

TABLE OF CONTENTS

Part	Description	Page
PART I	STATEMENT OF FACTS	1
	A. Introduction	1
	B. The Province’s Notice of Haida Title and Rights	2
	C. TFL 39: Undisputed Facts	6
	D. The Nature of the Tenure	7
	E. No Consultation or Accommodation on Replacement	9
	F. Opportunity to Consult and Accommodate on Replacement	10
	G. The Haida Position on Logging	13
	H. Procedural History	13
	1. Chambers Judgment	14
	2. The British Columbia Court of Appeal: <i>Haida 1</i>	14
	3. The British Columbia Court of Appeal: <i>Haida 2</i>	16
PART II	ISSUES ON APPEAL	19
PART III	ARGUMENT	20
	I. RESPONSE TO THE FACTUM OF THE APPELLANT, PROVINCE OF BRITISH COLUMBIA	20
	A. Lessons from History	20
	B. The Crown’s Fiduciary and Constitutional Duty to Consult and Accommodate	23
	C. Roots of the Crown’s Duty to Consult and Accommodate	25
	D. Evolving Jurisprudence of the Crown’s Fiduciary Duty	26
	E. The Division of Powers	33

Part	Description	Page
	F. The Province’s “Only After” Theory of Section 35	37
	G. The Content of the Duty	42
	H. The Haida Objectives for Consultation and Accommodation	45
	I. The Duty to Consult and Accommodate in Good Faith	49
	J. Conclusion with Respect to the Crown’s Obligations	52
	II. RESPONSE TO THE FACTUM OF THE APPELLANT WEYERHAEUSER	54
	A. Introduction	54
	B. Jurisdiction to Issue a Declaration that Included Weyerhaeuser	55
	C. Justice Could not be Done Without Including Weyerhaeuser	64
	D. Weyerhaeuser’s Obligation in this Case	68
	1. A Statutory Regime that Confers Responsibilities	70
	2. Nature of the Tenure – Likelihood of Infringement/Capacity to Accommodate	73
	3. Knowing Receipt	74
	E. The Remedy Fulfils the Purposes of Section 35(1)	75
	III. THE CONSTITUTIONAL QUESTION	76
PART IV	SUBMISSION ON COSTS	77
PART V	NATURE OF ORDER SOUGHT	78
PART VI	TABLE OF AUTHORITIES	79

PART I
STATEMENT OF FACTS

A. Introduction

1. The Respondent, the Council of the Haida Nation, is the governing body of the Haida Nation pursuant to its constitution. The people of the Haida Nation include all Indigenous Peoples of Haida ancestry, whose ancestral home is Haida Gwaii, also known as the Queen Charlotte Islands (“the Haida”).

2. These appeals concern the obligations of a minister of the Crown when he contemplated an exercise of discretion with knowledge that his decision would result in an infringement of Aboriginal Title and Rights, and the discretion of an appellate court, acting in the place of a superior court, to fashion declaratory relief so as to vindicate the rights of the Aboriginal Peoples in those circumstances, balance the interests of the parties and do justice in the case.

3. No one argues that the Crown owes no obligations to Aboriginal Peoples until their Title or Rights are proven in a court of law, and no one argues that a private tenure holder is not a necessary and proper party to proceedings that challenge the validity of the tenure. Instead, the issues are the nature of Crown’s obligation prior to proof of Title or Rights - is it merely procedural, or is it fiduciary, constitutional and substantive– and the range of the court’s remedial options – are they limited to relief against the Crown, or do they include, in appropriate cases, a declaration that includes the tenure holder?

4. The facts and procedural history are important in these appeals. It will be shown from the facts as found in the courts below that, when the Minister of Forests replaced the tree farm licence which granted exclusive rights to harvest an area of more than one-quarter the land mass of Haida Gwaii, he was aware of a good *prima facie* case in support of the Haida’s Aboriginal Title and Rights, and aware that the Haida had concerns with the replacement, which, by imposing terms on the licence, he could accommodate. It will also be shown that the Minister refused to consult with the Haida, and replaced the licence without accommodating their interests, and that Weyerhaeuser received the tenure with knowledge of the Haida’s case and knowledge that the tenure was legally vulnerable.

5. It will be shown from the procedural history that Weyerhaeuser participated fully in the proceedings from the start, received full notice of the facts on which the tenure was impugned, asked the Court to avoid invalidating the tenure, and had ample opportunity to argue the procedural and substantive issues now on appeal concerning the company's obligation.

6. In response to the Provincial Crown's factum, it will be argued that a fiduciary and constitutional obligation to consult and seek workable accommodations in relation to reasonably asserted Aboriginal Title and Rights is founded solidly on this Court's decisions in *Guerin*, *Sparrow*, *Delgamuukw*, *Osoyoos* and *Wewaykum*. It will also be argued that the Crown's argument that a duty to consult arises only after Title and Rights have been proven in a court of law is wrong in both law and policy. It will be further argued that the content of an antecedent duty is workable and consistent with the purposes of s. 35(1) of the *Constitution*.

7. In response to Weyerhaeuser's factum, it will be argued that there was no jurisdictional or procedural reason why the Court of Appeal could not include Weyerhaeuser in a declaration concerning the Crown's obligations, a declaration that included Weyerhaeuser was fully justified by Chief Justice Finch's finding that justice could not be done without including the company, and the obligation of the company was a reasoned and appropriate holding in the circumstances of this case. It will be further argued that the remedy crafted by the Court of Appeal is workable and consistent with the purposes of s. 35(1) of the *Constitution*.

8. The facts set out in the factum of the Appellants, the Minister of Forests and the Attorney General of British Columbia ("the Province") and in the factum of the Appellant Weyerhaeuser Company Limited ("Weyerhaeuser") are incomplete and in particular, those facts do not include the inescapable facts found by the Chambers Judge and relied on by the Court below.

B. The Province's Notice of Haida Title and Rights

9. The Haida filed extensive evidence to establish the Province's notice and knowledge of Haida exclusive occupation of Haida Gwaii, including the area covered by Block 6 of tree farm licence #39 ("TFL 39"), prior to 1846 and thereafter and of the importance of red cedar to the Haida. Those affidavits included Haida oral history and opinions from an expert linguist,

anthropologist, ethnobotanist, and archaeologist. The expert affidavits had been filed previously, in the Haida's challenge of the 1995 replacement of TFL 39.¹

Appellants' Record, Vol. I, pp. 15, 23 (Reasons for Judgment of Mr. Justice Halfyard pronounced November 21, 2000 ("BCSC Reasons"), at paras. 13, 25)
 Respondents Record, Vol. I, pp. 2-17 (Affidavit of Guujaaw, December 28, 1999 ("Guujaaw 1"))
 Appellants Record, Vol. II, pp. 260-272 (Affidavit of Kathleen M. Pearson, December 28, 1999 ("Pearson"))
 Appellants' Record, Vol. II, pp. 273-290 (Affidavit of Ernie Collison, December 28, 1999 ("Collison 1"))
 Respondents' Record, Vol. II, pp. 189-196 (Affidavit of Dr. John Enrico, September 14, 1995)
 Respondents' Record, Vol. II, pp. 197-211 (Affidavit of Dr. Marianne Boelscher-Ignace, September 14, 1995)
 Respondents' Record, Vol. II, pp. 273-286 (Affidavit of Dr. Nancy Turner, April 28, 1995)
 Respondents' Record, Vol. III, pp. 354-357 (Affidavit of Dr. George F. MacDonald, October 30, 1995)

10. Following a five day hearing the Chambers Judge found that the Province had in its possession, or available to it, a significant body of evidence indicating that the Haida exclusively occupied coastal and inland areas of TFL 39 at and before 1846, and indicating the importance of red cedar in Haida culture. The Province's own evidence supported this conclusion.

Appellants' Record, Vol. I, pp. 15, 26 (BCSC Reasons, at paras. 13, 25(m))
 Appellants' Record, Vols. II, pp. 316-320 and Vol. III, pp. 350-351, 357, 377, 379, 422-423, 428-429 (Affidavit of Shauna McRanor, pp. 2-6; Ex. "B", pp. 5-6, 10; Ex. "C", pp. 19-23; Ex. "D", pp. 10-12; Ex. "E", pp. 240-241, 246-247)

11. Based on the "voluminous" evidence, the Chambers Judge also found the following conclusions to be "inescapable":

- (a) The Haida people have inhabited the Queen Charlotte Islands continuously from at least 1774 to the present time.
- (b) At the time of the assertion of British sovereignty in 1846, and likely for many years before then, the Haida were the only Aboriginal people who lived on the Queen Charlotte Islands.

¹ *Council of the Haida Nation v. Minister of Forests*, [1998] 1 C.N.L.R. 98 (B.C.C.A.) Both the Province and MacMillan Bloedel Limited (Weyerhaeuser's predecessor) were respondents in this litigation.

- (c) From 1846 to the present time, the Haida have been the only Aboriginal people living on the Queen Charlotte Islands.
- (d) The Haida have never been conquered, they have never surrendered their Aboriginal rights by treaty, and their Aboriginal rights have not been extinguished by federal legislation.
- (e) For more than 100 years, the Haida have claimed to possess Aboriginal title to all of the lands comprising the Queen Charlotte Islands.
- (f) From a time which is uncertain, but which pre-dates 1846, up to the present time, the Haida have used large red cedar trees from the old-growth forests of the Queen Charlotte Islands for the construction of canoes, houses, and totem poles, and have also used red cedar for carving masks, boxes, and other objects of art, ceremony, and utility.
- (g) Since before 1846, the Haida have utilized red cedar trees obtained from old-growth forests on both coastal and inland areas of what is now Block 6 of TFL 39.
- (h) Red cedar has long been, and still is, an integral part of the Haida culture.
- (i) Old-growth red cedar timber has been, and will in the future continue to be, harvested from Block 6, pursuant to TFL 39.
- (j) For a number of years, the Haida have expressed their objections to the Crown, to the rate at which the old-growth forests of Haida Gwaii are being logged off, the methods of logging being used, and the environmental effects of the logging on the land, watersheds, fish, and wildlife.
- (k) Since the decision of the Court of Appeal in *Delgamuukw* on June 25, 1993, the Province has known that there was no blanket extinguishment of Aboriginal rights in British Columbia.
- (l) Since at least 1994, the Province has known that the Haida objected to TFL 39 being replaced without their consent and without the reconciliation of their title with Crown title.
- (m) Since 1994, and probably much earlier, there has been available to the Province a significant body of evidence that indicates the Haida people exclusively occupied and used both coastal and inland areas of the Queen Charlotte Islands, including some of the coastal and inland areas of Block 6, since before the assertion of sovereignty in 1846, and evidence that indicates the importance of red cedar in the Haida culture.
- (n) Since the Court of Appeal's decision on November 7, 1997, in *Haida Nation v. British Columbia Minister of Forests*, [1998] 1 C.N.L.R. 98, the Province has

known that, if the Haida proved their claim of Aboriginal title, their title would constitute an encumbrance on the timber on Block 6.

Appellants' Record, Vol. I, pp. 23-26 (BCSC Reasons, at para. 25)
 Appellants' Record, Vol. I, pp. 60-62 (Reasons for Judgment of the British Columbia Court of Appeal pronounced February 27, 2002 ("*Haida I*"), at para. 22)

12. The Haida evidence went far beyond a mere assertion of Aboriginal Title. The Chambers Judge stated:

In my opinion, there is a reasonable probability that the Haida will be able to establish Aboriginal title to at least some parts of the coastal and inland areas of Haida Gwaii, and that these areas will include coastal areas of Block 6. As to inland areas of Block 6, I would describe the Haida's chance of success at this stage, as being a reasonable possibility. Moreover, in my view, there is a substantial probability that the Haida will be able to establish the Aboriginal right to harvest red cedar trees from various old-growth forest areas of Haida Gwaii, including both coastal and inland areas of Block 6, regardless of whether Aboriginal title to those forest areas is proven.

Appellants' Record, Vol. I, pp. 37-38 (BCSC Reasons, at para. 47)
 Appellants' Record, Vol. I, p. 64 (*Haida I*, at para. 24)

13. Based on the evidence, the Chambers Judge concluded that there is a reasonable probability that the Haida would be able to establish a *prima facie* infringement of the right to harvest cedar.

I am also of the opinion that a reasonable probability exists that the Haida would be able to show a *prima facie* case of infringement of this last-mentioned right, by proof that old-growth cedar has been and will continue to be logged on Block 6, and that it is of limited supply. I find myself unable to predict what likelihood there is that the Haida would be able to establish infringement of other aspects of their rights in relation to the lands and timber of Block 6.

Appellants' Record, Vol. I, p. 38 (BCSC Reasons, at para. 48)
 Appellants' Record, Vol. I, p. 64 (*Haida I*, at para. 24)

14. In relation to the Province's notice of the strength of the Haida's case, the Chambers Judge concluded:

In my judgment, the provincial Crown should have been able to make a similar assessment of the apparent strength of the Haida claims, long before September 1, 1999, when the Minister offered to replace TFL 39.

Appellants' Record, Vol. I, p. 39 (BCSC Reasons, at para. 51)
 Appellants' Record, Vol. I, p. 65 (*Haida I*, at para. 24)

15. Weyerhaeuser also had notice of the strength of the Haida's case, a fact relied on by the Court in *Haida I* to establish the source of the company's duty.

... Weyerhaeuser [was] aware of the Haida claims to aboriginal title and aboriginal rights . . . by evidence supplied to them by the Haida people, and through further evidence available to them on reasonable inquiry, an inquiry which they were obliged to make.

Appellants' Record, Vol. I, p. 81 (*Haida I*, at para. 49)

See also: Appellants' Record, Vol. II, p. 283, Respondents' Record, Vol. II, pp. 168-169 (Collison 1, at para. 47, Ex. "E")

16. As regards the replacement of TFL 39 in 2000, the Chambers Judge found that Weyerhaeuser "acted in reliance of this decision of the Minister . . . with knowledge of the risk of the potential consequences of the Haida claim".

Appellants' Record, Vol. I, p. 36 (BCSC Reasons, at para. 45)

C. TFL 39: Undisputed Facts

17. The Chambers Judge summarized the following "undisputed facts that gave rise to this lawsuit":

(a) The area within TFL 39 known as Block 6 is made up of several areas, all of which are located on the islands of Haida Gwaii, and contains old-growth forests and second growth forests, including spruce, cedar, and hemlock timber (as well as other species), portions of which have been logged off.

(b) For more than 100 years, the Haida people have claimed title to all the lands and surrounding waters of the Queen Charlotte Islands.

(c) MacMillan Bloedel Limited ("M&B") was engaged in logging timber on the Queen Charlotte Islands since about the time of World War I, acquired TFL 39 in 1961, and conducted logging operations pursuant to TFL 39 until the transfer of its rights under TFL 39 to Weyerhaeuser in November 1999.

(d) TFL 39 granted to M&B the exclusive right to harvest quantities of timber on the Queen Charlotte Islands within the areas collectively known as Block 6.

(e) In 1981 and 1995, the Minister offered to replace, and upon acceptance of the offer by M&B, did replace TFL 39 pursuant to the procedure authorized by the *Forest Act*.

(f) In February 1995, the Haida Nation filed a petition challenging the validity of the replacement of TFL 39 that became effective March 1, 1995. On November 7, 1997, the Court of Appeal held that the Aboriginal title claimed by the Haida Nation, if it exists, would constitute an encumbrance on the Crown's title to timber, within the meaning of s. 28 of the *Forest Act* (now s. 35). That litigation was never formally concluded.

(g) On September 1, 1999, the Minister sent to M&B an offer to replace TFL 39, with the knowledge that Weyerhaeuser would likely become the successor to M&B, and on February 10, 2000, the Minister issued the replacement to Weyerhaeuser effective March 1, 2000.

(h) The three decisions of the Minister to replace TFL 39 which are complained of were all made without the consent of the Haida Nation, and the decisions in 1995 and 2000 were made against the objections of the Haida. The Haida also objected to the transfer of TFL 39 from M&B to Weyerhaeuser.

Appellants' Record, Vol. I, pp. 7-9 (BCSC Reasons, at para. 6)
Appellants' Record, Vol. I, pp. 58-60 (*Haida 1*, at para 21)

D. The Nature of the Tenure

18. The *Forest Act* provides for several types of forest tenures, most of which are volume based. Tree farm licences grant the most extensive rights. They are exclusive, long-term, area-based licences. TFL 39 grants exclusive rights to Weyerhaeuser to harvest all of the merchantable timber on all types of terrain within an area which constitutes almost one-quarter of the total land base of Haida Gwaii.

Forest Act, R.S.B.C. 1996, c. 157, s. 35(1)(e)
Appellants' Record, Vol. I, p. 44 (BCSC Reasons, at para. 59)
Appellants' Record, Vol. III, p. 465 (Affidavit of Brad Harris, February 25, 2000 ("Harris 1"), Ex. "E", TFL 39, ss. 1.02-1.04)

19. As holder of TFL 39, Weyerhaeuser submits a Management Plan to the Chief Forester for approval every 5 years (Part 2.00 of TFL 39). The terms of TFL 39 require Weyerhaeuser to include in that Plan inventories of the forest and recreation resources in the licence area together with inventories of the fisheries, wildlife, range, and cultural heritage resources of the licence

area, based on the information readily available to the licensee. This information forms the foundation for determining the allowable annual cut (“AAC”) for the licence.

Forest Act, supra, s. 35(1)(d)

Respondents’ Record, Vol. III, pp. 453-453, 455-456, 458-459 (Affidavit of Herb Hammond, June 5, 2000 (“Hammond 2”), at paras. 12-14, 20-22, 29)

Appellants’ Record, Vol. III, pp. 470-477 (Affidavit of Brad Harris, February 25, 2000 (“Harris 1”) at para. 20, Ex. “E”, TFL 39, ss. 2.04, 2.05(c), 2.09, 2.18, 2.19, 2.22)

20. The Management Plan includes a timber supply analysis, and a “20-Year Plan”. The timber supply analysis forms the basis for the determination of the AAC. The licensee, Weyerhaeuser, develops all of the technical information, assumptions and methodology on which the analysis is based.

Appellants’ Record, Vol. III, pp. 470-472 (Harris 1, Ex. “E”, TFL 39, ss. 2.04-2.07)

Respondents’ Record, Vol. III, pp. 455-458 (Hammond 2, at paras. 20-28)

21. The 20-Year Plan sets out the timber harvesting land base, as well as areas that have already been harvested, existing and proposed roads, areas subject to management constraints, and a hypothetical sequence of cutblocks over a 20-year period, in order to show that there is timber available to sustain the harvest rate. The 20-Year Plan for TFL 39 includes blocks in Haida Protected Areas (“HPAs”)². Because of the extent of past logging, Weyerhaeuser will have limited ability to deviate from this Plan while maintaining the rate of cut.

Appellants’ Record, Vol. IV, pp. 665-666 (Affidavit of Joseph Duckworth, April 4, 2000 (“Duckworth 1”), Ex. “C”)

Respondents’ Record, Vol. III, pp. 457-461 (Hammond 2, at paras. 26, 29-36)

Respondents’ Record, Vol. IV, pp. 545-547, 553-556 (Affidavit of John Broadhead, June 7, 2000 (“Broadhead”), at paras. 9-19, Ex. “B” and Ex. “C”)

22. The AAC is approved consistent with the Management Plan, and after this approval, Weyerhaeuser is entitled to cutting permits. This is the “Operational Level” of the forestry planning process. Before obtaining cutting permits, Weyerhaeuser must submit, every year, a

² HPAs are areas that have been set aside by the Haida for cultural, archaeological, historical, spiritual and environmental reasons. The Haida have advised the Province that these areas should be protected from industrial logging. There are 14 HPAs throughout Haida Gwaii. HPAs are discussed further at para. 138 below.

Forest Development Plan showing the location of cutblocks and roads over a 5 year period. If a cutblock receives “Category A” approval at this stage, a cutting permit cannot later be refused.

Appellants’ Record, Vol. III, pp. 489-491 (Harris 1, Ex. “E”, TFL 39, ss. 8.02, 8.06)

Respondents’ Record, Vol. III, p. 465 (Hammond 2, at para. 48)

23. Weyerhaeuser’s Tree Farm Licence contains terms that impose requirements on Weyerhaeuser relating to Aboriginal Peoples.

Weyerhaeuser’s Factum, at para. 12

See also Appellants’ Record, Vol. I, pp. 128-134 (Reasons for Judgment of the British Columbia Court of Appeal pronounced August 19, 2002 (“*Haida 2*”), per Lambert, J.A., at paras. 48-60)

E. No Consultation or Accommodation on Replacement

24. The Minister refused to consult with the Haida about the replacement, on the grounds that there was no legal duty to consult in the absence of a court determination on Haida Title, and that such consultation could not affect his statutory duty to replace TFL 39. The Chambers Judge found:

[O]n the evidence presented, it is apparent that the Minister refused to consult with the Haida about replacing TFL 39 in 1995 and 2000, on the grounds that he was not required by law to consult, and that such consultation could not affect his statutory duty to replace TFL 39. Accordingly, if (contrary to my decision) the Crown had a legal obligation to consult with the Haida, and if that duty extended to the Minister’s decisions to replace TFL 39, then it would follow that the duty had been breached.

Appellant’s Record, Vol. I, p. 35 (BCSC Reasons, at para. 42)

25. In paras. 16 and 17 of the Province’s factum and para. 10 of Weyerhaeuser’s factum, reference is made to certain policies and measures taken by the Province and Weyerhaeuser to address Haida concerns. This evidence was contested as to whether these measures amounted to

accommodation. The Chambers Judge stated why the Haida saw these measures, most or all of which are operational, as insufficient.

The Haida recognize and accept the foregoing measures as being steps in the right direction. But they say these measures fall far short of accommodation of their title, or consultation in good faith. The Haida point out that the cedar logs supplied by Weyerhaeuser under its cedar policy amounts to only a tiny fraction of the allowable annual cut. Also, they say that there is no guarantee that Weyerhaeuser will not eventually apply for, and be granted, cutting permits for timber in the Haida Protected Areas. Finally, the Haida argue that the consultation that may occur at the operational stage when cutting permits are applied for is far too late.

Appellants' Record, Vol. I, p. 33 (BCSC Reasons, at para. 39)

26. The Chambers Judge concluded that these measures **‘do not... amount to protection or accommodation of the Haida’s claimed Aboriginal title from possible infringement by the logging and other related activities of Weyerhaeuser on Block 6.’** (emphasis added)

Appellant’s Record, Vol. I, p. 35 (BCSC Reasons, at para. 41)

27. The Haida and the Province entered the B.C. Treaty process in 1992, and since 1994 were negotiating Forestry Interim Measures Agreements. The Haida made a number of requests to put the replacement and transfer of TFL 39 on the negotiating table, but the Province refused. The Province terminated the negotiations altogether when these proceedings were commenced. The Chambers Judge found “it difficult to understand why the Province has apparently refused to consider the replacement of TFL 39 as a subject for Interim Measures negotiations”.

Appellants’ Record, Vol. I, pp. 39-40, 46-47 (BCSC Reasons, at paras. 52-54, 63)
Appellants’ Record, Vol. II, pp. 267-269, Respondents’ Record, Vol. I, pp. 128-130
(Pearson, at paras. 28-37, Ex. “L” and Ex. “S”)

F. Opportunity to Consult and Accommodate on Replacement

28. The licence has a term of 25 years, and, under the legislation in force at the time of the replacement, a replacement licence is offered every 5 years. While under the *Forest Act* a replacement must be offered, the terms and conditions of the new licence need not be the same as

the licence being replaced. While the *Act* dictates some of the content of tree farm licences, it also provides for the exercise of ministerial discretion regarding the terms and conditions.

Forest Act, supra, ss. 35(1)(a),(o), 36(1), 36(3)
Appellants' Record, Vol. III, p. 465 (Harris 1, Ex. "E", TFL 39, s. 1.11)

29. Terms and conditions could protect from harvest certain sizes, shapes or species of trees, such as monumental red cedar trees, to ensure future availability for Haida uses.

Appellant's Record, Vol. III, p. 465 (Harris 1, Ex. "E", TFL 39, ss. 1.02(a)(i), 1.03(b))
Respondents' Record, Vol. III, pp. 450-451 (Hammond 2, at paras. 8-9)

30. The licence grants Weyerhaeuser the right to log on all types of terrain. Terms and conditions could address Haida environmental concerns to exclude some or all lands adjacent to creeks, rivers and wetlands, in order to protect fish habitat and monumental old-growth cedar.

Appellant's Record, Vol. III, p. 465 (Harris 1, Ex. "E", TFL 39, ss. 1.02 and 1.04(b))
Forest Act, supra, s. 35(1)(e)
Respondents' Record, Vol. III, p. 451 (Hammond 2, at para. 10)
Respondents' Record, Vol. I, pp. 6, 15 (Guujaaw 1, at paras. 16, 48-49)

31. The existing terms of the licence do not require Weyerhaeuser to take into account Haida interests when developing the timber supply analysis, which is used to determine the AAC.

Forest Act, supra, ss. 35(1)(d)(vii)(viii)
Appellant's Record, Vol. III, p. 470 (Harris 1, Ex. "E", TFL 39, ss. 2.05(b), 2.05(c))
Respondents' Record, Vol. III, pp. 452-456 (Hammond 2, at paras. 12-13, 15-22)

32. Licencees are required to include in their Management Plans inventories of timber and non-timber resources, but Weyerhaeuser is not required by the licence to collect baseline data on non-timber resources of concern to the Haida, such as berries, mushrooms, and medicine plants, in preparing its Management Plan. Management options could be assessed if there were appropriate terms and conditions in the licence.

Forest Act, supra, s. 35(1)(d)(ii)
Appellant's Record, Vol. III, p. 472-473 (Harris 1, Ex. "E", TFL 39, ss. 2.09(c)(e), 2.12, 2.17)
Respondents' Record, Vol. III, pp. 453-455 (Hammond 2, at paras. 13-18)

33. While the District Manager may provide the Haida with “Free Use Permits” to log within TFL 39, the District Manager may not dispose of more than 0.5% of the AAC attributable to Crown lands under the licence, and Weyerhaeuser must agree to those areas of land within which Free Use Permits may be issued.

Appellant’s Record, Vol. III, pp. 466-467 (Harris 1, Ex. “E”, TFL 39, ss. 1.09(b), 1.12)

34. The Chambers Judge addressed the impact of the replacement of TFL 39 on Haida Title and also the critical importance of consultation at the replacement stage, as opposed to the operational level. The Chambers Judge, after reviewing the contested evidence filed by all parties on this issue, and taking a helicopter view, concluded:

It was unclear from the evidence as to how much of the total area of Block 6 has been logged off. But from the one-hour helicopter view of the Graham Island portion of Block 6 that I took after court on August 3, 2000 (along with representatives of the petitioners and respondents), **it was apparent that large areas of Block 6 have been logged off.**

Although I could not discern from the evidence how much of the old-growth forests of Haida Gwaii or Block 6 have been logged off, and how much remains, **such forests are obviously limited in quantity, and I find it understandable that the Haida would want to reduce the rate at which logging is being conducted in old-growth forests on Block 6.** They say these forests take 500 years or more to grow.

Consultation at the operational level does not permit the Haida to influence the quantity of the annual allowable cut on Block 6.

In my opinion, once the decision to replace TFL 39 is made (followed by the required offer and acceptance procedure) it is inevitable that logging and road building activities will be authorized and carried out on Block 6, pursuant to TFL 39. **I conclude that the decision to replace TFL 39 has high potential to affect Haida title, if it is established. Consultation at the replacement stage would enable the Haida to seek the inclusion of terms and conditions in TFL 39 that would address their major concerns, on a long-term basis.** (emphasis added)

Appellants’ Record, Vol. I, pp. 44-45 (BCSC Reasons, at paras. 59(b)(c)(d), 60)
 Appellants’ Record, Vol. I, pp. 65-66 (*Haida 1*, at para. 25)
 Respondents’ Record, Vol. III, pp. 417, 419-434 (Affidavit of Guujaaw, May 31, 2000 (“Guujaaw 2”), at para. 23, Ex. “A” and Ex. “C”)

G. The Haida Position on Logging

35. The Province and Weyerhaeuser mischaracterize the position of the Haida regarding logging on Haida Gwaii. The Haida have worked hard to develop good and co-operative relationships with all residents of Haida Gwaii, both Haida and non-Haida alike. The Haida and non-Haida communities on Haida Gwaii have sought to reduce the AAC on Haida Gwaii to promote greater sustainability for future generations and to remove the Haida Protected Areas from the land base used to determine the AAC.

Respondents' Record, Vol. III, p. 435-438 (Affidavit of Leslie Johnson, May 31, 2000 ("Johnson"))

Appellants' Record, Vol. IV, pp. 592-610 (ICSI Consensus Document, Duckwork 1, Ex. "A")

Respondents' Record, Vol. IV, p. 562 (Affidavit of Guujaaw, June 16, 2000 ("Guujaaw 3"), at para. 4)

36. The Haida are not opposed to logging, but have serious concerns about the current rate and manner of logging. They are also concerned that all the logs are barged to the Lower Mainland and elsewhere for manufacturing and export, and that very little of the benefits stay on Haida Gwaii, including jobs and other economic and social benefits. The evidence indicated that the Haida were seeking a solution that would allow logging to continue on Haida Gwaii, while protecting the ecology of the islands and Haida interests. The evidence also indicated that a reduction in the AAC can benefit the economy of Haida Gwaii, in the interests of both Haida and non-Haida residents.

Respondents' Record, Vol. IV, pp. 564-605 (Affidavit of Tom Green, July 13, 2000 ("Green"))

Respondents' Record, Vol. IV, pp. 561-562 (Guujaaw 2)

H. Procedural History

37. This lawsuit was commenced on January 13, 2000. The Province filed a motion under Rule 52(11)(d) of the *Supreme Court Rules* ("the Rules") to sever and refer to the trial list those issues requiring proof of Aboriginal Title or Rights. An order to this effect was made by consent.

38. A Notice of Constitutional Question was filed, identifying the following issues:

(a) Are the sections of the *Forest Act* and the decision to replace Tree Farm Licence 39 unconstitutional because they assume an unburdened title of the Province contrary to s. 109 of the *Constitution Act, 1867* and s. 52 of the *Constitution Act, 1982*?

(b) Are the sections and the decision made thereunder to replace TFL 39 of no force or effect in accordance with s. 52 of the *Constitution Act, 1982*, because they violate s. 35 of the *Constitution Act, 1982*, based on the fiduciary relationship between the Crown and aboriginal peoples entrenched therein?

Appellants' Record, Vol. II, pp. 203-204

1. Chambers Judgment

39. The Chambers Judge dismissed the petition. He decided that until the nature and extent of the Aboriginal Title and Rights of the Haida had been determined at a trial, questions about the sufficiency of Crown consultation could not be accurately framed or decided. Based on the inescapable conclusions as to the strength of the Haida case however, he found a moral duty on the Crown to consult. If the Crown had a legal duty to consult on the replacement then he would have found that the Crown breached that duty.

Appellants' Record, Vol. I, pp. 28, 30, 31, 35 (BCSC Reasons, at paras. 29, 34, 42)

2. The British Columbia Court of Appeal: *Haida 1*

40. One week before the hearing of *Haida 1* in the Court of Appeal, the Court's decision was rendered in *Taku River Tlingit First Nation v. Ringstad, et al*, 2002 B.C.C.A. 59 ("*Taku*"), imposing a constitutional obligation on the Crown to consult, antecedent to proof of Aboriginal Title and Rights. The parties were invited by the Court to make submissions regarding the impact of *Taku* to the appeal.

41. In *Haida I*, the Court of Appeal held unanimously that the decision in *Taku* was determinative of the appeal. The Court reinforced the reasons in *Taku* by articulating “the timing fallacy”. Stated simply, the Court held that the Crown could not justify an infringement if it did not try to consult the Aboriginal Peoples prior to the infringement.

Appellants’ Record, Vol. I, pp. 28, 35 (*Haida I*, at paras. 29, 30, 42)

42. In *Taku*, the discussion of the Crown’s fiduciary duty to consult was located in the justification test. In *Haida I*, the Court identified the genealogy of the duty to be the trust-like relationship between the Crown and Aboriginal people, as reflected in the *Royal Proclamation of 1763*, which grounds a general guiding principle for s. 35(1) of the *Constitution Act, 1982*.

Appellants’ Record, Vol. I, pp. 71-72 (*Haida I*, at paras. 33, 36)

43. The Court found that the duty to consult and to seek an accommodation arose from the following circumstances:

- (a) The Province had fiduciary obligations of utmost good faith to the Haida people with respect to the Haida claims to Aboriginal title and Aboriginal rights;
- (b) The Province and Weyerhaeuser were aware of the Haida claims to title and rights over TFL 39 through evidence supplied by the Haida and through further evidence available to them on reasonable inquiry, an inquiry which they were obliged to make; and
- (c) The claims of the Haida to Aboriginal title and rights to all or some significant part of TFL 39 were supported by a good *prima facie* case.

Appellants’ Record, Vol. I, pp. 80-81 (*Haida I*, at para. 49)

44. The Court found that the content of the enforceable duty to consult was to seek workable accommodations, which extended to both the cultural and economic interests of the Haida.

Appellants’ Record, Vol. I, pp. 80, 87 (*Haida I*, at paras. 48, 60)

45. The Court did not declare TFL 39 to be invalid as had been requested by the Haida, but instead issued a declaration which provided:

... a framework for dealing with and protecting the Haida claim to aboriginal title and aboriginal rights over the period until the title and rights had been established by treaty or by a court of competent jurisdiction, while at the same time protecting

Weyerhaeuser's interests in TFL 39 and the Crown's interest in safeguarding the public forests.

Appellants' Record, Vol. I, pp. 109-110 (*Haida 2*, per Lambert, J.A., at para. 13)

46. The Court viewed the remedy as providing the "beginning of an alternative framework for dealing with the reconciliation of claims to constitutionally protected Aboriginal title and Aboriginal rights on the one hand, and the public interest, ...".

Appellants' Record, Vol. I, p. 53 (*Haida 1*, at para. 11)

3. The British Columbia Court of Appeal: *Haida 2*

47. Weyerhaeuser petitioned the Court by way of motion for reconsideration of the duty imposed on the company. At a post hearing conference, the Court directed a hearing to address the following questions stated by the company:

(a) First, was the question of whether any obligation of Weyerhaeuser to consult the Haida people and seek accommodations with them in relation to any aspect of TFL 39 was properly in issue before the Court, and whether the obligation should have formed a part of the declaration by the Court?

(b) If that question was properly before the Court and open for decision, should the answer to the question have been that in the circumstances of this case there was not now, would not be in the future, at least until the Aboriginal title and Aboriginal rights of the Haida people had been decided by treaty or by a court of competent jurisdiction, and had not been in the past, any obligation on the part of Weyerhaeuser, or its predecessor, MacMillan Bloedel Limited, to consult with the Haida people or to seek accommodations with them in relation to any aspect of TFL 39?

Appellants' Record, Vol. I, pp. 111, 112 (*Haida 2*, per Lambert, J.A., at para. 17)

48. Weyerhaeuser raised both procedural and substantive arguments. Weyerhaeuser's procedural arguments were dismissed.

Appellants' Record, Vol. I, pp. 119-120 (*Haida 2*, per Lambert, J.A., at paras. 32, 43-45)

49. Weyerhaeuser's substantive argument was that the foundation of the duty to consult attaches only to the conduct of the Crown. The majority found against Weyerhaeuser, with Lambert, J.A. and Finch, C.J.B.C. providing separate reasons.

50. Finch, C.J.B.C. held that Weyerhaeuser's duty to consult with the Haida is a "lawful, necessary and appropriate part of the remedy in this case ..." (para. 108). Without a declaration that included Weyerhaeuser, Chief Justice Finch reasoned, the Crown would lack "effective power" to accommodate the concerns of the Haida:

A declaration of the Crown's duty to consult, without more, would therefore have been a completely hollow or illusory remedy. Weyerhaeuser might choose to co-operate in the consultation or not. If it refused to co-operate, the Crown would be unable to make any effective accommodation. The Crown's duty of consultation and accommodation would be frustrated.

There is a broad range of issues on which the Haida might reasonably seek consultation and accommodation. TFL 39 fully allocates all timber exclusively to Weyerhaeuser. The Crown has no capacity to allocate any part of that timber to the Haida without Weyerhaeuser's consent or co-operation. Within the tree farm licence, the AAC is dependant upon the management plan prepared by the licensee. The Crown's ability to reduce unilaterally the AAC is limited by statute, and the licensee has no power to do so without the Crown's consent. The ability to vary the AAC is therefore a power shared by the Crown and Weyerhaeuser. Other issues of concern to the Haida would include employment opportunities for their people, as well as opportunities for sub-contracting.

Appellants' Record, Vol. I, pp. 167-168 (*Haida 2*, at paras. 118-119)

51. In light of these statutory and economic realities, Finch, C.J.B.C. concluded that "a declaration against the Crown alone is no remedy at all. Justice cannot be done in these proceedings without a declaration against Weyerhaeuser as well."

Appellants' Record, Vol. I, p. 170 (*Haida 2*, at para. 128)

52. Lambert, J.A. founded Weyerhaeuser's duty on three connected but distinct grounds:

(a) the statutory, administrative, and the factual context of the case, including the provisions of TFL 39 itself;

Appellants' Record, Vol. I, pp. 128-132, 134 (*Haida 2*, at paras. 48 -54, 60, 99)

(b) under fiduciary law, Weyerhaeuser was a constructive trustee in knowing receipt, and owed closely corresponding obligations of consultation and accommodation as did the provincial Crown;

Appellants' Record, Vol. I, p, 140 (*Haida 2*, at para. 71)

(c) as a necessary consequence of the justification test, because Weyerhaeuser could invoke a justification defence, it had an obligation to consult and accommodate in order to rely on the justification analysis.

Appellants' Record, Vol. I, pp. 149-150 (*Haida 2*, at para. 87)

53. The only point of departure in *Haida 2* from *Haida 1* was the conclusion that the original declaration, which had referred to the obligations of the Crown and Weyerhaeuser prior to the renewal of the licence in 2000, should be amended to reflect an appropriate foundation for Weyerhaeuser's duty to consult upon receipt of the replacement licence in 2000 and that the duty was legally enforceable as of the date of the judgment in *Haida 1*.

54. Low, J.A. dissented on procedural grounds, but acknowledged that he was not saying that the "... duty on Weyerhaeuser does not exist. I simply say that the issue is not properly before the court."

Appellants' Record, Vol. I, pp. 175-176 (*Haida 2*, at paras. 138 – 140)

PART II
ISSUES ON APPEAL

55. The Haida would revise the issues as stated by the Appellant Province and the Appellant Weyerhaeuser, and submit that these appeals raise the following issues:

- (a) 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?
- (b) Does the Crown's duty require that its representatives address substantively the interests of the Aboriginal People, including their cultural and economic interests?
- (c) Did the Court of Appeal err by finding that it was lawful, necessary and appropriate to include Weyerhaeuser in the declaration that was issued in this case?

**PART III
ARGUMENT**

**I. RESPONSE TO THE FACTUM OF THE APPELLANT PROVINCE
OF BRITISH COLUMBIA**

A. Lessons from History

56. The Haida occupied Haida Gwaii for millennia before the Crown's assertion of sovereignty. Haida monumental totem poles, houses and canoes, all carved from the ancient, old-growth red cedar forests, greeted the first European newcomers to Haida Gwaii, just as their contemporary art welcome international travellers from all over the world to the Vancouver Airport, and can be seen in galleries, museums and public institutions the world over. It is from these same forests that the Haida seek to carve out a future and sustain Haida culture.

57. This Court has been called upon to articulate the constitutional principles that govern the relationship between Aboriginal Peoples and the Crown. McLachlin, J. (as she then was), in her reasons in *Van der Peet*, identified the principal and principled elements of continuity in the recognition and affirmation of the pre-existing rights of Aboriginal Peoples and the protectorate obligations of the Crown. McLachlin, J. stated: "The maxim of *terra nullius* was not to govern here." The "Grundnorm of settlement in Canada" was that Aboriginal Peoples could not be deprived of the livelihood they drew from the land and adjacent waters except by solemn Treaty with the Crown.

R. v. Van der Peet, [1996] 2 S.C.R. 507, at paras. 270-272

58. The principles and the fundamental understanding described by McLachlin J., while grounded in 300 years of Crown-Aboriginal relations, have failed to penetrate into Haida Gwaii and the other territories of Indigenous Nations in British Columbia. With only minor exceptions, in the case of the early Douglas Treaties on Vancouver Island, Treaty 8 in North-east British Columbia, and the Nisga'a Treaty in 1998, successive colonial and provincial governments in British Columbia have resisted the acceptance of any principle that Aboriginal Peoples have unextinguished Aboriginal Title to their traditional territories, and have rejected the "Grundnorm" that Aboriginal Peoples could not be dispossessed of their territories, except in accordance with a treaty. Although expressed as a more general proposition, the statements by

this Court in *Sparrow* that, “[w]e cannot recount with much pride the treatment accorded to the native people of this country,” and “[f]or many years, the rights of the Indians to their Aboriginal lands – certainly as legal rights – were virtually ignored,” have particular significance in British Columbia.

Sparrow, [1990] 1 S.C.R. 1075, at 1103

59. Many decisions of this Court have established principles to guide reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown, including the recognition in *Delgamuukw* of Aboriginal Title as a right protected by s. 35(1), which had not been extinguished in British Columbia. Notwithstanding these decisions, it was not until *Haida 2*, declaring that the Crown and Weyerhaeuser have legally enforceable duties to the Haida to consult in good faith and to seek workable accommodations prior to proof of title, that the Province took any steps to implement principles aimed at reconciliation.

Province’s Factum, at paras. 26-28

60. Yet the Province continues to resist on this appeal the duty imposed on it by the Court below. The Province asserts baldly that the “core functions” of the Province are the alienation and management of lands and resources, and that a duty to consult prior to the formal determination of title and rights “at a practical level” would substantially impair the functions of government and is unworkable. The Province wants to continue business as usual, granting interests in Haida Gwaii to others without any duty to get to the truth of the rights at stake and to accommodate them.

Province’s Factum, at paras. 47, 49

61. At paragraph 50 of its factum, the Province argues that the imposition of “a duty to accommodate the First Nations’ assertions of title before tenures are issued or renewed and before land management decisions are made has the potential to stifle economic development.” This argument has now assumed the status of a liturgy, having been raised in one form or another, in every Aboriginal Title case involving this Province: initially to say that Aboriginal Title had never been recognized in B.C. and it would disrupt the *status quo*; then to suggest a non-proprietary conception of title, to ensure its subordination to non-Aboriginal tenures; then to

advance a definition of title that would effectively confine its geographical scope to Indian reserves or subsistence activities; and now, in this appeal, to maintain that it should not be required to accommodate the unextinguished Title of the Haida of which it has notice, prior to issuing an exclusive tenure to Weyerhaeuser covering a quarter of the land base of Haida Gwaii. Seventeen years ago, Seaton J.A., speaking for the B.C. Court of Appeal, in the case of *MacMillan Bloedel v. Mullin*, had this to say:

It has also been suggested that a decision favourable to the Indians will cause doubt on the tenure that is the basis for the huge investment that has been and is being made. I am not influenced by the argument. Logging will continue on this coast even if some parts are found to be subject to certain Indian rights. It may be that in some areas, the Indians will be entitled to share in one way or another, and it may be that in other areas there will be restrictions on the type of logging. **There is a problem about tenure that has not been attended to in the past. We are being asked to ignore the problem as others have ignored it. I am not willing to do that.** (emphasis added)

MacMillan Bloedel v. Mullin (1985), 61 B.C.L.R. 145, at 160

62. The Province also argues that the duty imposed by the Court below would “reduce the incentives for progress in treaty negotiations,” and asks this Court instead to provide a remedy that “should encourage all parties to the treaty process to continue to strive for workable means of reconciling aboriginal title with Crown sovereignty.” (Province’s Factum, at paras. 48, 50) The lessons in this case are illustrative of the problem in addressing these issues through the British Columbia Treaty Commission (“BCTC”) process. The Haida participated in treaty negotiations at the time when TFL 39 was to be replaced by the Province in 1999. At that time, the Province and the Haida were engaged in negotiations toward the Interim Measures Agreement on forestry referred to by the Province in its factum, at paras. 16 – 17(a). Yet, the Province refused to discuss the issue of the replacement, and when the Haida commenced proceedings to challenge the replacement, the Province unilaterally terminated negotiations, and replaced TFL 39.

63. Lambert, J.A. was explicit as to the undesirable implications of the Province’s argument:

The issue is an important one. If the Crown can ignore or override Aboriginal title or Aboriginal rights until such time as the title or rights are confirmed by treaty or by judgment of a competent court, then by placing impediments on the treaty

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

Appellants' Record, Vol. I, p. 53 (*Haida 1*, at para. 10)

64. Sixty years ago, Lord Atkin said: "Convenience and justice are often not on speaking terms." However inconvenient the Court of Appeal's judgment may seem to the Province, the declaration granted in *Haida 2* was a "lawful, necessary and appropriate" remedy in this case and one carefully fashioned to do justice.

General Medical Council v. Spackman, [1943] A.C. 627 (H.L.), at 638

B. The Crown's Fiduciary and Constitutional Duty to Consult and Accommodate - Overview

65. The facts which triggered the fiduciary and constitutional duty to consult and accommodate (the "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.

66. The Duty to Consult and Accommodate arises when a representative of the Crown contemplates an exercise of discretion with knowledge that the exercise of discretion may infringe on Aboriginal Title and Rights, or in circumstances that would put a reasonable person on enquiry. The scope of the consultation, and the strength of the obligation to seek an accommodation, will be proportionate to the strength of the case supporting the existence and potential infringement of Aboriginal Title and Rights. However, at a minimum, the Crown is obligated, upon receipt or reasonable access to information establishing a good *prima facie* case, to consult with the affected Aboriginal Peoples in good faith and seek workable accommodations between their Aboriginal interests and the objectives of the Crown and any interested third party.

67. The Duty to Consult and Accommodate is an aspect of the Crown's fiduciary relationship to Aboriginal Peoples which has its roots in the common law concept of Aboriginal Title, is reflected in the *Royal Proclamation*, and finds expression in s. 35(1) of the *Constitution*. The Duty to Consult and Accommodate is fiduciary because, when the Crown takes action that may

infringe on, or fails to take action that may accommodate, reasonably asserted Aboriginal Title and Rights, it is exercising discretionary control in relation to cognizable Indian interests. It is constitutional because the interests at stake are recognised and affirmed in s. 35(1) of the *Constitution*. The purpose of recognising the Duty to Consult and Accommodate before Aboriginal Title and Rights are litigated is to prevent unjustifiable infringements of constitutional rights before they occur, and to encourage negotiated settlements rather than court-imposed solutions.

68. In this case, the cognizable Indian interest was the unextinguished Aboriginal Title and Rights of the Haida. The Haida's Title encompasses the right to exclusive use and occupation of the land, the right to choose what uses the land can be put to, and an inescapable economic component. Flowing from the inescapable facts found by the Chambers Judge, the Haida's Rights encompass the use of red cedar as an integral part of Haida culture. The Crown's discretionary control in this case was the right and opportunity of and for the Minister under the *Forest Act* to impose terms and conditions on TFL 39, an exclusive tenure, when it was replaced. The Minister could not ignore the Haida's Aboriginal Title and Rights, having been put on notice of a good *prima facie* case for their existence and infringement, when he exercised that discretion.

69. The Province advances an "only after" argument. Only after Title and Rights are proven does a consultation duty engage. Until then, the Province says, an administrative law duty of procedural fairness governs. This position turns the well-established principles of Aboriginal Title on their head. In 1846, the Crown asserted sovereignty, and the Haida had pre-existing legal rights to occupy Haida Gwaii as their forefathers had done. Today, the Province asks this Court to conclude that the Haida must assert, and prove their pre-existing legal rights, and that until those rights are taken to judgment, the Crown is unfettered by any fiduciary or constitutional constraint, even when it grants exclusive and incompatible rights to the land and resources of Haida Gwaii, such as those granted to Weyerhaeuser.

70. In *Delgamuukw*, this Court affirmed that Aboriginal Title predates and survives the assertion of European sovereignty and is founded upon the prior occupation of Canada by Aboriginal Peoples, and **not upon Crown recognition**. The Province, in this case, in effect

argues that Aboriginal Title and the Crown’s fiduciary relationship arise upon **Court recognition**. The Province is wrong.

Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, at para. 114

C. Roots of the Crown’s Duty to Consult and Accommodate

71. The Court of Appeal located the historical, conceptual, and legal roots of the Duty to Consult and Accommodate “in the trust-like relationship which exists between the Crown and the Aboriginal people of Canada”, a relationship which was reflected in the *Royal Proclamation*. One manifestation of the relationship “now usually expressed as a fiduciary duty owed by both the federal and Provincial Crown to the Aboriginal people” is that it “grounds a general guiding principle for section 35(1).” While the duty to consult has been articulated by this Court as a necessary element of the justification analysis under s. 35(1) in relation to the infringement of an Aboriginal Right, the Court of Appeal correctly found that the duty to consult is not confined to the strict ambit of the justification analysis.

Appellants’ Record, Vol. I, pp. 71-72 (*Haida I*, at paras. 33-36)

72. The *Royal Proclamation* endorsed and consolidated the principles governing Aboriginal-Crown relationships which had been articulated and agreed upon in the Covenant Chain treaties and compacts and in the Imperial measures directed to their maintenance. This Court has confirmed that the *Royal Proclamation* itself was not the source of Aboriginal Title, nor the root of the Crown’s fiduciary relationship with Aboriginal Peoples. The *Proclamation* did, however, recognize and affirm the pre-existing rights of Aboriginal Peoples to their territories as a policy underpinning Aboriginal-Crown relationships.

Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (1996), pp. 108-109

73. Pursuant to the *Royal Proclamation*, Treaties were concluded throughout Canada. It is noteworthy, in considering the Province’s argument, that when the Crown negotiated treaties both before and after Confederation, the process was not dependant upon the Aboriginal Peoples

proving in a court of law that they had Aboriginal Title which could be the subject of treaty. The government of the day, in determining which nations to negotiate with and for which lands, made appropriate enquiries and assessed the relevant evidence of Aboriginal Peoples' historical occupation of their territories. In each case, the Crown wanted the beneficial use of the land within First Nations' territories to promote settlement or resource exploitation, just as the Province wants to do in this case, with the replacement of TFL 39. Viewed properly, therefore, from its roots in the *Royal Proclamation*, the Duty to Consult and Accommodate, antecedent to proof of Aboriginal Title and Rights, is a reflection of the pre-existing nature of those rights.

D. Evolving Jurisprudence of the Crown's Fiduciary Duty

74. The Duty to Consult and Accommodate is also a logical evolution in the law concerning the Crown's fiduciary obligations. This Court's judgment in *Guerin* marks the first landmark in the evolving jurisprudence of the fiduciary obligations of the Crown, and can properly be regarded as the first of the modern consultation cases. Decided outside the constitutional framework of s. 35(1), the Court found that the federal Crown violated its fiduciary duty regarding reserve lands by "...obtaining without consultation a much less valuable lease than that promised..."

Guerin v. The Queen, [1984] 2 S.C.R. 335, at 389

75. As *Guerin* makes clear, the Crown's fiduciary relationship with corresponding obligations to the Aboriginal People arose with the assertion of sovereignty. In *Mitchell v. M.N.R.*, speaking for the Court, Chief Justice McLachlin said:

...with this assertion of [sovereignty by the Crown] arose an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation, a duty characterized as 'fiduciary' in *Guerin v. The Queen*.

Mitchell v. M.N.R., [2001] 1 S.C.R. 911, at para. 9

76. In *Guerin*, Dickson J. (as he then was) held that the Crown’s fiduciary obligation to the Musqueam regarding surrender of their reserve lands for the purposes of leasing, stemmed from three sources: (a) the nature of Aboriginal Title, specifically, that the Indian interest in lands is inalienable, except upon surrender to the Crown; (b) the requirements of the *Royal Proclamation* and the *Indian Act*; and (c) the Crown’s discretionary power in the management and disposal of Aboriginal lands. In Professor Rotman’s analysis of the fiduciary doctrine he describes why the *Guerin* judgment, while stressing the specific situation of the fiduciary duty arising upon surrender of Indian land, does not mark the outer limits of the fiduciary obligation.

...[T]he Crown’s general fiduciary duty towards native peoples is a result of the relationship between the parties from the time of contact and both builds on and informs the specific fiduciary obligations which arise within the context of the particular relationships between the Crown and Indian bands. **The Crown’s obligation regarding surrendered reserve lands is merely one constituent element of its overall duty.** (emphasis added)

Rotman, *supra*, at p. 107

W.R. McMurtry and A. Pratt, “Indians and the Fiduciary Concept, Self-Government and the Constitution: *Guerin* in Perspective,” [1986] 3 C.N.L.R. 19 at p. 31

77. The second landmark in the evolving jurisprudence of the Crown’s fiduciary obligations towards Aboriginal Peoples is the judgment in *Sparrow* where this Court explored for the first time the scope of s. 35(1) and grounded its analysis in the Crown’s historical fiduciary obligations to Aboriginal Peoples.

The *sui generis* nature of Indian title, and the historical powers and responsibilities assumed by the Crown constitute the source of such a fiduciary obligation . . . The government has a responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.

Sparrow, supra, at 1108

78. While finding that the Crown’s exercise of certain powers was restrained by its fiduciary duty, this Court provided the constitutional space to regulate and infringe Aboriginal Rights. As this Court stated, the existence of section 35(1) required that “the federal power must be

reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any governmental regulation that infringes upon or denies aboriginal rights.” This Court’s final comments regarding its justificatory test re-emphasized the fiduciary nature of the Crown-Aboriginal Peoples relationship.

By giving aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal rights are affected. Implicit in this constitutional scheme is the obligation of the legislature to satisfy the test of justification. **The way in which a legislative objective is to be obtained must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada’s aboriginal peoples.** (emphasis added)

Sparrow, supra, at 1010

79. In its subsequent judgments on the scope of section 35, in *Van der Peet*, *Gladstone* and *Delgamuukw*, this Court poured further content into the fiduciary obligations of the Crown in light of the purposes underlying section 35. As stated by Lamer C.J.C. in *Delgamuukw*, the ultimate purpose of section 35 is to facilitate the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown, a reconciliation that both this Court and other courts have urged, can best be effected through negotiation. As stated in *Sparrow*, section 35(1) “provides a solid constitutional basis upon which subsequent negotiations can take place”. (at para. 1105)

80. The Crown’s duty to consult, as part of its section 35 fiduciary obligations, was first articulated in *Sparrow* as part of the justification analysis, with respect to conservation measures that infringed the Aboriginal Right to fish. In *Delgamuukw*, Lamer C.J.C., in the context of justifiable infringement of Aboriginal Title, expanded upon the duty of consultation as part of the fiduciary relationship between the Crown and Aboriginal Peoples, by extending the spectrum of consultation to include the accommodation of Aboriginal interests. In so doing, the Chief Justice explicitly explained the duty of consultation and accommodation under section 35 by reference to the duty of consultation recognized at common law.

There is always a duty of consultation. Whether the Aboriginal group has been consulted is relevant to determining whether the infringement of Aboriginal title is

justified, in the same way that the Crown's failure to consult an Aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law: *Guerin*. The nature and scope of the duty of consultation will vary with the circumstances.

Delgamuukw, supra, at para. 168 (cited in *Haida 1*, at para. 38)

81. In the same way as the federal Crown argued in *Osoyoos* that the federal government's fiduciary obligation with respect to land was limited to the specific context of *Guerin* – the surrender of reserve land - and had no application in expropriation cases, (an argument rejected by this Court) so too, in this case, the Province contends (wrongly) that the wider duty to consult established in *Sparrow* and *Delgamuukw* applies only where a court has formally adjudicated the nature and scope of an Aboriginal title or right and in the context of whether that title or right has been justifiably infringed. In so doing the Province places particular reliance on *Wewaykum* to argue that the source of the Crown's duty to consult outside of the justificatory process is neither fiduciary nor constitutional.

Province's Factum, at paras. 89-90
Osoyoos Indian Band v. Oliver (Town), [2001] 3 S.C.R. 746
Wewaykum Indian Band v. Canada, 2002 S.C.C. 79

82. The Province relies on *Wewaykum* to argue that not all aspects of the fiduciary relationship give rise to fiduciary duties. This proposition, generally, is not in dispute. However when, as in this case, the Province exercises discretion through sections 35 and 36 of the *Forest Act* to replace a tenure which affects Aboriginal Title and Rights, *Wewaykum* holds that fiduciary obligations do arise.

83. The context of this case is similar, but not identical, to the context of *Guerin*. Both involve Indian interests over which the Crown exercised discretion or control. In *Guerin*, the Indian interest was unextinguished Aboriginal Title which had been set aside as reserve land, over which the Crown exercised discretion when it accepted a surrender for lease. In this case, the Indian interest is unextinguished Aboriginal Title and the Haida's Rights to cedar, over which the Crown exercised discretion when it granted an incompatible exclusive tenure. What is different is the governing statutory regimes. In *Guerin*, the *Indian Act* created a framework for the federal government dealing with the land exclusively for the benefit of the Indians. In this

case, the legislation is the *Forest Act* which creates a framework for the Province disposing of the forests of British Columbia in the public interest.

84. The Province relies on the forestry legislation it enacted (without consideration of unextinguished title in British Columbia) to argue, that because the Province must balance a broad range of interests, both Aboriginal and non-Aboriginal, Crown fiduciary obligations to Aboriginal Peoples vanish in the equation. They rely on *Wewaykum* to support this position as well.

85. However, in *Wewaykum*, no cognizable Indian interest was found to exist. The Court emphasized that the case was not dealing with reserves created out of Aboriginal Title lands (e.g. paras. 94, 95, 98). Nor had a reserve interest been created at the point in time of the alleged breach of the Crown's obligations. Put another way, the dispute did not concern unextinguished Aboriginal Title or the Aboriginal interest in reserve lands. The Court's characterization of the Crown's obligations must be viewed in that context.

86. The distinction in *Wewaykum*, between the nature and content of the Crown's obligations before and after reserve creation, is very different from the Crown's obligations before and after proof of Aboriginal Title and Rights. The reserve in *Wewaykum* did not exist until land was set aside for the benefit of the Band and the underlying title was transferred to the federal Crown. The Aboriginal Title and Rights at issue in this case, on the other hand, pre-dated and exist independently of Crown recognition, statutory protection or judicial confirmation. In *Wewaykum*, therefore, the Crown was not, prior to the reserve being created, dealing with a "cognizable Indian interest", whereas in this case, prior to Aboriginal Title and Rights being proved in court, it was.

87. The Province further relies on *Wewaykum* to argue that the decision to replace TFL 39 is "quintessentially a public duty" as that term is used by the Court. This conclusion does not follow from Mr. Justice Binnie's comments in the case:

I do not suggest that the existence of a public law duty necessarily excludes the creation of a fiduciary relationship. The latter, however, depends on identification of a cognizable Indian interest, and the Crown's undertaking of discretionary control in relation thereto in a way that invokes responsibility 'in the nature of a private law duty', as discussed below.

Wewaykum, supra at para. 85

88. The language of “in the nature of a private law duty” is from *Guerin*, and describes a *sui generis* relationship:

. . . the Indians’ interest in land is an independent legal interest. It is not a creation of either the legislative or executive branches of government. The Crown’s obligation to the Indians with respect to that interest is therefore not a public law duty. While it is not a private law duty in the strict sense either, it is nonetheless in the nature of a *private* law duty. Therefore, in this *sui generis* relationship, it is not improper to regard the Crown as a fiduciary. (per Dickson J.) (cited at para. 76 of *Wewaykum*)

89. In *Wewaykum*, the Court speaks of a “cognizable Indian interest”. The word ‘cognizable’ is defined as:

Cognizable *adj.* 1. Capable of being known or recognized; esp., capable of being identified as a group because of a common characteristic or interest that cannot be represented by others . . . 2. Capable of being judicially tried or examined before a designated tribunal; within the court’s jurisdiction . . .

Black’s Law Dictionary (7th ed.)

90. Aboriginal Title and Rights are, by this point in the evolution of the jurisprudence in Canada, “capable of being known or recognized” and “within the court’s jurisdiction”. It does not lie in the Province’s mouth since 1997 (*Delgamuukw*), at the latest, to say that Aboriginal Title and Rights in British Columbia are unknown or unrecognizable without further litigation.

91. The Province’s position is that a fiduciary and constitutional duty “to exercise discretionary powers in the best interests of a First Nation” is “inconsistent with the duties of the Province for the management and disposition of its natural resources in the public interest.” The Province both mischaracterizes the declaration of the Court below and misconceives this Court’s rulings. The declaration of the Court below does not translate into a legal conclusion that Aboriginal Peoples’ interests must always be put first. Lambert J.A., in *Haida 1*, made it clear that, consistent with this Court’s reasons in *Delgamuukw*, the essential thrust of the remedy granted was to facilitate reconciliation and the balancing of conflicting interests. The declaration granted by the Court in *Haida 1*, as modified in *Haida 2*, specifically addressed this need to balance interests in declaring that the Province had a duty “to consult with [the Haida] in good

faith and to endeavour to seek workable accommodations between the Aboriginal interests of the Haida people, on the one hand, and the short term and long term objectives of the Crown and Weyerhaeuser to manage TFL 39 in accordance with the public interest, both Aboriginal and non-Aboriginal, on the other hand.”

Province’s Factum, at paras. 91, 93
 Appellants’ Record, Vol. I, pp. 53, 87 (*Haida 1*, at paras. 11, 60)
 Appellants’ Record, Vol. I, p. 171 (*Haida 2*, per Finch, C.J.B.C., at para. 129)

92. While acting in the best interests of the beneficiary is the normal underpinning of the duty owed by a fiduciary, this Court has already described circumstances in which the Crown’s fiduciary obligation may not be defined exhaustively by the best interests of Aboriginal Peoples. The spectre of unmanageable conflict between the Crown’s fiduciary duties to Aboriginal Peoples and its obligation to manage resources in the public interest was laid to rest by this Court in *Osoyoos*. The context of the decision was expropriation of reserve lands for public purposes. The Court cast the fiduciary duty in that context to accord with a principle of minimum impairment. Iacobucci, J. stated:

The intervener the Attorney General of Canada submits that when Canada’s public law duty conflicts with its statutory obligation to hold reserve lands for the use and benefit of the band for which they were set apart, then a fiduciary duty does not arise. The Attorney General argues that the existence of a fiduciary duty to impair minimally the Indian interest in reserve lands is inconsistent with the legislative purpose of s. 35 [of the *Indian Act*] which is to act in the greater public interest ... In addition, the Attorney General contends that a fiduciary obligation to impair minimally the Indian interest in reserve lands is inconsistent with the principles of fiduciary law which impose a duty of utmost loyalty on the fiduciary to act only in the interests of the person to whom the duty is owed. Thus, the Attorney General submits that the holding in *Guerin, supra*, that the surrender of an Indian interest of land gives rise to a fiduciary duty on the part of the Crown to act in the best interests of the Indians does not extend to the context of expropriation, and that the duty of the Crown to the band in the case of an expropriation of reserve land is similar to its duty to any other land holder - to compensate the band appropriately for the loss of the lands.

In my view, the fiduciary duty of the Crown is not restricted to instances of surrender. Section 35 [of the *Indian Act*] clearly permits the Governor in Council to allow the use of reserve land for public purposes. However, once it has been determined that an expropriation of Indian lands is in the public interest, a fiduciary duty arises on the part of the Crown to expropriate or grant only the minimum

interest required in order to fulfil that public purpose, thus ensuring a minimal impairment of the use and enjoyment of Indian lands by the band. This is consistent with the provisions of s. 35 which give the Governor in Council the absolute discretion to prescribe the terms to which the expropriation or transfer is to be subject. **In this way, instead of having the public interest trump the Indian interests, the approach I advocate attempts to reconcile the two interests involved.** (emphasis added)

Osoyoos, supra, at paras. 51-52

93. *Osoyoos* is an example of how the Crown’s fiduciary obligations to Aboriginal Peoples remain engaged when the Crown discharges public interest responsibilities. *Osoyoos* and *Wewaykum* demonstrate that the Crown’s obligations can be contextually balanced. For example, in *Wewaykum*, the Court carefully differentiated the obligations which the Crown had prior to reserve creation from those after reserve creation. Prior to reserve creation, the Crown’s duty is limited to the basic obligations of loyalty, good faith in the discharge of its mandate, providing full disclosure appropriate to the subject matter, and acting with ordinary prudence with a view to the best interests of the Aboriginal beneficiaries. After reserve creation, the Crown’s fiduciary duty expands to include the protection and preservation of the Band’s quasi-proprietary interest in the reserve from exploitation. The Duty to Consult and Accommodate that was articulated by the Court of Appeal in this case is another example of a contextual application of the Crown’s fiduciary duty.

Wewaykum, supra, at para. 86

E. The Division of Powers

94. The Province, in support of its argument that the Province’s obligations to manage resources in the public interest are not consistent with a fiduciary obligation to Aboriginal Peoples, also invokes sections 92 and 92A of the *Constitution Act, 1867*, to argue that the “Fathers of Confederation intended that the development of resources on these lands would provide a source of revenue for the provinces to carry out their constitutional function” and that “section 35 ought not to be applied so as to undermine the balance of federalism, or to prevent

government from regulating the development and management of natural resources in the Province.”

Province’s Factum, at paras. 94, 96

95. In so arguing, the Province distorts the balance of federalism and asks this Court to ignore, as the Province has done since joining Confederation, the clear provision drafted by the Fathers of Confederation in section 109 of the *Constitution Act, 1867*:

All Lands, Mines, Minerals and Royalties belonging to the several Provinces of Canada ... at the Union ... **shall belong to the several Provinces ... subject to any** Trusts existing in respect thereof, and to any **Interest other than that of the Province in the same**. (emphasis added)

96. In the *St. Catherine’s Milling* case, the Privy Council was clear that, in 1867, the lands vested in the provincial Crown subject to the provisions of section 109 of the *Constitution* (ie. subject to “an interest other than the Province in the same”). In that case, by virtue of the surrender of Aboriginal Title under the terms of Treaty 3, the Crown in right of Ontario received ownership over the forestry resources which became available to it as a source of revenue.

St. Catherine’s Milling and Lumber Co. v. The Queen (1888), 14 A.C. 46 (P.C.)

97. The Privy Council described the burden on provincial Crown title arising from Aboriginal Title:

... there has been all along vested in the Crown **a substantial and paramount estate**, underlying the Indian title, which became a plenum dominium whenever the title was surrendered or otherwise extinguished. (emphasis added)

St. Catherine’s Milling, supra, at 55

98. The Privy Council also described the nature of the substantial and paramount estate underlying Indian title:

The fact that the power of legislating for Indians and [their lands] has been entrusted to... Parliament is not in the least degree inconsistent with the right of the Provinces to a beneficial interest in these lands, **available to them as a source of**

revenue whenever the estate of the Crown is disencumbered of the Indian title.
(emphasis added)

St. Catherine's Milling, supra, at 46

99. As stated by Professor Foster:

The converse of this proposition is of course that, if the estate of the Crown has not been 'disencumbered' – that is, if the aboriginal title to it has not been extinguished – such lands are not available to the Province as a source of revenue.

Foster, Hamer, *The Advocate*, Vol. 56, Part II, March 1998, at p. 221

100. In *Delgamuukw*, in the last of its unsuccessful attempts before this Court to argue that Aboriginal Title in B.C. had been extinguished, the Province put forth the proposition that, by virtue of section 109, the Province has underlying title to the lands held by Aboriginal Title. The Province wrongly argued that this right of ownership carried with it the right to grant fee simple interests, which, by necessary implication, extinguished Aboriginal Title and so, by negative implication, excluded Aboriginal Title from the scope of section 91(24) of the *Constitution Act, 1867*. Lamer, C.J.C. rejected this argument, precisely because the Province failed, as it continues to do in this case, to take account of section 109.

Although [section 109] vests underlying title in provincial Crowns, **it qualifies provincial ownership by making it subject to the any Interest other than that of the Province in the same**. In *St. Catherine's Milling*, the Privy Council held that Aboriginal title was such an interest, and rejected the argument that provincial ownership operated as a limit on federal jurisdiction. The net effect of that decision, therefore, was to separate the ownership of lands held pursuant to Aboriginal title from jurisdiction over those lands. **Thus, although on surrender of Aboriginal title the province would take absolute title**, jurisdiction to accept surrenders lies with the federal government. The same can be said of extinguishment **although on extinguishment of Aboriginal title, the province would take complete title to the land**, the jurisdiction to extinguish lies with the federal government. (emphasis added)

Delgamuukw, supra, at para. 175

101. The power of the Province to replace TFL 39 in light of ss. 109 and 91(24) remains undecided. In *Haida 1*, the Court left it for another day after Aboriginal Title has been proven, to decide the division of powers implications. However, the Duty to Consult and Accommodate

does not depend on the outcome of the division of powers issue. The Duty to Consult and Accommodate is hinged on the Crown's notice of a good *prima facie* case of Aboriginal Title or Rights. The Province's constitutional authority is a separate issue; however, the fact that the Province's authority is subject to a challenge of substantial merit in this case militates in favour of recognizing an obligation that promotes accommodation over litigation.

Appellants' Record, Vol. I, pp. 50-52, 70 (*Haida I*, at paras. 206, 32)
Reasons for Judgment of Rowles J.A., *Taku*, at para. 151

102. The Province opines that it is "extremely difficult for administrative decision makers to determine with any certainty where aboriginal title exists in British Columbia", compounded by the difficulty that there are "conflicting and overlapping claims of aboriginal title to some of the lands".

Province's Factum, at paras. 42-43

103. The underlying premise of the Province's position is that unless a First Nation proves Aboriginal Title to specific tracts of land, the Province can treat the land as solely belonging to the Province and available to it to grant to third parties and as a source of revenue. This argument is another version of *terra nullius*. While the Province is correct that no First Nation in B.C. has established the precise boundaries of their territories in court, it does not follow that the Province can ignore a *prima facie* case of unextinguished Aboriginal Title until proven. B.C. is a constitutional work in progress; but the Province's duty to clarify boundaries through Treaty making does not entitle the Province to take unfair advantage of its unfinished business.

Delgamuukw v. B.C., *supra*, at para. 195 (per LaForest, J.)

104. The Province also argues that the protection of "specific Indian interests" is unique to the federal and not the provincial Crown, relying again on *Wewaykum*. However, the context of the Court's comments in *Wewaykum* is the reserve creation process in British Columbia, where there existed a federal-provincial tug-of-war over lands "belonging" to the Province and those reserved for the Indians. The Court did not decide what fiduciary obligations, if any, the Province owes to B.C. First Nations in the reserve creation process. Nor does the case discuss, let alone decide,

whether the Province owes fiduciary obligations with respect to specific Indian interests such as the Title and Rights of the Haida in this case.

Province's Factum, at para. 92

105. In *Mitchell v. Peguis Indian Band*, Dickson, C.J.C. (dissenting but not on this issue), said:

On its facts, *Guerin* only dealt with the obligation of the *federal* Crown arising upon surrender of land by Indians and it is true that, since 1867, the Crown's role has been played, as a matter of the federal division of powers, by Her Majesty in right of Canada, with the *Indian Act* representing a confirmation of the Crown's historic responsibility for the welfare and interests of these peoples. However, the Indians' relationship with the Crown or sovereign has never depended on the particular representatives of the Crown involved. From the aboriginal perspective, any federal-provincial divisions that the Crown has imposed upon itself are internal to itself and do not alter the basic structure of Sovereign-Indian relations. This is not to suggest that aboriginal peoples are outside of the Crown, nor does it call into question the divisions of jurisdiction in relation to aboriginal peoples in federal Canada.

Mitchell v. Peguis Indian Band, [1990] 2 S.C.R. 85, at 108-109

See also: Reasons for Judgment, Lambert J.A., *Haida 2*, at para. 61, Appellants' Record, Vol. I, p. 135

106. In this case, it is the Province who is exercising power capable of infringing the unextinguished Aboriginal Title of the Haida through the decision to replace TFL 39. As such, the Province must bear the burden of the Crown's fiduciary obligations.

F. The Province's "Only After" Theory of Section 35

107. The Province says that consultation is relevant only after title and rights, and infringement, have been proven, and the court turns to whether the infringement is justified. This "only after" argument confuses the path that the proceedings follow when an Aboriginal person challenges legislation or state action under ss. 35(1) and 52 of the *Constitution* – first the Aboriginal litigant proves an existing right and its infringement, and then the Crown attempts to justify the infringement – with the existence of a duty to consult, independent of the Crown's opportunity to justify its actions after the fact. In *Taku*, Madam Justice Rowles referred to consultation being an aspect of the Crown's burden of justification after an aboriginal right has been shown to have been infringed, and then said: "It does not logically follow that until an

Aboriginal right has been established in Court proceedings, the right does not exist”. She dismissed the Province’s “only after” argument as being inconsistent with the original rationale of section 35, which included a responsibility to protect the rights arising from the special trust relationship grounded in history, treaties and legislation. The Province’s position would rob section 35 of its constitutional significance. It would also undercut section 35 as a foundation for negotiation, one of the important objectives section 35(1) was intended to address.

Taku River Tlingit First Nation v. Ringstad, et al (2002), 98 B.C.L.R. (3d) 16, 2002 B.C.C.A. 59, at paras. 173, 174, 183

108. This issue is fully addressed in the factum of the Respondent Tlingits, in *Taku*, and the Haida do not intend to repeat what has been said, but add the following.

109. The conclusion reached by Rowles, J.A. in *Taku* was also reached by Huddart, J.A. (dissenting) in *Paul v. British Columbia (Forest Appeals Commission)*. She called the assumption of the Province’s argument “flawed”. Citing *Sparrow* and *Gladstone*, Huddart, J.A. stated:

In those seminal cases, infringements or potential infringements of Aboriginal rights were found to have occurred at times when the rights in questions had not been proven. Legal duties arise from legal rights. Proof of the right is required in the process of establishing a breach that gives rise to a remedy. Lack of proof does not mean the right and the duty do not exist. Legal proceedings simply enforce the duty and give a remedy for a breached right.

Paul v. British Columbia (Forest Appeals Commission), [2001] 4 C.N.L.R., 210 (B.C.C.A.) at 241, appeal allowed 2003 S.C.C. 55

110. The Court in *Haida 1* concluded that the decision in *Taku* was binding and determinative of the appeal. It is submitted that the Court was correct in this conclusion. In both cases, the consultation duty was triggered based on the Province’s notice of a reasonable assertion of rights. In both cases, the Province successfully moved to sever and refer to a trial the issues requiring proof of section 35 rights from those issues involving the Province’s consultation duty which were heard in the Petition. The Province’s arguments were the same in both cases, centred on whether the consultation duty arises prior to proof of rights.

111. Under the heading “The Timing Fallacy”, *Haida I* provided further reasons in support of the decision of Rowles, J.A. in *Taku*. The entire point of consultation and accommodation is to determine whether, if the claimed right does exist, the proposed activity or decision can be carried out in a manner that does not infringe the right, minimizes the infringement, and provides compensation for unavoidable infringements. To require Aboriginal People to prove their Title and Rights in court before consultation and accommodation takes place defeats the point of the exercise. By the time a court has ruled that Aboriginal Title or Rights exist, and that an infringement has occurred, there will be little left to consult about, and it will be too late to discover the best means of accommodation.

Appellants’ Record, Vol. I, pp. 75-76 (*Haida I*, at paras. 41-42)

112. The purpose of section 35 is not limited to providing a remedy for unjustified infringements **after the fact**, but extends to preventing unjustified infringements **before they occur**. This is consistent with what this Court has said in relation to *Charter* rights. In *R. v. Simmons*, Dickson, C.J.C. commenting on the prior authorization requirements established in *Hunter v. Southam*, [1984] 2 S.C.R. 145, as pre-conditions for a reasonable search under section 8 of the *Charter*, stated:

The Court arrived at the three minimum prior authorization requirements only after examining the values s. 8 is meant to protect. Foremost among these values is the interest in preventing unjustifiable searches before they occur.

R. v. Simmons, [1988] 2 S.C.R. 495, at 527

113. Other policy considerations support the conclusion of the Court below. Because it serves to avoid unjustifiable infringements before they occur, the duty to consult can encourage negotiation and minimize litigation, a policy issue addressed in academic commentary:

But the Court’s treatment of the duty in *Delgamuukw* as part of a justification of an infringement of an existing right illuminates only one consequence of breach of the duty, namely, that breach will affect the constitutionality of a Crown or third party action that amounts to an infringement. **If the duty also operates to minimize reliance on litigation, as a means of determining the nature and scope of Aboriginal and treaty rights, it must also apply in cases where a First Nation asserts rights that have yet to be formally recognized by a court of law or treaty.** Breach in this context might well affect the ultimate constitutionality of the proposed Crown or third party action, but it should also result in remedies that facilitate outcomes

determined by the parties themselves without the need for subsequent litigation. (emphasis added)

Lawrence and Macklem, “From Consultation to Reconciliation: Aboriginal Rights and the Crown Duty to Consult” (2000) 79 *Can. Bar Rev.* 252, at p. 262

114. The Province argues that since justification may vary according to the specific right at stake, no duty to consult should arise until proof. The Respondent Redfern in the *Taku* appeal cites from the dissenting Reasons of McLachlin J. (as she then was) in *Marshall*:

How can one meaningfully discuss accommodation or justification of a right unless one has some idea of the core of that right and its modern scope? How is the government, in the absence of such definition, to know how far it may justifiably trench on the right in the collective interest of Canadians? How are the courts to judge whether the government that attempts to do so has drawn the line at the right point?

R. v. Marshall, [1999] 3 S.C.R. 456, [1999] S.C.J. No. 55, at para. 112

115. It is important to note that these questions were posed in the context of a Treaty term – “truckhouses” - which required determination as to its exact nature and scope and modern counterpart for the Court to determine if an infringement was justified. McLachlin, J. stated:

When pressed on the exact nature and scope of the trade right asserted, the appellant at times seemed to suggest that this did not matter. A finding that the treaties granted a right to truckhouses or licensed traders, undefined as it might be in scope and modern counterpart, would shift the onus to the government to justify its failure to provide such trading outlets, he suggested. The absence of any justification would put the government in breach and preclude it from applying its regulations against the appellant.

Marshall, supra, at para. 109

116. In contrast, the content of unextinguished Aboriginal Title in British Columbia has been defined as a **matter of law**. In *Delgamuukw*, this Court affirmed that Aboriginal Title is: an interest in land, inalienable except to the Crown; predates and survives the assertion of European sovereignty and founded upon the prior occupation of Canada by Aboriginal Peoples; and encompasses the right to exclusive use and occupation of the land for a variety of purposes and the

right to decide to what use Aboriginal Title lands are to be put. These elements can all be the subject of consultation, where an infringement is contemplated by the exercise of provincial power.

Delgamuukw, supra, at paras. 111, 113-117

117. Moreover, the issue in this case is not whether an infringement of the Haida's Rights is justified – for which analysis one might need to know the exact nature and scope of the Rights and their infringement - but whether, as a matter of law and policy, the Court should recognise an obligation to sit down, prior to the infringement, and attempt to find an accommodation. It is not necessary, for the purposes of a good faith attempt to accommodate the Haida's Rights, to know the precise delineation of those Rights, and it is unconscionable to refuse to meet and attempt to find an accommodation, simply because the details are not yet known. Sufficient guidance has already been given by this Court for the meeting to occur; and for the Crown to address substantively the Haida's concerns.

118. The Province argues that the *Transcanada* case is contrary to the decision of the Court below. At issue in *Transcanada* was a lack of consultation over a planned municipal amalgamation. Contrary to the *Haida* case where a good *prima facie* case of Title and Rights had been established and found by the Chambers Judge, in *Transcanada*, the claims were characterized as “speculative”, and insufficient to trigger the duty to consult. (pp. 453-455) Further, as the Court in *Haida I* stated, the *Transcanada* decision is a statement of law with respect to the procedure and onus of proof in a court proceeding in which Aboriginal Peoples are attempting to establish Aboriginal Rights and their infringement. (para. 46) However, this is not to be confused with a proceeding founded on a failure to consult, rather than infringement of an Aboriginal Right. It should be noted that the Court in *Transcanada* cited with approval Lawrence and Macklem who argue that the duty to consult should be recognized as a feature of the fiduciary relationship which could be applied so as to prevent breach prior to infringement:

Properly understood, the duty to consult also acts as a prelude to a potential infringement of an Aboriginal or treaty right. Consultation requirements ought to be calibrated according to the nature and extent of Aboriginal interests and the severity of the proposed Crown action in order to provide incentives to the parties to reach negotiated agreements. In most cases, the duty requires the Crown to make good faith efforts to negotiate an agreement with the First Nation in question that translates Aboriginal interests adversely affected by the proposed Crown action into binding

Aboriginal or treaty rights. **By realizing the duty’s *ex ante* possibilities, the judiciary will have more success in its efforts to promote reconciliation between First Nations and the Crown.** (emphasis added)

Lawrence and Macklem, *supra*, at pp. 254-255
 Appellants’ Record, Vol. I, pp. 77-79 (*Haida I*, at paras. 44-46)
Transcanada Pipelines Ltd. v. Beardmore (Township) (2000), 186 D.L.R. (4th)
 403 (Ont. C.A.)

G. The Content of the Duty

119. The Duty to Consult and Accommodate in *Haida I*, in essence, requires the Province to get to the truth of the Haida perspective on their rights and the interference to those rights caused by the Province replacing TFL 39, and to try to “seek workable accommodations.” The duty is characterized as an “obligation to consult the Haida people about accommodating the Aboriginal title and Aboriginal rights of the Haida people when consideration is being given to the renewal of TFL 39.” The scope of the consultation and the strength of the obligation to seek an accommodation is said to be “proportional to the potential soundness of the claim for Aboriginal title and Aboriginal rights.” As part of the larger guiding fiduciary principle, the obligation to consult includes the requirement of “utmost good faith” and extends to consultation “about both the cultural and economic interests of the Haida people.” The duty as articulated by the Court in *Haida I* builds upon the evolving jurisprudence in a way consistent with a principled articulation of the fiduciary obligations of the Crown.

Appellants’ Record, Vol. I, pp. 71, 80, 82, 85-87 (*Haida I*, at paras. 34, 48, 51, 58, 60, 61)

120. Because of the important purpose of preventing unjustified infringements before they occur, the parameters of the duty to “seek workable accommodations” can be informed by the elements of the justification analysis.

121. In *Delgamuukw*, the content of the consultation duty, like other aspects of the justification analysis, was linked to the nature of Aboriginal Title.

Three aspects of Aboriginal title are relevant here. First, Aboriginal title encompasses the right to *exclusive* use and occupation of land; second, Aboriginal title encompasses *the right to choose* to what uses land can be put, subject to the

ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of Aboriginal peoples; and third, that lands held pursuant to Aboriginal title have an inescapable *economic component*. (emphasis in original)

Delgamuukw, supra, at para. 166

122. The exclusive nature of Aboriginal Title engages a cross-section of valid government objectives which may infringe Aboriginal Title and Rights, and which may require the Crown – as part of its fiduciary relationship – to attach priority to Aboriginal interests. As this Court stated in *Delgamuukw*:

... if the Crown’s fiduciary duty requires that Aboriginal title be given priority, then it is the altered approach to priority that I laid down in *Gladstone* which should apply. What is required is that the government demonstrate (at para. 62) both that the process by which it allocated the resource and the actual allocation of the resource which results from that process reflect the prior interest of the holders of Aboriginal title in the land. ... [T]his might entail ... that governments accommodate the participation of Aboriginal peoples in the development of the resources of British Columbia, that the conferral ... of leases and licences for forestry ... reflect the prior occupation of Aboriginal title lands, This is an issue that may involve an assessment of the various interests at stake in the resources in question. ...

Delgamuukw, supra, at para. 167

R. v. Gladstone, [1996] 2 S.C.R. 723, at para. 64

123. Not every case will lend itself to a priority option, but “the fiduciary relationship between the Crown and Aboriginal peoples may be satisfied by the involvement of Aboriginal peoples in decisions taken with respect to their lands”.

There is always a duty of consultation. ... The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to Aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the Aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an Aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to Aboriginal lands.

Delgamuukw, supra, at para. 168

124. Finally, because Aboriginal Title “has an inescapable economic aspect”, compensation is relevant to justification. “In keeping with the duty of honour and good faith on the Crown, fair compensation will ordinarily be required when Aboriginal title is infringed.”

Delgamuukw, supra, at para. 169

125. In *Marshall*, this Court affirmed that the objective of consultation is to attempt to reach an accommodation by agreement. In so doing, the Court emphasized the case-specific factors that are necessarily part of the explanation of “workable accommodations.”

. . . The factual context, as this case shows, is of great importance, and the merits of the government’s justification may vary from resource to resource, species to species, community to community and time to time. As this and other courts have pointed out on many occasions, the process of accommodation of the treaty right may best be resolved by consultation and negotiation of a modern agreement for participation in specified resources by the Mi’kmaq rather than by litigation . . .

R. v. Marshall, supra, at para. 22

126. In *Halfway River*, the B.C. Court of Appeal articulated the key elements of the consultation duty:

The Crown’s duty to consult imposes on it a positive obligation to reasonably ensure that Aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns and to ensure that their representations are **seriously considered**, and wherever possible, **demonstrably integrated into the proposed plan of action**. (emphasis added)

Halfway River First Nation v. British Columbia (Ministry of Forests)
(1999), 178 D.L.R. (4th) 666 (B.C.C.A.), at para. 160, per Finch J.A. (as he then was)

127. In *Taku*, the B.C. Court of Appeal held that prior to the issuance of the Project Approval Certificate, the Ministers of the Crown had to be, “mindful of the possibility that their decision might infringe Aboriginal rights and accordingly to be careful to ensure that the **substance of the Tlingit concerns had been addressed**.” (para. 193) (emphasis added) Because of the Ministers’ “abrupt truncation” (para. 117) of the consultation process, the Crown had failed to meet the standard and the Court directed the Ministers to revisit the issuance of this Certificate.

The *Taku* standard of “ensuring the substance of the concerns are addressed” echoes the “demonstrably integrated” standard of *Halfway River*.

128. In *Mikisew*, the Court held that the timing of the consultation will be indicative of whether the “consultation [was] undertaken with the genuine intention of substantially addressing First Nations’ concerns”. In that case a decision was made before the Mikisew’s concerns were integrated. Because the Mikisew were afforded no more than the same procedural rights as all other stakeholders, this impugned the Minister’s decision under the “adequate priority” branch of the justification analysis.

Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), [2002] 1 C.N.L.R. 169 (F.C.T.D.), at paras. 154 and 155

129. In *Mikisew*, the Court correctly identified meaningful consultation as the linchpin of the justification analysis, because decisions about priority, minimal infringement and compensation depend on it. The Court stated:

The question of whether the Crown’s actions were consistent with its fiduciary duty in this case hinges on consultation. In fact, it is premature to consider the issues of priority, minimal infringement and compensation, given that the consultation that would enable the Crown to satisfy those branches of the test were not undertaken.

Mikisew, supra, at para. 181

See also: Devlin, Richard F. and Ronald Murphy, “Contextualizing the Duty to Consult: Clarification or Transformation?” (2003) 14 *National Journal of Constitutional Law*, 167

H. The Haida Objectives for Consultation and Accommodation

130. In the circumstances of this case, the Crown granted an exclusive long-term tenure to log all merchantable timber on all types of terrain over almost a quarter of the land base on Haida Gwaii. The problem is complicated by the fact that Weyerhaeuser’s predecessor, MacMillan Bloedel, had already extensively logged large quantities of monumental cedar, leaving the Haida with the gravest concerns for protecting sufficient old-growth cedar for future generations.

131. The Haida objectives for consultation and accommodation prior to the replacement of TFL 39 were articulated in the Haida proposal for an Interim Measures Agreement. The primary concern of the Haida engages the second aspect of Aboriginal Title referred to by Lamer C.J.C. in *Delgamuukw*, namely that “. . . Aboriginal title encompasses *the right to choose* to what uses land can be put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of Aboriginal peoples.” (at para. 166) The Haida objective is to protect the ultimate limit of their title.

132. The inherent limit is relevant in this case prior to proof of Haida Aboriginal Title and Rights, given the extensive logging of the forests, particularly the logging of monumental old-growth cedar, of Haida Gwaii. The inherent limit will be breached if the unsustainable rate of logging as authorized, continues unabated, and if old-growth cedar continues to be targeted. The Haida seek to ensure that the inherent limit is respected through meaningful discussions that will result in a solid information base upon which to make better forestry management decisions that will not infringe Haida Aboriginal Title and its inherent limit. The Haida believe that these decisions are in the best interests of *all* parties when they occur at the strategic planning level, rather than only at the operational level. The findings of the Chambers Judge and the effect of the remedy of the Court of Appeal is to emphasize the urgent nature of the need to ensure that sufficient old-growth forests and cedar remain to sustain Haida culture and to benefit all peoples.

133. The Haida proposal was for the development of a Haida Gwaii Forest Council which would operate as a co-operative decision-making body which would develop a joint resource management approach to sustainable development. This co-operative strategic planning process, supported by all of the local communities, would also include participation of the non-Haida community.

Respondents' Record, Vol. III, pp. 443-444 (Affidavit of Ernie Collison, May 31, 2000 (“Collison 2”), at paras. 9-12)

134. Given the high rate of logging and decreasing availability of cedar, a critical component for long-term sustainability of the forests was the Haida proposal for an inventory of old-growth cedar. This inventory is part of the Haida's 1,000 year Cedar Plan. The inventory would

determine the remaining cedar stands in TFL 39 and Haida Gwaii, and would then inform strategic planning and the creation of cedar reserves for the benefit of future generations.

Respondents' Record, Vol. III, pp. 444-445 (Collison 2, at para. 13)

135. A further objective of consultation and accommodation is the protection of culturally modified trees (CMTs), which, to be effective, requires the determination of adequate buffer zones so that CMTs do not blow down (a key concern given the extremely high winds that are common in Haida Gwaii).

Respondents' Record, Vol. I, pp. 9-11, 31 (Guujaaw 1, at paras. 29-35 and Ex. "J")

Respondents' Record, Vol. III, p. 416 (Guujaaw 2, at paras. 20-21)

Respondents' Record, Vol. III, p. 464 (Hammond 2, at para. 45)

136. The Haida are concerned that activities carried out under the current licence are transforming the old-growth forests of Haida Gwaii into tree farms logged on 75-100 year rotations. In addition, the Haida are concerned that cedar is not returning after clear-cut logging at the same quantity or quality as in old-growth forests (cedar is an under-story species which grows under the canopy of other old-growth forests). The current transformation of the landscape results in loss of other culturally important species (including food and medicinal plants), damage to hydrological systems and salmon populations, and loss of high quality mature wood. Therefore the Haida sought conditions to the licence preserving areas of old-growth forests within TFL 39, as well as conditions for longer rotation periods. Rotation periods affect the determination of the rate of harvest because the assumption that second growth will be available for harvest in a shorter period is generally used to justify a faster rate of liquidation of the remaining old growth (ie. the sooner the old growth is logged, the sooner second growth can be logged). According to the Chambers Judge, because old-growth forests on TFL 39 are now limited in quantity as a result of past logging, it is "understandable that the Haida would want to reduce the rate at which logging is being conducted in old-growth forests on [TFL 39]." He further found that "[c]onsultation at the operational level does not permit the Haida to influence the quantity of the annual allowable cut on [TFL 39]."

Appellants' Record, Vol. I, p. 44 (BCSC Reasons, at paras. 59(c)(d)

Respondents' Record, pp. 14-16 (Guujaaw 1, at paras. 45, 50-51)

Appellants' Record, Vol. II, pp. 288-289 (Collison 1, at paras. 66-68)

Respondents' Record, Vol. III, p. 389 (Affidavit of Herb Hammond, January 15, 2000 ("Hammond 1"), at paras. 6-7)

Respondents' Record, Vol. III, pp. 467-468 (Hammond 2, at paras. 54-55)

137. The Haida objectives for consultation and accommodation would address the inescapable economic component of Aboriginal Title by examining alternative economic strategies which would achieve long-term economic benefits for Haida Gwaii as well as maintain the ecological, social and cultural integrity of the Islands. One example would include the development of value-added capacity on Haida Gwaii.³

Respondents' Record, Vol. IV, pp. 568-570 (Green, at paras. 8-13)

138. An important subject for the consultation and accommodation process would be the HPAs. The HPAs represent 20% of the operable timber on Haida Gwaii. Of the 14 HPAs on Haida Gwaii, six are located wholly or partly within TFL 39. The Haida seek long term protection of the HPAs. This requires a reduction in the AAC because currently, in calculating the AAC, it is assumed that the HPAs within TFL 39 will be logged. Until the HPAs receive Crown designation⁴, the rate of cut is inflated to unsustainable levels. The result is increased pressure on, and a higher rate of harvest outside, the HPAs. To protect these areas in the long term, the AAC must be lowered. It also requires the removal of the HPAs from TFL 39 so that Weyerhaeuser cannot, as it has done, seek and obtain approval of cutblocks within Haida Protected Areas. The non-Haida communities of Haida Gwaii agree that HPAs should be protected and the AAC on Haida Gwaii reduced.

Respondents' Record, Vol. III, p. 438 (Johnson, at para. 10)

Appellants' Record, Vol. IV, pp. 603, 666 (Duckworth 1, Ex. "C", at p. 42 and Ex. "A" at p. 12)

Respondents' Record, Vol. III, pp. 461-463 (Hammond 2, at paras. 37-42)

Respondents' Record, Vol. IV, p. 548 (Broadhead, at paras. 21-24)

139. Accommodation of Haida interests could also be provided by stipulations in the licence regarding the method of logging. Clearcutting and variable retention have been the primary

³ The term "value added" refers to the processing of timber and production of products from timber. This is contrasted with the harvesting of logs and shipping of raw logs to locations outside of Haida Gwaii.

⁴ One HPA, *Duu Guusd*, has been designated under Part 13 of the *Forest Act*. *Duu Guusd* is located outside of the TFL 39 land base.

logging methods on TFL 39. Variable retention has typically resulted in the logging of large areas with retention of small patches which are vulnerable to being blown down by strong winds.

Respondents' Record, Vol. III, p. 390 (Hammond 1, at paras. 9-10)
 Respondents' Record, Vol. III, pp. 468-479, 505-540 (Hammond 2, at paras. 57-83 and Ex. "G" and Ex. "FF")

140. A final, but most important, element of consultation and accommodation would be the integration of Haida law into the management of Haida Gwaii. An important principle of Haida law is the principle of *7yahguudang*. The closest translation into English is "respect", or "taking care of". It embraces respect for oneself, respect for one's family, community and nation, and more importantly, respect for and taking care of the land. The Constitution of the Haida incorporates *7yahguudang*, as the Council of the Haida Nation is charged with safeguarding Haida culture and Haida Gwaii. This includes taking care of future generations, and leaving a legacy for future generations of Haida and all people.

Appellants' Record, Vol. II, pp. 278-280 (Collison 1, at paras. 25-27, 32-34)
 Respondents' Record, Vol. I, pp. 158-167 (Collison 1, Ex. "A")

141. The Land Use Planning Framework Agreement concluded between the Haida and the Province following *Haida 2* (referred to by the Province at para. 27 of its factum), is an important step in the right direction. It is a joint planning process, the results of which will require ratification by the Province and the Haida. However, the planning will take time, with the outcome uncertain. In the meanwhile, while logging continues, protections need to be in place to ensure that adequate cedar and old-growth forests remain available for this and future generations of Haida and non-Haida residents of Haida Gwaii.

I. The Duty to Consult and Accommodate in Good Faith

142. In *Haida 1*, the Court declared the existence of a "duty to consult with [the Haida] in good faith and to endeavour to seek workable accommodations".

143. In *Delgamuukw*, the Court recognized the necessity of negotiated settlements and the need for good faith to achieve them:

Moreover, the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith. Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet, supra*, at para. 31, to be a basic purpose of s.35(1) – the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown.

Delgamuukw, supra, at para. 186

144. It is submitted that imposing a standard of good faith on the parties' conduct in the consultation process will facilitate the reconciliation process. The standard of good faith is analogous to the duty to bargain in good faith, which has been applied to negotiations between First Nations and governments in the B.C. Treaty Process ("BCTC"). In *Luuxhon*, the Court found that, once the Crown entered negotiations pursuant to the BCTC, it has a duty to negotiate in good faith. Williamson, J. set some broad parameters for the Crown's duty to negotiate in good faith. At the very least good faith must include an absence of any appearance of sharp dealing, disclosure of relevant factors and negotiating without oblique motive.

Luuxhon v. The Queen (No.2), Unreported, No. C981165, BCSC, March 28, 1999, per Williamson, J., p.28

145. While the Court in *Luuxhon* (at para. 94) noted that it did not apply labour law principles in assessing the content of the duty, nonetheless, good faith bargaining principles in labour law present a useful example for the operation of good faith in the duty of consultation. In the labour law context there is a fully developed treatment of the law governing the duty to bargain in good faith.

146. Good faith bargaining is required under every labour relations regime in Canada. The underlying principle in labour law is that the parties must act with the intent to conclude an agreement and make every reasonable effort to do so.

See: s. 11(1) B.C. *Labour Relations Code* and s. 50 (a) of the *Canada Labour Code*

147. Labour law principles are particularly relevant because they address uneven power relations. Obligatory collective bargaining with trade unions arose in response to unilateral employer power. The good faith bargaining requirement in labour relations was introduced to scrutinize and control bargaining conduct and to ensure that collective agreements be reached. The 1968 Woods Report on Labour Relations set out the underlying rationale for the good faith bargaining obligation:

Collective bargaining works more effectively and yields more satisfying results when both sides to the negotiations act in good faith. This applies both to the negotiation of an agreement and to its administration. Where one party does not act in good faith, the disease is usually contagious. A sign of bad faith by one side is likely to make the other suspicious, and to weaken the possibilities for meaningful accommodations both before and during the life of a collective agreement.

Canadian Labour Law, 2nd Edition, 2003, at pp. 10-95

148. The same rationale is applicable to negotiations between the governments and First Nations and to the conduct of consultation.

149. Good faith requirements also have been considered by the courts and the Native Title Tribunal under the *Native Title Act* in Australia. A statutory obligation to bargain “in good faith” was considered by the Court in the case of *Walley v. Western Australia*. Justice Carr found that the government must negotiate with the intent of reaching an agreement, before applying to an arbitral body for a determination. Where this did not occur, the parties were ordered back to the negotiation table. The imposition of good faith standards acted as a powerful incentive to the government to consult with native title parties in a meaningful way.

Walley v. Western Australia, (1996) 137 ALR 561

150. The scope of the good faith requirement was also considered by the National Native Title Tribunal. The Tribunal set down basic guidelines for what constituted good faith negotiations. The Tribunal determined that there was an absence of good faith when either of the parties, *inter alia*, failed to respond to reasonable requests for relevant information within a reasonable time, sent negotiators without authority to do no more than argue or listen, adopted a rigid non-

negotiable position, failed to make counter proposals, and failed to do what a reasonable person would do in the circumstances.

Western Australia v. Walley, on behalf of the Ngunooru Wadjar: People,
WF9715, 25 March 1998, Hon. C.J. Sumner, at pp. 9-15

151. Good faith standards established in Australia are the kind of standards that can be readily applied in consultation and bargaining between the governments and First Nations in Canada. These standards are similar to the principles established by labour relations boards in Canada. They conform to principles and objectives that have developed over many years and are familiar to Canadian courts. While there is no legislative framework which compels good faith bargaining with First Nations in British Columbia, as there is in the context of labour law and the Australia native title case law, section 35(1), with its reconciliation purpose, provides a secure constitutional foundation for the good faith standard.

Stuart Rush, Q.C., *The Duty to Bargain in Good Faith Arising out of Delgamuukw*, 1998, Pacific Business and Law Institute

J. Conclusion with Respect to the Crown's Obligations

152. The Province's minimalist approach to a generous and liberal interpretation of Aboriginal Title underpins their conceptualisation of the Crown's duty to consult. To the existing trilogy of arguments they have previously made about the nature of Aboriginal Title - it has been extinguished, it is non-proprietary, and it is limited either to reserves or to traditional activities - they add a new trilogy in relation to any duty on the Crown to consult about that Title. Again it is a trilogy of negatives. The duty, argues the Province, is not fiduciary, is not constitutional, and is not substantive. Instead they advance an administrative duty of procedural fair dealing, a duty owed to all individuals or stakeholders whose rights or interests are affected by decision-making.

153. In effect, the Province is arguing that, in lieu of the Court's requirement that the Ministers of the Crown must consult and accommodate Aboriginal interests before renewing an exclusive forest tenure subject to unextinguished Aboriginal Title of which the Province has notice, this Court should prefer a standard of review in which the Ministers are entitled to the

highest standard of deference. This coming from a Province that has shown over the course of much of the last 130 years, either intractable resistance or minimal deference to the recognition of Aboriginal Title.

154. The articulation of the fiduciary and constitutional Duty to Consult and Accommodate prior to any final determination of rights, in the circumstances of this case, is a necessary part of the evolution of fiduciary duties and is in keeping with the historical roots of the fiduciary relationship. It is consistent with the purposes of section 35 in underpinning negotiations that can achieve reconciliation and accommodation of Aboriginal interests and is well designed to ensure that Aboriginal Title and Rights are, in the words of this Court in *Sparrow*, no longer observed in the breach and that the substantive promises of section 35 and this Court's judgment in *Delgamuukw* are not hollow ones.

II. RESPONSE TO THE FACTUM OF THE APPELLANT WEYERHAEUSER

A. Introduction

155. The “central thesis”⁵ of Weyerhaeuser’s submissions is misconceived. The issue on Weyerhaeuser’s appeal is not whether third parties, generally, owe fiduciary obligations to the First Nations who assert Aboriginal Title to the Crown land on which they operate. Instead, the issue is whether the Court of Appeal erred 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 in proceedings under the *JRPA*⁶. That issue is primarily one of jurisdiction and procedure, and concerns the fundamentally important discretion of a superior court – or, in this case, an appellate court acting in its place – to structure declaratory relief so as to do justice in the case and ensure the effectiveness of its orders. On any fair reading of the full Reasons for Judgment of the Court below, it is clear that the third-party obligation which found recognition in the Court’s order was not the unprincipled leap of reasoning Weyerhaeuser suggests, but rather a necessarily ancillary remedy to the declaration against the Crown, and a holding which was both justified and constrained by the facts of this case.

156. It will be argued below in response to Weyerhaeuser’s submissions that:

- (a) there is no jurisdictional reason why the Court of Appeal could not include Weyerhaeuser in a declaration concerning the Crown’s obligations; the real issue is procedural fairness, and, on that issue, Weyerhaeuser has not shown that the Court of Appeal erred in the exercise of its discretion;
- (b) the Court of Appeal’s exercise of its discretion to include Weyerhaeuser was fully justified by Chief Justice Finch’s finding that justice could not be done in this case without a declaration against the company;
- (c) the obligation of the company, as articulated by Lambert J.A., was a reasoned and appropriate holding in the circumstances of this case, from which circumstances a number of workable principles emerge; and

⁵ Weyerhaeuser’s Factum, at para. 38.

- (d) a remedy which included the company was consistent with the purposes that underlie recognition and affirmation of aboriginal rights in s. 35(1) of the *Constitution*.

B. Jurisdiction to Issue a Declaration that Included Weyerhaeuser

157. A declaration that included Weyerhaeuser was within the discretionary powers of the Court of Appeal under s. 9(1) of the *Court of Appeal Act*,⁷ to “make or give any order that could have been made or given by the court or tribunal appealed from,” and “make or give any additional order that it considers just.” Those powers included the full range of remedies available to a judge of the Supreme Court of British Columbia in proceedings under the *JRPA*. For the reasons which follow, a declaration against Weyerhaeuser was well within this latter jurisdiction.

Vancouver (City) v. British Columbia (1996) 20 B.C.L.R. (3d) 79 (C.A.), at paras. 56 and 58

158. A full appreciation of the solid jurisdictional foundation for the Court of Appeal’s order requires that the declaration concerning the company’s obligation be viewed in the context of the remedy and the proceedings as a whole. The full order of the Court of Appeal, concurred in by Lambert J.A. and Finch C.J.B.C., bears repeating:

1. The Crown provincial had in 2000, and the Crown and Weyerhaeuser have now, legally enforceable duties to the Haida people to consult with them in good faith and to endeavour to seek workable accommodations between the aboriginal interests of the Haida people, on the one hand, and the short-term and the long-term objectives of the Crown and Weyerhaeuser to manage TFL 39 and Block 6 in accordance with the public interest, both aboriginal and non-aboriginal, on the other hand.
2. The parties have liberty to apply to a judge of the Supreme Court of British Columbia for whatever orders they may be instructed to seek, pending the conclusion of the proceedings with respect to a determination of aboriginal title and aboriginal rights, infringement and justification.

⁶ *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 (“*JRPA*”)

⁷ R.S.B.C. 1996, c. 77.

3. The affidavits filed by the five intervenors in support of their applications to intervene be admitted in evidence in this appeal.
4. Any reference in the original reasons to any breach by Weyerhaeuser of its duty to consult the Haida Nation is expunged from the reasons, by consent of the parties.

Appellants' Record, Vol. I, pp. 160-161 (*Haida 2*, at para. 104)

159. As set out in the Procedural History above, the Chambers Judge found as fact that the Crown did not consult with the Haida when the Minister issued the replacement TFL 39 in 2000. The Court of Appeal held unanimously in *Haida 1* that this was a breach of the Crown's obligations to the Haida. In *Haida 2*, the common holding of Lambert J.A. and Finch C.J.B.C. was that Weyerhaeuser's separate obligation arose when the company received the replacement licence in 2000 and the Court declared, in *Haida 1*, that the licence was issued by the Minister in breach of the Crown's obligations, meaning the tenure suffered a fundamental legal defect. No finding was made as to whether Weyerhaeuser was in breach of its obligation to the Haida, and no order was made as to the validity of TFL 39. The Court's order was restricted to the Crown's past and present obligations, and Weyerhaeuser's present obligations.

Appellants' Record, Vol. I, pp. 28, 35 (BCSC Reasons, at paras. 29, 42)
 Appellants' Record, Vol. I, pp. 83, 85-86 (*Haida 1*, at paras. 52, 58)
 Appellants' Record, Vol. I, pp. 152-153, 166 (*Haida 2*, at paras. 92-93 (per Lambert, J.A.; and at para. 115 (per Finch, C.J.B.C.))

160. The gravamen of the remaining issues in these proceedings is the validity of TFL 39. That question arises on the pleadings in a number of ways. At issue is:

- (a) whether the Aboriginal Title of the Haida is an encumbrance within the meaning of s. 109 of the *Constitution Act, 1867*, or s. 35(1)(b)(i) of the *Forest Act*, such that the provincial Crown could not lawfully grant or replace TFL 39;
- (b) whether ss. 35(1)(b)(i) and 36 of the *Forest Act* are of no force and effect to the extent to which they interfere with Aboriginal Title or Rights of the Haida;

- (c) whether Weyerhaeuser has satisfied its obligation to consult with the Haida and seek workable accommodations of their Aboriginal interests;
- (d) whether the 1981, 1995 or 2000 replacements by the Province of TFL 39, or the logging activities by Weyerhaeuser under the purported authority of TFL 39, infringe on the Aboriginal Title or Rights of the Haida.

Appellants' Record, Vol. I, pp. 190-191, 193-194 (Amended Petition, at pp. 3-4, 16-17)

161. The order appealed from was therefore not interim in the sense of an interim or preliminary declaration of rights pending final determination of those rights at trial,⁸ but rather interim in the sense that the overall dispute is still before the courts. It is clear, however, that the Court of Appeal's order disposes in a final way of an issue on the pleadings: that is, the obligations of the Crown and Weyerhaeuser with respect to TFL 39 prior to proof of the Haida's Title and Rights. That issue is not subject to the Court's ultimate findings at trial as to rights, title or infringement. Its disposition at an interim stage of the proceedings was useful in the immediate context – by resolving an important issue without further delay – but also useful in the broader context referred to above and explained by the Court of Appeal in *Haida 1*:

This case has been presented as a petition for judicial review. It is not, technically, an interlocutory proceeding. But its resolution could provide the beginning of an alternative framework for dealing with the reconciliation of claims to constitutionally protected Aboriginal title and Aboriginal rights, on the one hand, and the public interest, both Aboriginal and non-Aboriginal, in the elusive economic prosperity of the primary industries of the province.

Appellants' Record, Vol. I, p. 53 (*Haida 1*, at para. 11)

162. The issue was properly considered by the Court of Appeal on an interim or interlocutory basis in the proceedings, within the Court's discretion under s. 10 of the *JRPA* "to make an interim order it considers appropriate." Contrary to Weyerhaeuser's submission⁹, the relief contemplated by s. 10 of the *JRPA* is not limited to interim injunctions.

⁸ Weyerhaeuser Factum at para. 104.

⁹ Weyerhaeuser Factum, at para. 105

Law Reform Commission of B.C., Report on Civil Rights (Project No. 3) 1974, *Part IV – A Procedure for the Judicial Review of the Actions of Statutory Agencies* (“B.C. Law Reform Commission Report”), at p. 38

163. Weyerhaeuser has been fully engaged in these proceedings from the start. Weyerhaeuser was named as a respondent, and never contested being named. The relief claimed included an order quashing TFL 39 or declaring TFL 39 invalid. That relief was claimed as against Weyerhaeuser as well as the Crown, in the very real sense that Weyerhaeuser, as a respondent, would be bound by the result. Weyerhaeuser joined the issue, and participated fully at the trial level and in the Court of Appeal. Weyerhaeuser not only supported the position of the Crown, but also argued on its own behalf that the Court should not quash or declare the tenure invalid. Following the Court of Appeal’s first set of Reasons – in which the Court avoided declaring the tenure invalid - Weyerhaeuser asked for, and was granted, a second hearing, and leave to file a full supplementary factum, addressing specifically the procedural and substantive issues arising from the declaration against the company. Further affidavit materials were tendered by Weyerhaeuser and supporting intervenors. In its factum, and orally before the Court, Weyerhaeuser argued all aspects of the issues now on appeal, both procedural and substantive.

Appellants’ Record, Vol. I, pp. 124-127 (*Haida 2*, at paras. 40-45)

164. Its full participation notwithstanding, Weyerhaeuser argues, with reliance on the dissenting Reasons of Low J.A., that the Court of Appeal should not have granted a declaration against the company in proceedings under the *JRPA*.¹⁰ The flaw in this submission is that the Court of Appeal did not owe its jurisdiction to grant a declaration, either as against the Crown or Weyerhaeuser, to the *JRPA*.

165. The B.C. Supreme Court’s jurisdiction¹¹ to grant declaratory relief concerning public or private action is founded on the authority it inherited from the Courts of Chancery, and exists independent of the *JRPA*. Unlike relief in the nature of *mandamus*, prohibition or *certiorari*, which must be brought by petition under the *JRPA* within the jurisdictional constraints of the old prerogative writs, declaratory and injunctive relief is available both within and outside the provisions of the statute, against both public and private bodies. The difference between an

¹⁰ Weyerhaeuser Factum, at paras. 102-107.

¹¹ and, accordingly, the Court of Appeal’s authority under section 9(1) of the *Court of Appeal Act*

action for a declaration and a petition for a declaration is procedural only. Both forms of proceedings existed at common law. The *JRPA* is, in the case of declaratory or injunctive relief, no more than a direction by the Legislature that claims relating to the exercise of a statutory power should, as a general rule, go by way of summary proceedings. This is largely a reflection of the policy underlying the old prerogative writs: public authorities and third parties should not be kept in suspense over the legal validity of a statutory decision. However, the purpose of the *JRPA* is not to create mutually exclusive procedures for the public and private law uses of declaratory and injunctive relief – an effect of a differently-worded statute in England that has been strongly criticized. Instead, the *JRPA*, combined with the *Rules of Court*, creates a procedural discretion. The *JRPA* provides an alternate, summary procedure for claims “in relation to the exercise . . . of a statutory power,” and a discretion in the court, under section 13, to order that such proceedings, or an issue in such proceedings, if they are commenced by writ of summons, go by way of summary procedure. Conversely, Rule 52(11)(d) confers a discretion on the court to convert proceedings initiated by petition “in relation to the exercise . . . of a statutory power”, or an issue in such proceedings, to an action, if a full trial is more appropriate.

Re St. Nazaire (1879), 12 Ch.D. 88, at 93-94
Whitechapel Estates Ltd v. British Columbia (Min. of Transportation) (1998) 57 B.C.L.R. (3d) 130 (C.A.), at paras. 40, 45-48
Auton v. British Columbia (Min. of Health), (1999) 12 Admin. L.R. (3d) 261 (B.C.S.C.)¹², at paras. 23-33, 56
 Law Reform Commission Report, at pp. 6-7 and 40
 Wade and Forsyth, *Administrative Law* (7th ed.), at pp. 680-88
JRPA, ss. 2(2) and 13
British Columbia Rules of Court, Rule 52(11)

166. It follows that the *JRPA* neither created, nor eliminated, any jurisdiction to grant declaratory relief. The sole issue is one of procedural discretion: whether the Court below was within its discretion to determine Weyerhaeuser’s obligations in summary proceedings. The principles to guide that discretion under the *JRPA* should be consistent with those in other contexts: whether the issue was suited to summary disposal, or better suited to a full trial. This interpretation of the *JRPA* is consistent with the purpose of the statute, which was to eliminate, rather than to create, procedural barriers. This Court should avoid reintroducing into the *JRPA*,

¹² separate application from the proceedings which reached this Court

at Weyerhaeuser's invitation, the procedural dichotomy that plagued the prerogative writs. Cases should be determined on their merits, rather than by arcane rules of rigid procedure.

Temple Sholom v. Insurance Corp. of B.C. (1996) 33 D.L.R. (4th) 231 (B.C.C.A.), at paras. 20-25

167. The appropriateness of the Haida proceeding by petition against the Crown, and the Court granting a declaration against the Crown on the issue of the Crown's antecedent obligations in summary proceedings under the *JRPA*, is beyond dispute. Weyerhaeuser, as the holder of TFL 39, was a necessary and proper party to those proceedings. Separate proceedings by writ of summons against Weyerhaeuser on the same facts would only duplicate the litigation and run the risk of inconsistent findings or results. Moreover, recent authority suggests that the Haida could not have sought declaratory relief against the Crown in this case, except if the proceedings included Weyerhaeuser. If Weyerhaeuser was a necessary and proper party to proceedings against the Crown "in relation to the exercise ... of a statutory power" – which it was – then nothing in the *JRPA* precluded the Court from exercising its discretion to grant declaratory relief which included the company.

Cheslatta Carrier Nation v. British Columbia (2000), 80 B.C.L.R. (3d) 312, 2000 B.C.C.A. 539, at para. 16

168. To put it another way, the procedural rules governing judicial review in British Columbia do not restrict the lower courts' discretion to grant declaratory relief as required to do justice in the case. This proposition finds support in the decision of this Court in *Kourtessis v. Canada (Minister of National Revenue)*. The appellants in that case instituted proceedings in the B.C. Supreme Court by way of petition, challenging a warrant issued under the *Income Tax Act*. The relief sought was an order quashing the warrant and the search and seizure executed under it, ordering the return of the materials seized, prohibiting their use and declaring that the section of the *Income Tax Act* was contrary to the *Charter*. The application was dismissed, and an appeal to the B.C. Court of Appeal was also dismissed. The Court of Appeal characterized the request for a declaration as an interlocutory matter in a criminal proceeding over which Parliament has exclusive jurisdiction to

prescribe procedure. On further appeal, this Court confirmed the independent jurisdiction of superior courts to grant declaratory relief in appropriate cases. This Court found that Parliament did not, by enacting rules of criminal procedure, intend to exclude this jurisdiction, and held that lower courts should not shy away from exercising their discretion to vindicate important civil rights.

Kourtesis v. Canada (Minister of National Revenue), [1993] 2 S.C.R. 53, at para. 42 (per La Forest J.) and at paras. 94-7 (per Sopinka J.)

169. Recognizing the lower courts' discretion to grant declaratory relief against private parties in proceedings under the *JRPA* is also consistent with the character of the remedy. The declaration is a uniquely flexible and useful remedy. Declaratory relief is available without a cause of action, and courts make declarations whether or not any consequential relief is, or could, be claimed. These features allow judges to structure remedies which are responsive to the needs of the case, but go no farther than required. Declaratory relief may be granted, with consequential relief held in reserve in the event the parties do not observe their obligations. Moreover, since it merely states the law, a declaration is neither sought, nor awarded, "against" any party in the sense of coercive relief. Instead, the rule is that all persons who appear to have an interest in objecting to the grant of the declaration should be made parties and thereby bound. In the case of judicial review of a statutory power to replace a tenure, it is necessary and appropriate that the tenure-holder be named as a party and bound by the result. In this way, the court takes into account the interests of those affected by its order, and a multiplicity of proceedings is avoided.

British Columbia Rules of Court, Rule 5(22)
Cheslatta Carrier Nation, *supra*, at paras. 11 and 16
 Zamir, *The Declaratory Judgment*, Sweet & Maxwell (1962) at pp. 119, 183 and 282-3

170. The flexibility of declaratory relief also means that the court is not confined by the specific relief pleaded; the court may adapt the remedy to get at the real issue in the case. This was demonstrated by this Court's decision in *Canada v. Solosky*. In that case, an inmate at Millhaven Institution commenced an action in the Federal Court for a declaration that correspondence to or from a solicitor must be forwarded to its destination unopened. The action was dismissed, and the inmate's appeal failed in the Federal Court of Appeal, in part because the

Court held that the claim to solicitor and client privilege was not framed properly, and the Court could not issue a declaration in relation to correspondence not yet written. In the Supreme Court of Canada, Mr. Justice Dickson said this:

With great respect to the views expressed in the Federal Court of Appeal, I do not think that the important issues raised in these proceedings should be determined by the particular form of wording employed in the prayer for relief, or on the basis that the question is hypothetical.

Declaratory relief is a remedy neither constrained by form nor bounded by substantive content, which avails to persons sharing a legal relationship, in respect of which a 'real issue' concerning the relative interests of each has been raised and falls to be determined.

His Lordship referred to several authorities, and continued:

Here there can be no doubt that there is a real and not hypothetical, dispute between the parties. The declaration sought is a direct and present challenge to the censorship order of the director of Millhaven Institute. That order, so long as it continues, from the past through the present and into the future, is in controversy. The fact that a declaration today cannot cure past ills, or may affect future rights, cannot of itself, deprive the remedy of its potential utility in resolving the dispute over the director's continuing order.

Once one accepts that the dispute is real and that the granting of judgment is discretionary, then the only further issue is whether the declaration is capable of having any practical effect in resolving the issues in the case.

The determination of the right of prison inmates to correspond, freely and in confidence with their solicitors, is of great practical importance, although admittedly, any such determination relates to correspondence not yet written.

However poorly framed a prayer for relief may be, even as twice amended, the present claim is clearly directed to the procedures for handling prison mail any indication in relation thereto of solicitor-client privilege. It is not directed to the characterization of specific and individual items of correspondence. That the appellant is entitled to a declaration, it is within this Court's discretion to settle the wording of the declaration: See Wade, *Judicial Review of Administrative Action* (3rd edition, 1973, p. 431). Further, section 50 [now section 48] of the *Supreme Court Act* allows the Court to make amendments necessary to a determination of the real issue, without application by the parties.

Canada v. Solosky, [1980] 1 S.C.R. 821, at 830-2

171. In summary, the Court of Appeal's jurisdiction to grant declaratory relief existed independent of the *JRPA*. The Court's decision to issue a declaration which included Weyerhaeuser in summary proceedings under the *JRPA* was an exercise of discretion. That discretion was not limited by the *JRPA* itself or by the form or the wording of the relief claimed by the Haida. This Court should not interfere, unless it is shown clearly that the Court of Appeal failed to exercise its discretion on proper grounds.

Harelkin v. University of Regina, [1979] 2 S.C.R. 561, at 588

172. The declaration against Weyerhaeuser complied with the principles governing declaratory relief. First, there can be no doubt that there was a real, and not a hypothetical, dispute between the Haida and Weyerhaeuser. Second, there can be no doubt that the declaration is capable of having a practical effect. Although it remains to be determined whether Weyerhaeuser breached its obligation to the Haida, and what effect consultation and accommodation, or the lack thereof, will have on the ultimate determination as to the validity of TFL 39, the Court of Appeal did not err by providing direction with respect to the parties' obligations, and leaving the consequential relief to be determined, in part on the basis of the parties' conduct. The Court of Appeal's measured intervention in this case was consistent with the role of the courts in both constitutional and non-constitutional litigation. The remedy vindicates the Haida's right to be consulted and have their interests accommodated, while leaving the Crown and Weyerhaeuser flexibility to address their obligations, and upholding the validity of TFL 39. Mr. Justice Lambert described the declaration correctly as the least disruptive order that could be made in light of the Crown's breach of its duty to consult. Chief Justice Finch described it correctly as doing justice while avoiding the consequences of invalidating TFL 39.

Canada v. Solosky, *supra*, at 830-832

Doucet-Boudreau v. Nova Scotia (Minister of Education), 2003 S.C.C. 62, at paras. 55-59

Appellants' Record, Vol. I, pp. 110-111, 124-125, 166-167 (*Haida 2*, at paras. 15 and 40 (per Lambert J.A.); and at paras. 116-118 (per Finch, C.J.B.C.))

173. Weyerhaeuser says that an interim injunction would have been a better remedy.¹³ But an injunction would have been far more disruptive. It would have stopped logging until trial, and

¹³ Weyerhaeuser Factum, at paras. 48-51

resulted in the very economic consequences Weyerhaeuser asked the Court to avoid. An injunction is an “either/or” form of remedy, and does not permit the internal balancing of interests that was possible with the carefully worded declaration in this case. It is precisely because of the disruptive effect of injunctions that considerations such as “the balance of convenience” and “irreparable harm” are necessary. Declaratory relief provides a more flexible and balanced alternative to injunctive relief.

174. As to procedural fairness, there is no evidence of any prejudice to Weyerhaeuser of a nature that would justify intervention on that basis alone. The facts on which the Court of Appeal extended its declaration to Weyerhaeuser were found by the Chambers Judge on extensive affidavit evidence, most of which was either undisputed or conclusive. That evidence was filed on pleadings which put in issue the circumstances surrounding the replacement of TFL 39 and the validity of the replacement TFL 39. Although Weyerhaeuser says no arguments were made and no evidence was led concerning the company’s obligation in the court of first instance, there is no evidence before this Court of what further materials could have been submitted or how those materials would have influenced the outcome. More importantly, Weyerhaeuser does not identify how whatever prejudice that might have resulted from the alleged initial lack of notice was not cured entirely by the procedure adopted by the Court of Appeal. Weyerhaeuser received full notice of the facts and law on which the obligation was found, a full opportunity to respond, and a fair hearing. Its real complaint is that it does not like the result.

Appellants’ Record, Vol. I, pp. 58-62 (*Haida 1*, at paras. 20-22)

Appellants’ Record, Vol. I, pp. 111-114, 124-127 (*Haida 2*, at paras. 17-22, 40-44 (per Lambert, J.A.))

C. Justice Could Not Be Done Without Including Weyerhaeuser

175. The Court of Appeal’s exercise of discretion is further reinforced when one considers the specific circumstances of the case. It is manifest that a declaration against the Crown alone was no remedy at all, and that justice could not be done without a declaration against Weyerhaeuser as well. This was the basis on which Chief Justice Finch joined in the order that included Weyerhaeuser.

176. Declaratory or injunctive relief against a private party respondent that is necessarily ancillary to relief against the statutory decision-maker under the *JRPA* is consistent with the general principle that:

Courts having a competence to make an order in the first instance have long been found competent to make such additional orders or to impose terms or conditions in order to make the primary order effective.

Canada (Attorney-General) v. Law Society of British Columbia, [1982] 2 S.C.R. 307, at 330

177. In *Haagsman v. British Columbia (Minister of Forests)*, the Supreme Court of British Columbia held that it is possible under the *JRPA* to make “necessarily ancillary” orders.

. . . [There is] some authority that the granting of consequential relief in the form of repayment of specific monies is an appropriate ancillary order under the injunction power in an application for judicial review . . .

. . . [T]here may be circumstances where orders for payment of monies can be made in judicial review proceedings when that relief is in the nature of mandamus or when they are “necessarily ancillary” orders, but those are not the circumstances here.

Haagsman v. British Columbia (Minister of Forests), (1998) 64 B.C.L.R. (3d) 180 (S.C.), at paras. 39 and 42

178. An example of a necessarily ancillary order under the *JRPA* is found in *Cheslatta Carrier Nation v. British Columbia*.¹⁴ In that decision, the B.C. Supreme Court held that the provincial Crown was in breach of a duty to consult that arose under the *Environmental Assessment Act*.¹⁵ To remedy the Crown’s failure, the Court issued a declaration directed to Huckleberry Mines “to produce the mapping information” required to allow adequate consultation.

Cheslatta Carrier Nation v. British Columbia (1998), 53 B.C.L.R. (3d) 1 (S.C.), at paras. 59 and 75.

179. In *Re Collins et al. and Pension Commission of Ontario et al.*, the Ontario Divisional Court issued an injunction against a private party in proceedings under the Ontario equivalent of

¹⁴ Separate proceedings from those referred to above.

the *JRPA*. The application was for review of an Ontario Pension Commission decision giving consent to an employer's removal of surplus funds from a pension plan. The Court held that the employer, Dominion, had no right to surplus funds except on the termination of the plan, and that the Commission should have required Dominion to give notice of its application to the employees. The Commission's consent was a statutory power of decision within the meaning of section 1(f) of the Ontario *JRPA*. The Court found that the Commission acted in breach of the rules of procedural fairness. Accordingly:

. . . the Commission's consent was given without jurisdiction, and Dominion's withdrawal of the funds was unauthorized. Dominion received the funds without authority. An order simply quashing the Commission's consent would be a purely academic exercise; it would slam the door on an empty stall. If these applications [for judicial review] can lead to no more significant effect than that, then the right to bring them is a hollow one and success is no success at all. If I am right in the views I have expressed, Dominion is enjoying the benefit of funds to which it has no right at all. If I correctly understand the argument put to us by Dominion's counsel, Dominion seeks, even if it has no right to funds, to continue to enjoy them on the ground that this Court can do nothing about it.

I do not construe the powers of this Court so narrowly. This is a case for a mandatory order if ever there was one. The criteria that commonly apply to the consideration of such an order indicate to me that one should be made. We have express authority to grant declarations and injunctions in proper cases in respect of the exercise of a statutory power: see s. 2 of the *Judicial Review Procedure Act*, R.S.O. 1980, c. 224. It has been held by the Divisional Court that a declaration may be made on application: *Re Doctors Hospital and Minister of Health et al.* (1976), 12 O.R. (2d) 164, 68 D.L.R. (3d) 220, 1 C.P.C. 232. I can see no reason why that decision should not apply equally to an injunction.

Re Collins et al. v. Pension Commission of Ontario (1986) 56 O.R. (2d) 274 (Div. Ct.), at 294-295

180. In *Re Collins*, a mandatory injunction against a private company was necessarily ancillary to the primary relief against the statutory decision-maker, because the effect of not making the order would be to make the primary relief an empty shell. In the case at bar, having left Weyerhaeuser's tenure in place, Chief Justice Finch found that a declaration of the Crown's obligations would be an empty shell unless Weyerhaeuser was included. This was supported by the evidence. Weyerhaeuser continues to log, continues to make profit, and continues to make

¹⁵ R.S.B.C. 1996, c. 119.

management decisions regarding the forestry resource on Haida Gwaii, all pursuant to the rights and privileges it enjoys under TFL 39. Because the tenure has been issued to Weyerhaeuser, the Province no longer has unfettered power to accommodate the Haida on a range of issues now within the exclusive domain of Weyerhaeuser. We return to this evidence below under the factors that justify a third-party obligation in this case.

181. It is not realistic to expect that a declaration against the Crown alone would be effective or useful. The Minister of Forests cannot now reduce the Annual Allowable Cut without Weyerhaeuser's consent. The Minister cannot now amend the terms of TFL 39 without Weyerhaeuser's consent. Although TFL 39 allocates certain responsibilities to Weyerhaeuser, the District Manager cannot reject a management plan or deny a cutting permit on grounds not set out in the *Forest Act* or TFL 39. Neither the Minister nor his representatives can compel Weyerhaeuser to include the Haida in the company's management or stewardship decisions, nor can the Crown compel Weyerhaeuser to share with the Haida any of the economic benefit from the forest. Moreover, on a day-to-day and operational basis, it is Weyerhaeuser and its employees who must live and work with the Haida, not the Minister and his representatives. Neither the specific objective of helping to resolve this litigation, nor the general objective of reconciliation and accommodation, could be advanced effectively without including Weyerhaeuser.

182. In the words of Chief Justice Finch:

[116] The question was, and is, what remedy was appropriate and lawful in those circumstances? The Haida urged us to declare the licence invalid and void. It was clearly within the Court's power to make such a declaration. However, a declaration that the 2000 replacement licence was invalid would have terminated all of Weyerhaeuser's rights under the licence, with serious economic consequences to it, its employees and others. Weyerhaeuser said that a declaration of invalidity would be draconian.

[117] The Crown argued that the Court should, if it found a breach of the Crown's duty to consult, simply declare that the Crown had a duty to consult, without more. In that event, the licence would have remained valid, and Weyerhaeuser would have continued to hold, unimpaired, the exclusive right to harvest timber up to the annual allowable cut ("AAC") from the area specified in the licence, which covers about one-quarter of the total area of Haida Gwaii.

[118] A declaration of the Crown's duty to consult, without more, would therefore have been a completely hollow or illusory remedy. Weyerhaeuser might choose to co-operate in the consultation or not. If it refused to co-operate, the Crown would be unable to make any effective accommodation. The Crown's duty of consultation and accommodation would be frustrated.

Appellants' Record, Vol. I, pp. 166-167 (*Haida 2*, at paras. 116-118)

183. A declaration including Weyerhaeuser was the only fair result in this case. It was Weyerhaeuser which asked the Court not to declare TFL 39 invalid. Now, Weyerhaeuser says the Court had no jurisdiction to do anything else, except leave the tenure in Weyerhaeuser's hands unfettered. Weyerhaeuser's position is not only wrong in law, it is fundamentally unjust.

D. Weyerhaeuser's Obligation in this Case

184. While a declaration including Weyerhaeuser was within the Court of Appeal's discretionary powers and a necessarily ancillary remedy to the relief against the Crown, this Court may be concerned to know the implications of the finding of a legally enforceable obligation on a third-party resource company.

185. It is important to understand that the doctrinal foundation of Weyerhaeuser's obligation was not a fiduciary or constitutional relationship between resource users and First Nations. Contrary to the submissions of Weyerhaeuser, the Court of Appeal did not create a general obligation on third parties, but rather recognized a specific obligation on a specific company in specific circumstances. Those circumstances included the following:

- (a) The *Forest Act* and TFL 39 allocated fully all timber exclusively to Weyerhaeuser, restricted the Crown's ability to manage the resource thereafter, and imposed on Weyerhaeuser responsibilities relating to consultation with the Haida Nation and the design of its management plan.
- (b) Weyerhaeuser and its predecessor have, for more than a generation, enjoyed a monopoly position on a land base encompassing more than one-quarter of Haida Gwaii, in respect of a resource which is of central cultural, spiritual and economic importance to the Haida.

- (c) Weyerhaeuser has the capacity to have a significant effect on the social and economic interests of the Haida, either negative or positive, through such matters as co-management, employment opportunities, sub-contracting, access to the cutblocks, environmental stewardship and community initiatives.
- (d) While at the time TFL 39 was replaced, Weyerhaeuser may not have fully understood the Crown's obligation to consult and accommodate, Weyerhaeuser well knew of the Haida Nation's case regarding Aboriginal Title and Rights over the land base of TFL 39, and of the history and evidence which established the Haida's good, *prima facie* case of Title and Rights.
- (e) Weyerhaeuser knew, from its involvement in previous legal proceedings, that, if the Haida prove their Aboriginal Title, under the provisions of the *Forest Act*, TFL 39 will be invalid.

186. A number of general principles emerge from these circumstances that could guide future cases – principles which found articulation in the Reasons for Judgment of Mr. Justice Lambert, and could circumscribe the categories of third parties to whom the obligation would extend. In the case at bar:

- (a) The statutory regime conferred responsibilities on the tenure holder with respect to Aboriginal interests in the tenure area.
- (b) The tenure granted exclusive privileges over a substantial area, such that there is a substantial likelihood that the tenure holder's activities will infringe on Aboriginal interests on the one hand, and the tenure holder has the capacity to accommodate those interests, on the other.
- (c) The tenure holder received the tenure with knowledge of a good *prima facie* case of Aboriginal Title and Rights in the tenure area, and knowledge of the possibility that the tenure suffers a legal defect.

187. This set of principles is not exhaustive of the circumstances that might justify a third-party obligation. They are, however, all present in the case at bar. They are dispositive of the present appeal, and illustrative of how future cases might be determined.

188. Before turning to the principles engaged in this case, it should be noted that, far from the flood gates being opened by the declaration in the Court below, as Weyerhaeuser suggests, judges of the B.C. Supreme Court have, since *Haida 2*, only faced a limited number of cases involving private parties, and have shown no difficulty applying the law to the facts. In one case, the Court found that the company attempted to consult, but the Aboriginal complainants failed to avail themselves of the opportunity. In another case, *Haida 2* was distinguished because the company against whom the relief was sought was not the recipient of the tenure.

Heiltsuk Nation v. British Columbia, 2003 B.C.S.C. 1422, at paras. 106-7
Gitksan and other First Nations v. British Columbia (2003), 10 B.C.L.R. (4th) 126 (S.C.)

1. A Statutory Regime that Confers Responsibilities

189. In the case on appeal, Mr. Justice Lambert analyzed the relevant provisions of the *Forest Act* and TFL 39, and found that the legislative and administrative scheme under which Weyerhaeuser enjoyed its privileges carried with it certain responsibilities. Many of those responsibilities are acknowledged by Weyerhaeuser in paragraph 12 of its factum. In brief:

- (a) Weyerhaeuser is required to consult with the Aboriginal Peoples claiming an Aboriginal interest in the area;
- (b) Weyerhaeuser's management plan must specify the measures it will take with respect to Aboriginal interests;
- (c) the District Manager may require Weyerhaeuser to amend a management plan; and

- (d) the District Manager may deny Weyerhaeuser a cutting permit if he or she is of the view that the issuance of the cutting permit would result in an unjustifiable infringement of an Aboriginal interest.

Appellants' Record, Vol. I, pp. 130-134 (*Haida 2*, at paras. 52-59)

190. As Mr. Justice Lambert found, Weyerhaeuser's consultation responsibilities must carry with them an obligation to seek an accommodation. Clearly, this is what is contemplated when the licence provides that the District Manager may deny a cutting permit if he or she is of the opinion that it would result in an *unjustifiable* infringement of an Aboriginal interest. An unjustifiable infringement is one which does not minimally impair or accommodate Aboriginal Title or Rights.

Appellants' Record, Vol. I, p. 134 (*Haida 2*, at para. 60)

191. While Weyerhaeuser's statutory and contractual obligations may on their face be owed to the Crown, their incorporation in the legislative and administrative scheme reflects the practical realities on the ground, as described by Chief Justice Finch. Responsibility for certain aspects of consultation and accommodation creates a relationship of proximity between the tenure holder and the First Nation, and supports the finding of a necessarily ancillary obligation.

192. Significantly, the Province has, since the decision of the Court of Appeal, enacted legislation that reduces the opportunity for Provincial decision-makers to exercise discretion, and increases the discretion allocated to forest companies.¹⁶ In effect, the Province is privatizing

¹⁶ For example:

(i) The *Forest (Revitalization) Amendment Act, 2003*, S.B.C. 2003, c. 30, s. 9, repeals and replaces s. 54 of the *Forest Act*, which required Ministerial consent to transfers of forest tenures such as TFLs (including through corporate change in control of the tenure holders), and allowed the Minister to attach conditions to a consent to the transfer. The BC Supreme Court in the *Gitxsan et. al* case confirmed that consultation and accommodation is required before approval of tenure transfers/change in control of the tenure holder. The new s. 54(1) simply allows the tenure holder to dispose of the agreement to another person, subject to certain requirements, which do not include Ministerial consent. Rather the requirements address matters such as provision of written notice of the intended disposition, and that the disposition "will not unduly restrict competition in the standing timber markets, log markets or chip markets" (s. 54.1). A new s. 54.5 allows changes in control of a corporate licensee (or another corporation that directly controls the licensee) without Ministerial consent.

forest management. The Province is getting out of the business of consultation and accommodation.

193. It has been held in England and New Zealand in the context of privatization that the activities of an otherwise private body may be governed by the standards of public law when its decisions are subject to responsibilities conferred by statute.

Foster v. British Gas PLC, [1991] 2 A.C. 306 (H.L.)
Mercury Energy Ltd. v. Electricity Corp. of NZ Ltd., [1994] 1 W.L.R. 521
 (J.C.P.C.)

194. The extension on the facts of this case is much shorter: TFL 39 is clearly subject to responsibilities conferred by statute and contract with the Crown, and it is appropriate and just to recognize those responsibilities when considering whether a necessarily ancillary obligation is justified in this case. In future cases, the effect of further privatization will need to be considered.

Devlin and Murphy, *supra*, at pp. 204-205

(ii) The *Forest (Revitalization) Amendment Act*, 2003 also repealed provisions that previously provided opportunities to incrementally free up land or timber volume for accommodation of the *Haida*. For example the former *Forest Act*, s. 56 provided for a 5% take-back on tenure transfer or licensee change in control.

(iii) The *Forest (Revitalization) Amendment Act (No. 2)*, 2003, S.B.C. 2003, c. 31, s. 23, amends s. 36 of the *Forest Act*, the provision under which the TFL at issue in this case was replaced. Section 36 required the Minister to offer a replacement approximately every 5 years. The new legislation allows the Minister to wait up to 10 years before offering replacements. This amendment postpones and reduces the frequency of opportunities for the Crown to consult and accommodate by including terms and conditions in TFLs to address aboriginal peoples' concerns.

(iv) At the operational level, the Province has enacted the *Forest and Range Practices Act*, S.B.C. 2002, c. 69 (not yet in force). This Act replaces the requirement under the *Forest Practices Code* (the "Code") to submit a Forest Development Plan (FDP) with a requirement to submit a Forest Stewardship Plan (FSP). In contrast to FDPs, FSPs do not have to identify the location of proposed cutblocks and roads; they must simply identify the boundaries of "forest development units." Those units are areas within which the licensee proposes to harvest timber or construct roads. This will seriously diminish the ability of the *Haida* to ascertain the anticipated impacts of specific activities on their asserted aboriginal title and rights, and thus to engage in consultation. In addition, whereas, under the Code, licensees were required to submit site level plans (silviculture prescriptions) for approval, the new legislation simply requires licensees to prepare, but not for approval, "site plans" for cutblocks and roads prior to commencing harvesting. The site plan must identify the approximate location of cutblocks and roads, but there is no approval and so no opportunity for the Crown to consult and accommodate.

2. Nature of the Tenure – Likelihood of Infringement/Capacity to Accommodate

195. It is painfully obvious that the Haida's Aboriginal Title and Rights will be infringed by the tenure holder. Weyerhaeuser will be harvesting a resource that is central to the Haida's culture and way of life. This is not a case in which the private party's commercial operations may have an incidental effect on Aboriginal Title or Rights, but rather one in which those operations have had, and will continue to have, a substantial impact on the very core of the First Nation's Aboriginal interests.

196. Conversely, Weyerhaeuser has a very real capacity to accommodate the Haida's interests through operational, economic and social initiatives. Weyerhaeuser's dominant position by virtue of the exclusive privileges it enjoys under TFL 39 justifies a share of the responsibility for consultation and accommodation.

197. These realities are reflected in Mr. Justice Lambert's finding that, if and when Weyerhaeuser faces a claim by the Haida for trespass or infringement of Aboriginal Title or Rights, it is only logical to expect that Weyerhaeuser will seek to justify its actions, not simply by resting on the purported authority of TFL 39, but also by demonstrating, if it be the case, that its own efforts at consultation and accommodation justify or mitigate the infringement.

Appellants' Record, Vol. I, pp. 144-150 (*Haida 2*, at paras. 80-87)

198. In *Sparrow*, this Court forecasted the role of private parties in the recognition and affirmation of Aboriginal Rights in Canada:

Suffice it to say that recognition and affirmation require sensitivity to and respect for the rights of aboriginal peoples on behalf of the government, courts and **indeed all Canadians**. (emphasis added)

R. v. Sparrow, supra, at 1114

199. Weyerhaeuser makes much of the fact that the existing justification analysis is restricted to state action¹⁷. However, the fact that the concept of justification has not yet been considered in the context of a claim of infringement or trespass against a private party does not render the

¹⁷ Weyerhaeuser Factum, at paras. 39-44

concepts of consultation and accommodation irrelevant in the case of third parties. This Court's decision in *Delgamuukw* leaves open the possibility of claims by Aboriginal Peoples against third parties in trespass. It would be very surprising if, when those claims advance through the courts, third parties like Weyerhaeuser still take the position that their consultation and accommodation efforts are irrelevant. Clearly, consultation and accommodation will be in their statements of defence; it only makes sense to acknowledge that reality today.

3. Knowing Receipt

200. The concept of knowing receipt, drawn on by Lambert, J.A. from the law of equitable remedies, provides a further factor on which to justify a necessarily ancillary obligation. Weyerhaeuser accepted this tenure with its eyes wide open. Weyerhaeuser knew that the tenure was legally vulnerable. Weyerhaeuser knew well of the Haida's case of Aboriginal Title and Rights. Weyerhaeuser knew that the case had substantial merit. Weyerhaeuser knew that the Haida took the position that the Crown's title to the land and timber of TFL 39 is encumbered by their Aboriginal Title, and that the Crown could not deal freely with TFL 39. Weyerhaeuser knew that if the Haida prove their Title, TFL 39 will be invalid. Weyerhaeuser knew that business as usual since World War I was no longer possible. Weyerhaeuser knew, or ought to have known on reasonable enquiry, that the Crown had not consulted adequately with the Haida in the circumstances, or accommodated their Aboriginal interests.

201. It is not novel to grant remedies against third parties who receive title with knowledge of an intervening interest. Although the principles of restitution may not fit exactly with the circumstances of this case, the informing ethic does. Where a private party receives a substantial tenure with knowledge of unextinguished Aboriginal Title and knowledge that the Crown has not consulted and accommodated the First Nation's Aboriginal interests, or in circumstances that would put a reasonable person on enquiry, then it would be unconscionable for that private party to claim the full privileges of the tenure, but none of the responsibilities. The genius of equity is its flexibility. Equitable remedies are based on what is just in all of the circumstances, and declaratory relief has always been an important equitable remedy. In this case, declaratory relief balances Weyerhaeuser's commercial interest in the validity of the tenure with the constitutional

objective of reconciling the tenure with the Haida's Aboriginal Title. Weyerhaeuser can no longer ignore the Haida as it enjoys the privileges of TFL 39. Knowing receipt, therefore, provides a final, and compelling, justification for the finding of a necessarily ancillary obligation in this case.

Soulos v. Korkontzilas, [1997] 2 S.C.R. 217, at para. 34
Royal Bank v. Fogler, Rubinoff (1991), 84 D.L.R. (4th) 724 (Ont. C.A.), at 733
 Pettit, *Equity and the Law of Trusts*, at p. 380
 Martin, J.E., *Modern Equity* (15th ed.), Sweet & Maxwell, 1997, at p. 34
 Reynolds, J.I., "Aboriginal Title and the Transmission of Fiduciary Obligations from the Crown to Business – Is the Leap of Logic Gallactic or Synaptic?", in *Fiduciary Obligations – 2003*, Continuing Legal Education Society of B.C.

E. The Remedy Fulfils the Purposes of Section 35(1)

202. The most recent judgment of this Court on the subject supports the remedial framework of the declaration made by the Court below. In *Doucet-Boudreau v. Nova Scotia*, in the context of the *Charter* provisions protecting minority language rights, Iacobucci and Arbour, J.J., laid down a purposive approach to *Charter* remedies:

. . . A purposive approach to remedies requires at least two things. First, the purpose of the right being protected must be promoted: courts must draft responsible remedies. Second, the purpose of the remedies provision must be promoted: courts must draft effective remedies.

Doucet-Boudreau v. Nova Scotia (Minister of Education), *supra*, at para. 25

203. Iacobucci and Arbour, J.J., citing this Court's judgment in *Mahe v. Alberta*, [1990] 1 S.C.R. 342, stated that section 23 of the *Charter* "is designed to correct past injustices not only by halting the progressive erosion of minority official language cultures across Canada, but also by actively promoting their flourishing" (para. 27), that section 23 represented "a linchpin in this nation's commitment to the values of bilingualism and biculturalism" (para. 28), and that "minority language education rights [are] particularly vulnerable to government delay or inaction. Every school year the governments do not meet their obligations under section 23 and there is an increased likelihood of assimilation . . ." (para. 29). In interpreting section 24(1) of the *Charter*, Iacobucci and Arbour, J.J. emphasized that, as "part of a constitutional scheme for the vindication of fundamental rights and freedoms" it "should be allowed to evolve to meet the

challenges and circumstances” of new cases, and “that evolution may require novel and creative features when compared to traditional and historical remedial practice because tradition and history cannot be barriers to what reason and compelling notions of appropriate and just remedies demand” (para. 59).

204. This Court, in its previous judgments, has commented on the way in which Aboriginal Rights have historically been vulnerable to governmental disrespect and that section 35 of the *Constitution Act* was “designed to correct past injustices” and to secure a solid foundation in Canadian society for the vindication of Aboriginal Rights. Like minority language rights, Aboriginal Rights are a unique feature of the Canadian constitutional framework, and these rights, like minority language rights, are intended to allow Aboriginal cultures to flourish. As with minority language rights, the reconciliation of rights recognized and confirmed by section 35, has been bedevilled by government delay and inaction. Like the remedy fashioned by the Court in *Doucet-Boudreau*, the remedy drafted by the Court below in this case was just and appropriate in the circumstances.

III. THE CONSTITUTIONAL QUESTION

205. The constitutional question concerns the constitutional validity or application of s. 36 of the *Forest Act*. Section 36 is the statutory provision that requires the Minister to offer a replacement licence at periodic intervals.

206. It has been argued above that there was, at the time TFL 39 was replaced, sufficient discretion in ss. 35 and 36 of the *Forest Act* for the Minister to consult with the Haida and seek workable accommodations of their interests, in part by including appropriate terms and conditions in the replacement licence.

207. To the extent that s.36 or any amendments to the *Forest Act* are interpreted so as to restrict the Minister’s ability to fulfil his fiduciary and constitutional obligations to the Haida, they would be unconstitutional. However, the fact is that, in this case, the Minister did not consult the Haida or attempt accommodate their interests. Accordingly, the Haida’s position is that it is not necessary to answer the constitutional question on this appeal.

PART IV
SUBMISSION ON COSTS

208. The Haida respectfully request that costs be awarded to them from both Appellants in this Court and the Court below, in any event of the cause.

209. The Province was granted leave to appeal on the condition that the Province pay the Haida's costs of the appeal on a party and party basis. These proceedings raise difficult legal issues and address unresolved constitutional issues of national importance. The Haida should not be required to shoulder the financial burden of responding to two appeals of a test case nature.

Thibaudeau v. Canada, [1995] 2 S.C.R. 627, at para. 152
Ruby v. Canada (Solicitor General), 2002 S.C.C. 75, at paras. 64-65
Palachik Estate v. Kiss, [1983] 1 S.C.R. 623, at 639-664

210. Weyerhaeuser should not be relieved from paying costs in either this Court or the Court below. The Haida were successful at both hearings in the Court of Appeal. The Haida should not be required to bear the financial burden of two hearings below, the second of which was requested by Weyerhaeuser.

B. (R.) v. Children's Aid Society of Metropolitan Toronto (1992) 10 O.R. (3d) 321
(Ont. C.A.) at 353-356

**PART V
NATURE OF ORDER SOUGHT**

211. It is respectfully submitted that this appeal be dismissed with costs to the Haida.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of November, 2003.

Louise Mandell, Q.C.

Michael Jackson, Q.C.

Terri-Lynn Williams-Davidson

Bruce Elwood

Clarine Ostrove

Cheryl Sharvit

EAGLE
Counsel for the Respondents,
Council of the Haida Nation, et al

**PART VI
TABLE OF AUTHORITIES**

Tab	Document	Paragraph(s)
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3	<i>Calder v. Attorney General of British Columbia</i> , [1973] S.C.R. 313	
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Tab	Document	Paragraph(s)
	Cases	
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16	<i>Harelkin v. University of Regina</i> , [1979] 2 S.C.R. 561	171
17	<i>Heiltsuk Nation v. British Columbia</i> , 2003 B.C. S. C. 1422	188
18	<i>Kourtessis v. Canada (Minister of National Revenue)</i> , [1993] 2 S.C.R. 53	168
19	<i>Luuxhon v. The Queen (No.2)</i> , Unreported, No. C981165, BCSC, March 28, 1999, per Williamson, J., p.28	144-145
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21	<i>Mercury Energy Ltd. v. Electricity Corp. of NZ Ltd.</i> , [1994] 1 W.L.R. 521 (J.C.P.C.)	193
22	<i>Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)</i> , [2002] 1 C.N.L.R. 169 (F.C.T.D.)	128-129
23	<i>Mitchell v. Minister of National Revenue</i> , [2001] 1 S.C.R. 911	75
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27(a)	<i>R. v. Gladstone</i> , [1996] 2 S.C.R. 723	122
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Tab	Document	Paragraph(s)
	Cases	Paragraph(s)
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	Statutes and Rules	Paragraph(s)
45	<i>British Columbia Rules of Court</i> , Rules 5(22) and 52 (11)(d)	165, 169
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Tab	Document	Paragraph(s)
	Statutes and Rules	
47	<i>Constitution Act, 1982</i> , ss. 35(1) and 52	38, 42
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