Crown and First Nations to proceed with treaty making and achieve reconciliation as required by s. 35.

Finally, UBCIC submits that the framework it proposes does not guarantee any particular outcome to First Nations, but ensures fair treatment of constitutionally protected rights and title, not just those interests that the Crown chooses to recognize.

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Factum Summary of the Intervener, the A-G of Canada

The focus of Canada's argument is that prior to the establishment of Aboriginal rights or title, there is no duty, either constitutional or fiduciary to consult with First Nations or to accommodate Aboriginal interests.

Canada goes on to say that where an Aboriginal right may exist and Canada is exercising a statutory decision-making power that may infringe that right, there should be a limited duty to consult. Canada submits that such a requirement, which applies to both provincial and federal governments, arises from the need to exercise statutory decision-making powers in a manner consistent with section 35 and the honour of the Crown.

Canada argues that this requirement is limited to acting in good faith to seriously consider potential Aboriginal rights. The content of the requirement varies with the circumstances and includes consideration not only of Aboriginal interests, but also the public and other stakeholders potentially affected by the Crown's decision. It distinguishes what it calls a limited *ex ante* requirement to consult from the justification standard set out in *Sparrow* and *Delgamuukw* which deal with the Crown's duties in the face of proven rights and title. Canada refers to these as *ex post facto* duties.

Canada acknowledges that for consultation to be effective in understanding and addressing potential (ie. rights not yet proven in court) Aboriginal rights, it must occur prior to the establishment of the right.

Canada submits that the *ex ante* requirement to consult arises in this appeal as a result of the statute which empowers the Crown with the authority to make a decision and because it is aware of potential Aboriginal rights of unknown scope and content.

Canada relies on a literal wording of s. 35 to argue that if there were a duty on the Crown to consult, there should be a corresponding right of First Nations to be consulted. Canada goes on to submit that consultation is not one of the rights falling within s. 35.

On the issue of fiduciary duty, Canada disagrees with British Columbia's assertion that such duty only applies to the federal Crown. Even so, Canada argues that its fiduciary duty to First Nations does not apply in the context of this matter, because it is engaged in a decision-making process that requires consideration of the public and the competing claims of other interests.

In Canada's submission, when the Crown is exercising its decision-making powers as conferred by statute, the values and purpose of s. 35 "may be taken into account" in considering what decision should be made in the face of unproven Aboriginal rights. Canada submits it is reasonable to infer that discretion should be exercised in a manner consistent with the honour of the Crown and the purpose of s.35 and goes on to say this

would be achieved through consultation. Canada invites the Court to intervene where satisfied that the Crown has not seriously considered potential Aboriginal rights and thus not acted in good faith and not upholding the honour of the Crown.

Canada repeatedly states that the decision maker must take potential Aboriginal rights “seriously”, but does not elaborate what this means practically and how this burden is discharged by the Crown.

Canada disagrees that participation by the Crown in treaty negotiations creates duties of good faith or infers that the Crown has accepted the legitimacy of Aboriginal assertions. Canada argues that the Crown’s participation in treaty negotiations is without prejudice to its legal position and has no relevance to this appeal or to the “*ex ante* requirement to consult”.

Canada argues that a judicial review of the *ex ante* requirement to consult should focus on an assessment of the conduct of the Crown, as opposed to an assessment of the strength of the potential Aboriginal claim. Further, Canada argues that the scope of the *ex ante* requirement to consult may be affected by the urgency and importance of the Crown objective and the implications of delaying a decision on third parties.

Canada argues that the *ex ante* requirement to consult does not include a requirement to obtain consent from the Aboriginal group in question, nor does it include a requirement to accommodate, unless failure to do so is patently unreasonable or in bad faith. Canada says adequate consultation may be achieved by including First Nations in a general public consultation process. Further, Canada argues that its discretion in determining what fulfills the consultation requirement should not be interfered with by the Court unless the Crown conduct is found to be patently unreasonable or in bad faith.

The Court of Appeal ordered that the Ministerial decision be reconsidered with a direction to consider the reasons of the Court of Appeal and the decisions of the Supreme Court of Canada concerning the Crown’s constitutional and fiduciary duties to First Nations. Canada argues this remedy is incorrect and that the proper approach would be to refrain from making any mandatory orders with respect to consultation. Instead, Canada argues that the court should limit itself to making declarations if the consultation requirement is not met and then providing guidance as to how that may be achieved. Canada argues the courts should exercise caution and grant relief only to the extent necessary to achieve justice between the parties.

Clearly, the approach Canada is advocating is one in which the Crown has almost unfettered discretion in its decision-making powers. Aboriginal interests are to be relegated to the same sphere as third parties, with the Crown’s burden being nothing greater than a general duty of good faith to consider “potential Aboriginal rights” in the context of all other interests.

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Factum Summary of the Intervener, the A-G of Alberta

The focus of Alberta's argument is that there is no duty to consult prior to proof of Aboriginal rights or title. Alberta submits that constitutionally, the only duty to consult arises from the justification component of the *Sparrow* test¹. Alberta distinguishes its position from that of Canada by arguing that it does not accept that there is even the *ex ante* duty of fair dealing, prior to proof of rights and that to do otherwise would create a situation where Aboriginal people "enjoy" a remedy without necessarily holding a right. Alberta submits that in order to trigger the positive obligation to consult, there must first be a proven violation of s. 35 rights. It characterizes a remedy without prior proof of the right as anticipatory or speculative.

Alberta reviewed the decision of the B.C. Court of Appeal and then contrasted it with what Alberta calls the preferable approach of the Ontario Court of Appeal in *Trans Canada Pipelines Ltd. v. Beardmore (Township)*. In *Beardmore*, the Court noted that because the Ontario Municipal Act did not impose upon the Crown an obligation to consult with First Nations, any obligation had to derive from another source. The Court concluded no such duty exists prior to proof of an existing Aboriginal or treaty right.

Alberta relies on *Delagamuukw* in support of its proposition and argues that the comments of Lamer C.J.C. (as he then was) with respect to the duty of consult are specific to lands where rights have been proven. This is a matter of interpretation and it is worth noting that the excerpt relied by Alberta includes the oft-quoted phrase "There is *always* a duty of consultation" [emphasis added].

Alberta relies on a case involving cruise missiles and the threat of possible nuclear war as support for the proposition that relief based on anticipatory breach of the Charter is only appropriate where the breach is provable and not merely speculation. It is important to note that s. 35 does not fall within the Charter, so the arguments Alberta advances with respect to this issue are clearly distinguishable on both the facts and the law. Alberta does go on to argue that because s. 35 falls outside the Charter, it makes it that much more challenging to craft anticipatory remedies with a clear relationship between the right and the remedy. Alberta argues that s. 52(1) of the Constitution can only be engaged to strike down laws on the basis of proven, not asserted rights.

Alberta disagrees with the finding of Rowles J. that finding infringement of Aboriginal or treaty rights prior to considering justification is inconsistent with *Sparrow* and *Van der Peet*. Alberta argues that the Crown must make attempts to consult and mitigate on the

¹ This reasoning is logical only in cases where the test is applied to justify Crown action in the face of a proven Aboriginal right. However, it begs the question how consultation ever arises as part of justification in a case involving proof of s. 35 rights if the Crown takes the position that there is no duty to consult prior to proof; the fact that consultation is one of the factors which must be considered in assessing whether the Crown can justify its actions clearly shows there is always a duty to consult.

determination that there is a possibility of infringement, prior to an order by the court. It does not explain the source of this requirement.

Alberta denies there is any fiduciary duty to consult in the absence of evidence of a s. 35(1) infringement.

Alberta goes on to suggest that the appropriate remedy to protect unproven s. 35 rights is the interlocutory injunction. It goes on to say that the analysis of irreparable harm and the balance of convenience enables the Court *inter alia*, to consider the Crown's competing duties toward both Aboriginal and non-Aboriginal interests.

Ringstad et al v. Taku River Tlingit v. Redfern Resources Ltd.
SCC No.: 29146

Factum of the Interveners Business Council of British Columbia and others

This factum was filed on behalf of the Business Council of B.C., Aggregate Producers Association of B.C., B.C. and Yukon Chamber of Mines, B.C. Chamber of Commerce, B.C. Wildlife Federation, Council of Forest Industries and Mining Association of B.C. Collectively, these interveners refer to themselves as the Business Coalition.

The Business Coalition purports to bring to the court's attention the interests of the private sector and submits that judicial notice should be taken of the uncertainty and impediments to the economy arising from the judgment on appeal.

The position of the Business Coalition is that the Provincial Crown does not owe a freestanding enforceable duty to accommodate the interests of First Nations with unproven Aboriginal rights or title. It submits that where Aboriginal groups can make out a *prima facie* case and establish irreparable harm, the proper remedy is to seek injunctive relief. The Business Coalition goes on to argue that if injunctive relief is not granted and Aboriginal rights or title are ultimately established in court or after treaty, other remedies such as compensation are available if there is unjustifiable infringement.

The Business Coalition argues that one of the effects of the Court of Appeal's decision if allowed to stand, is that Aboriginal groups are able to circumvent "the strictures of injunction law by seeking judicial review". It argues that the result is that natural resource development and exploitation in B.C. has been hindered and could eventually be paralyzed.

The Business Coalition argues that under the constitutional division of powers, the provincial crown does not have a constitutional or fiduciary obligation to First Nations. It goes on to say that the province's exclusive right to manage natural resources on behalf of the public is incompatible with a fiduciary relationship to First Nations.

It is argued that s. 35 cannot take precedence over the province's constitutional duties and should not be interpreted to limit other constitutional powers.

The Business Coalition referred to authorities for the proposition that Aboriginal rights are not absolute and that Aboriginal claims must be balanced against other competing interests. It argues that if priority is given to unproven Aboriginal rights, the province is prevented from balancing interests.

The Business Coalition relies on the *Mitchell* decision of the Supreme Court of Canada as standing for the proposition that caution must be exercised in granting interim remedies on the basis of unproven Aboriginal rights. In particular, it argues that *Mitchell* brings "a sense of reality to the weight to be given to oral evidence" and then cites *Kitkatla* as echoing these concerns of the "indiscriminate use of oral evidence".

The Business Coalition characterizes Aboriginal title as essentially economic in nature and thus capable of compensation, where unjustified interference is proven.

The Business Coalition advances a novel policy argument in its submission that one of the results of the Court of Appeal decision would be that it acts as a *deterrent* to treaty negotiations. It argues that certain First Nations have changed their focus from treaty negotiations to what it terms “mini or quasi-negotiations” over asserted rights in the face of development activity. It uses this assertion as support for overturning the decision of the Court of Appeal and thereby removing an obstacle to treaty negotiations.

The Business Coalition summarizes by submitting that there is no justiciable issue between the province and First Nations with respect to the duty to consult and accommodate until the *prima facie* infringement is proven. It goes on to argue that it is only after that test is met, that the elements of consultation and accommodation may be raised by the province as part of a justification defence. The Business Coalition fails to address how and why consultation and accommodation would even arise as potential defences, given its argument that there is no burden on the province to engage in either, prior to proof of an Aboriginal claim.