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## PART I - STATEMENT OF FACTS

1. The Interveners, the Squamish and Lax Kw'alaams Indian Bands (respectively, the "Squamish" and "Lax Kw'alaams"), take no position with respect to the specific facts in issue between the parties, and rely on the findings of fact made by the courts below.
2. Facts specific to these interveners are found in the affidavits of Chief Gibby Jacob and Chief Councillor Garry Reece, both sworn October 17, 2003, and appended hereto.
3. Since the decision of the Court of Appeal, there has been a marked increase in negotiations to achieve reconciliation, involving First Nations, government and industry:
  - a) the Squamish have negotiated with the Province to the final stages of an Interim Measures Agreement regarding forestry; entered into discussions involving Interfor and the Province which have led to various interim agreements; negotiated an Olympic Legacies Agreement with the Province; and negotiated four agreements with developers of independent power projects. The Squamish attribute success in these various matters to the decision on appeal;
  - b) the Lax Kw'alaams have negotiated Harvesting Co-operation Agreements with International Forest Products Ltd. and Triumph Timber Ltd. and an Interim Measures Agreement on forestry has been concluded with the Province. The Lax Kwa'alaams believe that the Court of Appeal decision was a major factor to enable these successful negotiations; and
  - c) the Province has taken a number of measures relating to accommodation of First Nations' interests relating to forestry.

**Affidavit of Gibby Jacob, Appendix "A", paras. 20-32, 37-45; Affidavit of Garry Reece, Appendix "B", paras. 8, 23-39; Factum of the Appellants, The Minister of Forests et al, paras. 26-28**

## PART II - QUESTIONS IN ISSUE

4. These Interveners agree with the issues as framed by the Respondent Haida Nation.

### PART III - STATEMENT OF ARGUMENT

#### A. Introduction

5. This Court has identified the challenge of honourably addressing aboriginal rights and title in Canadian society as “the reconciliation of the prior occupation of North America by distinctive aboriginal societies with the assertion of Crown sovereignty over Canadian territory” and the “bridging of aboriginal and non-aboriginal cultures”. Accordingly, “a Court must take into account the perspective of the aboriginal people claiming the right...or at the same time taking into account the perspective of the common law” such that “true reconciliation will, equally, place weight on each”.

*Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 81; *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at paras. 42, 49-50

6. In *Delgamuukw*, Lamer, C.J.C. stated:

Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet*, *supra*, at para. 31, to be a basic purpose of s. 35(1) – “the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.

In concurring reasons La Forest, J. made a similar point:

On a final note, I wish to emphasize that the best approach in these types of cases is the process of negotiation and reconciliation that properly considers the complex and competing interests at stake.

*Delgamuukw*, *supra*, at paras. 186, 207, (the comments of LaForest J. cited by the Court in *R. v. Marshall*, [1999] 3 SCR 533 at para. 22)

7. In *British Columbia (Minister of Forests) v. Okanagan Indian Band*, LeBel, J. reiterated the desire:

that the parties will be encouraged to resolve the matter through negotiation, which remains the ultimate route to achieving reconciliation between aboriginal societies and the Crown....

*British Columbia (Minister of Forests) v. Okanagan Indian Band* 2003 SCC 71 at para 47

8. These Interveners submit that the decision of the Court below enables and assists reconciliation by:

- a) establishing a practical basis for involvement of aboriginal communities in determining the disposition of their traditional lands and resources; and
- b) establishing a legal basis for judicial supervision of reconciliation through consultation and accommodation of aboriginal interests.

**B. Consultation and Accommodation in Practice**

9. As a practical matter, reconciliation requires an incentive on all parties to negotiate. First Nations have an incentive to negotiate over development and resource extraction in their traditional territories, since the *status quo* is that development and extraction occur without their participation and without compensation. On the other hand, without a legal duty, Government and industry will have no such incentive and in fact seek in this appeal to avoid the legal obligation to consult and accommodate aboriginal interests.

10. The decision of the Court of Appeal provides a mechanism with the necessary balance and incentive to achieve reconciliation. Government, First Nations and industry all have interests at risk, and none can benefit if they fail to negotiate “with good faith and give and take on all sides”.

*Delgamuukw, supra*, at para. 186

11. Most importantly, this balance, imposed by the Court of Appeal, has had an immediate practical effect in encouraging reconciliation.

**(i) Reconciliation – The First Nation Perspective**

12. Reconciliation is more than a determination of rights. It requires that aboriginal people achieve social and economic benefits in their communities, related to the land which they have traditionally used and occupied.

13. This Court has recognized the difficult circumstances faced by aboriginal communities:

...Aboriginal peoples experience high rates of unemployment and poverty, and face serious disadvantages in the areas of education, health, and housing (Report of the Royal Commission on Aboriginal Peoples, vol. 3, Gathering Strength (1996).

*Lovelace v. Ontario*, [2000] 1 S.C.R. 950; 188 D.L.R. (4<sup>th</sup>) 193, at para 69;  
See also the Affidavit of Garry Reece, Appendix “B”, para. 11.

14. The objective of these Interveners is to become participants in economic development within their traditional lands. They prefer to achieve this objective through negotiation.

**Affidavit of Gibby Jacob, Appendix “A”, paras. 11-14, 19; Affidavit of Garry Reece, Appendix “B”, paras. 10, 19**

15. For many years, these Interveners have been involved in the British Columbia Treaty Process. However, both Interveners observe that the treaty process has been very slow to achieve treaties, and are concerned with development in their traditional territories in the interim.

**Affidavit of Gibby Jacob, Appendix “A”, paras. 9, 12; Affidavit of Garry Reece, Appendix “B”, paras. 20-22**

16. Prior to the decision under appeal, both Interveners have attempted to engage in discussions with government and industry in respect of resources in their traditional territories. The Squamish have had only partial success in this regard. The Lax Kw’alaams have been largely unsuccessful.

**Affidavit of Gibby Jacob, Appendix “A”, para. 15; Affidavit of Garry Reece, Appendix “B”, paras. 7, 13**

17. The reason these initiatives have previously been unsuccessful is clear – the position of the Province that it is entitled to authorize exploitation of resources and development of land without accommodating aboriginal interests. This is the same position being advanced by the appellants in the present appeal.

18. The experience of these Interveners since *Haida* has been that Crown and industry have been able to reach positive reconciliation agreements, contrary to B.C.’s assertion that the *Haida* decision will reduce the incentives for negotiations. Thus, recognition and accommodation of aboriginal interests may be accomplished while resource and development proceeds, with a benefit to all parties.

**(ii) Reconciliation – Significance of Third Party Involvement**

19. There are strong practical considerations which make it necessary that third parties participate in the process of accommodation.

20. As stated at the Court of Appeal by Chief Justice Finch:

If the position of the Crown and Weyerhaeuser were accepted, and Weyerhaeuser had no duty to consult, the Crown would lack effective power to address any of the Haida's concerns, or to accommodate their legitimate economic objectives.

**Appeal Reasons for Judgment, *Haida 2*, at para. 120**

21. On a practical level, there is a large range of issues on which a First Nation may have a right to consultation and accommodation. These include: allocation of resources; employment and subcontracting; joint ventures and business relationships; conservation and environmental concerns; cultural issues; and general economic participation.

22. These matters are wholly or partially within the power of the third party proponent of resource utilization. Thus, consultation and accommodation in the context of resource use cannot be effective unless there are tripartite negotiations.

23. As stated by Chief Justice Finch:

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

***Haida 2, supra*, at para. 118**

24. On the other hand, negotiations undertaken pursuant to the legal obligations set out in *Haida* have been beneficial to all parties.

**Affidavit of Gibby Jacob, Appendix "A", paras. 16, 24 - 26, 33 - 35, 37 - 39 and 41 - 44; Affidavit of Garry Reece, Appendix "B", paras. 23 - 36**

**(iii) Practical Consequences of the Appellants' Position**

25. If the Province and industry have no legally enforceable obligation to consult and accommodate, First Nations will be excluded from economic opportunities during the indefinite and potentially lengthy period pending the conclusion of treaties.

26. Mr. Justice Lambert observed:

The issue is an important one. If the Crown can ignore or override aboriginal title or aboriginal rights until such time as the title or rights are confirmed by treaty or by judgment of a competent court, then by placing impediments on the treaty process the Crown can force every claimant of aboriginal title or rights into court and on to judgment

before conceding that any effective recognition should be given to the claimed aboriginal title or rights, even on an interim basis.

**Appeal Reasons for Judgement, *Haida 1*, at para. 10**

27. Without an obligation to consult and accommodate First Nations' aboriginal interests, government and industry will be encouraged to exploit land and resources claimed by First Nations, in advance of treaty settlements. The alternative will be litigation, rather than negotiated settlement of aboriginal claims.

**Affidavit of Gibby Jacob, Appendix "A", para. 18; Affidavit of Garry Reece, Appendix "B", para. 9**

### **C. Judicial Review Provides A Practical Role For The Courts**

28. The Appellant B.C. seeks to substitute a procedural duty of 'fair dealing' for a substantive obligation of accommodation. However, without substantive obligations to fairly recognize the real interests of First Nations, there will be no encouragement of real negotiation and reconciliation.

#### **(i) There Must be a Meaningful Interim Remedy to Encourage Negotiations**

29. To require proof of aboriginal title before any recognition of substantive legal rights or duties in relation to lands and resources is contrary to the desire for reconciliation and negotiated solutions. Aboriginal title trials are difficult, complex and costly undertakings, and can take many years. Such trials may lead to a winner-take-all outcome, inconsistent with a 'reconciliation' approach, and require the Court to determine many complex issues which are better dealt with through negotiation.

30. To ensure justice to First Nations, to provide incentives to all to negotiate fairly, and to comply with the fiduciary relationship and the Honour of the Crown, some meaningful interim remedy must be seen to be realistically available if negotiations fail. Negotiations cannot succeed if disputed rights can be ignored by one party, with no remedy. A process-only duty, with no substantive rights, will not lead to fair negotiations, and has not led to fair accommodation processes in B.C. prior to the Court of Appeal decisions in issue.

31. The courts have properly recognized that the fact that negotiation and reconciliation is the preferred outcome cannot and should not eliminate a role for the Courts. *In Nunavik Inuit v.*

*Canada (Minister of Canadian Heritage)*, Richard A.C.J. concluded, after a thorough review of the case law:

It is the role of the Court to assist and further the negotiating process. Where the Federal Government had agreed to negotiate claims, the public anticipates that the claims will be resolved by negotiation and by settlement.

*Nunavik Inuit v. Canada (Minister of Canadian Heritage)*, [1998] 4 C.N.L.R. 68 (F.C.T.D.), (1998) 164 D.L.R. (4th) 463 at para 105.

32. In *Gitanyow First Nation v. Canada*, Mr. Justice Williamson of the B.C. Supreme Court stated:

While the courts should be chary of interfering in the process itself, it is appropriate for the courts to assist in determining the duties of the parties involved in that process, in particular when the obligations of the Crown in dealing with aboriginal peoples have been recognized only after judicial pronouncement. In *Delgamuukw*, at p.1123, Chief Justice Lamer wrote:

Ultimately, it is through negotiated settlements, with good faith and give and take on all side, reinforced by the judgments of this Court, that we will achieve ... the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.

I reject the submission that "reinforced by the judgments of this Court" can mean only judicial enforcement of executed agreements. That such agreements will become treaties and will be enforceable is contemplated by s. 35 of the Constitution Act, 1982. I do not read the recommendations of the B.C. Task Force, nor the subsequent treaty commission legislation, as ousting the jurisdiction of the court from its important task of ensuring that the Crown does not fail in its fiduciary obligation to aboriginal peoples. [emphasis added]

*Gitanyow First Nation v. Canada*, (1999), 66 B.C.L.R. (3d) 165 (S.C.), at paras. 63-64.

33. The Court in *Nunavik Inuit* also stated:

The [Royal Commission on Aboriginal Peoples] has urged the courts to design their remedies to facilitate negotiations...The Commission further asserts that Government and Aboriginal action in the form of nation-to-nation negotiation is central to the constitutional recognition and affirmation of Aboriginal rights under section 35. Therefore, there is a need for remedies to assist the parties where negotiations are not progressing.

*Nunavik Inuit*, *supra*, at para. 100

**(ii) Interlocutory Injunctions have not been an Effective Remedy**

34. The Appellants and some Interveners argue that the interlocutory injunction is a satisfactory remedy for First Nations with unresolved claims to land and resource title. However, it is submitted that the interlocutory injunction has not provided a realistic or effective approach to resolving these disputes.

**eg. B.C. at para. 45, Weyerhaeuser at paras. 48-56, COFI Factum in Docket No. 29146 at para. 37, Canada at para. 38, Ontario at para. 29-42**

35. An examination of the history of interlocutory injunction applications in BC over the last two decades shows that, from a First Nations' point of view, injunctions have been a wholly inadequate remedy. A useful analysis in this regard is provided in a 2002 paper by John Hunter, Q.C.:

Since *Sparrow* (though not necessarily because of it), there do not appear to have been any instances in which an interlocutory injunction has been granted to stop development of land pending resolution of a land claim...; and

The Supreme Court of Canada judgment in *Delgamuukw* has not made injunctions easier to obtain. In fact, the Court of Appeal has specifically stated that "nothing in *Delgamuukw* has changed any of the existing law with reference to injunctions.

**John Hunter, Q.C., et al., *Injunctions - British Columbia Law and Practice* (Vancouver: The Continuing Legal Education Society of British Columbia, 2002) at 117-118.**

36. It is submitted that the failure of the interlocutory injunction as an effective remedy does not arise from particular facts; rather, an examination of court decisions indicates there are a number of structural issues, discussed below, which make this remedy inadequate to deal with the unique societal and legal challenges raised by aboriginal title.

**The requirement that an aboriginal title action be started**

37. First Nations are often reluctant to commence aboriginal title litigation. They are deterred by the cost. They are deterred by the fact that the existing position of federal and provincial governments is not to continue treaty negotiations where aboriginal title litigation is pursued.

38. Where the issue in dispute is one in respect of a particular site, project or industry, First Nations are further deterred by the disproportionality of the effort to the issue. It is seldom a

workable solution for First Nations, and certainly not in the public interest, to require a complex aboriginal title trial to resolve specific issues.

### **The ‘winner-take-all’ aspects of injunctions**

39. Interlocutory injunctions, by their nature, are the antithesis of reconciliation. Once an injunction is granted, or denied, the winner has little incentive to negotiate further in respect of that issue.

### **The magnitude and strength of aboriginal title throughout British Columbia**

40. Ironically, it has been the very strength and comprehensive nature of aboriginal title claims throughout British Columbia that has worked against the availability of the injunctive remedy. Crown and industry lawyers have successfully argued the ‘*in terrorem*’ or ‘floodgates’ argument:

- a) In an early case, *Westar Timber Ltd*, Esson J.A., refers to the “simply unthinkable” possibility that:

...a series of interlocutory injunctions should so cripple the industry as to throw people out of work, reduce the revenues both of the government and industry and thus threaten the very existence of that industry and our existing social arrangements.

*Westar Timber Ltd. v. Gitksan Wet'suwete'en Tribal Council* (1989), 37 B.C.L.R. (2d) 352 (C.A.) at 370

- b) In a post-*Delgamuukw* case, Hutchison, J. reconfirmed this approach:

And I fear that if this court starts enjoining each individual band's claim pressed on by the *Delgamuukw* decision, the floodgates discussed in the *Meares Island* case may very well open. And I am not prepared to be the one that allows the first olive out of the bottle.

*Kitkatla Band v. British Columbia (Minister of Forests)*, [1999] 2 C.N.L.R. 156 (B.C.S.C.), at para. 59.

### **The permanence and impact of injunctions**

41. The timelines for aboriginal title litigation have also worked strongly against First Nations injunctions. Courts have recognized that an aboriginal title injunction may be in place for a significant time, and demonstrated a “growing reluctance” to consider injunctions except in very significant cases, if at all. As noted in Mr. Hunter's paper:

The history of this case, [ie. the *Meares Island*] particularly when considered in light of the two other cases in which injunctions have been granted to stop logging despite provincial authority, calls into question the appropriateness of the interlocutory injunction remedy in aboriginal claims cases. [emphasis added]

**John Hunter, Q.C., “The Impact of the *Delgamuukw* Decision on the use of Injunctions by Aboriginal Rights Claimants” (January 8, 1999), prepared for Continuing Legal Education, at 5.02.07 (“Hunter 1999”); see also Hunter et al., *supra* at 119.**

### **The application of the ‘balance of convenience’ test**

42. The principle that it is not appropriate to weigh the merits on interlocutory injunctions means that, in evaluating the “balance of convenience”, courts must ignore the strength of the First Nation’s claim – an approach which does not do justice to First Nations.

43. Because of the large financial and social issues involved in forestry, road construction and mining, the balance of convenience will almost always override the rights of First Nations. The fact that First Nations may have a very strong case is not relevant to the injunction test, and First Nations’ rights are deferred indefinitely, in favour of the public interest.

*Westar, supra*, at 369-370; *Siska Indian Band v. British Columbia (Minister of Forests)* (1998), 62 B.C.L.R. (3d) 133 (S.C.) (“*Siska 1*”) at para. 27; *Siska Indian Band v. British Columbia (Minister of Forests)*, [1999] B.C.J. No. 2354 (S.C.) (“*Siska 2*”), at para. 47; *Kitkatla Band v. British Columbia (Minister of Forests)* (B.C.S.C.), *supra*, at para. 58; *Kitkatla Band v. British Columbia (Minister of Forests)*, [1999] 2 C.N.L.R. 170 (B.C.C.A.) at paras. 21-22; *Te’mexw Treaty Association v. W.L.C. Developments Ltd.* (1998), 163 D.L.R. (4th) 180 (B.C.S.C.) at para. 28; *Wiigyet v. Kispiox Forest District et al.* (1990), 51 B.C.L.R. (2d) 73 at 79-80; *Tlowitsis-Mumtagila Band v. MacMillan Bloedel Ltd.*, [1991] 2 C.N.L.R. 164 (C.A.) at 92-95

### **The requirement for “Uniqueness”**

44. Although injunctions have generally been sought over specific projects or limited areas, the courts’ concern with the comprehensive nature of aboriginal title and the ‘floodgates’ argument has led to the evolution of a requirement that First Nations must show ‘uniqueness’, or ‘special factors’ for a particular site before an injunction will be granted.

45. Such a requirement adds a very significant hurdle to the First Nations’ burden of proof - if the province’s economic future is weighed against any particular Nation’s interests on a particular site, the First Nation interest can be overridden. The same test is not applied to the Crown or proponents – any interference with the economic objectives of the province is considered irreparable harm.

*Westar, supra* at 372, 374-375; *Tlowitsis-Mumtagila Band v. MacMillan Bloedel and R. in Right of British Columbia, supra*, at 92-95; *Kitkatla (C.A.) supra*, at para. 19; *Siska 2, supra*, at para. 43; *Wiigyet, supra*, at 79-80; *House of Delgamuukw v. British Columbia (Minister of Forests, Chief Forester)*, [1988] B.C.J. No. 3045 (S.C.), p. 3

46. Such an approach effectively denies injunctions on ‘normal’ (non-unique) First Nations lands, leading to steady and incremental erosion through incremental Crown land sales and resource development.

### **The assumption that Aboriginal claims are ‘compensable in damages’**

47. The argument is also made that the “inescapable economic aspect” of aboriginal title means that the loss of present-day resources and economic activities can be ‘compensable in damages’,<sup>1</sup> and that injunctions should not be available.

*Hunter 1999, supra*, at 5.2.20; *COFI Factum in Docket No. 29146* at para. 39; *Te’mexw, supra*, at para. 22(1); *Siska 1, supra*, at 140.

48. However, this argument ignores the social and cultural aspects of aboriginal title, and confuses monetary compensation with development of a sustainable economy. To defer economic sharing to the indefinite future, is to impoverish the current generation and to perpetuate indefinitely the existing economic gap for First Nations.

49. Further, the idea that substantial damage awards will occur in the future is completely hypothetical. There is no evidence to date that the Crown is willing to negotiate past compensation in treaties, nor that courts will award damages for past takings. However, the ‘balance of convenience’ test relies heavily on such assumptions, and the refusal of interlocutory injunctions for this reason allows resource depletion to continue unchecked without any fair share to First Nations.

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<sup>1</sup> Hunter’s 1999 paper argues that since “one of the tests for justification is whether compensation has been paid, an injunction should not issue to protect a right that the Supreme Court of Canada has characterized as having an ‘inescapably economic aspect’. After all if the right is essentially economic, and infringement can be justified by (among other things) the payment of compensation, this would seem to be a textbook case for denying an injunction and leaving the parties to their claim for compensation” (pg. 5.2.20)

### **The unavailability of interlocutory injunctions against the Crown**

50. Despite BC's assertion here that injunctive relief is an appropriate remedy, B.C. courts have accepted the Crown's argument that interlocutory injunctive relief is not available against Crown decision-makers. Thus, an interlocutory injunction is unavailable as a remedy to correct the failure of a Crown decision-maker to exercise a duty in relation to First Nations, regardless of the nature of that duty.

*Te'mexw, supra, at para 8; House of Delgamuukw, supra, at p. 3; Hunter et al., supra, at 127.*

### **The need for an undertaking as to damages**

51. First Nations are necessarily deterred by the requirement for an undertaking as to damages. Forestry or mining operations can involve large amounts in comparison to First Nations budgets. Responsible First Nations leaders are properly reluctant to gamble their peoples' future on a final court decision, which might occur many years later. Further, where First Nations offer an undertaking, but acknowledge their lack of ability to pay, they may be denied injunctive relief.

*Siska 1, supra, at paras. 28-30; Siska 2, supra, at para. 49; Hunter 1999, supra, at 5.02.05.*

### **(iii) Judicial Review of a Fiduciary Duty to Consult and Accommodate Presents a Functional Alternative**

52. It is submitted that the Court of Appeal's reasons in *Haida 1* reflect that Court's awareness of the injunction history for First Nations in British Columbia. While recognizing that the Interlocutory Injunction process "continues to be a valuable interim process", Mr. Justice Lambert noted "the importance of having a framework or frameworks for dealing with the reconciliation process" before rights and title are dealt with by Treaty or an aboriginal title trial.

*Haida 1, supra, at paras. 12-14*

### **Flexibility of review**

53. The decision of the Court of Appeal allows a nuanced analysis of the strength of aboriginal claims, weighed against the efforts and results of the consultation and accommodation process.

### **Flexibility of remedy**

54. Judicial review provides for the application of equitable principles and a wider range of remedies, suitable to the “reconciliation process”. Courts may issue a simple declaration confirming the parties have a duty to further consult and accommodate, (ie. send the parties back to the bargaining table) allowing the project or licence to proceed in the interim (e.g. *Haida*; see also *Gitxsan*, *Halfway River*, *Mikisew*, *Cheslatta*); give guidance to the parties, in appropriate cases, on legal issues such as the strength of the claim; quash the permit but return it to the decision maker for potential re-issue; or set the matter for trial with an appropriate interim order.

*Gitxsan and Other First Nations v. British Columbia (Minister of Forests)* (2002), 10 B.C.L.R. (4th) 126 (S.C.); *Halfway River First Nation v. British Columbia (Minister of Forests)* (2000), 178 D.L.R. (4th) 666 (B.C.C.A.); *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* [2002] 1 C.N.L.R. 169 (F.C.T.D.); *Cheslatta Carrier Nation v. British Columbia (Environmental Assessment Cut, Project Assessment Director)* (1998) 53 B.C.L.R. (3d) (S.C.).

### **Proportionality to issues**

55. A judicial review determination applies only to a particular issue and process. The review focuses on a particular decision, in relation to a particular parcel of land or a specific project, and the remedy can specify appropriate accommodation.

### **Timeliness**

56. Litigation based on judicial review can usually be resolved in a matter of months, whereas aboriginal title litigation is likely to take many years.

57. The court history of Judicial Review has been entirely different from interlocutory injunctions – perhaps in recognition of the limited impact of the Judicial Review remedy, courts have been much more willing to find just remedies:

*Gitxsan, supra*; *Gitanyow, supra*; *Nunavik supra*, *Halfway River, supra*; *Mikisew, supra*; *Cheslatta, supra*

#### **(iv) The Arguments Against Judicial Review are not Compelling**

##### **Duty to accommodate is neither final nor absolute**

58. The Appellants arguments proceed as if the finding by the court below of a duty to accommodate would lead to a full award of aboriginal title and all its benefits for merely asserted rights. They also argue that courts and decision-makers cannot reasonably assess rights and title

in advance of a full trial. However, those arguments misread the effect of the court's decision below.

59. In a practical sense, the duty to accommodate, when taken as a substantive obligation, requires a measured attempt to recognize the real merits of an aboriginal title interest in the land or resource against reasonable accommodation, and leads to a measured or 'calibrated' sharing. Mr. Justice Lambert said, 'The strength of the title case will inform the strength of the duty to accommodate'.

*Haida 1*, paras. 44, 45, 51

60. These are cognizable and justiciable issues for the court, where negotiations fail. Courts on judicial review can consider both the strength of the case, as a matter of law, and the appropriateness of the effort to accommodate. Where a First Nation demands too much, an administrative decision-maker may offer a reasonable accommodation, and if challenged, the court can deny a remedy. Court decisions over time will inform decision makers and First Nations.

61. Such assessments do not require or assume a total award to the First Nation. Rather, they will usually lead to a small, proportionate sharing of resources.

62. Administrative decision-makers regularly factor in complex legal questions, including constitutional and *Charter* issues, to their decisions, with judicial review as an available remedy to correct mistakes, and to inform subsequent decisions.

**The post-Haida experience shows that Judicial Review can provide a workable remedy**

63. In *Gitksan*, (which included Lax Kw'alaams), the B.C. Supreme Court usefully applied the decision under appeal to an administrative decision to approve the transfer of control of a Tree Farm Licence. The Court did not quash the transfer, but held that there was a strong *prima facie* case to aboriginal title in respect of at least part of the Licence. This decision subsequently led to a negotiated agreement with the Lax Kw'alaams over not only the TFL area, but forestry operations throughout their territory.

*Gitksan*, *supra*; Gary Reece Affidavit, Appendix "B", at paras. 31-37; B.C. Factum, para. 28

64. In this manner, administrative efficiency will encourage the Crown to develop appropriate large-scale programs or institutional arrangements to provide for accommodation, as has occurred in B.C. under the Forest Revitalization program.

65. This is the process recommended by the Royal Commission on Aboriginal Peoples:

The fact that the relationship between the Government and Aboriginal peoples is trust-like, rather than adversarial has important implications for the role of Government with respect to Aboriginal lands and resources. It requires institutional arrangements to protect them, and it requires Government not to rely simply on the 'public interest' as justification for limiting the exercise of Aboriginal rights with respect to them. Moreover, it requires Government to act in the interests of Aboriginal peoples when negotiating arrangements concerning their lands and resources.

*Nunavik Inuit, supra*, at para. 99

#### **D. The Crown's Duty of Fair Dealing and its Fiduciary Obligations**

66. It is submitted that it is misconceived to make a distinction between a duty to act honourably and fairly before a judicial determination of Aboriginal rights and title and a fiduciary duty (including a duty of consultation and accommodation), which (according to the Appellants) arises after such determination. The duty to act honourably and fairly is simply an expression of the Crown's fiduciary obligations, which exist both prior to and after such determination.

67. The Appellants' objection that the Crown had no fiduciary duty to the Haida misapplies the decision of this Court in *Wewaykum* and the distinction made in *Lac Minerals* and other cases between *per se* fiduciary relationships and *ad hoc* fiduciary relationships and the further distinction between fiduciary relationships and fiduciary obligations.

*Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 at 646 - 648 per La Forest J.; *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245 at paras. 83 - 85; James I. Reynolds, "Aboriginal Title and the Transmission of Fiduciary Obligations from the Crown to Business - Is the Leap of Logic Galactic or Synaptic?" in *Continuing Legal Education Society of British Columbia, Fiduciary Obligations - 2003*, notes 19 - 29; Peter D. Maddough, "Definition of Fiduciary Duty" in *Continuing Legal Education Society of B.C., Fiduciary Obligations - 2003* at 3 - 4 and note 12.

68. This Court has recognized the *per se* fiduciary relationship between the Crown and aboriginal people:

It is now well settled that there is a fiduciary relationship between the Federal Crown and the aboriginal peoples of Canada:

*Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159 at para. 34; *Guerin v. The Queen*, [1984] 2 S.C.R. 335.

69. The honour of the Crown is an aspect of the Crown's fiduciary relationship with Aboriginal peoples and not distinct from it, as explained by Chief Justice Lamer in *Van der Peet*:

...The Crown has a fiduciary obligation to aboriginal peoples with the result that in dealings between the government and the aboriginals the honour of the Crown is at stake.

*R. v. Van der Peet*, *supra*, at para. 24

70. In *Mitchell v. M.N.R.*, Chief Justice McLachlin, for the Court, said, “[w]ith this assertion [of sovereignty by the Crown] arose an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation, a duty characterized as ‘fiduciary’ in *Guerin v. The Queen*.”

*Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911 at para. 9; See also *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1107 – 1110; *Wewaykum*, *supra*, at para. 80

71. It is also misconceived to exclude the application of fiduciary obligations by invoking the existence of administrative law duties. Administrative law and fiduciary principles are not incompatible, but rather are similar in holding public officials and fiduciaries to a high standard of conduct. As Chief Justice Mason of the High Court of Australia observed extra-judicially, “[m]odern administrative law ..... from its earliest days, has mirrored the way in which equity has regulated the exercise of fiduciary powers.” Justice Binnie commented in *Wewaykum* that “the existence of a public law duty does not exclude the possibility that the Crown undertook in the discharge of that public law duty, obligations in the nature of a private law duty towards aboriginal peoples.”

Sir Anthony Mason, “The Place of Equity and Equitable Principles in Contemporary Common Law” (1994), 110 L.Q.R. 238 at 238; *Wewaykum*, *supra*, at para. 74; See also: *Fares Rural Meat and Livestock Co. Pty. Ltd. v. Australian Meat and Live-stock Corporation* (1990), 96 A.L.R. 153 (H.C.A.) at 167 per Gummow J.; P.D. Finn, *Fiduciary Obligations* (Sydney: Law Book Company, 1977) at 3; *Roberts v. Hopwood*, [1925] A.C. 578 (H.L.) at 603 - 604 per Lords Atkinson and Sumner; *Bromley London Borough Council v. Greater London Council*, [1983] 1 A.C. 768 at 815, 838 per Lords Wilberforce and Scarman

**E. The Duty Of Licence Holders To Participate In Consultation And Accommodation Processes**

72. These Interveners respectfully support the reasoning of Lambert J.A. in the Court of Appeal with respect to the application of equitable principles and, in particular, the principles of “knowing receipt.” Further, these Interveners adopt the reasons of Chief Justice Finch:

...the Crown did not consult as required, and was therefore in breach of its duties in granting this tenure to Weyerhaeuser; Weyerhaeuser had received a licence that suffered a fundamental legal defect.

*Haida 2, supra, at para. 115*

73. It is not necessary to find that there is an “independent” or freestanding duty on private corporations to support the Decision under Appeal. It is sufficient to find a duty derived from the Crown’s duty.

74. It is submitted that the duties involved in this case arise on Crown land, in respect of a Crown licence. Although the licensee may be a ‘private’ party, the duty arises through their acquisition of an interest in public lands. To the extent that lands are encumbered by aboriginal rights and title, any licences granted must be subject to the pre-existing rights.

75. Further, the duty of consultation that arises in the circumstances of a grant of a Crown licence to another party can be found to be a shared duty, leading to a shared responsibility which must be met by the efforts of both parties.

76. The declaration under appeal with respect to Weyerhaeuser is an application of well-established principles of law and equity to the challenges of aboriginal title and the circumstances now before this Court. These principles were properly applied by Lambert J.A. in *Haida 2, supra*, at paragraphs 61-73.

*Hunter Engineering Ltd. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426 at 471 per Dickson C.J.C.; *Air Canada v. M&L Travel Ltd.*, [1993] 3 S.C.R. 787, at 810; 108 D.L.R. (4<sup>th</sup>) 592 at 607-608; *Gold v. Rosenberg*, [1997] 3 S.C.R. 767, 152 D.L.R. (4<sup>th</sup>) 385; *Citadel General Assurance Co. v. Lloyds Bank of Canada*, [1997] 3 S.C.R. 805

77. To reject the application of these principles would be to permit the Crown to ignore its historic role as intermediary and protector of Indian lands to remove from the lands the interests of the Haida and their rights to consultation and accommodation, by transferring the lands or

licence to a third party such as Weyerhaeuser. It would also be contrary to basic principles of law such as respect for property rights, *caveat emptor*, *nemo dat quod non habet* and preventing unjust enrichment, all of which find expression in the principles of “knowing receipt.”

*Mitchell v. M.N.R.*, *supra*, at para. 9; *Reynolds*, *supra*, at 11 – 23

78. The Weyerhaeuser Factum raises the relationship between restitutionary principles recognized in relatively recent years and well-established principles of equity such as those of ‘knowing receipt’, which have been part of our law for centuries. There is no basis in law to say that the availability of strict restitutionary remedies should exclude the continued availability of other less draconian equitable remedies. In this case, the Court of Appeal had a discretion to decline to require Weyerhaeuser to hand back the licence and, as an alternative and more appropriate equitable remedy, to make the declaration that it considered “the least disruptive order that could still take account of the fact that the Haida people had not been consulted as they should have been consulted.” As Chief Justice McLachlin noted in *Soulos*, “[e]quitable remedies are flexible; their award is based on what is just in all the circumstances of the case.”

*Haida 2*, *supra*, per Lambert J.A. at para. 40; *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 at para. 34; Justice McLachlin, “Restitution in Canada” in W.R. Cornish (ed.) *Restitution, Past, Present and Future* (Oxford: Hart Publishing, 1998) at 275.

79. The objection by Weyerhaeuser that the Haida have proven no proprietary interest in the lands in question ignores the finding of the courts below that the Haida had demonstrated a good *prima facie* case of Aboriginal title to at least a significant part of the lands.

*Haida 1*, *supra*, per Lambert J.A. at para. 50

80. The objection by Weyerhaeuser that there is no trust property likewise ignores the application of the principles of “knowing receipt” to all fiduciary relationships and not just that between a trustee and a beneficiary.

*Alers - Hankey v. Teixeira* (2000), 75 B.C.L.R. (3d) 232 (B.C.C.A.) at 245 – 246; *Reynolds*, *supra*, at notes 70 – 71

81. The objection that Weyerhaeuser lacked sufficient knowledge of the existence of the Crown’s fiduciary obligation and of its breach wrongly assumes that ignorance of the state of the law is relevant. If this were true, the Crown’s lack of knowledge that it owed a fiduciary

obligation to the Musqueam would have been a defence in *Guerin*. The Courts below found that Weyerhaeuser had knowledge of the requisite facts. Also, as observed by Millet J. in the *Agip (Africa)* case, the required knowledge may be obtained subsequent to receipt of the property.

*Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805 at paras. 48 - 49; Authorities cited by Reynolds, *supra* at notes 73 – 83; *Haida I*, per Lambert J.A. at para. 49; *Agip (Africa) Ltd. v. Jackson*, [1990] 1 Ch. 265 at 291 per Millet J. (cited by La Forest J. in *Citadel, supra*, at para. 42), *aff'd* [1992] 4 All E.R. 451.

82. It is further submitted that to allow a Third Party to obtain the benefit of a grant from the Crown of lands to which is attached a fiduciary duty on the part of the Crown without taking that duty into account through an enforceable duty of consultation and accommodation would result in the unjust enrichment of the Third Party contrary to the principles of equity.

83. In *Peter v. Beblow*, McLachlin J. (as she then was) said that, “courts have not been adverse to applying the concept of unjust enrichment in new circumstances.”

*Peter v. Beblow*, [1993] 3 S.C.R. 980 at 989, 101 D.L.R. (4<sup>th</sup>) 621 at 643 per McLachlin J.; See also: *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762 at 788; 98 D.L.R. (4<sup>th</sup>) 140 at 55; *Soulos v. Korkontzilas, supra*, at para 80.

84. It is submitted that in the case at bar, the Third Party is enriched by not having to incur the adjustments required by consultation and accommodation and the First Nation is correspondingly deprived of the benefits of the same.

85. It is submitted that, in circumstances in which the defendant has knowingly received property subject to a fiduciary obligation such as in the case at bar, the absence of juristic reasons is established by the decision of this Court in the *Citadel* case, where La Forest J., (who gave the judgment of the Court on this point) said:

As I wrote in *Lac Minerals, supra*, at 670, “(t)he determination that the enrichment is “unjust” does not refer to abstract notions of morality and justice, but flows directly from the finding that there was a breach of a legally recognized duty for which the courts will grant relief.” In “knowing receipt” cases, relief flows from the breach of a legally recognized duty of inquiry. More specifically, relief will be granted where a stranger to the trust, having received trust property for his or her own benefit and having knowledge of facts which would put a reasonable person on inquiry, actually fails to inquire as to the possible misapplication of trust property. It is this lack of inquiry that renders the recipient’s enrichment unjust. [emphasis added]

*Citadel General Assurance Co. v. Lloyds Bank of Canada, supra*, at para. 49

86. To excuse a Third Party in the circumstances under consideration from the legal and equitable duty to consult and accommodate would enable the Crown to give a better interest than it possesses. This would circumvent the basic common law rule of *nemo dat quod non habet*.

87. Equitable and common law principles were properly considered by Chief Justice Finch, who concluded that the licence had a “fundamental legal defect”.

**PART IV - SUBMISSIONS CONCERNING COSTS**

88. The Intervener makes no submission as to costs.

**PART V - ORDER REQUESTED**

89. It is respectfully submitted that this Appeal should be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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Gregory J. McDade, Q.C.

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John R. Rich

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January 16, 2004  
Vancouver, B.C.

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## PART VI – TABLE OF AUTHORITIES

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