

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

BETWEEN:

THE MINISTER OF FORESTS AND THE ATTORNEY GENERAL
OF BRITISH COLUMBIA on behalf of Her Majesty the Queen
in right of the Province of British Columbia

APPELLANTS
(RESPONDENTS)

AND:

COUNCIL OF THE HAIDA NATION and GUUJAAW, on their own behalf
and on behalf of all members of the Haida Nation

RESPONDENTS
(APPELLANTS)

AND BETWEEN:

WEYERHAUSER COMPANY LIMITED

APPELLANT
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AND:

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and on behalf of all members of the Haida Nation

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OVERVIEW

1. The primary issue raised in this case is whether provinces have a freestanding enforceable legal and equitable duty to consult with aboriginal peoples upon the assertion of a s. 35 right.
2. It is the position of the Attorney General of Ontario that:
 - (a) Section 35 of the *Constitution Act, 1982* provides a comprehensive framework for dealing with aboriginal rights, including assertions of aboriginal rights. It is neither necessary nor desirable to create unprecedented duties in fiduciary law in order to ensure that s. 35 rights claimants have adequate interim relief pending determination of their rights;
 - (b) Provincial Crowns are not in a general fiduciary relationship with aboriginal peoples. For historic and constitutional reasons, it is only the federal Crown that is in such a general fiduciary relationship; and
 - (c) The B.C. Court of Appeal erred in granting a declaration requiring the provincial Crown and Weyerhaeuser to consult with the First Nation and to accommodate its interests. In essence, the declaration issued by the Court of Appeal was, and was intended to be, in the nature of an interlocutory injunction. The Court of Appeal should have applied well-established legal principles and required the Respondents to seek an interlocutory injunction if they wished to preserve asserted interests prior to the outcome of the legal proceedings.

**PART I
STATEMENT OF FACTS**

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

Is s. 36 of the *Forest Act*, R.S.B.C. 1996, c. 157, of no force or effect to the extent that the replacement of T.F.L. No. 39 violated any right of the Haida Nation, as recognized and affirmed by s. 35 of the *Constitution Act, 1982*, to be consulted and to have their asserted aboriginal rights accommodated prior to replacement?
4. The Attorney General of Ontario intervenes as of right pursuant to Rule 61(4) of the *Rules of the Supreme Court of Canada*, notice of which was served and filed on July 31, 2003.
5. The Attorney General of Ontario takes no position on the facts of the appeal.

**PART II
POINTS IN ISSUE**

6. The constitutional question stated by Gonthier J. gives rise to four issues on which the Attorney General of Ontario takes the following position:
 - (a) Section 35 of the *Constitution Act, 1982* provides a comprehensive legal framework, in terms of both scope and content, for the consideration of aboriginal rights, including assertions of aboriginal rights;
 - (b) The proper approach to address asserted s. 35 rights pending their ultimate determination is provided by the law of interlocutory relief;
 - (c) Provincial Crowns are not in a general fiduciary relationship with aboriginal peoples and, in any event, fiduciary relationships do not necessarily give rise to fiduciary duties; and

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

PART III ARGUMENT

A. Section 35 of the *Constitution Act, 1982* provides a comprehensive framework

7. The Attorney General of Ontario submits that s. 35 of the *Constitution Act, 1982* provides a comprehensive legal framework to deal with aboriginal rights claims. Assertions of s. 35 rights should be addressed within the existing s. 35 framework and not pursuant to a *sui generis* aboriginal law fiduciary framework.

8. First, unlike fiduciary obligations, s. 35 of the *Constitution Act, 1982* applies equally to all government actors, including both the federal and provincial Crowns. As a result, if s. 35 is employed to deal with assertions of aboriginal rights then a uniform legal approach can be employed across the country.¹

RWDSU v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573 at pp. 593-603;
Reference re Secession of Quebec, [1998] 2 S.C.R. 217 at p. 247, para. 47.

9. Second, s. 35 promotes the reconciliation of aboriginal and non-aboriginal interests in a way that fiduciary law is not equipped to do. Section 35 focuses on reconciling the prior occupation of Canada by aboriginal peoples with the assertion of European sovereignty. In *Gladstone*, this Court emphasized the need to reconcile s. 35 rights with the interests of the broader community:

Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole equally a necessary part of that reconciliation. [Emphasis in original.]

¹ The differential application of fiduciary obligations to the federal and provincial Crowns is discussed below in Part C of the argument.

R. v. Gladstone, [1996] 2 S.C.R. 723, at pp. 774-75, para. 73; passage affirmed with added emphasis in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at p. 1108, para. 161. This Court introduced reconciliation as the purpose of s. 35 in *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at pp. 539, 550-51, paras. 31, 49-50.

10. In *Sparrow*, this Court read a justification component into the s. 35 framework precisely to allow governments the opportunity to balance aboriginal interests with competing non-aboriginal interests. This flowed from the recognition that no rights are absolute in a democratic society.

R. v. Sparrow, [1990] 1 S.C.R. 1075, at pp. 1108-1110.

11. In contrast, the law of fiduciary obligations traditionally does not look to the interests of parties other than the beneficiary, because it is designed to protect the best interests of the beneficiary to the exclusion of other interests. This was the approach adopted by Lambert J.A. in the Court of Appeal below when he stated that “the interests of the aboriginal people, to whom the fiduciary duty is owed, must not be subordinated by the Crown to competing interests of other persons to whom the Crown owes no fiduciary duty”.

Lac Minerals Ltd. v. International Corona Resources Ltd., [1989] 2 S.C.R. 574, at pp. 646-49; *K.L.B. v. British Columbia*, 2003 SCC 51, at paras. 38-49; decision of B.C. Court of Appeal below on August 19, 2002 (“*Haida No. 2*”), at para. 62, Appellants’ Record, v. 1, p. 135.

12. The protection of beneficiaries is at the heart of fiduciary law. Although in the aboriginal context, a *sui generis* law of fiduciary obligations has been established where the Crown is “no ordinary fiduciary”, the primary objectives remain acting in the best interests of an aboriginal beneficiary and protecting the beneficiary from an exploitative bargain.

Wewaykum Indian Band v. Canada, 2002 SCC 79, at para. 96; *Guerin v. Canada*, [1984] 2 S.C.R. 335; *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344.

13. While this Court has described s. 35 obligations as being fiduciary in nature, on the basis that fiduciary concepts are a “guiding principle” to describe the nature of s. 35 constitutional protection, the use of fiduciary language in a descriptive fashion does not make s. 35 rights synonymous with *Guerin*-type fiduciary situations.

Sparrow, supra, at p. 1108.

14. Fiduciary law is primarily concerned with protecting the interests of beneficiaries, while s. 35 is primarily concerned with reconciling aboriginal and non-aboriginal interests. Fiduciary principles are therefore put under unnecessary stress if assertions of s. 35 rights are dealt with pursuant to fiduciary law. Furthermore, the reconciliation purpose of s. 35 risks being undermined, if not lost altogether, if asserted s. 35 rights are dealt with under the rubric of fiduciary law.

15. It would also be unprecedented to deal with asserted s. 35 rights pursuant to fiduciary law, but with established s. 35 rights pursuant to the s. 35 legal framework. There is no basis to warrant separate doctrinal approaches to the consideration and protection of these rights. Just as compliance with the *Charter* is considered exclusively pursuant to a *Charter* jurisprudence framework, it is submitted that compliance with s. 35 should be considered exclusively pursuant to a s. 35 framework.

16. The Ontario Court of Appeal considered this very issue in *TransCanada Pipelines*, and rejected the elevation of consultation to an independently enforceable legal obligation. Instead, the Court of Appeal concluded that issues of consultation with respect to asserted s. 35 rights should be dealt with exclusively within the existing s. 35 legal framework:

In my view, O'Driscoll J. incorrectly applied the concept of the Crown's duty to consult with First Nations ... he elevated the Crown's duty to consult with First Nations from merely being one, of several, justifiatory requirements to be met by the Crown when a challenge is mounted to a law, or government action, on the ground that it unduly

interferes with Aboriginal rights or treaty rights recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*, to an independent ground on which such a law, or government action, may be challenged.

TransCanada Pipelines Ltd. v. Beardmore (Township) (2000), 186 D.L.R. (4th) 403 (Ont. C.A.), at p. 452, para. 112; leave to appeal to S.C.C. dismissed October 19, 2000, [2000] S.C.C.A. No. 264.

(i) The development of s. 35

17. Prior to 1982, consultation with aboriginal peoples was only legally required when a government had undertaken to exercise control over a cognizable aboriginal interest. For instance, in *Guerin* this Court held that the federal government had to consult with aboriginal peoples prior to surrender of their reserve lands and act in the best interests of the aboriginal beneficiaries upon sale or lease of those lands, including following any instructions received from the beneficiaries in the consultation exercise regarding the disposition of the lands.

Guerin, supra, at pp. 388-89; *Weywaykum, supra*, at paras. 74-85.

18. At that time, however, governments were legally able to unilaterally infringe common law aboriginal rights, and the common law did not demand that any such infringement or extinguishment be justified.

R. v. Badger, [1996] 1 S.C.R. 771, at pp. 812 and 815, paras. 77 and 84.

19. Post-1982, the legal requirements placed on governments changed. Due to constitutional reform, all levels of government entered a new era of Crown-aboriginal relations. In *Sparrow*, this Court read in a justification component into s. 35 analogous to s. 1 justification under the *Charter*. This development resulted in governments needing to take additional steps in order to constitutionally infringe aboriginal rights.

Sparrow, supra, at pp. 1108-09; *R. v. Agawa* (1988), 65 O.R. (2d) 505 (C.A.), at p. 524-25.

20. Precisely what steps are required to justify an infringement of a right protected by s. 35 is a product of context – both of the nature of the right at issue and the nature of the potentially infringing action. All that can be stated with legal certainty is that some evidence of government consultation, accommodation, compensation or proof of a more-compelling public interest is required for a government to justify an infringement of a right protected by s. 35.

Sparrow, supra, at pp. 1111-19; *Gladstone, supra*, at pp. 763-75, paras. 56-75.

21. It is problematic to assess the sufficiency of justificatory steps required before the precise nature and scope of the relevant s. 35 right or rights is known. As Lamer C.J. stated for this Court in *Delgamuukw*, the “degree of scrutiny is a function of the nature of the aboriginal right at issue”. Absent such certainty regarding the right, the nexus between the potential infringement and the required justificatory steps is impossible to determine.

Delgamuukw, supra, at p. 1109, para. 163. See also *Sparrow, supra*, at p. 1119, where it was stated that the questions to be addressed in the justification analysis depend “on the circumstances of the inquiry”.

22. In *R v. Marshall*, McLachlin J., as she then was, captured the difficulty of discussing accommodation and justification in the absence of an undefined right:

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 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, at p. 530, para. 112.

23. This is similar to the *Charter* context, where a *Charter* rights claimant could not obtain a declaration that the government implement an alternative legislative approach to ensure compliance with the s. 1 justification test prior to a judicial finding that the impugned legislation violates *Charter* rights. Similarly, a s. 35 rights claimant should not be entitled to put justification before rights

infringement and obtain a remedy at an interim stage in the proceedings that effectively determines the constitutional issues in dispute.

(ii) Operation of s. 35

24. The Attorney General of Ontario submits that, in practice, upon the assertion of a s.35 right, prudent governments take reasonable steps in good faith to assess whether there is a valid concern regarding the potential infringement of the asserted right. This may include information sharing and a dialogue regarding the nature of the asserted right and the proposed government conduct. If there is a valid concern, justificatory steps by the government are warranted. The precise nature of the justificatory steps varies with context, as justification depends on the nature of both the right and infringement at issue.

25. A government need not take justificatory steps unless it determines that an asserted right exists and that the right will be infringed by the impugned action. The Ontario Court of Appeal held that justification was not required in *TransCanada Pipelines* after reviewing the strength and scope of the asserted rights:

...from this inadequate evidentiary record, in my view, it is speculative whether such treaty or Aboriginal rights, should they exist, will be impacted adversely by the restructuring proposal.

As well, to the extent that it is relevant, there was also a serious deficiency as to the particulars of the First Nation respondents' land claims, including the status of the negotiations and precisely how the creation of a new municipality would in fact impede, or jeopardize, the resolution of the claims.

TransCanada Pipelines Ltd., *supra*, at pp. 454-55, paras. 121-22.

26. In Ontario, there is a wide range of s. 35 rights assertions, including treaty rights, aboriginal rights and aboriginal title. As in the *TransCanada Pipelines* case, some of these claims prove to be either unsubstantiated or unmeritorious. Many of these claims potentially impact on a wide-range of provincial or provincially-

authorized activities, including forestry, mining, environmental protection, wildlife conservation, and infrastructure development. The creation of a free-standing duty to consult irrespective of the merits of the claim has the potential to encourage a “whole spectrum of possible complaints” so as to seriously restrict and delay government operations.

Weywaykum, supra, at para. 82.

27. In those instances where s. 35 rights assertions merit a government taking justificatory steps, the use of a reasonableness standard in assessing the government’s response to an asserted aboriginal right is in accord with this Court’s s. 35 jurisprudence. In *Nikal*, for example, Cory J. for the majority stated:

It can, I think, properly be inferred that the concept of reasonableness forms an integral part of the *Sparrow* test for justification. ... So long as every reasonable effort is made to inform and to consult, such efforts would suffice to meet the justification requirement.

R. v. Nikal, [1996] 1 S.C.R. 1013, at p. 1065, para. 110. See also *Gladstone, supra*, at pp. 767-68, para. 63 where a parallel was drawn to the reasonableness standard in the doctrine of minimal impairment under s. 1 of the *Charter*.

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

B. The proper approach to address asserted aboriginal rights pending their ultimate determination is provided by the law of interlocutory relief

29. The central issue for this Court concerns the best way for aboriginal groups to seek interim relief to protect an asserted s. 35 right. Such relief can be attained pursuant to existing common law remedies within the s. 35 legal framework, and does not require the creation of an independently enforceable fiduciary duty in order to preserve asserted s. 35 rights.

30. An aboriginal rights claimant can bring an action to seek a declaration that the right at issue exists and challenge the constitutionality of the impugned government action. In situations where the aboriginal rights claimant is concerned that waiting for a remedy at trial will make the remedy insufficient, interlocutory relief can be sought.
31. This is the approach to interlocutory relief in constitutional cases that has been adopted in the *Charter* context. In *RJR-MacDonald*, this Court examined whether there are “special considerations or tests which must be applied by the courts when *Charter* violations are *alleged* and the interim relief which is sought involves the execution and enforceability of legislation?” (emphasis added). The same situation is now before this Court with respect to alleged s. 35 violations.
- RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at p. 334, para. 40.
32. This Court in fact referred to an aboriginal rights claim in *RJR-MacDonald* when providing illustrations of cases involving irreparable harm that “cannot be quantified in monetary terms”, indicating that one such instance is “where a permanent loss of natural resources will be the result when a challenged activity is not enjoined”.
- RJR-MacDonald, supra*, at p. 341, para. 59;
MacMillan Bloedel Ltd. v. Mullin, [1985] 3 W.W.R. 577 (B.C.C.A.).
33. This is exactly the fact situation encountered in the instant case. The Court of Appeal below was aware of the suitability of employing the law of injunctions to resolve this type of dispute:

The interlocutory injunction process continues to be a valuable interim process for balancing competing interests while litigation is pending. It provides a framework for reconciling competing interests on the basis of standards which can be used for weighing, on a preliminary basis, the validity of all or some aspects of the claims to title and rights, and which can be used for assessing the balance of inconvenience in the granting of an interlocutory injunction over all or part of the area claimed and in relation to some or all of the interests claimed.

Decision of B.C. Court of Appeal below on February 27, 2002 ("*Haida No. 1*"), at para. 12, Appellants' Record, v. 1, p. 54.

34. The Court of Appeal, however, rejected the interlocutory injunction approach in favour of a free-standing fiduciary law approach, which the Attorney General of Ontario submits was inappropriate in the circumstances of this case:

But the interlocutory injunction process is not necessarily suitable for balancing competing interests in every case. If there are obligations with respect to consultation and accommodation between the parties which are in effect as binding legal obligations before title is declared, then the exercise of those obligations may provide an alternative framework to the interlocutory injunction in the period preceding final determination of aboriginal title or rights by treaty or by a Court of competent jurisdiction.

Haida No. 1, para. 14, Appellants' Record, v. 1, p. 55.

35. The B.C. Court of Appeal's approach in *MacMillan Bloedel* is a full answer to the issue presently before this Court. The issue in that case was identical to the issue in the present appeal, namely "what is to happen on Meares Island in the period before the actions come to trial?"

MacMillan Bloedel, *supra*, per Seaton J.A., at p. 580, para. 1.

36. Seaton J.A., in the lead majority judgment, granted the Band's request for an interlocutory injunction. He had no difficulty in accepting that there was a serious issue to be tried, given the extent of the evidence put forward by the Band with respect to its claim to aboriginal title. On the issues of irreparable harm and balance of convenience, Seaton J.A. concluded that "the position of the Indians is far stronger than that of *MacMillan Bloedel*" because of the impossibility of returning the forest after it had been logged, the unique cultural value of the forest to the aboriginal community, and the unacceptability of preserving a status quo where aboriginal rights are ignored.

MacMillan Bloedel, *supra*, at pp. 584, 591-92, paras. 17 and 68. Lambert and Macfarlane J.J.A. wrote separate judgments concurring with Seaton J.A.

37. The result on the ground of granting this injunction (along with other events that transpired as a result of the injunction having been granted) was that a joint venture agreement was entered into between MacMillan Bloedel and the Central Region Nuu-chah-nulth First Nations to establish Iisaak Natural Resources Ltd., a company that conducts “conservation-based forestry” in Clayoquot Sound and that is owned 51 percent by the First Nations (through Ma-Mook Natural Resources Limited) and 49 percent by MacMillan Bloedel (now by Weyerhaeuser).

For an overview and historic timeline see www.iisaak.com.

38. It is open to the courts to contextualize the *RJR-MacDonald* test to take account of unique aboriginal interests. As noted above, the nature of what constitutes irreparable harm in the aboriginal law context may well be different from other legal contexts, including the *Charter* context. In addition, when assessing the balance of convenience there are a number of factors unique to the aboriginal law area that could potentially be taken into account. These include the relative situations of the parties and recognition of the substantive promise of s. 35. The Attorney General of Ontario submits that developing the factors to be taken into account under the *RJR-MacDonald* test in the aboriginal law area is preferable to manipulating the law of fiduciary obligations to respond to s. 35 rights assertions prior to their determination.

39. A s. 35 rights claimant should therefore be required to seek an interlocutory injunction if the claimant wants to preserve its asserted interests at an interim stage. If the Respondents had been required by the lower courts to seek such relief in the instant case, issues regarding irreparable harm and the balance of convenience would have been assessed by the court to which the application was made.

40. Although the Respondents submit that it was only after the Court of Appeal’s decision that there was an effort by the Appellants to accommodate their concerns, there is no reason to believe that a similar result would not have flowed

from the granting of an interlocutory injunction, just as it did in *MacMillan Bloedel*.

Respondents' Factum, para. 141.

41. What the courts cannot do, however, is make a declaration regarding a breach of a s. 35 right prior to the conclusion of a legal proceeding to determine that very issue. In the instant case, the Court of Appeal therefore erred in suggesting that one possible interim remedy was a declaration that TFL 39 is invalid. As the Court of Appeal went on to suggest, the validity of TFL 39 can only be established after the trial of the issues in dispute, in which full submissions and evidence are entered on the existence, nature and scope of the asserted rights, any potential infringements of those rights by TFL 39, and justification of any such infringements. As LaForest J. stated for this Court in *Kourtessis*, "the declaration by its nature merely states the law without changing anything".

Haida No. 1, at para. 59, Appellants' Record, v. 1, p. 86; *Kourtessis v. Canada (Minister of National Revenue)*, [1993] 2 S.C.R. 53, at p. 86, para. 43.

42. Similarly, it would have been inappropriate for the Court of Appeal to have granted a declaration requiring consultation based on a breach of s. 35 given that the rights and obligations of the parties under s. 35 remain in dispute. A breach of s. 35 can only be declared after the full s. 35 legal framework is applied, that is after issues of existence of the asserted rights, infringement of the rights, and justification of infringement have been dealt with.

C. Provincial Crowns are not in a general fiduciary relationship with aboriginal peoples and, in any event, fiduciary relationships do not necessarily give rise to fiduciary duties

43. The B.C. Court of Appeal concluded that the provincial Crown has a freestanding enforceable legal and equitable duty to consult and accommodate upon the assertion of an aboriginal right. Lambert J.A., writing for the court in its first

decision, stated that the source of this duty is the Crown's "trust-like relationship" with aboriginal peoples, which he equated with "a fiduciary duty owed by both the federal and provincial Crown to the aboriginal people".

Haida No. 1, paras. 33 and 34, Appellants' Record, v. 1, p. 71.

44. The Attorney General of Ontario submits the Court of Appeal erred in its understanding and application of fiduciary principles, particularly with respect to its conclusion that the provincial and federal governments equally owe a fiduciary duty to aboriginal people and that the duty to consult "stands on the broader fiduciary footing of the Crown's relationship with the Indian peoples who are under its protection".

Haida No. 1, para. 55, Appellants' Record, v. 1, p. 85.

(i) The historic and constitutional position of provincial Crowns

45. Contrary to Lambert J.A.'s conclusion that both the federal and provincial Crowns owe a fiduciary duty to aboriginal peoples, the Attorney General of Ontario submits that provincial Crowns are not in a general fiduciary relationship with the aboriginal peoples within their boundaries. This legal reality is a product of both history and the constitutional division of powers.

46. The history of Crown-aboriginal relations in Canada in fact places the federal Crown in a distinct legal position to the provincial Crowns. The relevant history was reviewed by Strong J. of this Court in *St. Catharine's Milling* (dissenting, but not on this point):

Then it is to be borne in mind that the control of the Indians and of the lands occupied by the Indians had, until a comparatively recent period, been retained in the hands of the Imperial Government... Further, it is to be observed, that by the terms of the 24th sub-section the power to legislate concerning Indians, as distinct from lands reserved, is expressly assigned to the Dominion Government, and this legislative power appears, by the tacit acquiescence of all the new Governments called into existence by confederation, to include the burden of providing for

the necessities of the Indians, which has since been borne exclusively by the Government of the Dominion.

St. Catharine's Milling and Lumber Co. v. Ontario (Attorney General) (1887), 13 S.C.R. 577, at p. 614 (aff'd (1888), 14 A.C. 46 (P.C.)).

See also *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159, at p. 183, where Iacobucci J. stated, for the Court, that "It is now well settled that there is a fiduciary relationship between the federal Crown and the aboriginal peoples of Canada: *Guerin v. The Queen*" (emphasis added); and *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, at p. 143.

47. The special historic relationship between the *federal* Crown and aboriginal peoples is a continuance of the Imperial Crown's relationship with aboriginal peoples in Canada, as evidenced by the *Royal Proclamation of 1763*. Upon Confederation, this relationship was continued by the federal Crown acting pursuant to the jurisdiction assigned to it by s. 91(24) of the *Constitution Act, 1867*. It is the exclusive federal jurisdiction in this area that provides the federal Crown with a much broader constitutional capacity to take actions that are capable of establishing a fiduciary duty owed to aboriginal peoples.

On the history of s. 91(24) see Hogg, *Constitutional Law of Canada, looseleaf ed.*, (Toronto: Thomson Carswell, 2002 update), at para. 27.1(a).

48. This does not mean that provinces cannot incur fiduciary obligations to aboriginal peoples. The critical point is that any such obligations arise through particular conduct on behalf of a provincial Crown (the second type of fiduciary obligation discussed by LaForest J. in *Lac Minerals*), not pursuant to a general relationship such as the special historic relationship that exists between the federal Crown and aboriginal peoples (the first type of fiduciary obligation discussed by LaForest J. in *Lac Minerals*). The contrast between the general fiduciary obligations of the federal Crown and the specific fiduciary obligations of the provincial Crown is captured in the Ontario Court of Appeal's decision in *Bear Island*:

"I am doubtful whether the provincial Crown owes fiduciary duties to aboriginal people that, on breach, would allow for the transfer of land. The fiduciary duty of the Crown to aboriginal people is fundamentally a duty of the federal Crown. It is the federal government that has legislative responsibility for Indians and lands reserved for Indians under s. 91(24) of the Constitution Act, 1867.

...

... the province's duty is "a restraint against regulations improperly affecting aboriginal [or treaty] rights." Breach of the duty may render the regulation unenforceable against aboriginal people exercising these rights. But the fiduciary duty owed by the provincial Crown is a "shield and not a sword"."

Bear Island Foundation v. Ontario (1999), 126 O.A.C. 385 at p. 394; *Lac Minerals Ltd.*, *supra*, at pp. 646-49.

49. Provincial Crowns must therefore act in a fiduciary-like capacity when they undertake actions that infringe or are likely to infringe a constitutionally protected aboriginal or treaty right. However, outside of s. 35(1) rights, the provinces are not subject to fiduciary obligations to aboriginal peoples unless they take specific steps that create a fiduciary duty.

For an application of this approach to provincial obligations in the s. 35 context see *Perry v. Ontario*, (1997), 33 O.R. (3d) 705 (C.A.), at pp. 733-34; leave to appeal to SCC dismissed, S.C.C. Bulletin, 1997, p. 2249.

50. The requirement for such specific steps was described by McLachlin J., as she then was, in *Norberg v. Wynrib* (dissenting, but on the basis that a fiduciary obligation should have been imposed):

...an imbalance of power is not enough to establish a fiduciary relationship. It is a necessary but not sufficient condition. There must also be the potential for interference with a legal interest or a non-legal interest of "vital and substantial 'practical' interest." And I would add this. *Inherent in the notion of fiduciary duty, inherent in the judgments of this Court in Guerin and Canson, is the requirement that the fiduciary have assumed or undertaken to "look after" the interest of the beneficiary. ... It is not easy to bring relationships within this rubric. (emphasis added)*

Norberg v. Wynrib, [1992] 2 S.C.R. 226, at p. 292.

51. While provincial Crowns must comply with the requirements of s. 35 of the *Constitution Act, 1982*, provincial Crowns have not generally promised, and do not have the constitutional capacity to promise, to “look after” the best interests of all aboriginal peoples within their jurisdiction. It is only the federal Crown that has the constitutional capacity and has taken the legislative and executive actions to look after these interests. In *Mitchell v. Peguis Indian Band*, LaForest J. stated, for the majority, that the “provincial Crowns bear no responsibility to provide for the welfare and protection of native peoples...”

Mitchell, supra, at p. 143.

(ii) Triggering a fiduciary duty

52. Even if provinces are in a general fiduciary relationship with aboriginal peoples, which the Attorney General of Ontario submits they are not, this Court affirmed in *Weywaykum* that not all interactions between parties in a fiduciary relationship result in fiduciary obligations. Binnie J., for the Court, stated that invoking a fiduciary duty as a source of plenary Crown liability “covering all aspects of the Crown-Indian band relationship overshoots the mark”.

Weywaykum, supra, at para. 81.

53. The fiduciary duty imposed on the Crown “does not exist at large but in relation to specific Indian interests”. In order to trigger a fiduciary duty, there must be a fiduciary relationship and control by the fiduciary over a cognizable interest of the beneficiary. The Court of Appeal did not have the benefit of this Court’s decision in *Weywaykum* when it rendered its decisions in this case.

Weywaykum, supra, at paras. 81, 85, 91-92.

54. A duty to consult does not necessarily flow from a finding that a government is in a fiduciary relationship with the s. 35 rights claimant. It is only upon the

establishment of a fiduciary duty that an independently enforceable legal obligation to consult with respect to the beneficiary's interests can be established. In this case, a fiduciary duty with respect to the lands at issue had not been established and therefore there was no legal basis for the Court of Appeal's declaration based on a breach of fiduciary duty.

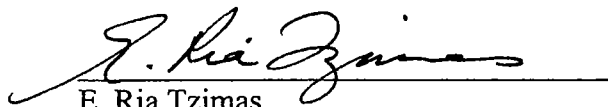
D. Governments are responsible for compliance with s. 35, but may rely on the activities of third parties to demonstrate justification of any infringements

55. On the issue of third-party obligations, the Attorney General of Ontario submits that s. 35 of the *Constitution Act, 1982* constrains government action. As a matter of practical reality, however, governments have numerous third parties involved in day-to-day operations on Crown lands. Governments routinely work with these third parties and review their conduct through various mechanisms, including legislative and regulatory requirements as well as contractual requirements.
56. As a result, when it comes to taking steps to justify a potential infringement of a right protected by s. 35, governments should be allowed to rely on the actions of third parties in the justification analysis. While governments are ultimately accountable to ensure that justification, if necessary, is achieved, it will often be third parties that have the resources and project-specific knowledge to concretely engage with s. 35 rights-holders to ensure that consultation, accommodation and possibly financial compensation occur.

**PART IV
NATURE OF ORDER SOUGHT**

57. The Attorney General of Ontario respectfully submits that the constitutional question be answered in the negative.

ALL OF WHICH IS RESPECTFULLY SUBMITTED ON December 17, 2003



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**PART V
LIST OF AUTHORITIES**

Cases:	Paragraph(s)
1. <i>Bear Island Foundation v. Ontario</i> (1999), 126 O.A.C. 385	48
2. <i>Blueberry River Indian Band v. Canada</i> , [1995] 4 S.C.R. 344	12
3. <i>Delgamuukw v. British Columbia</i> , [1997] 2 S.C.R. 1010	9, 21
4. <i>Guerin v. Canada</i> , [1984] 2 S.C.R. 335	12, 17
5. <i>K.L.B. v. British Columbia</i> , 2003 SCC 51	11
6. <i>Kourtessis v. Canada (Minister of National Revenue)</i> , [1993] 2 S.C.R. 53	41
7. <i>Lac Minerals Ltd. v. International Corona Resources Ltd.</i> , [1989] 2 S.C.R. 574	11, 48
8. <i>MacMillan Bloedel v. Mullin</i> , [1985] 3 W.W.R. 577 (B.C.C.A.)	32, 35, 36
9. <i>Mitchell v. Peguis Indian Band</i> , [1990] 2 S.C.R. 85	46, 51
10. <i>Norberg v. Wynrib</i> , [1992] 2 S.C.R. 226	50
11. <i>Perry v. Ontario</i> (1997), 33 O.R. (3d) 705 (C.A.), leave to appeal to SCC dismissed, SCC Bulletin, 1999, p. 2249	49
12. <i>Quebec (Attorney General) v. Canada (National Energy Board)</i> , [1994] 1 S.C.R. 159	46
13. <i>R. v. Agawa</i> (1988), 65 O.R. (2d) 505 (C.A.)	19
14. <i>R. v. Badger</i> , [1996] 1 S.C.R. 771	18
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17. <i>R. v. Nikal</i> , [1996] 1 S.C.R. 1013	27
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19. *R. v. Van der Peet*, [1996] 2 S.C.R. 507 9
20. *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 31, 32
21. *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 8
22. *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 8
23. *St. Catharine's Milling and Lumber Co. v. Ontario (Attorney General)* (1887), 13 S.C.R. 577, aff'd (1888), 14 A.C. 46 (P.C.) 46
24. *TransCanada Pipelines Ltd. v. Beardmore (Township)* (2002), 186 D.L.R. (4th) 403 (Ont. C.A.) 16, 25
25. *Wewaykum Indian Band v. Canada*, 2002 SCC 79 12, 17, 26, 52, 53

Legislation:

26. *Constitution Act, 1982*, s. 35 1, 2, 3, 6, 7, 8, 9, 10, 13, 14, 15, 16, 19, 20, 21, 23, 24, 26, 27, 28, 29, 31, 38, 39, 41, 42, 49, 51, 54, 55, 56
27. *Royal Proclamation of 1763* 47

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28. Hogg, *Constitutional Law of Canada, looseleaf ed.*, (Toronto: Thomson Carswell, 2002 update) 47