

PART ISTATEMENT OF FACTS

1. The Intervenor, Village of Port Clements (“Port Clements”) adopts the facts as set forth in the factum of the Respondent’s Council of The Haida Nation (“Haida Nation”), and sets out the following relevant facts.
2. Port Clements is located in the centre of Graham Island of Haida Gwaii. It is a largely non-Aboriginal community of 536 residents with a history going back to 1907. The majority of its working residents are employed by Weyerhaeuser Company Limited in its logging operation on Block 6. Port Clements is dependent upon the continued operation of logging on Graham Island and the sustainability of logging over the long term. Port Clements has made countless representations to licensees and the Province regarding the concerns of the community in relation to forest management initiatives and the impact of these on the stability and well-being of the Village.

Dale Lore Affidavit, December 15, 2003, paras. 2, 5, 10, 17, 22 and 23.

3. Sustainable forest harvest levels is a principal concern for both the Haida and Island communities on Haida Gwaii. Both communities are concerned that the current allowable annual cut (AAC) on Haida Gwaii is unsustainable:

One of the primary concerns of both Haida and non-Haida Islands residents that led to the formation of ICSI [Island Community Stability Initiative] was that the AAC on Haida Gwaii is too high, being based on the assumption that “all operable mature timber” will be harvested. From ICSI’s perspective, an inventory and planning process is necessary to determine sustainable levels of harvest, and ICSI’s goal was to establish sustainable levels of harvest by 1999.

Affidavit of Leslie Johnson, May 31, 2000, Respondents’ Record, Vol. III, p. 437

PART IIPOINTS IN ISSUE

4. Port Clements accepts the points in issue as described in the factum of the Respondent, Haida Nation.

PART IIIARGUMENT

5. Port Clements will make submissions on two points:
  1. the Court of Appeal's order is the best available remedy to balance the interests of the Haida and the public, both aboriginal and non-aboriginal;
  2. the Court of Appeal's order gives meaningful content to the Crown's fiduciary duty to the Haida Nation and is supported by this Court's jurisprudence.

Need to Balance Competing Interests

6. The Village of Port Clements submits that the decision by the Court of Appeal is the correct approach in order to provide the opportunity to balance Haida rights and title, the public interest and the interests of industry.
7. Port Clements supports an outcome that will address the interests of the Haida people at the present time and will ensure that there is an ecologically sustained forest resource that will maintain and perpetuate the local Haida and Island community. Port Clements submits that the decision of the Court of Appeal will provide an opportunity to achieve this goal.
8. Port Clements submits that it will be next to impossible to protect the interests of the Haida and the public interest of Port Clements after Haida Gwaii has been logged beyond sustainable limits. This would be a case of closing the barn door after the horses have bolted.
9. The remedy ordered by the Court of Appeal is the best available method for achieving long-term sustainability for both the Haida and local Island communities.

10. The concerns and aspirations of the Village of Port Clements are a significant aspect of the public interest. Port Clements is part of that broader public community whose interests the Crown must reflect in the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.

*R. v. Gladstone*, [1996] 2 SCR 723 at para. 73

11. The resolution of the question before the Court goes to the continued existence of Port Clements as a community. While the residents of Port Clements are dependent upon logging operations for their livelihood, they are also socially and economically integrated into the local Haida community. The members of these communities live and work together and share much of the same long-term vision of sustainability of the forest and the future of Haida Gwaii.
12. Port Clements' public interest cannot solely be equated to or represented by the economically driven provincial public interest represented by British Columbia's submissions. Neither can Weyerhaeuser's corporate logging interests be said to represent those of Port Clements. The future of Port Clements depends on finding local, workable accommodations. Neither the Province nor Weyerhaeuser share the aspirations or concerns of Port Clements.
13. Port Clements submits that, if Haida interests are protected through workable accommodations, the Island community would be better served than the status quo is providing. There is also a far greater likelihood that the public interest which Port Clements represents will be protected.
14. In contrast to the position taken by the Appellants and their supporting intervenors, Port Clements submits that the concerns, interests and objectives of the Haida and the local non-aboriginal community are compatible and complementary. The Haida have pursued this issue because of their concerns about the rate of logging, the method of logging and the environmental effects of logging in T.F.L. 39 Bock 6 (*Haida Nation v. British Columbia (Minister of Forests)* [2002] 2 C.N.L.R. 121 (BCCA) ("Haida 1") at para 22 (j)). Port Clements has the same concerns. Furthermore, Port Clements submits that these concerns are not being addressed

by the Province or industry. The issue of sustainability can only be addressed through the consultation and accommodation process ordered by the Court of Appeal.

15. Importantly, neither the Haida nor Port Clements oppose all logging in the area in question. The Court of Appeal accepted the position advanced by Weyerhaeuser not to declare its license invalid and thus to stop logging altogether in Block 6. At the same time it imposed an obligation on the Crown and Weyerhaeuser to positively act to address the obvious impacts the character and scope of logging is having on Haida aboriginal rights and title, with attention, in particular, to the liquidation of the old growth red cedar timber in Block 6.
16. The issue is not whether to log or not to log. The issue is how and where to log in a manner that respects and accommodates the interests of the Haida while also protecting the sustainability of the forests, which is given little consideration in the status quo.
17. Port Clements rejects any assertion that Port Clements “would likely cease to exist” if Weyerhaeuser was required to lower the extraction rate of timber or employ more ecologically sound forest practices (Affidavit of Joseph Duckworth, May 26, 2000, Appellants’ Record, Vol. IV, p. 727, para. 13). Rather, the evidence of the Haida indicates that there are economically sound measures that can be employed to reduce the scale and pace of logging in Block 6 and to repatriate to the Island communities, including Port Clements, some of the wealth extracted from the logging operations on the islands now destined to offshore beneficiaries. The slower pace of logging and the more ecologically cautious approach to timber resource extraction advocated by the Haida will not only protect their aboriginal cultural and livelihood rights to the timber and their aboriginal title to their homelands, but it will also better ensure the long-term future of Port Clements.

Affidavit of Tom Green, July 13, 2000, Respondents’ Record, Vol. IV, pp. 564-606;

Affidavit of Leslie Johnson, May 31, 2000, Respondents’ Record, Vol. III, pp. 435-438

### The Court of Appeal's Decision is Workable

18. It is significant that the Court of Appeal directed the parties “to endeavour to seek workable accommodations”. The operative word is workable. This properly places the focus on solutions and practicality. A solution-based remedy is what is required to compel the Crown and Weyerhaeuser to seriously address the substantive entitlements arising from Haida title and rights and the consequences of the logging practices on the ground.

19. It is also significant that Weyerhaeuser's focus in *Haida 2* was on remedy:

But counsel for Weyerhaeuser's principal argument related to the question of remedy. He said that any remedy granted by declaration was discretionary and he said that the Court should exercise its discretion against granting a declaration that Tree Farm Licence 39 (“T.F.L. 39”) was invalid. He did not suggest any other remedy.

....

There was no focus in the arguments in the appeal on whether any declaratory remedy could be given, other than a declaration of invalidity or no declaration at all.

*Haida 2*, paras. 9, 11; emphasis added

20. The Court of Appeal gave what it considered to be the “most minimal remedy” in the circumstances in order to achieve the reconciliation required under Section 35(1) of the *Constitution Act*. This was an interim order that was subject to supervision by a judge of the Supreme Court of British Columbia and that entitled either party to bring the matter back to court for direction or further orders. These were necessary incentives to make the consultation and accommodation process work.

*Haida 2*, para. 29

21. The recent decision by Madam Justice Garson of the Supreme Court of British Columbia in *Husby Forest Products v. British Columbia (Minister of Forests)*, 2004 BCSC 142, illustrates that the enforcement of the Crown's duty to consult with the Haida can lead to workable solutions and an equitable balancing of interests.

22. The *Husby Forest Products* case concerned the discretion of a Ministry of Forests District Manager under a forest licence to refuse to issue a cutting permit for Haida Gwaii, unless the company's application was modified to avoid harvesting a large number of culturally modified trees and their surrounding buffers, on the grounds that it would infringe an aboriginal right asserted by the Haida. The Court was called upon, in judicial review proceedings, to review an exercise of the District Manager's discretion in accordance with the law as found by the Court of Appeal in *Haida 1, Haida 2 and Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* [2002] 2 C.N.L.R. 312 (BCCA) ("*Taku*").
23. Madam Justice Garson found that the District Manager's discretion was not restricted to aboriginal rights that have been established in a court of law, as argued by the company, but extended to those aboriginal rights which the District Manager identified through consultation with the Haida as being at risk. She found that the District Manager was required to "consult with the Haida so that he may properly identify the allegedly infringed right as well as the scope of that right as it applies to the potentially conflicting use" (*Husby*, para. 4). She placed an onus on the Haida to be clear with the District Manager as to the precise nature of their rights and potential infringement at stake in the decision.
24. Importantly, and contrary to the arguments raised by the Appellants and supporting intervenors in this appeal, Madam Justice Garson, relying on *Halfway River First Nation v. British Columbia (Ministry of Forests)* (1999) 64 B.C.L.R. (3d) 206 (BCCA), held that the process of accommodation is not about the exercise of a veto by either the Crown or the First Nation: "Once the scope of the aboriginal right is identified the question then becomes one of accommodation as opposed to one of exclusive exercise of either the aboriginal right in question or the Crown's proposed use...." (*Husby*, para. 78).
25. Madam Justice Garson accepted the Court of Appeal's analysis in *Haida 2* of both the Crown's and the company's duty to consult and she set down a specific process for compliance. She provided the District Manager with practical guidance on how

he was to fulfill his obligation to accommodate the aboriginal right asserted by the Haida. The decision in *Husby Forest Products* illustrates that at a practical level *Haida 1*, *Haida 2* and *Taku* provide the basis for the balancing of interests at a local level when resource decisions are made. Furthermore, she recognized that if industry was not included in the process, the reconciliation of Haida and the public interest could not occur.

26. The *Husby* decision does not support Saskatchewan's argument that logging will take place "only in the best interest of a First Nation." Neither does the decision give the Haida "control" of harvesting management (Saskatchewan, paras. 23 and 65).

#### A Deferred Remedy Would Diminish the Right

27. Port Clements submits that in order for there to be an effective remedy the reconciliation process must begin now and must include Weyerhaeuser.
28. The appellants and their supporting intervenors argue that the obligation to consult and accommodate should be deferred until after the rights of the Haida have been fully litigated at trial. Port Clements rejects this position.
29. In order for there to be a meaningful balancing of interests, the reconciliation process cannot wait for aboriginal title and rights to be litigated at trial. Port Clements, as a representative of the local public interest with a substantial stake in the outcome of the reconciliation process, submits that the local Island community is eager for reconciliation to begin now and not be delayed by a lengthy trial.
30. While compensation to the Haida is seen by the Court as a remedy, it should be a remedy of last resort. Compensating the Haida after the logging has occurred would not result in a balancing of the cultural, ecological and economic interests of the Haida and the local Island community. Compensation to the Haida is not an acceptable solution for the long-term viability of Port Clements. In order to protect the future of Port Clements and ensure a workable and sustainable solution to this issue that satisfies both the Aboriginal and public interest, reconciliation must occur now.

31. Contrary to the position of Canada, consultation and accommodation are inseparable. They are part of a single process that seeks to balance the Aboriginal cultural rights of a First Nation that asserts a right or title on the one hand and the public interest, both Aboriginal and non-Aboriginal, and the interest of industry on the other. The court's direction in *Husby Forest Products* demonstrates that consultation and accommodation are part of a single process. It was this necessary and integrated process of consultation and accommodation, that McLachlin J., as she then was, described in *R. v. Van der Peet*:

It is for the Aboriginal peoples and the other peoples of Canada to work out a just accommodation of the recognized Aboriginal rights. This process – definition of the rights guaranteed by s.35(1) followed by negotiated settlements – is the means envisioned in *Sparrow*, as I perceive it, for reconciling the Aboriginal and non-Aboriginal legal perspectives.

*R. v. Van der Peet*, [1996] 2 S.C.R. 507; [1996] 4 C.N.L.R. 177, at para. 313

32. This Court has stated a clear preference for negotiation over litigation as a way of settling disputes over aboriginal title and rights. The objective is settlement. The process is negotiation. The procedure is governed by good faith. Consultation is another form of negotiation where the objective is to accommodate infringing actions. Thus the comments of Chief Justice Lamer in *Delgamuukw* are apposite:

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 Section 35(1) – “The reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.” Let us face it we are all here to stay.

*Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; [1998] 1 C.N.L.R. 14, at para. 186

33. Justice La Forest made comments to the same effect in *Delgamuukw* at para. 207:

On a final note, I wish to emphasize that the best approach in these types of cases is a process of negotiation and reconciliation that properly considers the complex and competing interests at stake. This point was made by Lambert, J.A. in the Court of Appeal, [1993] 5 W.W.R. 97, at pp. 379-80:

So, in the end, the legal rights of the Indian people will have to be accommodated within our total society by political compromises and accommodations based in the first instance on negotiation and agreement and ultimately in accordance with the sovereign will of the community as a whole.

(underlining in original)

34. In addition, Justice La Forest stated that aboriginal interests should not be subordinated to the public interest in the process of reconciliation:

In summary, in developing vast tracts of land, the government is expected to consider the economic well being of all Canadians. But the aboriginal peoples must not be forgotten in this equation. Their legal right to occupy and possess certain lands, as confirmed by s. 35(1) of the *Constitution Act*, 1982, mandates basic fairness commensurate with the honour and good faith of the Crown.

*Delgamuukw*, para. 204

35. It is evident that consultation must lead to an effective result if it is to be meaningful. The result must be an adjustment of the provincial licence or of the management of the cutting permits to take into account the rights of the Haida. And, although the form of order only directed the appellants “to endeavour to seek” an accommodation, failure to engage meaningfully in the exercise would undermine the process and be accounted for in the ultimate determination of the validity of T.F.L. 39. Moreover, the Haida are entitled to return to court or to seek supervisory assistance of a Supreme Court judge to assist in making accommodation workable. Thus, there is a clear incentive to the parties to reach a settlement. Good faith standards should be accepted by all to govern that process.
36. Weyerhaeuser submits that it should not be bound by the Crown’s duty of consultation and it should not be required to accommodate. Weyerhaeuser’s argument contradicts the position it took before the Court of Appeal. It was acknowledged by all of the parties that the Court of Appeal had the authority to exercise a broad-reaching discretion in making a declaration. Indeed, Weyerhaeuser urged the Court to exercise its discretion in a way so that TFL 39 was not found to be invalid:

He [counsel for Weyerhaeuser] said that any remedy granted by declaration was discretionary and he said that the Court should exercise its discretion against granting a declaration that Tree Farm Licence 39 (“TFL 39”) was invalid.

*Haida 2*, para. 9

37. Chief Justice Finch recognized that the only way for there to be an effective remedy was to include Weyerhaeuser in the declaration requiring consultation and accommodation. He said:

Justice cannot be done in these proceedings without a declaration against Weyerhaeuser as well.

*Haida 2*, para. 128

38. It was clear to the Court that as a practical matter, if there was to be any real accommodation, it was dependent upon Weyerhaeuser’s participation in the consultation process.
39. Weyerhaeuser is the de facto operative presence of the Crown in the community. Either directly or indirectly, Weyerhaeuser employs most of the loggers and contractors who are the residents of Port Clements. Weyerhaeuser implements the day-to-day logging operations in Haida Gwaii. Weyerhaeuser has discretionary control of the logging operations that affects the well-being of the Island community as a whole. Because the Crown has deferred much of its authority to Weyerhaeuser, the Province is now unable to act unilaterally to ensure meaningful consultation and accommodation. These factors necessitate Weyerhaeuser’s participation in the remedy.
40. Weyerhaeuser argues for “tenure security” (Weyerhaeuser’s Factum, para. 111). In essence, Weyerhaeuser is arguing that it, and other large forest companies, have invested in the British Columbia forest industry based on the assumption that aboriginal rights and title can be ignored until proven in court. Weyerhaeuser would rather continue to invest on this basis and run the risk of losing at trial than take steps to balance aboriginal and public and industrial interests in advance. Port

Clements does not support this type of high-risk approach that endangers the future of local Island communities.

41. If the duty to consult does not extend to Weyerhaeuser, any attempt at reconciliation will be illusory. Port Clements submits that the only workable solution to this issue is for Weyerhaeuser to be included in the Crown's duty to consult.

The Court's Order is Supported by the Case Law on the Crown's Fiduciary Duty

42. Saskatchewan's argument at paras. 27-29 of its factum misunderstands the case law on the Crown's fiduciary duty to Aboriginal people and the effect of the Court of Appeal's decision.
43. Saskatchewan's distinction between so-called "public" and "private" fiduciaries is obfuscation. This distinction is not supported by the case law. The idea that fiduciary duties arise only in the private, or quasi-private, law context appears to find its source in *Guerin v. The Queen* where Dickson J., as he then was, said:

It should be noted that fiduciary duties generally arise only with regard to obligations originating in a private law context. Public law duties, the performance of which requires the exercise of discretion, do not typically give rise to a fiduciary relationship. As the "political trust" cases indicate, the Crown is not normally viewed as a fiduciary in the exercise of its legislative or administrative function. ... The Crown's obligation to the Indians ... is none the less in the nature of a private law duty.

*Guerin v. The Queen*, [1984] 2 S.C.R. 335 (S.C.C.) at 385 (emphasis added)

44. It is clear that while public law duties may not have been viewed in *Guerin* as "typically" giving rise to fiduciary duties, the Court in *Guerin* did not say that such duties could not be fiduciary in nature. More importantly, there is nothing inherent in the fiduciary concept that restricts or prevents its application to public interests.
45. The notion that the Crown "is not normally viewed as a fiduciary in the exercise of its legislative or administrative function" was most certainly departed from in *R. v. Sparrow*, where the Supreme Court unanimously held that the federal Crown was

constrained by fiduciary duties to Aboriginal peoples where it engaged in legislative initiatives that infringed upon Aboriginal rights. As the Court explained:

Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 92(24) of the *Constitution Act, 1867*. These powers must, however, now be read together with s. 35(1). In other words, 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. Such scrutiny is in keeping with the liberal interpretive principles enunciated in *Nowegijick* ... and the concept of holding the Crown to a high standard of honourable dealing with respect to the aboriginal peoples of Canada as suggested by *Guerin* ....

*R. v. Sparrow*, [1990] 1 S.C.R. 1075 (S.C.C.) at 1109.

46. A similar effect was imposed upon provincial legislative competence in respect of Aboriginal peoples, as seen in the Court's statement that s. 35(1) "affords Aboriginal peoples constitutional protection against provincial legislative power."

*Sparrow*, at 1077.

47. The distinction, if any, between "public" and "private" fiduciaries has been dissipated by *Sparrow*. Consequently, characterizing the Crown's fiduciary duty as "public" or "private" is an artificial distinction that serves no useful purpose in this appeal.
48. Furthermore, the distinction between "public" and "private" fiduciaries is potentially misleading. It does not have the effect that it is alleged to have by the provincial Crowns, namely ousting any notion of Crown fiduciary duty. *Guerin* and *Sparrow* fiduciary duties are not separate forms of fiduciary duty: they are different elements of the broad fiduciary duty owed by the Crown to Aboriginal peoples as a result of their historical interaction.
49. The historical interaction of the Crown and Aboriginal people is the common foundation for contemporary Crown fiduciary duties owed to Aboriginal peoples. It is what grounds both the duty found to exist in *Guerin* as well as the duty articulated in *Sparrow*. As explained in John J. Borrows and Leonard I. Rotman, *Aboriginal Legal Issues: Cases, Materials & Commentary*, 2<sup>nd</sup> edition:

In *Guerin*, the Supreme Court of Canada rooted its finding of a Crown-Native fiduciary relationship in the historical interaction between the parties. The *Sparrow* decision also determined that the Crown's fiduciary obligations emanated from historical Crown-Native relations. As the Supreme Court explained, "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." Thus, it would appear that the findings of Crown-Native fiduciary relations in both *Guerin* and *Sparrow* are premised upon the historical interaction between the parties. The fiduciary relationship is simply one aspect of a broader Crown-Native relationship that includes fiduciary relations, treaty relations, and nation-to-nation relations (under which Aboriginal self-government falls).

J.J. Borrows and L.I. Rotman, eds., *Aboriginal Legal Issues: Cases, Materials & Commentary*, 2<sup>nd</sup> edition, (Toronto: Butterworths, 2003) at 326

50. Professor Leonard Rotman in "Conceptualizing Crown-Aboriginal Fiduciary Relations" makes a similar point:

The *Guerin* judgment began the process of providing substance to the Crown's historical duties to Aboriginal peoples. By incorporating the Crown's fiduciary duties in section 35(1), the *Sparrow* judgment recognized the failures of the past and attempted to provide a more appropriate foundation for the affirmation and protection of Aboriginal and Treaty rights, along with the special *sui generis* relationship between the Crown and Aboriginal peoples.

L.I. Rotman, "Conceptualizing Crown-Aboriginal Fiduciary Relations," in Law Commission of Canada and Association of Iroquois and Allied Indians, *In Whom We Trust: A Forum on Fiduciary Relationships*, (Toronto: Irwin, 2002) at 55

51. The fiduciary duty of the Crown sits at the centre of the *sui generis* relationship that exists between the Crown and Aboriginal peoples in Canada. Consequently, the Crown's fiduciary duty was entrenched in s. 35 of the *Constitution Act, 1982* [both for its effects generally and for its implications upon the Aboriginal and treaty rights recognized in s. 35(1)]. As Professor Rotman concluded in "Conceptualizing Crown-Aboriginal Fiduciary Relations," the judgments in *Guerin* and *Sparrow* "initiated a new way of thinking about Aboriginal peoples' rights and their relationship with Canadian legal, political, and social realms" (*Ibid.* at 26). More pointedly, as Professor Rotman indicates:

The Crown's fiduciary duty to Aboriginal peoples in Canada is the fundamental element of the special *sui generis* (unique) relationship between them. Its place

within section 35(1) and resultant implications for Aboriginal and Treaty rights, as well as for federal and provincial legislative competence in respect of those rights, has solidified this premise. Describing Crown-Aboriginal relations as fiduciary provides a substantive basis for understanding the legal implications of the parties' interaction. Further, this characterization imposes exacting and enforceable duties on the Crown to act in the best interests of Aboriginal peoples in a variety of contexts.

*Ibid* at 26

52. It is this historical reality that forms the basis for the Crown fiduciary and it is this historical reality that Justice Lambert referred to with his description of the fiduciary duty that “permeates the whole relationship” between the Crown and aboriginal people. Contrary to Saskatchewan’s argument at para. 26 of its factum, Justice Lambert did not ascribe to an “all embracing fiduciary duty” irrespective of particular obligations, interests or rights. His reasons are consistent with this Court’s observations in *Wewaykum Indian Band v. Canada* [2002] 4 S.C.R. 245 (Q.L.) at para. 81:

The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests.

53. Justice Lambert, having begun with recognition of the roots of the fiduciary duty, grounded this duty in the particular circumstances of the right asserted by the Haida and the Crown’s assumption of discretionary control through the granting of TFL 39 Block 6 to Weyerhaeuser.
54. The argument made by the Appellants and supporting intervenors that Crown fiduciary duties to Aboriginal peoples are restricted to duties emanating from s. 35(1) is also incorrect. The jurisprudence on s. 35 (particularly in *Sparrow*) is clear that the section protects “existing” rights and does not create new rights. Even rights that may be acquired via negotiated agreements with the Crown are not new rights *per se*, but are simply newer versions of historic treaty rights already protected by s. 35(1). Thus, the Crown’s fiduciary duty must predate s. 35. As Dickson J. said in *Guerin* the Crown’s fiduciary duties date at least as far back as the *Royal Proclamation of 1763* (*Guerin, supra* at 385). Rooting the Crown’s

fiduciary duty in s. 35 explicitly recognizes the Crown's historic duties to Aboriginal peoples but it does not limit them to s. 35.

55. Contrary to the suggestion made by Saskatchewan, the fiduciary duty of the Crown is not limited to the justificatory test developed in *Sparrow*. Rather, that test adopted the fiduciary standard that was developed in *Guerin* because of the need to consider the fiduciary nature of the Crown's obligations to Aboriginal peoples stemming from its historical interactions with them when the Crown seeks to infringe upon constitutionally protected Aboriginal or treaty rights. The fiduciary obligation the Crown has with respect to Aboriginal people is much broader than its existence within the *Sparrow* justificatory test.

56. This Court has explicitly rejected the argument Saskatchewan now makes:

All members of the Court accepted in *Ross River* that potential relief by way of fiduciary remedies is not limited to the s. 35 rights (*Sparrow*) or existing reserves (*Guerin*).

*Wewaykum*, para. 79

57. Finally, Saskatchewan's fiduciary argument fails because it misinterprets the effect of the Court of Appeal's decision. Contrary to Saskatchewan's argument at paras. 28 and 29 of its factum, the Court of Appeal did not conclude that the Crown's fiduciary duty to Aboriginal people means that the Crown must assure that Aboriginal rights receive priority over the rights and interests of others. The Court of Appeal held that the Crown, while in the role of fiduciary to Aboriginal people, must balance the interests of the Aboriginal people and the public interest. While this may not be an ordinary fiduciary, it is certainly the form of *sui generis* fiduciary duty described by this Court in *Wewaykum* (paras. 72-85). There is no support for the proposition that the Crown cannot have a fiduciary duty to Aboriginal people and balance the Aboriginal interests with the public interest, both Aboriginal and non-Aboriginal.

58. Stating that the Crown owes a general fiduciary obligation to Aboriginal peoples does not suggest that it owes fiduciary duties to Aboriginal peoples in all

circumstances. Rather, it reflects the reality of the relationship between Aboriginal people and the Crown; a relationship characterized by an imbalance of power where Aboriginal interests are vulnerable to the Crown's unilateral action. Some of the Crown's duties are broad and over-arching, which may then crystallize around certain events, while others are premised upon specific initiatives, such as governmental legislation, that infringes upon s. 35 rights.

59. In summary, given the particular circumstances of the case at bar, the Court of Appeal's order is the best available remedy to balance the interests of the Haida and the public, both aboriginal and non-aboriginal. Furthermore, the Court of Appeal's order gives meaningful content to the Crown's fiduciary duty to the Haida Nation and is supported by this Court's jurisprudence.

PART IV

SUBMISSION CONCERNING COSTS

60. This intervenor makes no submission as to costs.

PART V

ORDER REQUESTED

61. It is respectfully submitted that this appeal should be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25<sup>th</sup> day of February, 2004.

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## PART VI

List of Authorities

<u>Cases</u>	<u>PARAGRAPH</u>
<i>Haida Nation v. British Columbia (Minister of Forest)</i> [2002] 4 C.N.L.R. 117 (B.C.C.A.) (Haida 2)	19, 20, 22, 25, 36, 37
<i>R. v. Gladstone</i> [1996] 2 SCR 723	10
<i>Haida Nation v. British Columbia (Minister of Forests)</i> [2002] 2 C.N.L.R. 121 (B.C.C.A.) (Haida 1)	14, 22, 25
<i>Husby Forest Products v. British Columbia (Minister of Forests)</i> , 2004 B.C.S.C. 142	21, 22, 23, 24, 25, 26, 31
<i>Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)</i> [2002] 2 C.N.L.R. 312 (B.C.C.A.)	22, 25
<i>Halfway River First Nation v. British Columbia (Minister Of Forests)</i> (1999) 64 B.C.L.R. (3d) 206 (BCCA)	24
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<i>Delgamuukw v. British Columbia</i> , [1998] 1 C.N.L.R. 14	32, 33, 34
<i>Guerin v. The Queen</i> (1984), 13 D.L.R. (4 <sup>th</sup> ) 321 (SCC)	43, 44, 48, 49, 50, 51, 54, 55, 56
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<i>Wewaykum Indian Band v. Canada</i> [2002] 4 S.C.R. 245 (SCC)	52, 56, 57

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*Constitution Act, 1982*, sec. 35. 20, 31, 32, 34, 45, 46,  
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Articles

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And Association of Iroquois and Allied Indians,  
*In Whom We Trust: A Forum on Fiduciary Relationships*,  
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PART VII

APPENDIX 1

1. Affidavit of Dale Lore, December 15<sup>th</sup>, 2003