

PART I: STATEMENT OF FACTS

1. The Respondent, Redfern Resources Ltd. (“Redfern”) adopts generally the facts set out in the factum of the Appellants Norm Ringstad et al (the “Crown Appellants”), and relies as well upon the following relevant facts.

2. Redfern seeks to reopen the Tulsequah Chief Mine, which is located near the border with the Yukon Territory and the State of Alaska. That mine was operated in the 1950’s by Cominco Ltd. Part of Redfern’s proposal to reopen the mine involves the building of an access road to the mine site for purposes of hauling ore from the mine to Atlin, British Columbia.

Appellants’ Record, Volume 1, pages 124 and 198-199 (Reasons for Judgment of the British Columbia Court of Appeal pronounced January 31, 2001 (“BCCA Reasons”), per Southin J.A at para. 4 and Rowles J.A. at para. 111-112)

3. Redfern’s proposal to reopen the Tulsequah Chief Mine (the “Project”) became the subject of an environmental review under the *Environmental Assessment Act*, R.S.B.C. 1996 c. 119 (the “EAA”). In September 1994, Redfern applied for approval of the Project under the predecessor legislation to the EAA.

Appellants’ Record, Volume 1, page 199 (BCCA Reasons, per Rowles J.A. at para. 112-114)

4. The EAA sets out an elaborate process of information gathering and consultation for projects within its purview. In accordance with the requirements of the EAA, a project committee was established to review the Project (the “Committee”). Participants on the Committee included representatives from the federal and provincial governments, the Atlin Advisory Planning Commission, the State of Alaska and the Taku River Tlingit First Nation (the “Tlingits”). The EAA requires that First Nations, such as the Tlingits, whose traditional territory includes the site of a reviewable project be invited to participate on a project committee established under the EAA. The Tlingits participated fully in the environmental review of the Project.

Appellants' Record, Volume 1, pages 125, 134-137, 149-150, 199 and Volume 2, pages 258-269 (BCCA Reasons, per Southin J.A. at paras. 5, 28, 39 and Rowles J.A. paras. 114 and Appendix "A")

5. Under section 10 of the EAA, the purpose of a project committee is, *inter alia*, to provide advice and recommendations to the Executive Director of the Environmental Assessment Office and the ministers responsible for deciding whether to issue a project approval certificate. In this case, the ministers responsible were the Minister of Environment, Lands and Parks and the Minister of Energy and Mines and Minister Responsible for Northern Development (the "Ministers").

Appellants' Record, Volume 1, page 53 (Reasons for Judgment of Kirkpatrick J., pronounced June 28, 2000 ("BCSC Reasons", at para. 31)

6. In February 1996, final project report specifications for the Project were issued pursuant to section 24 of the EAA. In advance of the development of the specifications, the Tlingits had submitted to the Committee a list of information requirements for the Project. The Tlingits had, at that point, clearly articulated that uppermost in their concerns was the proposal for a new road. Thus, by February 1996, what has always been the Tlingits' main concern – the location of the road from the mine to Atlin – had become clear.

Appellants' Record, Volume 1, pages 150-153 (BCCA Reasons, per Southin J.A., at paras. 41-42)

7. Pursuant to section 24 of the EAA, Redfern, at the request of the Executive Director, prepared a project report in accordance with the final specifications. On August 1, 1997, the project report was accepted for review pursuant to section 26 of the EAA. Section 26 provides that a project report must be accepted for review if it meets the final form of the project report specifications.

Appellants' Record, Volume 1, page 153 and Volume 2, page 264 (BCCA Reasons, per Southin J.A., para. 43 and Appendix "A")

8. In March 1998, the Committee prepared a recommendations report and submitted it to the Ministers for consideration (the "Project Committee Report"). The Project Committee Report discloses that the Tlingits were opposed to the recommendation of the

majority of the Committee, that the Tlingits requested more detailed information regarding wildlife, aquatic resources and access, and that they requested an extension of the review to provide this information and full Project Committee meetings to discuss.

Appellants' Record, Volume 1, pages 154 and 276-277 (BCCA Reasons, per Southin J.A., at paras. 45-46 and Appendix "C")

9. The Tlingits also prepared a minority report, some 65 pages in length. The Tlingits' minority report was provided to the Minister of Environment, Lands and Parks.

Appellants' Record, Volume 1, page 200 (BCCA Reasons, per Rowles J.A., at para. 118)

10. On March 19, 1998, approximately 3½ years after Redfern's initial application for a mine development certificate, the Ministers issued to Redfern a Project Approval Certificate under the EAA (the "Project Approval Certificate").

Appellants' Record, Volume 1, page 200 (BCCA Reasons, per Rowles J.A. at para. 118)

11. The Tlingits brought a petition under the *Judicial Review Procedure Act*, R.S.B.C. 1996, c.241, to quash the Ministers' decision to issue the Project Approval Certificate.

Appellants' Record, Volume 1, page 200 (BCCA Reasons, per Rowles J.A., at para. 119)

12. Several of the grounds upon which the Tlingits' judicial review petition was based were characterized in the courts below as "administrative law issues". Madam Justice Southin in the court below concluded that as a matter of administrative law there is no foundation for an order in the nature of *certiorari* quashing the Project Approval Certificate. The majority of the Court of Appeal did not take issue with Southin J.A.'s disposition of the administrative law issues.

Appellants' Record, pages 129, 189-190, 197 (BCCA Reasons, per Southin J.A., at paras. 82-85, paras. 14-15 and per Rowles J.A., at para. 108)

13. In reaching her conclusion on the administrative law issues, Southin J.A. held as follows:

- (a) During the whole environmental review process weight was given to all the considerations laid down in section 2 of the EAA.

Appellants' Record, Volume 1, page 183 (BCCA Reasons, per Southin J.A., at para. 71)

- (b) As of early 1998 the review process had gone on and on at very considerable expense and it was clear that nothing short of changing the route of the road from the mine to Atlin would satisfy the Tlingits. The Tlingits had made their points, and the majority did not accept them. The Executive Director and the Chairman of the Committee had a duty to bring the matter to an end and put the issue before the Ministers for their determination.

Appellants' Record, Volume 1, page 184-185 (BCCA Reasons, per Southin J.A., at para. 77)

- (c) There was no basis on the evidence for concluding that the Ministers were ignorant of what had been going on in the review process since 1994.

Appellants' Record, Volume 1, page 186 (BCCA Reasons, per Southin J.A., at para. 79)

- (d) A decision as to whether a project shall proceed requires the weighing of many considerations put forward by competing interests. The decision of the Ministers in the end must be "political" using the word in its non-pejorative sense.

Appellants' Record, Volume 1, page 188 (BCCA Reasons, per Southin J.A., at para. 80)

- (e) The legislature has enacted a process that implicitly entrusts to the Ministers an exclusive power to decide whether the purposes of the statute have been met and, if not, what should be the next step. Here, it is plain that the Ministers have determined that the benefits of the Project outweigh its detriments.

Appellants' Record, Volume 1, page 189 (BCCA Reasons, per Southin J.A., at paras. 82-83)

14. By the time the Project Approval Certificate was issued on March 19, 1998, Redfern had expended in excess of \$10,000,000 on the environmental review process. Redfern had made genuine and full efforts to comply with the EAA and to satisfy the concerns of the Tlingits.

Appellants' Record, Volume 2, page 212 (BCCA Reasons, per Rowles J.A., at para. 134)

Appellants' Record, Volume 1, page 112 (BCSC Reasons, at para. 137)

15. After the Project Approval Certificate was issued, an extensive process of permitting applications and approvals for specific elements of the Project, including road construction, continued. This process involved further consultation with the Tlingits and further expenditure by Redfern.

Record of Redfern, pages 4 - 11 (Affidavit of Terry Chandler, sworn February 21, 2000)

16. The majority of the Court of Appeal dismissed the appeal of the Crown Appellants on the question of whether the Ministers owed a constitutional and fiduciary duty of consultation to the Tlingits. The majority upheld the decision to quash the Project Approval Certificate, and remitted the matter for reconsideration by the Ministers.

Appellants' Record, Volume 2, pages 256-257 (BCCA Reasons, per Rowles J.A., at paras. 207-208)

PART II: ISSUES

17. Redfern agrees with the statement of the issues set out at paragraphs 19 and 20 of the Appellants' Factum, except that,

- (a) for greater clarity, Redfern would restate the first issue (paragraph 19) as follows:

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

- (b) Redfern submits that the following additional issue is raised by this appeal:

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

PART III: ARGUMENT

A. INTRODUCTION

18. In Redfern's submission, the present case should be recognized as one in which the Court of Appeal has devised an interim or provisional remedy for the protection of aboriginal rights which have been asserted but not yet proven. If such a remedy is to be provided by the Courts, its reach must be defined in a manner which is appropriate in light of the fact that it is granted at a point when no court has determined the existence, and perhaps more importantly the scope and definition, of the asserted rights upon which it is based.

19. In particular, Redfern submits that:

- (a) this honourable Court should not impose upon the Crown interim or provisional obligations which are only appropriately imposed as a requirement for justifying the infringement of existing aboriginal rights pursuant to s. 35 of the *Constitution Act, 1982*; and
- (b) the courts, in considering whether a remedy of this nature will be granted on a judicial review, must exercise the appropriate degree of deference to the decision-maker whose decision is impugned in the judicial review proceedings.

20. The perspective which Redfern seeks to provide, on this appeal, is that of a private company engaged in resource development within the province of British Columbia. Any interim obligation which the Crown may have must, in Redfern's respectful submission, be defined in such a manner as to provide some clarity as regards the scope of the obligation and whether it has been satisfied in any particular case. If such an obligation is ill-defined or infeasible, the practical result will be to substantially impede the orderly development of the

province of British Columbia and its resources.

B. THE COURT OF APPEAL JUDGMENT

(a) Nature of the Duty as Recognized by the Court of Appeal

21. It is not Redfern's position that "until an aboriginal right has been established in court proceedings, the right does not exist". However, Redfern submits that a breach of an aboriginal right cannot be established without proving the existence of the right. Similarly, in order to establish a breach of an obligation which flows from an aboriginal right, such as the Crown's obligation to consult regarding a *prima facie* infringement, the claimant must prove the existence of the underlying right.

Appellants' Record, Volume 2, page 249 (BCCA Reasons, per Rowles J.A., at para. 193)

22. Redfern respectfully submits that, except on an interlocutory basis, a remedy is not ordinarily provided for breach of a right that has not yet been proven to exist.

23. The proceedings before the Courts below were judicial review proceedings in which the existence of any aboriginal right was not in issue and was not proven. In the British Columbia Supreme Court, all questions requiring determination of aboriginal rights and title were severed from the judicial review proceedings and referred to the trial list. A judge of the Court of Appeal refused leave to appeal from the order of the Supreme Court in this regard, and the refusal of leave was upheld by a panel of the Court. The severed issues have not yet been tried.

Appellants' Record, Volume 1, pages 11-12, 18-19 1 (Reasons for Judgment of Kirkpatrick J., pronounced April 30, 1999 ("Chambers Reasons on Severance"), at paras. 12, 25-28)

Appellants' Record, Volume 1, pages 20-30 (Reasons for Judgment of Goldie J.A., pronounced June 25, 1999)

Appellants' Record, Volume 1, pages 31-34 (Reasons for Judgment of the British Columbia Court of Appeal, pronounced September 22, 1999)

24. Neither the proceedings in the Courts below nor the orders granted by those Courts were in any way interlocutory in nature. The judicial review proceeded on the basis that the Tlingits, if successful, would obtain a final order which might render unnecessary

any further proceedings.

Appellants' Record, Volume 1, page 17 (Chambers Reasons on Severance, at para. 23)

25. Thus, the onus of proof in the judicial review proceeding was the same as in any other civil proceeding where a final order is sought: proof on a balance of probabilities. Neither the British Columbia Court of Appeal nor the British Columbia Supreme Court found that the Tlingits had proven, on a balance of probabilities, the existence of any aboriginal right.

26. Accordingly, the obligation on the part of the Province which the Court of Appeal recognized was one that existed independently and might be proven independently of any aboriginal right. At the same time, however, it is clear from the majority judgment that the Court viewed the obligation as one that is very closely tied to the recognition of existing aboriginal rights and title in s. 35 of the *Constitution Act, 1982* and to the requirements imposed by that section for the justification of an infringement of aboriginal rights or title.

Appellant's Record, Volume 2, page 256 (BCCA Reasons, per Rowles J.A., at para. 206)

(b) Scope of the Duty as Recognized by the Court of Appeal

27. The judgment of the Court of Appeal provides little guidance with respect to the content of the fiduciary obligation that was recognized in this case.

28. The Court of Appeal described the obligation of the Ministers as follows:

In my opinion, the jurisprudence supports the view taken by the chambers judge 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 Tlingits’ concerns had been **addressed**.

(emphasis added)

Appellants' Record, Volume 2, page 249 (BCCA Reasons, per Rowles J.A., at para. 193)

29. Redfern does not interpret the Court of Appeal judgment as providing a veto to First Nations over the approval of a project such as that in the present case. Although the

Tlingit were not satisfied with the Project as approved by the Ministers, the Court of Appeal made no finding that the Tlingits had been inadequately consulted or accommodated, such that the approval of the Project would constitute a breach of the Province's fiduciary obligations. If such a finding had been made, it would have been futile to remit the matter for reconsideration by the Ministers, as the Court did, based on the existing Project Committee Report. Rather, the Court concluded that the Ministers must **consider** the matter in light of the Province's "constitutional and fiduciary obligations to aboriginal people in relation to matters that may affect their aboriginal rights".

Appellants' Record, Volume 2, pages 254-255, 256-257 (BCCA Reasons, per Rowles J.A., at paras. 202, 207)

30. It is important to note that this conclusion was reached in the context of the position taken by the Ministers before the Court of Appeal. The Ministers argued that no fiduciary obligation to consult or accommodate aboriginal people arose on the part of the Crown until the rights of the aboriginal people had been proven to exist. The Ministers did not argue that they had taken into account the Crown's obligations in arriving at the decision that they did. Thus, it was logical to conclude that the Ministers had not been "mindful" of the possibility that the Crown's actions might be in violation of aboriginal rights.

Appellants' Record, Volume 2, page 216-219, 222-223 (BCCA Reasons, per Rowles J.A., at paras. 140-142, 153-154)

31. It is also important to note that the Court reached this conclusion in the context of a finding of full compliance with the EAA, a statute the express purposes of which included the "thorough, timely and integrated" assessment of (*inter alia*) the social, cultural and heritage effects of projects, the prevention or mitigation of adverse effects of projects, and the participation in the assessment of first nations.

EAA, s. 2

32. The Court of Appeal specifically varied the judgment of Kirkpatrick J. in the British Columbia Supreme Court, who had ordered that the matter be referred back to the Ministers "after a revised project committee report, which meaningfully addresses the Tlingits' concerns, has been delivered to the Ministers". The Court of Appeal set aside this

Order and directed that the matter “simply be remitted to the Ministers” to be considered afresh in light of their obligation to be “mindful” that the Project might infringe aboriginal rights.

Appellants’ Record, Volume 1, pages 112-113 (BCSC Reasons, at para. 137)
Appellants’ Record, Volume 2, page 257 (BCCA Reasons, per Rowles J.A., at para. 208)

33. The Court gave no direction to the Ministers as to what factors should be taken into account in considering whether to approve the Project, except to remind them of the Crown’s constitutional and fiduciary obligations and to warn them of the constitutional limits on provincial powers as set out in the recent decision of the same Court in *Paul v. British Columbia (Forest Appeals Commission)*.

Appellants’ Record, Volume 2, pages 221, 256-257 (BCCA Reasons, per Rowles J.A., at paras. 149, 206-207)
Paul v. British Columbia (Forest Appeals Commission) (2001), 89 B.C.L.R.(3d) 210, 2001 BCCA 411, suppl. reas. 2001 BCCA 644

34. In *Paul*, it was held that the provincial legislature could not confer on any quasi-judicial decision-maker, other than a true court, the power to consider and decide questions of aboriginal title and aboriginal rights. The same reasoning, it would seem, would prevent the Ministers, as provincial administrative decision-makers, from considering and deciding the existence, nature and scope of the Tlingits’ aboriginal rights.

Paul, supra, at para. 47

35. Thus, far from deciding that the Tlingit were to be provided with a veto over the Project, the Court of Appeal provided little or no guidance to the Ministers as to the manner in which the potential impact of the Project on asserted Tlingit rights ought to be taken into account in reconsidering the Project Approval Certificate.

36. The Court of Appeal judgment leaves undetermined, Redfern submits, the test for determining whether the Ministers have been appropriately “mindful” of the Tlingits’ aboriginal rights.

37. In Redfern’s respectful submission, if this honourable Court is inclined to

recognize any fiduciary obligation which is based upon the assertion of aboriginal rights, but is independent of their existence, then further guidance should be provided to the courts, as well as to the Crown and to interested parties such as Redfern, regarding the content of the obligation. Otherwise, great uncertainty is likely to be created regarding the validity of government approvals and the extent to which they can be relied upon by parties, such as Redfern, who must base important economic decisions on an assessment of the risk involved in such reliance.

C. DEFINING THE FIDUCIARY OBLIGATION OF THE CROWN

38. To the extent that the Crown has fiduciary or constitutional obligations which are independent of the existence of aboriginal rights, Redfern submits that such obligations should be defined in a manner which is consistent with:

- (a) the interim or provisional nature of the proceedings in which such the obligations are recognized; and
- (b) the fact that the enforcement of the obligation will take place at a time when the scope of the existing aboriginal rights of the claimant is undefined.

(a) Interim Nature of the Remedy

39. As previously noted, the effect of the Court of Appeal judgment is in effect to create a remedy for asserted rights pending their proof in court or pending a negotiated settlement. The remedy is provided through the recognition of a fiduciary obligation which arises from the unilateral assertion of aboriginal rights and which may be enforced in proceedings, such as the subject judicial review application, without proof that the asserted right in fact exists.

40. The remedy provided by the Court of Appeal is similar to interlocutory relief in that it is available pending a final determination of the rights of the claimant and of whether the rights have been violated. However, the remedy differs from traditional interlocutory relief, such as an injunction or a stay, in a number of very significant respects.

41. Firstly, no test has been stated for the grant of such a remedy which would require a balancing of interests such as that which is undertaken in deciding to grant interlocutory relief. In deciding whether to grant an injunction, for example, this honourable Court has stated that the courts will generally apply a three-step test which involves:

- (a) a preliminary assessment of the merits of the case;
- (b) a determination of whether the claimant will suffer irreparable harm if the remedy is not granted; and
- (c) an assessment as to which of the parties will suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

RJR-Macdonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311 at 334

42. In certain cases, the courts have required more than a preliminary assessment of the merits of the case, for example where the interlocutory remedy will have the practical effect of putting an end to the action. In such cases, the courts have required a more extensive review of the strengths of the plaintiff's claim.

RJR-Macdonald Inc. v. Canada, supra, at 338-339

43. In the present case, the British Columbia Court of Appeal did not expressly require any preliminary assessment of the merits of the aboriginal rights claim as a prerequisite to the imposition of a duty, although the Court emphasized that, in this particular case, the duty had been imposed based upon the fact that the Crown had accepted the Tlingits' claims for treaty negotiations.

Appellants' Record, Volume 2, pages 248-249 (BCCA Reasons, per Rowles J.A., at para. 191)

44. Subsequently, in *Haida Nation v. B.C.*, the British Columbia Court of Appeal imposed a duty of consultation and accommodation upon the Crown based on a finding that the Haida had established a "good *prima facie* case" to a claim for aboriginal title and aboriginal rights. However, the Court expressly refrained from holding that a good *prima facie* case would always be required:

The strength of the Haida case gives content to the obligation to consult and the obligation to seek an accommodation. I am not saying that if there is something less than a good *prima facie* case then there is no obligation to consult. I do not have to deal with such a case on this appeal.

Haida Nation v. British Columbia (Minister of Forests), 2002 BCCA 147, [2002] B.C.J. No. 379 (“*Haida No. 1*”), at para. 51

45. Thus, no clear evidentiary threshold is imposed which the claimant must cross in order to secure a remedy for breach of the Crown’s obligation to consult.

46. Moreover, the judgment in the present case does not set out a framework for the balancing of interests as between the claimant and other affected parties as a precondition for granting a remedy. Although the Court of Appeal in its subsequent decisions in *Haida* appears to have recognized the need for such a balancing, the question has been left for the discretion of the courts.

Haida No. 1, supra, at paras. 53-54
Haida Nation v. British Columbia (Minister of Forests), 2002 BCCA 462, [2002] B.C.J. No. 1882 (“*Haida No. 2*”), at paras. 116-121 (per Finch C.J.B.C.)

47. Finally, the protections which are ordinarily in place as regards interlocutory relief, to protect the defendant from risks associated with insupportable claims, are lacking in the current context.

48. For example, the rationale for requiring an undertaking in damages as a condition for granting interlocutory relief has been explained as follows:

The need for compensation follows from the nature of interlocutory relief. A plaintiff applying for an interim injunction is asking for the court to interfere with his opponent’s rights before the plaintiff has established his entitlement to do so. The justification for such interference is that it is necessary in order to protect the plaintiff’s interests pending litigation. Since a final resolution of the dispute is yet to take place, it is possible that the plaintiff will fail to prove his claim and that it will emerge that the interim order prevented the defendant from exercising his perfectly valid and lawful rights. **It follows that an interim injunction inevitably creates a risk of harm to the defendant’s rights or interests. As justice requires the court to give equal protection to the parties’ rights, the interlocutory procedure must seek to safeguard the defendant’s interests as well as the plaintiff’s. The undertaking in damages is the embodiment of this safeguard.** For this reason the

undertaking has been described as a “matter of elementary fairness when an interlocutory injunction is granted in advance of the determination of the parties’ rights at a trial”, and has to be of real economic value.

A.A.S. Zuckerman, “The Undertaking in Damages – Substantive and Procedural Dimensions” (1994), 53 *Cambr. L.J.* 546 at 549-550 (footnotes omitted; emphasis added)

49. Where, as here, an interim obligation is imposed, giving rise to a right to final relief, there is no requirement that the claimant plead or intend ultimately to prove in the proceedings that the underlying rights exist. Unlike an interlocutory injunction or stay of proceedings, a remedy which is granted based upon the Crown’s interim obligation to consult is a final remedy, which will not be discharged at the conclusion of the proceedings if the claimant is not in a position to prove the asserted rights upon which it is based. Moreover, it is not clear that third parties, such as Redfern, who have been prevented from exercising their lawful rights based upon claims which have been asserted, but never be proven, will be provided with any remedy for the damages which they may incur.

50. For these reasons, Redfern submits that the Crown’s interim fiduciary obligation must be defined in such a manner that:

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

51. The scope of the Crown’s interim obligations in the present case must also be defined in light of the fact that:

- (a) the existence, nature and scope of the Tlingits’ aboriginal rights have not been determined by any court;

- (b) the Ministers themselves are not empowered to consider and decide such questions; and
- (c) the scope of the Crown's obligations to consult under s. 35 of the *Constitution Act, 1982* has on many occasions been expressed to be dependent upon the nature and scope of the aboriginal rights at stake.

52. It is important to keep in mind that the analysis of a claim under s. 35 of the *Constitution Act, 1982* has at least three steps. First, the court must determine whether there is an existing (unextinguished) aboriginal right that is engaged by the facts of the case. Second, the court must determine whether the right has been infringed. Third, the court must determine whether the infringement was justified.

R. v. Gladstone, [1996] 2 S.C.R. 723, [1996] S.C.J. No. 79 at para. 20

53. At both the second and the third stage of the analysis, the courts must take into account the nature and scope of the aboriginal right that was established at the first stage. The nature of the right at stake is particularly important at the justification stage of the analysis. In *R. v. Gladstone, supra*, this Court stated (paras. 56-57, 71):

As was noted with regards to the question of infringement, the framework for analyzing aboriginal rights laid out in *Sparrow* depends to a considerable extent on the legal and factual context of that appeal. In this case, where, particularly at the stage of justification, the context varies significantly from that in *Sparrow*, it will be necessary to revisit the *Sparrow* test and to adapt the justification test it lays out in order to apply that test to the circumstances of this appeal.

Two points of variation are of particular significance. First, the right recognized and affirmed in this case...differs significantly from the right recognized and affirmed in *Sparrow*....

...

Although the aboriginal rights recognized by s. 35(1) are, as was noted in *Van der Peet*, fundamentally different from the rights in the *Charter*, the same basic principle – that the purposes underlying the rights must inform not only the definition of the rights but also the identification of those limits on the rights which are justifiable – applies equally to the justification analysis under s. 35(1).

In *Gladstone*, the nature of the right at stake in that case affected the manner in which the right must be accommodated (para. 64) and the types of legislative objectives that would be considered “compelling and substantial” for the purposes of the justification analysis (para. 69).

54. In *Delgamuukw v. British Columbia*, this Court recognized that the fiduciary obligations of the Crown as articulated in the justification analysis may vary according to the definition of the right at stake, not only as to its form but also as to the degree of scrutiny required in respect of any infringing action.

Delgamuukw v. British Columbia, [1997] S.C.R. 1010, [1997] S.C.J. No. 109 (paras. 163, 166)

55. As this Court pointed out in *Delgamuukw*, even where the right is a general possessory right such as aboriginal title, the Crown’s obligations in terms of consultation and compensation may vary according to the “nature of the particular aboriginal title affected and with the nature and severity of the infringement”. These are aspects of the Crown’s duties which may vary not only according to the specific right at stake, but also according to the underlying practices and activities upon which the right is based.

Delgamuukw v. British Columbia, *supra*, at paras. 168, 169

56. In *R. v. Marshall*, [1999] 3 S.C.R. 456, [1999] S.C.J. No. 55, a treaty rights case, this Court held (at para. 112):

To proceed from a right undefined in scope or modern counterpart to the question of justification would be to render treaty rights inchoate and the justification of limitations impossible. 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?

57. Of course, the geographical extent, as well as the content, of the aboriginal right at stake must be properly defined. Otherwise, it will be impossible to know whether a particular activity is a potential infringement in respect of which the Crown owes a fiduciary

obligation to consult and accommodate.

58. Thus, if the aboriginal right at stake is not properly defined, it is impossible to determine whether there is an actual or threatened infringement, such as to engage the Crown's fiduciary obligation to justify the infringement, and it is impossible to determine the content of the Crown's duties, if any.

59. It would be simply untenable to assume, for the purpose of the analysis, that the nature, scope and extent of the rights at stake are as asserted by the claimants. To do so would be to impose a positive obligation upon the Crown the extent of which is determined solely according to the ambitiousness of the claimants in asserting their claims.

60. Redfern's position is that, assuming that a fiduciary obligation exists on the part of the Crown which is independent of the existence of aboriginal rights, and may be enforced without proof of such rights, then the obligation ought not to be defined with reference to obligations which may or may not be imposed as requirements for the justification of an infringement of aboriginal rights. To do so would give rise to grave difficulties in practice, in that without defining the right, it is impossible to determine:

- (a) the content of the corresponding obligation;
- (b) whether the obligation has been breached; or
- (c) what, if any, remedy should be granted.

61. In Redfern's submission, if the Crown has a fiduciary obligation which arises independently of the existence of aboriginal rights, the content of that obligation ought to be defined independently of the constitutional protection accorded to existing aboriginal rights under s. 35 of the *Constitution Act, 1982*, and independently of the requirements for justifying an infringement of aboriginal rights under that section.

(c) **Alternative Means of Defining the Right**

62. If the Crown's obligations, at this stage of the proceedings, are not to be defined with reference to constitutional duties which may, or may not, arise under s. 35 of the

Constitution Act, 1982, then the question arises, what is an appropriate reference point for these obligations? Two possible reference points present themselves.

(1) The Statutory Scheme of the *Environmental Assessment Act*

63. The first, and most obvious, reference point is the statutory scheme for consultation and accommodation which was set out in the EAA (the EAA has since been amended, but nevertheless provides the legal framework for the present case).

64. The relevant portions of the statutory scheme at the time are set out in the reasons for judgment of Southin J.A., dissenting, in the Court below and are further addressed in the Appellants' Factum.

65. In summary, the EAA provided a procedure pursuant to which the role of a first nation in the environmental review process was a participatory one. Subsection 2(e) of the EAA listed as one of the purposes of the EAA, "To provide for participation, in an assessment under this Act, by...first nations...". Pursuant to paragraph 9(2)(d) of the EAA, the government was required to invite any first nation "whose traditional territory includes the site of the project or is in the vicinity of the project" to nominate members to the "project committee" which was struck for the purpose of, *inter alia*, analyzing and advising upon the potential effects of the proposed project and the prevention or mitigation of any adverse effects. The consultation envisioned by the EAA was a process of information distribution and general participation by all project committee members.

EAA, para. 9(2)(d), sub-s. 7(2), s. 10
Appellants' Record, Volume 2, pages 258-269 (BCCA Reasons, per Southin J.A., at Appendix "A")

66. Arguably, the EAA was itself "mindful" of the possibility that government actions might have the potential to infringe aboriginal rights. The EAA therefore provided for the accommodation of aboriginal interests through participation in the approval process and a full opportunity to provide input into the Crown's decisions.

67. Where, as here, a statutory scheme has been put in place by the legislature with the apparent intention of accommodating aboriginal rights, Redfern submits that it is

unnecessary to superimpose obligations on the part of the Crown of a fiduciary or constitutional nature, unless:

- (a) the statutory scheme is incapable of providing for adequate consultation with aboriginal people and the accommodation of their rights;
- (b) the statutory scheme has not been complied with; or
- (c) there is evidence that the statutory scheme is not being implemented in good faith, in the sense that the statutory procedures are being used as a smokescreen for the implementation of policies which disregard or give no credence to the possibility that the Crown's actions may infringe aboriginal rights.

68. In the present case, it is respectfully submitted that the statutory scheme was fully capable of accommodating aboriginal interests. Indeed, the lengthy and complex consultation process which was engaged in under the Act in the present case demonstrates that the Act provided an ample mechanism for consultation and accommodation of aboriginal rights.

69. The question of whether the EAA was complied with in the present case is extensively addressed in the reasons for judgment of Southin J.A. in the Court below. Madam Justice Southin in effect concluded that the Crown Appellants had observed the statutory requirements of the EAA, and that "weight was given to all the considerations laid down in s. 2". The majority of the Court was in agreement with this conclusion. Redfern notes, in addition, that there is no evidence that Redfern breached any of the statutory requirements of the EAA. Rather, the Courts below expressly recognized that Redfern had "made genuine and full efforts to comply with the EAA and has made a genuine effort to satisfy the concerns of the Tlingits".

Appellants' Record, Volume 1, pages 129, 181-183, 188-190 (BCCA Reasons, per Southin J.A., at paras. 14-15, 67-72, 80-87)
Appellants' Record, Volume 1, pages 112-113 (BCSC Reasons, at para. 137)
Appellants' Record, Volume 2, page 212 (BCCA Reasons, per Rowles J.A., at para. 134)

70. Redfern submits, moreover, that there is no evidence and no finding of any lack of good faith on the part of the Ministers in the implementation of the EAA in the circumstances of the present case.

(2) Good Faith in Aboriginal Negotiations

71. The second obvious reference point for defining the Crown's obligations in the context of the present case is the relationship between the Crown and the Tlingits as parties who were engaged in negotiations towards the settlement of the Tlingits' aboriginal claims. This relationship was clearly an important factor in the imposition of a fiduciary duty upon the Crown, both in the British Columbia Supreme Court and in the Court of Appeal:

The footing on which the learned chambers judge proceeded in arriving at her decision to quash the Project Approval Certificate is clear from her reasons, the relevant portions of which I have reproduced above. The chambers judge stated (in paragraph 130) that the federal government had agreed to negotiate land claims with the Tlingits in 1984 on the basis of a preliminary determination that they had aboriginal rights in their territory flowing from their pre-existing use and occupation of the land and resources of the area. That fact, together with the fact that the federal government had accepted the Tlingits' claim under the Comprehensive Land Claims Policy, was known to the provincial government when it entered into a framework agreement to negotiate with the Tlingits under the B.C. treaty process.

Appellants' Record, Volume 2, pages 248-249 (BCCA Reasons, per Rowles J.A., at para. 191)

72. The concept of a duty of good faith in aboriginal negotiations, which has received some recognition from lower courts in Canada, is a workable concept, because the duty is not defined in terms of unproven and hypothetical rights but rather is based upon the actual relationship between the parties and their conduct in treaty or similar negotiations.

Gitanyow First Nation v. Canada, [1999] 3 C.N.L.R. 89 (B.C.S.C.)
Nunavik Inuit v. Canada (Minister of Canadian Heritage), [1998] 4 C.N.L.R. 68 (F.C.T.D.)

73. It would arguably be inconsistent with any such duty for the Crown to act in such a manner, in its daily operations, as to effectively preclude any prospect of a successful outcome to its negotiations with an aboriginal people. For example, if the Crown is engaged

in active negotiations with an aboriginal group in which it is made clear that aboriginal control over a particular parcel of Crown land is a critical objective of the negotiations, it might be inconsistent with the Crown's obligations of good faith to put that parcel out of reach of any prospective settlement by alienating it to a third party.

74. However, there is no evidence in the present case that the negotiations between the Crown and the Tlingits have reached a stage where such issues would even arise. Indeed, apart from the fact that the Tlingits' claim had been accepted for negotiation, there was very little evidence before the Courts below as to the scope and nature of the negotiations, the stage which they had reached, or the impact that the Project would have on them.

Appellants' Record, Volume 2, page 362 (Affidavit of R. Salter, para. 362)

75. Thus, to the extent that the Crown has obligations of good faith in the negotiation of aboriginal agreements, Redfern submits that the duty is not engaged by the facts of this case.

(3) Conclusion

76. In conclusion, Redfern submits that the imposition of duties of a fiduciary or constitutional nature is not necessary in order to fill any vacuum as regards the protection of aboriginal rights pending the final determination of those rights.

77. First, duties of good faith may arise on the part of the Crown, for example where the Crown has accepted, to some extent, the legitimacy of aboriginal assertions of rights through engaging in the treaty negotiation process.

78. Second, the common interest shared by the Crown, private third parties and first nations in minimizing the potential for unconstitutional infringements of aboriginal rights is reflected in enactments such as the EAA, which include within them a mechanism for considering the assertions of first nations and which provide for reasonable measures to mitigate potential infringements.

79. Redfern notes that the statutory scheme in the present case was held by

Southin J.A. to “meet the demands of *Delgamuukw*”. In any event, Redfern respectfully submits that if the mechanism enacted by the legislature in an attempt to prevent unconstitutional infringements is unsuccessful, then it is for the legislature, and not the courts, to provide an alternative mechanism.

Appellants’ Record, Volume 1, page 194 (BCCA Reasons, per Southin J.A., at para. 99)

D. STANDARD OF REVIEW

80. Redfern submits, finally, that the decision of the Ministers in this case, as a discretionary, polycentric and political decision of Ministers of the Crown, is subject to review only for statutory compliance and good faith.

81. The Courts have traditionally restricted their review of discretionary ministerial decisions to circumstances where the decision was made in bad faith or did not comply with statutory conditions.

Re Maple Lodge Farms Ltd. and Canada, [1982] 2 S.C.R. 2 at pp. 6-8
Union of Nova Scotia Indians v. Canada (Attorney General) (1996), 22 C.E.L.R. (NS) 293 (FCTD)
Cheslatta Carrier Nation v. British Columbia (Project Assessment Director) (1998), 53 B.C.L.R. (3d) 1 (S.C.)
Bow Valley Naturalists Society v. Alberta (Minister of Environment Protection) (1995), 35 Alta. L.R. (3d) 285 (QB)

82. It is submitted that the decision of this honourable Court in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, has not removed this general principle from the law of judicial review. In *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] S.C.J. No. 31, this Court held (paragraphs 37-38):

It is the Minister who was obliged to give proper weight to the relevant factors and none other. *Baker* does not authorize courts reviewing decisions on the discretionary end of the spectrum to engage in a new weighing process, but draws on an established line of cases concerning the failure of ministerial delegates to consider and weigh implied limitations and/or patently relevant factors: see *Anisminic Ltd. v. Foreign Compensation Commission*, [1969] 2 A.C. 147 (H.L.); *Sheehan v. Ontario (Criminal Injuries Compensation Board)* (1974), 52 D.L.R.(3d) 728 (Ont. C.A.); *Maple Lodge Farms Ltd. v. Canada*,

[1982] 2 S.C.R. 2; *Dagg, supra*, at paras. 11-12, per La Forest J. (dissenting on other grounds).

This standard appropriately reflects the different obligations of Parliament, the Minister and the reviewing court. Parliament's task is to establish the criteria and procedures governing deportation, within the limits of the Constitution. The Minister's task is to make a decision that conforms to Parliament's criteria and procedures as well as the Constitution. The court's task, if called upon to review the Minister's decision, is to determine whether the Minister has exercised her decision-making power within the constraints imposed by Parliament's legislation and the Constitution. If the Minister has considered the appropriate factors in conformity with these constraints, the court must uphold the decision. It cannot set it aside even if it would have weighed the factors differently and arrived at different conclusions.

83. While the Court in *Suresh* described the standard as one of patent unreasonableness, it is clear that the standard permits review only on the basis of non-compliance with statutory standards or criteria or bad faith:

We agree with Robertson J.A. that the reviewing court should adopt a deferential approach to this question and should set aside the Minister's discretionary decision if it is patently unreasonable in the sense that it was made arbitrarily or in bad faith, it cannot be supported on the evidence, or the Minister failed to consider the appropriate factors.

Suresh v. Canada, *supra*, at para. 29

84. In the present case, the Ministers' decision is purely discretionary and political and has no adjudicative aspect. In *Transcanada Pipelines Ltd. v. Beardmore (Township)*, the Ontario Court of Appeal reviewed the *Baker* decision with respect to standard of review applicable to a decision which was non-adjudicative in nature. The Court of Appeal concluded that judicial review was:

...limited to a consideration of whether the commission properly exercised the powers conferred on it by the *Municipal Act* and the Regulations. In other words, the judicial review is limited to whether a restructuring commission, as a creature of statute, properly exercised powers conferred on it by the legislature. Its exercise of its statutory powers is reviewable to the extent of determining whether its actions are *intra vires*. Such a review does not encompass a consideration of the merits of the restructuring proposal, or agreement or disagreement with it.

Transcanada Pipelines Ltd. v. Beardmore (Township) (2000), 186 D.L.R. (4th) 403 at para. 99, application for leave to appeal dismissed, October 19, 2000 (S.C.C.)

85. Although the Court of Appeal adopted the patently unreasonable standard in assessing the commission's restructuring proposal, it expressed doubt that such review is appropriate in the absence of a determination that the commission did not act according to law in arriving at its decision.

86. Similar doubts were expressed by the Ontario Superior Court of Justice in *East Luther Grand Valley (Township) v. Ontario (Minister of Environment and Energy)*. In that case, following an assessment under the EAA, the Minister issued a notice to proceed with a project, without a hearing on the issue. The Court noted that the Minister's decisions were discretionary and that a discretionary decision will not be subject to judicial review merely because a party wishes the discretion had been used to come to a different conclusion:

Thus, to succeed under judicial review, the township must show the Minister acted in bad faith, or that he clearly failed to comply with the statutory conditions, as per *Ofner, supra*, or that he showed "the exercise of discretion for an improper purpose, and the use of irrelevant considerations" as per *Baker, supra*,...or that he was biased in his decision or that there is a reasonable apprehension that he was biased. Failing to comply with the statute has been held to mean a failure to consider matters the Act requires be considered or considering matters outside of the Act.

East Luther Grand Valley (Township) v. Ontario (Minister of Environment and Energy) (2000), 48 O.R. (3d) 247 at paras. 32-33 (Ont. S.C.J.)

87. As the Ontario Court of Appeal noted in *Transcanada Pipelines, supra*, there are good and valid reasons why the Courts have been reluctant to review the merits of policy decisions made by Ministers of the Crown. It is respectfully submitted that a review of ministerial decisions that are polycentric and political in nature, such as the one at issue in this case, should be given a great deal of deference by the courts.

88. In the present case, as previously noted, the Crown Appellants and Redfern have been found to have complied with all statutory requirements. In the absence of proof that their actions have infringed constitutional rights, the only question should be whether the Ministers have acted in good faith in the exercise of their statutory duties.

E. CONCLUSION: SCOPE OF THE CROWN'S OBLIGATION

89. For the foregoing reasons, Redfern submits that the only obligation on the part of the Crown which ought to have been recognized by the Courts below, prior to the proof of any aboriginal title or right, was an obligation of good faith and statutory compliance. It was unnecessary for the Court to recognize a vague and problematic fiduciary obligation arising independently of existing aboriginal rights or title.

90. Redfern submits that the Crown has complied with its good faith requirements and both the Crown and Redfern have fully complied with the requirements of the EAA. For these reasons, Redfern agrees with the Crown Appellants that the appeal ought to be allowed.

PART IV: COSTS

91. The Crown Appellants were granted leave to appeal on terms that the Crown Appellants pay the party and party costs of the Tlingits in any event of the cause.

Appellant's Record, Volume 2, p. 553 (Judgment of the Supreme Court of Canada, November 14, 2002)

92. Redfern did not apply for leave to appeal. On leave being granted, Redfern applied for party status on the basis that its rights and interests as a proponent of the Project stood to be affected by this Court's disposition of the issues in this case.

93. As Redfern is not responsible for the decision to bring the appeal, it is submitted that Redfern should not bear the burden of any award of costs in favour of the Tlingits.

94. It is submitted that Redfern's participation in this appeal, in support of the Crown Appellants, has not and will not significantly affected the costs incurred by the Tlingits in responding the appeal. Redfern's sole participation has been and will be to provide additional submissions to those of the Crown Appellants which reflect a different perspective on the issues raised by this appeal. In this respect, Redfern's participation is similar to that of an intervener. As a rule, apart from any additional disbursements associated with the intervention, costs are not awarded either for or against an intervener.

Rules of the Supreme Court of Canada, Rule 59
Crane and Brown, Supreme Court of Canada Practice, 2002, pp. 310-311

95. Redfern does not seek costs as against the Tlingits in the event that the appeal is allowed.

PART V: ORDERS SOUGHT

96. Redfern seeks an Order that the appeal be allowed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of May, 2003.

RANDAL J. KAARDAL

JOANNE R. LYSYK

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PART VII: STATUTES

**IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal of British Columbia)**

BETWEEN:

NORM RINGSTAD, in his capacity as the Project Assessment Director for the Tulsequah Chief Mine Project, SHEILA WYNN, in her capacity as the Executive Director, Environmental Assessment Office, THE MINISTER OF ENVIRONMENT, LANDS AND PARKS and THE MINISTER OF ENERGY AND MINES AND MINISTER RESPONSIBLE FOR NORTHERN DEVELOPMENT

**APPELLANTS
(Appellants/Respondents on Cross Appeal)**

AND:

THE TAKU RIVER TLINGIT FIRST NATION and MELVIN JACK, on behalf of himself and all other members of the Taku River Tlingit First Nation

**RESPONDENTS
(Respondents/Appellants on Cross Appeal)**

AND:

REDFERN RESOURCES LTD.

**RESPONDENT
(Appellant/Respondent on Cross Appeal)**

AND:

The ATTORNEY GENERAL OF CANADA, the ATTORNEY GENERAL OF QUEBEC, the UNION OF BRITISH COLUMBIA INDIAN CHIEFS, the FIRST NATIONS SUMMIT, the BUSINESS COUNCIL OF BRITISH COLUMBIA, BRITISH COLUMBIA & YUKON CHAMBER OF MINES, BRITISH COLUMBIA CHAMBER OF COMMERCE, BRITISH COLUMBIA WILDLIFE FEDERATION, COUNCIL OF FOREST INDUSTRIES, MINING ASSOCIATION OF BRITISH COLUMBIA, AGGREGATE PRODUCERS ASSOCIATION OF BRITISH COLUMBIA and DOIG RIVER FIRST NATION

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