

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

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:

Weyerhaeuser Company Limited

**APPELLANT
(Respondent)**

- 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 -

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Business Council of British Columbia, Aggregate Producers Association of British
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PART I

STATEMENT OF FACTS

1. The Attorney General for Saskatchewan adopts the Statements of Facts set out at paragraphs 5 to 11 of the Factum of the Appellant, British Columbia, and at paragraphs 4 to 12 of the Factum of the Appellant, Weyerhaeuser. In addition, the Attorney General submits that the following is an important factual consideration in this case - the Tree Farm Licence in issue has been in place since 1961 which was before existing Aboriginal and Treaty rights received constitutional protection from section 35(1) of the *Constitution Act, 1982*. This case does not deal with a new disposition.

Constitution Act, 1982, R.S.C. 1985, Appendix II, No. 44.

PART II

POINTS IN ISSUE

2. The Attorney General has intervened in these proceedings in order to address the issue concerning the constitutionality of section 36 of British Columbia's *Forest Act* raised by the Constitutional Question set for this appeal by Gonthier J. on July 4, 2003. The issue at the heart of the Constitutional Question is whether British Columbia has a constitutionally mandated duty to consult with First Nations who are asserting Aboriginal rights and title to lands covered by a Tree Farm Licence prior to issuing a replacement licence or agreeing to the transfer of the licence in circumstances where the Province disputes the existence, extent or scope of the asserted Aboriginal rights and title.

Forest Act, R.S.B.C. 1979, c. 140 (now R.S.B.C. 1996, c. 157).

PART III
ARGUMENT

A. Introduction

3. The position of the Attorney General is that any constitutionally mandated duty to consult with First Nations concerning the replacement or transfer of a Tree Farm Licence must find its source in the existing Aboriginal and Treaty rights which are recognized and affirmed by section 35(1) of the *Constitution Act, 1982* and in the prior jurisprudence of this Court. Whether the Crown has consulted with First Nations is an important consideration that must be taken into account whenever the Crown is arguing that an infringement of an existing Aboriginal or Treaty right is justified according to the test laid down by this Court in *R. v. Sparrow*. Any duty to consult is part of the *Sparrow* justificatory test and is engaged only in the face of a *prima facie* infringement of an existing Aboriginal or Treaty right.

R. v. Sparrow, [1990] 1 S.C.R. 1075.

4. The Attorney General takes the position that there is no free-standing constitutional duty to consult with First Nations with respect to asserted but unproven rights arising out of the fiduciary relationship between the Crown and Aboriginal peoples. The creation of this duty by the Court of Appeal resulted from its failure to appreciate the dichotomy between private law and public law fiduciary duties. Furthermore, such a duty is not necessary in order to address the concerns raised by the Court of Appeal.

5. The Attorney General further takes the position that when a court is faced with issues concerning the sufficiency of consultations with Aboriginal peoples at an interlocutory stage of

proceedings, the court should apply the well-established equitable principles that have been laid down by this Court in cases such as *Manitoba (Attorney General) v. Metropolitan Stores (M.T.S.) Ltd.* and *RJR - MacDonald Inc. v. Canada (Attorney General)* dealing with applications for interlocutory relief in the context of other constitutional rights. The concerns which lead the Court of Appeal to adopt a free-standing and fiduciary based duty to consult with respect to asserted but unproven Aboriginal rights can be satisfactorily addressed within the framework of these equitable principles.

Manitoba (Attorney General) v. Metropolitan Stores (M.T.S.) Ltd., [1987] 1 S.C.R. 110; *RJR - MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

6. The Appellant, British Columbia, suggests that prior to a court determination concerning the existence and extent of Aboriginal rights and title, no constitutionally mandated duty to consult exists. British Columbia takes the position that any duty to consult which exists at this stage arises solely out of administrative law principles. The Attorney General of Saskatchewan does not agree that only administrative law principles are relevant at this stage. The Attorney General agrees with the statement of Rowles J.A. in *Taku River Tlingit* that rights exist prior to a court saying that they exist. If a right exists, then according to the *Sparrow* test, there may be an obligation to consult. In order for consultations to be effective, generally speaking they must take place before infringements occur. But the Attorney General agrees with British Columbia that there is no need to create a separate free-standing constitutional duty in order to ensure that consultations take place before infringements occur. The *Sparrow* justificatory test already accomplishes this objective.

Taku River Tlingit First Nation v. Rigstad, et al., [2002] 2 C.N.L.R. 312 (B.C.C.A.), at para 183 per Rowles J.A.; see also *Paul v. British Columbia (Forest Appeals Commission)*, [2001] 4 C.N.L.R. 210 (B.C.C.A.), at para. 119, per Huddart J.A., dissenting, but not on this point; aff'd 2003 SCC 55, without discussion of this point.

7.. The Attorney General is interested in the outcome of this appeal because similar issues have arisen in Saskatchewan. In *Yellow Quill First Nation v. Saskatchewan (Minister of Environment and Resource Management)*, a First Nation which is a party to Treaty No. 4 sought a stay of the operation of a Forest Management Agreement that had been entered into between the Province and SaskFor MacMillan Limited Partnership, a subsidiary of MacMillan Bloedel. Yellow Quill alleged that the agreement which authorized SaskFor to engage in logging on Crown lands infringed its Aboriginal and Treaty rights and that the Crown had not adequately consulted prior to entering into the agreement. Yellow Quill also sought an interlocutory injunction to restrain SaskFor from logging on a particular 46,080 acre parcel until the trial of its action. The application for the injunction was dismissed by Krueger J. of the Court of Queen's Bench. He applied the well-established test laid down by this Court in *RJR - MacDonald*. He concluded that while there was a serious question to be tried, the Applicants had not established that irreparable harm would occur to their interests given that the area in question had already been logged for thirty years and monetary damages could compensate them for any losses. Krueger J. also concluded that the balance of convenience favoured maintaining the *status quo* and avoiding the serious economic repercussions for the provincial economy that could result from shutting down SaskFor's milling operations. It is submitted that the approach adopted by Krueger J. in *Yellow Quill* was the correct one.

Yellow Quill First Nation v. Saskatchewan (Minister of Environment and Resource Management), [2000] 2 C.N.L.R. 359 (Sask. Q.B.).

8. In addition, the outcome of this appeal could have a significant impact on how all provinces deal with their Crown lands and resources in the face of asserted but unproven Aboriginal and Treaty rights, such as unextinguished Aboriginal title. The claims put forth by the Respondents in this case are not unique to British Columbia. In Saskatchewan, several First Nations have alleged

that their Aboriginal title was not fully extinguished when they entered into treaties and the Metis Nation of Saskatchewan has asserted a claim to unextinguished Aboriginal title over approximately one quarter of the province. Saskatchewan has existing Partnership Agreements with both First Nations and Metis political organizations and has ongoing discussions with them about a broad range of issues. But Saskatchewan does not currently consult with either of these groups before disposing of Crown lands or resources except in specific situations where it is known that the disposition will have a significant effect on the exercise of recognized hunting or fishing rights.

B. Summary Determination Inappropriate

9. The Respondents commenced these proceedings by seeking judicial review of the Minister's decision to replace Tree Farm Licence No. 39 and to approve its transfer to Weyerhaeuser. However, all issues requiring proof of Aboriginal rights or title were referred to the trial list in July, 2000. The Respondents nevertheless continued to seek a declaration concerning the validity of the Minister's actions prior to the trial of their action. The Chambers Judge determined that it was impossible to assess the validity of Tree Farm Licence No. 39 in summary proceedings and dismissed the application. It is submitted that this was the correct approach to take. Cases concerning the existence and scope of Aboriginal rights and title, their possible infringement and whether any infringements are justified, like other constitutional cases, involve complex legal and factual issues and are not amenable to summary determination. It is, therefore, submitted that it is impossible to make any determination with respect to the validity of the Tree Farm Licence without a trial and it was a mistake for the Court of Appeal to

do so. However, this does not mean that the Respondents are completely without legal recourse prior to the completion of the trial. The Respondents could always apply for interlocutory relief.

Judgement of the Chambers Judge, at para. 34; see also *Halfway River First Nation v. British Columbia (Minister of Forests)*, [1999] 4 C.N.L.R. 1 (B.C. C.A.), at p. 53, per Southin J.A. dissenting; see generally, *Metropolitan Stores*, *supra*, at para. 40.

10. The Constitutional Question set for this appeal concerns the validity of section 36 of the *Forest Act*. It is submitted that the *Forest Act* is a valid provincial law clearly within British Columbia's legislative jurisdiction under sections 92 and 92A of the *Constitution Act, 1867*. Section 36 authorizes the Minister to offer replacement tree farm licences to licencees from time to time. The constitutional validity of section 36 is called into question in these proceedings only in the context of the replacement and transfer of Tree Farm Licence No. 39 and an alleged clash with rights protected by section 35(1) of the *Constitution Act, 1982*. It is submitted that the constitutional validity of section 36 itself is not called into question in these proceedings. It is only the constitutional validity of the Minister's actions pursuant to section 36 in the particular circumstances of this case that are called into question and, as stated above, this issue can only be resolved by trial.

Constitution Act, 1867, R.S.C. 1985, Appendix II, No. 5.

C. The Duty to Consult

(1) Part of the Sparrow Justificatory Test

11. In recent years, the Crown's obligation to consult with Aboriginal people has been the subject of a great deal of litigation. Most of the cases have concerned alleged infringements of existing Aboriginal and Treaty rights, such as rights to hunt and fish, and the Crown's attempts to

justify these infringements according to the *Sparrow* test. This test may involve consideration of whether the Crown consulted with the affected Aboriginal peoples before taking the action which allegedly infringed their rights. In this case, the Court of Appeal has extended the duty to consult beyond the *Sparrow* justificatory test and has established a free-standing fiduciary duty to consult with respect to asserted but unproven rights. In order to determine whether this extension of the duty to consult was proper, it is necessary to examine the origin of the concept of consultations in Aboriginal law.

12. Existing Aboriginal and Treaty rights received constitutional protection in 1982 from section 35(1) of the *Constitution Act, 1982*. This Court first examined the nature of this constitutional protection in 1990 in *Sparrow* and concluded that rights which are “recognized and affirmed” are not absolute. Governments can still override or infringe these rights provided that their actions satisfy a justificatory standard. The Court indicated that in order to justify infringements of existing Aboriginal or Treaty rights, governments must satisfy a two step test. First, it must be shown that the impugned government action has a sufficiently valid legislative objective to warrant overriding existing rights. Second, it must be shown that this objective has been achieved in a way which upholds the honour of the Crown in its dealings with Aboriginal peoples and which respects the fiduciary relationship that exists between them. As part of the second stage of the *Sparrow* justificatory test, the Court indicated that the following factors should be considered: whether there has been as little infringement as possible in order to achieve the desired objective; whether in cases of expropriation, compensation has been paid and whether the affected Aboriginal peoples have been consulted about the government’s action. The Court also made it clear that the list of factors that it was setting out was neither exclusive nor exhaustive. Each case must be considered within its own particular context.

Sparrow, supra, at pp. 1109-1119.

13. Therefore, whether the Crown has consulted with Aboriginal peoples about a particular matter is simply one of the factors that may be relevant to an inquiry into whether an infringement of an Aboriginal right is justified. Any requirement to consult is clearly anchored in the *Sparrow* justificatory test which is an integral part of section 35(1). This is the approach that has been consistently adopted by this Court since *Sparrow*. This Court has never recognized a free-standing duty to consult. Nor has it recognized that the lack of adequate consultations, in and of itself, is a separate ground upon which government action infringing Aboriginal rights can be constitutionally impugned.

See generally: *R. v. Badger* [1996] 1 S.C.R. 771, at paras. 96-98, per Cory J.; and *R. v. Marshall (Motion for Rehearing and Stay)*, [1999] 3 S.C.R. 533, at para. 43, per the Court.

14. This Court considered the role of consultations in some detail in *R. v. Nikal*. Cory J. wrote the majority judgment. He affirmed that consultations are simply one of the possible considerations under the *Sparrow* justificatory test. He concluded that reasonableness is the overriding consideration in determining whether consultations are required and the scope of the consultations required. He made it clear that in some cases, such as where it is necessary to enact regulations expeditiously in order to avert a crisis, government action infringing Aboriginal rights may be justified without prior consultations. In particular, Cory J. said as follows:

It can, I think, properly be inferred that the concept of reasonableness forms an integral part of the *Sparrow* test for justification. For example, in these last questions reasonableness will be a necessary aspect of the inquiry as to justification. For instance, when considering whether there has been as little infringement as possible, the infringement must be looked at in the context of the situation presented. So long as the infringement was one which in the context of the circumstances presented could reasonably be considered to be as minimal as possible then it will meet the test. The mere fact that there could possibly be other solutions that might be considered to be a lesser infringement should not, in itself, be the basis for automatically finding that there cannot be a justification for the infringement. So too in the

aspects of information and consultation the concept of reasonableness must come into play. For example, the need for the dissemination of information and a request for consultations cannot simply be denied. So long as every reasonable effort is made to inform and to consult, such efforts would suffice to meet the justification requirement. This is not more than recognizing that regulations pertaining to conservation may have to be enacted expeditiously if a crisis is to be avoided. On occasion, strict and expeditious conservation measures will have to be taken if potentially catastrophic situations are to be avoided. The nature of the situation will have to be taken into account in assessing the conservation measures taken. The greater the urgency and the graver the situation the more reasonable strict measures may appear.

R. v. Nikal, [1996] 1 S.C.R. 1013, at para. 110.

15. This Court dealt with consultations in the context of an Aboriginal title claim in *Delgamuukw v. British Columbia*. In that case, Lamer C.J. set out what must be proven in order to establish Aboriginal title. He also confirmed that Aboriginal title, like other Aboriginal rights, can be infringed by both federal and provincial governments provided that the *Sparrow* test is satisfied. Chief Justice Lamer also indicated that whether consultations have taken place with respect to decisions affecting Aboriginal title lands is relevant in determining whether infringements are justified - i.e., consultations are simply part of the *Sparrow* justificatory test. He also affirmed the flexible approach to justification that was enunciated in *Sparrow* and held that the nature and scope of consultations required with respect to decisions affecting Aboriginal title lands would vary with the circumstances of each case. In some cases, there will be only a duty to discuss those decisions with the affected Aboriginal group. In other cases, the obligation will require substantially more. In particular, Lamer C.J. said:

Moreover, the other aspects of aboriginal title suggest that the fiduciary duty may be articulated in a manner different than the idea of priority. This point becomes clear from a comparison between aboriginal title and the aboriginal right to fish for food in *Sparrow*. First, aboriginal title encompasses within it a right to choose to what ends a piece of land can be put. The aboriginal right to fish for food, by contrast, does not contain within it the same discretionary component. This aspect of aboriginal title suggests that the fiduciary relationship between the Crown and aboriginal peoples may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their lands. There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified, in the same way that the Crown's failure to consult an aboriginal group with respect to the terms by which reserve land is

leased may breach its fiduciary duty at common law: *Guerin*. The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. [Emphasis added.]

Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, at para. 168.

16. In discussing the second step of the *Sparrow* test, Lamer C.J. noted that when dealing with Aboriginal title “there is always a duty to consult”. This statement was relied upon by the Court of Appeal to support its conclusion that in Aboriginal title cases, consultations are no longer simply one of the various factors that may be taken into account in the justification analysis but rather are mandatory. It is submitted that this interpretation reads too much into a single sentence contained in a lengthy judgment dealing with many difficult and complex issues. Chief Justice Lamer’s statement certainly reflects the importance of Aboriginal title within the spectrum of existing Aboriginal rights. But it must be read within its proper context. It is submitted that Lamer C.J. did not intend to sweep away the flexible and case by case approach which the Court had adopted in previous cases. In addition, it is important to recognize that in *Delgamuukw*, Lamer C.J. was discussing the role of consultations with respect to an established Aboriginal title. The Chief Justice was not considering the issue in the context of interlocutory proceedings. Therefore, it is submitted that *Delgamuukw* should not be interpreted as having elevated consultations to the status of either a separate duty or a separate and mandatory step in the *Sparrow* test, either specifically for Aboriginal title cases or more generally.

See similar conclusion in *Treaty Eight First Nations v. Canada (Attorney General)* [2003] F.C.J. No. 1009, at paras. 61-63, per Dawson J.

17. The Ontario Court of Appeal reached exactly this conclusion in *Ontario (Minister of Municipal Affairs and Housing) v. TransCanada Pipelines Limited*, where Borins J.A. held as follows:

In my view, O'Driscoll J. incorrectly applied the concept of the Crown's duty to consult with First Nations in setting aside the restructuring proposal on the ground of loss of jurisdiction. As I will explain, he elevated the Crown's duty to consult with First Nations from merely being one, of several, justifactory [*sic*] 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.

Ontario (Minister of Municipal Affairs and Housing) v. TransCanada Pipelines Limited, [2000] 3 C.L.N.R. 153 (Ont. C.A.).

18. Therefore, it is submitted that the prior jurisprudence of this Court and others confirms that consultations are simply one of the factors that may be taken into account in the *Sparrow* justificatory test. Nothing more. Nothing less.

(2) Consultations and Pre-1982 Government Action

19. A unique issue with respect to the necessity of consultations arises in this case. The Tree Farm Licence in issue was originally granted in 1961 which was before Aboriginal rights received constitutional protection from section 35(1) of the *Constitution Act, 1982*. It is submitted that when government actions which infringe Aboriginal rights occurred prior to 1982, a different and less onerous standard of consultation should be incorporated into the *Sparrow* justificatory test. This Court has recognized that consultations are only one of the factors to be taken into account and that consultations may not always be required. If the impugned government action, be it the enactment of *Fisheries Regulations* or the issuance of a resource disposition, occurred prior to 1982, it should be recognized that Aboriginal rights did not have constitutional status at that time and that the Crown cannot be expected to have met a constitutional standard which did not exist and which was

not enunciated until this Court's decision in *Sparrow* in 1990. The lack of consultations in these cases cannot be considered fatal to justification arguments put forth by the Crown.

See generally: *Badger, supra*, at para. 77; *R. v. Horseman*, [1990] 1 S.C.R. 901, at p. 936; and *R. v. Sikyey*, [1964] S.C.R. 642.

20. This dilemma was recognized by Judge Nightingale of the Saskatchewan Provincial Court in *R. v. Couillonneur*. The issue in that case concerned whether or not restrictions on fishing nets' mesh size contained in the *Saskatchewan Fishery Regulations* constituted an unjustifiable infringement of the Accused's right to fish under Treaty No. 10. The restriction had been in place prior to 1982 and had been enacted without consultations with affected First Nations. Judge Nightingale noted that the justificatory factors set out in *Sparrow* were not intended to be either exhaustive or exclusive. Therefore, while there were no consultations with affected First Nations before the regulations were enacted, in Judge Nightingale's opinion, this was not fatal to their applicability. The regulations had not been enacted in a "high-handed or paternalistic fashion". Therefore, they remained constitutionally applicable notwithstanding the lack of consultations.

R. v. Couillonneur, [1997] 1 C.N.L.R. 130 (Sask. Prov. Ct.), at pp. 137-138; see also: *R. v. Pine*, [1997] O.J. No. 1004 (Ont. C.J. (Gen. Div.)), at para. 55.

21. It is submitted that similar considerations are applicable in this case. The original Tree Farm Licence was issued in 1961 when Aboriginal rights and title had no constitutional protection and there was no duty to consult before infringing those rights. While the licence has been replaced since 1982, the replacements should not be seen as new dispositions. They did not create new rights nor did they alter the nature of any infringement of the Respondents' rights that had occurred in 1961. Therefore, it is submitted that no consultations or a lesser degree of consultations would be sufficient to meet the *Sparrow* justificatory test in this case than what would be required if, for

example, a new disposition was being made. By this submission, the Attorney General is not suggesting that any government action prior to 1982 is immune from challenge under section 35(1). The Attorney General is simply suggesting that a flexible approach should be taken to the application of the *Sparrow* justificatory test which recognizes that consultations are only one part of the equation and that governments cannot be expected to meet constitutional standards that did not exist at the time when they acted.

(3) Consultations and Treaty Rights

22. The Attorney General notes that the issue in this case concerns consultations in the context of Aboriginal rights and title claims. The necessity for consultations in a Treaty context may be quite different. Whether consultations are required will depend upon, *inter alia*, the terms of the specific Treaty, whether the government action infringes a Treaty right and whether the Treaty itself contemplates consultations in these circumstances. There are currently cases before the courts dealing with consultations in Treaty contexts and it is submitted that, consistent with the direction from this Court in *Sparrow*, these cases will have to be determined within their own particular circumstances and on a case by case basis. No universal rules with respect to the necessity of consultations when provinces dispose of Crown lands or resources are possible.

Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), [2002] 1 C.N.L.R. 169 (F.C.T.D); appeal heard by F.C.A. in Sept., 2003 and decision reserved; *R. v. Cardinal*, [2003] A.J. No. 908 (Prov. Ct.), at paras. 95-97.

D. Fiduciary Obligations and the Duty to Consult

(1) A Nebulous Concept

23. The Court of Appeal concluded that the Province had a constitutionally mandated duty to consult with the Haida Nation prior to issuing a replacement of Tree Farm Licence No. 39 and prior to consenting to the transfer of that licence to Weyerhaeuser. The Court of Appeal said that the source of this duty was the fiduciary relationship which exists between the Crown and Aboriginal peoples. The Court of Appeal concluded that this duty is not dependent upon any determination by a court that an existing Aboriginal or Treaty right has been infringed. The duty is separate and apart from the *Sparrow* justificatory test. The Court of Appeal described it as a free-standing duty. The duty is triggered merely by the assertion of an Aboriginal or Treaty right. In this case, the Court of Appeal said that the Haida Nation had a “good *prima facie* case” in support of the rights that they asserted, but the Court’s comments clearly suggest that the duty will exist even where weaker claims are asserted. The strength of the claim merely affects the scope and degree of consultations required.

Court of Appeal Judgment, *Haida Nation No. 1*, at paras. 48-51.

24. The Attorney General submits that the Court of Appeal erred in concluding that a free-standing constitutional duty to consult exists based upon the fiduciary relationship between the Crown and Aboriginal peoples. It is the position of the Attorney General that any obligation to consult arises only with respect to infringements of existing Aboriginal and Treaty rights, as part of the *Sparrow* justificatory test. It is submitted that the Court of Appeal’s conclusion reflects a misunderstanding of fiduciary law in the context of Aboriginal and Treaty rights and overlooks the dichotomy between private law and public law fiduciary duties.

25. Although the courts have recognized for centuries that fiduciary duties exist in certain relationships such as trustee and beneficiary, principal and agent and solicitor and client, the fiduciary concept remains a nebulous one. For example, in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, La Forest J. of this Court said that “there are few legal concepts more frequently invoked but less conceptually certain than that of fiduciary relationships.” This is particularly true in the field of Aboriginal law.

Mark V. Ellis, *Fiduciary Duties in Canada* (Carswell, looseleaf ed.) at p. 1-1; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, at pp. 643-644.

26. In this case, Lambert J.A. on behalf of the Court of Appeal stated at paragraph 36 of the judgment in *Haida Nation No.1*, that fiduciary duty permeates the whole relationship between the Crown and Aboriginal peoples. However, it is well-established in other areas of fiduciary law that not all aspects of the relationship between a fiduciary and a beneficiary are necessarily fiduciary in nature. In *Wewaykum Indian Band v. Canada*, this Court rejected the notion of an all embracing fiduciary duty between the Crown and Aboriginal peoples. Binnie J. held as follows:

I think it desirable for the Court to affirm the principle, already mentioned, that not all obligations existing between the parties to a fiduciary relationship are themselves fiduciary in nature (*Lac Minerals, supra*, at p. 597), and that this principle applies to the relationship between the Crown and aboriginal peoples. It is necessary, then, to focus on the particular obligation or interest that is the subject matter of the particular dispute and whether or not the Crown had assumed discretionary control in relation thereto sufficient to ground a fiduciary obligation.

Wewaykum Indian Band v. Canada, 2002 SCC 79, at para. 83, relying upon *Lac Minerals, supra*.

(2) Private Law and Public Law Duties

27. It is submitted that there are two quite distinct types of fiduciary duties at play in Aboriginal law. The first is akin to a private law duty and is illustrated by the cases dealing with reserve lands

such as *Guerin*, *Blueberry River* and *Wewaykum*. In order for a fiduciary obligation of this type to arise, as Binnie J. held in *Wewaykum*, there must be a cognizable Indian interest in some type of property in issue, like reserve lands, and the Crown must be in a position to exercise some sort of discretionary control over this property. This type of fiduciary duty is very much like the fiduciary duty that arises in the private law context and will carry with it many of the traditional responsibilities of a private law fiduciary. Given the existence of section 91(24) of the *Constitution Act, 1867*, this sort of duty will ordinarily be owed to Aboriginal peoples only by the federal Crown.

Guerin v. The Queen, [1984] 2 S.C.R. 335; *Blueberry River Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344; *Wewaykum*, *supra*; *Constitution Act, 1867*, *supra*.

28. It is submitted that in *Sparrow* and subsequent cases dealing with section 35(1) of the *Constitution Act, 1982*, this Court has recognized a second and quite distinct type of fiduciary duty. This duty limits governments' ability to infringe upon constitutionally protected Aboriginal and Treaty rights. This duty is part of the constitutional protection accorded to existing Aboriginal and Treaty rights by section 35(1). It was created by section 35(1). It is a critical component of the second stage of the *Sparrow* justificatory test. But the role that fiduciary duty plays in the *Sparrow* test is quite different from the role that it plays in the *Guerin*-type cases. In the context of the *Sparrow* test, it is submitted that the fiduciary duty is purely a public law duty. The Crown is not and cannot be a true fiduciary in this context. Governments cannot legislate with respect to the conservation, management or disposition of natural resources with only the interests of Aboriginal peoples whose rights may be

affected in mind. Governments must be able to balance these rights against the broader public interest. This critical distinction was recognized by Binnie J. in *Wewaykum* where he stated as follows:

When exercising ordinary government powers in matters involving disputes between Indians and non-Indians, the Crown was (and is) obliged to have regard to the interest of all affected parties, not just the Indian interest. The Crown can be no ordinary fiduciary; it wears many hats and represents many interests, some of which cannot help but be conflicting: *Samson Indian Nation and Band v. Canada*, [1995] 2 F.C. 762 (C.A.). As the Campbell River Band acknowledged in its factum, “[t]he Crown’s position as fiduciary is necessarily unique” (para. 96). In resolving the dispute between Campbell River Band members and the non-Indian settlers named Nunns, for example, the Crown was not solely concerned with the band interest, nor should it have been. The Indians were “vulnerable” to the adverse exercise of the government’s discretion, but so too were the settlers, and each looked to the Crown for a fair resolution of their dispute. At that stage, prior to reserve creation, the Court cannot ignore the reality of the conflicting demands confronting the government, asserted both by the competing bands themselves and by non-Indians. As Dickson J. said in *Guerin*, *supra*, at p. 385:

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.

Wewaykum, *supra*, at para. 96.

29. It is accordingly submitted that the fiduciary duty that is a key component of the second part of the *Sparrow* justificatory test is not a true fiduciary duty in the private law sense. It is a public law duty. It requires governments to be mindful of existing Aboriginal and Treaty rights when legislating and to take those rights seriously. But it does not necessarily guarantee those rights immunity from legislation or priority over the rights and interests of others. A public law formulation of the fiduciary duty which is part of section 35(1) recognizes that governments are entitled to balance the rights of Aboriginal people against the public interest in their decision making. It is submitted that this characterization of the fiduciary duty is consistent with the purposes underlying section 35 which were described by Lamer C.J. in *R. v. Van der Peet* as follows:

The Canadian, American and Australian jurisprudence thus supports the basic proposition put forward at the beginning of this section: the aboriginal rights recognized and affirmed by s. 35(1) are best understood as, first, the means by which the Constitution recognizes the fact that prior to the arrival of Europeans in North America the land was already occupied by distinctive aboriginal societies, and as, second, the means by which that prior occupation is reconciled with the assertion of Crown sovereignty over Canadian territory. The content of aboriginal rights must be directed at fulfilling both of these purposes. [Emphasis added.]

R. v. Van der Peet, [1996] 2 S.C.R. 507, at para. 43; see also *R. v. Gladstone*, [1996] 2 S.C.R. 723, at paras. 57 to 75 and *Delgamuukw*, *supra*, at para. 167.

30. The public law nature of the protection accorded to existing Aboriginal and Treaty rights by section 35(1) is also reflected in the following statement made by Cory J. in *Nikal*:

It has frequently been said that rights do not exist in a vacuum, and that the rights of one individual or group are necessarily limited by the rights of another. The ability to exercise personal or group rights are necessarily limited by the rights of others. The government must ultimately be able to determine and direct the way in which these rights should interact. Absolute freedom in the exercise of even a *Charter* or constitutionally guaranteed aboriginal right has never been accepted, nor was it intended. Section 1 of the *Canadian Charter of Rights and Freedoms* is perhaps the prime example of this principle. Absolute freedom without any restriction necessarily infers a freedom to live without any laws. Such a concept is not acceptable in our society. On this issue the reasons of Blair J.A. in *R. v. Agawa* (1988), 65 O.R. (2d) 505 (Ont. C.A.), at p. 524, are persuasive and convincing. He recognized the need for a balanced approach to limitations on treaty rights, stating:

... Indian treaty rights are like all other rights recognized by our legal system. The exercise of rights by an individual or group is limited by the rights of others. Rights do not exist in a vacuum and the exercise of any right involves a balancing with the interests and values involved in the rights of others. This is recognized in s. 1 of the *Canadian Charter of Rights and Freedoms* which provides that limitation of Charter rights must be justified as reasonable in a free and democratic society.

Nikal, *supra*, at para. 92 quoting *R. v. Agawa* [1988] 3 C.N.L.R. 73 (Ont. C.A.), at pp. 89-90.

31. Viewing section 35(1) as incorporating a public law fiduciary duty also establishes a clear parallel to section 1 of the *Canadian Charter of Rights and Freedoms*. This Court noted in *Sparrow* that section 35 is not part of the *Charter* and that existing Aboriginal and Treaty rights are therefore not subject to the limitations provided by section 1 of the *Charter*. Nevertheless, the Court held that

these rights are not absolute and can be overridden or infringed when the government's action is justified. The justification test that was crafted by the Court in *Sparrow* fulfills a similar role to section 1 of the *Charter* and is similar to the *Oakes* test. This analogy has been recognized on several occasions.

Sparrow, supra, at pp. 1108-1109; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Gladstone, supra*, at para. 63; and *TransCanada Pipelines, supra*, at para. 114.

32. The distinction between private law and public law fiduciary duties in Aboriginal law has not been specifically articulated by this Court in any previous case. However, it is submitted that such a distinction was suggested in both *Guerin* and in *Wewaykum*. It is also submitted that a similar distinction was recognized in *Osoyoos Indian Band v. Oliver (Town)* where Iacobucci J., for the majority, concluded that no fiduciary duty exists at the initial stage of determining whether or not an expropriation of reserve land is required in the public interest. A fiduciary duty to the affected First Nation arises only after this decision has been made and then obligates the expropriating government to take only the minimum interest in reserve land required in order to fulfill the public purpose. Expropriation of reserve land accordingly involves a two-step process - one involving purely public law duties and the other involving duties to the affected First Nation which are akin to private law duties.

Osoyoos Indian Band v. Oliver (Town), [2001] 3 S.C.R. 746, at pp. 771 to 773, per Iacobucci J.; see also, *Treaty Eight First Nations, supra*, at paras. 64-74.

33. A public law fiduciary duty must be taken into account whenever governments attempt to justify infringements of section 35(1) rights. It matters not whether the rights can be characterized as a "cognizable Indian interest" in some property as that term was used in *Wewaykum*. (The Attorney General, however, acknowledges that there may be cases where both section 35(1) public

law fiduciary duties and fiduciary duties more akin to private law fiduciary duties arise in the same case.) Given that both federal and provincial governments can infringe upon Aboriginal rights within their respective legislative spheres, the public law fiduciary duty incorporated into section 35(1) may be owed by either.

(3) Errors of the Court of Appeal

34. It is submitted that the Court of Appeal erred by considering the fiduciary duty at issue in this case as being akin to a private law duty and by failing to recognize that this duty is in fact a public law duty. For example, in his judgment in *Haida Nation No. 2*, Lambert J.A. held as follows:

The fiduciary duty of the Crown, federal or provincial, is a duty to behave towards the Indian people with utmost good faith and to put the interests of the Indian people under the protection of the Crown so that, in cases of conflicting rights, the interests of the Indian 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. All the principles which must inform the tests for justification of a *prima facie* infringements, such as consultation, accommodation, and minimal impairment, represent examples of the Crown's fiduciary duty to the Indian peoples. [Emphasis added.]

Judgment of Lambert J.A., *Haida Nation, No. 2*, at para. 62.

35. It is submitted that this statement represents significant error in law. It overlooks the fact that this Court held in *Sparrow* that existing Aboriginal and Treaty rights protected by section 35(1) are not absolute and may be overridden or infringed by governments provided that the justificatory test is fulfilled. Lambert J.A.'s characterization of the fiduciary duty would mean that Aboriginal rights can never be subordinated to the public interest and can never be justifiably infringed. The fundamental error that the Court of Appeal made is that it overlooked the fact that fiduciary concepts are employed under section 35(1) as part of the Crown's public law duties and require a balancing of the rights of Aboriginal peoples and the public interest. The Court of Appeal treated

the fiduciary duty under section 35(1) as akin to a private law fiduciary duty. Therefore, the Court got off on the wrong foot and this error necessarily coloured the remainder of its analysis leading to the establishment of a free-standing duty to consult.

36. The Court of Appeal expressed concerns that if there is no duty to consult prior to a court determination that an Aboriginal right exists and has been infringed, section 35(1) will be robbed of much of its significance. This was referred to by Lambert J.A. as “the timing fallacy”. The Court of Appeal was concerned that in order for consultations to be meaningful, they must occur before any infringement takes place. The Attorney General agrees that after the fact consultations are largely meaningless and can have little or no impact on the justifiability of infringements.

However, it is submitted that the concern expressed by the Court of Appeal is overstated and is not sufficient reason to create a separate free-standing pre-determination duty to consult. The *Sparrow* justification test in fact has prospective application. When governments embark upon legislative initiatives which may potentially infringe upon Aboriginal rights, they will ordinarily consult with the affected Aboriginal peoples. The reason for doing so is simple - any failure to consult will result in the initiative being at risk of being struck down as an unjustifiable infringement of section 35(1) rights under the *Sparrow* test. The existence of the *Sparrow* justificatory test, in fact, motivates governments to consult with Aboriginal peoples prior to infringing upon their rights.

However, the decision to consult or not to consult is always part of a risk-benefit analysis.

Governments may run the risk of not consulting provided that they are prepared to live with the consequences of having the legislative initiative ultimately struck down as a violation of section 35(1) or possibly having the initiative halted prior to final determination by an injunction. The free-standing duty to consult created by the Court of Appeal denies governments the ability to make these sorts of assessments and creates a duty to consult where it is possible that no underlying right exists.

37. The Court of Appeal's judgment also ignores the fact that in some circumstances consultations may not be required in order to justify infringements. Governments ought to be free to proceed without consultations where they believe that an initiative can ultimately withstand constitutional scrutiny under section 35(1) without consultations. Furthermore, the Court of Appeal's judgment is tantamount to an order that the Province negotiate with the Haida Nation concerning their asserted Aboriginal rights and title prior to taking any action that could possibly infringe those rights. This conclusion is inconsistent with the holding of the Ontario Court of Appeal in *Perry v. Ontario*. In that case, the Court expressly rejected the submission that section 35(1) creates a duty to negotiate with Aboriginal peoples about the existence and scope of their rights.

Perry v. Ontario, [1997] O.J. No. 2134 (C.A.), at paras. 88 to 95.

38. A good example of the prospective effect of the *Sparrow* justificatory test is provided by a Saskatchewan case, *R. v. Maurice and Gardner*. In that case, Saskatchewan decided to enact new regulations to deal with the issue of hunting at night with lights. Extensive consultations were held with potentially affected Aboriginal groups. When the regulation was challenged in court, Saskatchewan took the position that the regulations were required for safety purposes and, therefore, did not constitute a *prima facie* infringement of either Aboriginal or Treaty hunting rights. Judge Nightingale of the Saskatchewan Provincial Court agreed with this submission. Therefore, consultations were, strictly speaking, unnecessary because there was no infringement of an Aboriginal or Treaty right. However, the Province had, in fact, extensively consulted about the new regulations because of the importance of the issue and the real risk that the regulations could be declared constitutionally invalid if consultations did not take place.

R. v. Maurice and Gardner, [2002] 2 C.N.L.R. 244 (Sask. Prov. Ct.), at pp. 270-272, aff'd [2002] 2 C.N.L.R. 272 (Sask. Q.B.).

39. The approach suggested by the Attorney General is not an “only after” argument. It does not leave First Nations who believe that their rights are being infringed without any available remedies prior to a court finally determining all of the issues related to their claims. The Attorney General specifically acknowledges that in appropriate circumstances interlocutory relief may be available in Aboriginal and Treaty rights cases.

E. Asserted Rights and Interlocutory Relief

40. The issue at the heart of this appeal is how should courts deal with asserted but unproven Aboriginal rights at interlocutory stages of proceedings. The Court of Appeal created a free-standing fiduciary based duty to consult and held that at least some level of consultations is required with respect to asserted rights prior to final determinations with respect to the existence and/or scope of those rights, their infringement and whether any infringements are justified. The Court of Appeal referred to this duty as an “alternative framework” to the equitable principles ordinarily applied pursuant to interlocutory injunction processes. It is submitted that there is no need for this alternative framework. The concerns of the Court of Appeal can be adequately addressed within the existing legal framework concerning interlocutory relief.

Court of Appeal Judgment, *Haida Nation No. 1*, at para. 14.

41. The equitable principles which are applicable to the discretionary power of courts to order interlocutory relief in constitutional cases are well known. In *Metropolitan Stores*, this Court discussed these principles in some detail and confirmed that in each case the following questions must be asked. Is there a serious question to be tried? Will the Applicant suffer irreparable harm if

the requested order is not granted? Where does the balance of inconvenience lie? The Court also confirmed that in

considering the balance of inconvenience, the public interest must always be taken into account in constitutional cases.

Metropolitan Stores, supra, at paras. 26-90; *RJR MacDonald, supra*, at pp. 333-349.

42. The special considerations applicable to interlocutory relief in constitutional cases were described by the Chief Justice and others in *Harper v. Canada* as follows:

Applications for interlocutory injunctions against enforcement of still-valid legislation under constitutional attack raise special considerations when it comes to determining the balance of convenience. On the one hand stands the benefit flowing from the law. On the other stand the rights that the law is alleged to infringe. An interlocutory injunction may have the effect of depriving the public of the benefit of a statute which has been duly enacted and which may in the end be held valid, and of granting effective victory to the applicant before the case has been judicially decided. Conversely, denying or staying the injunction may deprive plaintiffs of constitutional rights simply because the courts cannot move quickly enough.

Harper v. Canada (Attorney General), [2000] 2 S.C.R. 764, at para. 5 citing Robert J. Sharpe, *Injunctions and Specific Performance* (Canada Law Book Inc., looseleaf ed.), at para. 3.1220.

43. The issue in *Metropolitan Stores* concerned the application of a section of the *Charter* in the context of a labour dispute. However, the Court made it clear that the principles it was enunciating were applicable in all types of constitutional cases. In fact, these principles have been applied in many cases raising Aboriginal rights. Their application in these cases cannot be considered novel. The fact that the results of the cases differ and that in some cases injunctions were granted and in others they were denied, is simply a reflection of the very fact specific nature of the inquiry required in each case. The availability of interlocutory relief in Aboriginal rights cases clearly provides the courts with a

powerful remedial tool that may be exercised at anytime during proceedings and which provides a significant incentive to governments to take Aboriginal rights seriously.

Metropolitan Stores, supra, at para. 9; *Kanatewat v. James Bay Development Corp.*, [1975] 1 S.C.R. 48; *Lubicon Lake Indian Band v. Norcen Energy Resources Ltd.*, [1985] 3 C.N.L.R. 111 (Alta. C.A.); *MacMillan Bloedel Ltd. v. Mullen*, [1985] 2 C.N.L.R. 58 (B.C. C.A.); *Yellow Quill, supra*.

44. The Attorney General submits that the application of these well-established legal principles at the interlocutory stage of Aboriginal rights cases allows the proper balancing of the interests of the parties including the public interest to take place. The necessity for this wider balancing exercise was described by Beetz J. in *Metropolitan Stores* as follows:

A review of the case law indicates that, when the constitutional validity of a legislative provision is challenged, the courts consider that they ought not to be restricted to the application of traditional criteria which govern the granting or refusal of interlocutory injunctive relief in ordinary private or civil law cases. Unless the public interest is also taken into consideration in evaluating the balance of convenience, they very often express their disinclination to grant injunctive relief before constitutional invalidity has been finally decided on the merits.

The reasons for this disinclination became readily understandable when one contrasts the uncertainty in which a court finds itself with respect to the merits at the interlocutory stage, with the sometimes far-reaching albeit temporary practical consequences of a stay of proceedings, not only for the parties to the litigation but also for the public at large.

Metropolitan Stores, supra, at paras. 38 and 39.

45. In fact, the Court of Appeal recognized the value of interlocutory injunction processes.

Lambert J.A. said as follows:

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.

Court of Appeal Judgment, *Haida Nation No. 1*, at para. 12.

46. However, the Court of Appeal chose to disregard these processes and created its own “alternative framework” based upon a pre-determination duty to consult. The free-standing duty created by the Court of Appeal hinges solely on the strength of the asserted right without any consideration of the other factors contained in the *Sparrow* justificatory test and without recognizing that in some exceptional cases Aboriginal rights can be infringed without consultations having first occurred. The duty to consult created by the Court of Appeal does not involve any balancing of the rights and interests of the parties as required by both the *Sparrow* justificatory test and interlocutory relief principles.

47. At paragraph 173 of their Factum, the Respondents suggest that interlocutory injunctive relief is not appropriate in Aboriginal rights cases because injunctions are all or nothing remedies. The Attorney General disagrees with this submission. The courts have considerable leeway with respect to fashioning the terms of injunctions. Injunctions can provide incentives to the parties to reach negotiated settlements. For example, in this case, if an injunction had been applied for, it would have been possible for the British Columbia courts as a manifestation of the necessary balancing exercise to grant an injunction restraining logging only within the Haida Protected Areas but not elsewhere.

See generally: Sharpe, *Injunctions and Specific Performance*, *supra*, at pp. 3-60 to 3-72.

48. The Attorney General also points out that the Court of Appeal in this case did, in fact, engage in the balancing exercise which he suggests ought to occur. The Court of Appeal held that a constitutional duty to consult had been breached by British Columbia but as an exercise of its discretionary power with respect to granting a remedy, the Court refused to declare the Tree Farm

Licence invalid. The Court of Appeal held that the aim of any remedy to be granted at this stage of the proceedings was to protect the interests of all parties pending the final determination of the nature and scope of the Respondents' Aboriginal rights and title. It is submitted that it would be more appropriate to consider the competing interests at stake within the framework of the well established principles for determining the availability of interlocutory relief, rather than to consider those issues simply as part of the exercise of the Court's discretion with respect to remedies.

Court of Appeal Judgment, *Haida Nation No. 1*, at para. 54.

PART IV

SUBMISSIONS CONCERNING COSTS

49. The Attorney General is not seeking costs.

PART V

ORDER SOUGHT

50. The Attorney General submits that the appeal should be allowed and the decision of the Chambers Judge dismissing the application and holding that all issues concerning the validity of Tree Farm Licence No. 39 should be determined only after trial should be restored.

51. The Attorney General submits that the Constitutional Question should be answered as follows:

The constitutional validity or applicability of section 36 of the *Forest Act* is not called into question by these proceedings. Whether the Minister's decisions to

replace Tree Farm Licence No. 39 and to approve its transfer to Weyerhaeuser, as authorized by section 36 of the *Forest Act*, are constitutionally invalid because of an unjustifiable infringement of the Aboriginal rights and title of the Respondents are matters that can only be determined after trial.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Regina, Saskatchewan, this 14th day of January, 2004.

P. Mitch McAdam
Counsel for the Attorney General for Saskatchewan

PART VI

LIST OF AUTHORITIES

	<u>Paragraph No.</u>
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<i>Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)</i> , [2002] 1 C.N.L.R. 169 (F.C.T.D).	22
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<i>R. v. Horseman</i> , [1990] 1 S.C.R. 901.	19
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