

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

**BETWEEN:**

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

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

**AND:**

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

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

**AND:**

REDFERN RESOURCES LTD.

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

**AND:**

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

**INTERVENERS**

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**FACTUM OF RESPONDENTS,**  
**TAKU RIVER TLINGIT FIRST NATION et al**

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## PART I – STATEMENT OF FACTS

1. The Respondents, the Taku River Tlingit First Nation, (the “Tlingits”) accept generally the facts in Part I of the Factums of the Appellants Norm Ringstad et al (the “Crown”) and the Respondent Redfern Resources Ltd. (“Redfern”), but submit those are not complete and do not properly describe the issues in the case, the statutory regime or the decisions below.
2. The Crown appeals from the Order of the British Columbia Court of Appeal upholding the Order of Madame Justice Kirkpatrick that quashed the Certificate of Approval (the “Certificate”) that was issued by the Ministers to Redfern on March 19, 1998, pursuant to s. 30 of the *Environmental Assessment Act* (the “EAA”). Redfern supports the Crown’s appeal.

### Issues in the Environmental Review

3. In September, 1994 Redfern applied under the *Mine Development Assessment Act* for permission to re-open the Tulsequah Chief Mine (the “Project”). The *EAA* was enacted in 1995, and the application was therefore transferred for environmental review under that Act.
4. The mine is at the confluence of the Taku and Tulsequah Rivers in northwest British Columbia. The area is an unroaded and pristine wilderness, in the heartland of the traditional territory of the Tlingits, who were therefore invited to join the Project Committee (the “Committee”) under s. 9(2)(d) of the *EAA*.

**For map of region and for map showing road route** see Exhibits 3 & 4, Tlingits Appeal Record (“TAR”) Vol. 1, pps. 7-8 to Affidavit of Tony Pearse, sworn February 20, 2000, Crown Appeal Record (“CAR”) Vol. X, p. 1953-1963; **For maps of Tlingit traditional territory and traditional harvesting use areas** see Exhibit A to Affidavit of Alice Carlick, TAR, Vol. 1, pp. 14 and 15.

5. The Tlingits’ objective in the environmental review was to ensure that the Project would not threaten the sustainability of the ecological, economic and cultural systems on which they rely as an Aboriginal people. They asserted their Aboriginal rights and interests throughout the process. Although the environmental review was not rights centred, it proceeded on the basis that the Tlingits had vitally important interests at stake, and many communications and reports by Redfern, government officials and independent experts reflected the view that Tlingit Aboriginal rights would be impacted by the Project.

*Pearse Report*, Exhibit B to Affidavit of Tony Pearse, TAR, Vol. 1, pps. 18-22, par. 4-15; Letter to Terry Chandler from Melvin Jack, August 30, 1995, Exhibit B(5) to Affidavit of Tony Pearse, TAR, Vol. 1, pps. 95-96; and see *Tlingits’ Information Requirements Report: “What We Need To Know”*, Exhibit B(6) to Affidavit of Tony Pearse, TAR, Vol. 1, pps. 97-112; Affidavit of Mrs. Nyman, Exhibit A to Affidavit of Anna Hrycyk, TAR, Vol. 1 at p. 116-117, par. 11 & 13; *Hudson Report*, Exhibit B to Affidavit of Doug Hudson, CAR, Vol. IV, p. 656; *Dewhirst Report*, Exhibit G to Affidavit of Martyn Glassman, TAR, Vol. 1,

pps. 137, 142 & 190 and Appendix 1, Terms of Reference and Study Agreement, TAR, Vol. 1, p. 207; *Final Report Specifications*, Exhibit B(11) to Affidavit of Tony Pearse, TAR, Vol. 2, p. 233; *Tlingit Deficiencies Report*, Exhibit B(30) to Affidavit of Tony Pearse, TAR, Vol. 2, p. 317; *LUCO Report*, Exhibit B(33) to Affidavit of Tony Pearse, TAR, Vol. 2, pps. 337 & 338; Letter to T. Pearse from J. Yardley of MELP with proposed Access Management Plan, Exhibit B(35) to Affidavit of Tony Pearse, TAR, Vol. 2, p. 370; *Staples Report*, TAR, Vol. 2, p. 374 (note these pages are missing from the copy in the CAR)

6. The Tlingits were encouraged to believe that the Crown acknowledged the importance of their interests and rights, and that the environmental review was the way to protect them, e.g., by this letter that urged their participation:

...Insofar as First Nations are concerned, the Province must ensure that resource developments do not adversely infringe constitutionally-protected First Nations' rights. The purpose of the TRTFN review would be to identify any specific impacts which you may perceive may result from the project...

Letter from J. Harris, MELP, to S. Jack, TRTFN, November 8, 1994, Exhibit B(1) to Affidavit of Tony Pearse, TAR Vol. 2, p. 378

7. No party presented evidence - during the environmental review or the judicial review - disputing the existence or importance of the Tlingits' aboriginal rights or interests. The Crown knew that the Federal government had accepted the Tlingits' Comprehensive Land Claim in 1984, based on an independent expert's determination that they had traditionally used and occupied their territory and its resources. Since 1993 the Tlingits have engaged in treaty negotiations with Canada and British Columbia under the BC Treaty process.

Affidavit of Richard Salter, CAR, Vol. III, p. 361, par. 8 & 14; *Staples Report*, CAR, Vol. III, p. 524

8. This was an unusual environmental review, because the Project's most significant impacts would result from accessing the re-opened mine rather than its operation. When Cominco operated the mine in the 1950s, access was by barge along the Taku River, through Juneau, Alaska. When Redfern purchased the closed mine it considered other options, including pipelines, air transportation and several road routes. Redfern initially proposed two options in 1994 - a 160 km. road to Atlin or barging - but withdrew the latter in March, 1997. At the time Norm Ringstad of the Environmental Assessment Office ("EAO") said that Redfern must bear the responsibility for limiting its options, if the road proved too problematic.

Affidavit of Terry Chandler, CAR, Vol. IX, p. 1590, par. 89-95 and Exhibit 31, *Project Report-Access Identification*, CAR, Vol. X, pps. 1821-1864; Affidavit of Garry Alexander, CAR, Vol. IV, p. 752, par. 8; *Pearse Report*, TAR, Vol. 1, p. 34, par. 45-46; Meeting Summary of Project Committee Conference call on June 17, 1997, Exhibit B(23) to Affidavit of Tony Pearse, TAR, Vol. 2, pps. 382-384.

9. The Tlingits' concerns about the Project centred on the road, as explained by Kirkpatrick J. in [14]-[17] of her Reasons.

[14] "For the Tlingits, the primary concern about the Project is the road proposal. It will open up the heartland of the Tlingit territory for the first time, and therefore raises concerns about their

ability to sustain the land-based economic, social and cultural system on which they collectively rely as an aboriginal people. The Tlingits explained that perspective at all stages of the environmental review process.”

[15] “The Tlingits’ concerns about the road proposal were expressed in terms of:

- (a) their sustainability as a people – including the need to sustain their culture, domestic economy and social well-being by, *inter alia*, protecting the fish and wildlife habitat on which it relies, as well as their own ability to harvest those resources;
- (b) interference with the aboriginal rights they assert in their traditional territory – in particular their aboriginal title and their harvesting rights; and
- (c) their treaty negotiations – including the ways the Project will compromise those.”

[16] “Extensive reference was made during the course of the hearing to the substantial body of evidence and expert reports filed in the environmental assessment process that supported the concerns of the Tlingits. That evidence was directed to the systemic nature of the Tlingits’ land use practices; their reliance on that land use system to sustain them socially, economically and culturally; the adverse effects the road will have on vulnerable wildlife populations on which they rely; the very serious effects of increased access to the Blue Canyon/Wilson Creek area; and the road’s effects on specific sites, including their main traditional trail and hunting and fishing camps.”

[17] “The Tlingits also asked the court to note the body of evidence and expert reports concerning the absence of a regional land use plan and the fact that treaty negotiations between the Tlingits and the government are not concluded. The Tlingits argued that proceeding with the construction of the road, in advance of an established regional land use plan and a treaty, will prejudice and limit the options available to the Tlingits in both land use planning and treaty negotiations.”

10. Those concerns are fully supported by information and reports from the environmental review and additional evidence in the judicial review.

**For enduring significance of Tlingit traditional land use** see *Staples Report*, CAR, Vol. III, pps. 513, 515, 534-543; *Staples Addendum Report*, CAR, Vol. IV, at p. 629. **For Tlingit systemic reliance on lands and resources** see *Weinstein Report*, TAR, Vol. 2, at pps. 393-395.

**For effect of road on specific Tlingit cultural sites including prayer sites, trails, traplines** see *Staples Addendum Report*, CAR, Vol. IV, at p. 618. **For effect on family fishing and hunting camps** see Affidavit of Bryan Jack, TAR, Vol. 2, p. 422, par. 21-23; **For effect on trails and traditional way of life into the future** see Affidavit of John Ward, TAR, Vol. 2, pps. 428-429, par. 14-15.

**For effects of the road on Tlingit economy** see *Pearse Report*, TAR, Vol. 1, p. 51, par. 98 quoting *Redfern’s Tulsequah Chief Project Report, Vol. V: Environmental Impacts and Mitigation* where it states that, “Increased, uncontrolled access by hunters is estimated to have the potential to hunt out or disperse game within five years representing a loss of a major food source within the domestic economy.” *Dewhirst Report*, TAR, Vol. 1, p. 187 where it states that, “All the TRTFN households in Atlin, including a number in Whitehorse and other distant places, sustain themselves, directly or indirectly, from resources in Blue Canyon.” And see pps. 175, 190 & 200 wherein it is noted that the road would pass through the Blue Canyon, also known as the Tlingits’ “breadbasket”. And see *Staples Addendum Report*, CAR, Vol. IV at pps. 629, 604-605 and 595-600; *Weinstein Report*, TAR, Vol. 2, p. 399.

**For impact of road on treaty negotiations** see *Environmental Impact Statement*, Exhibit 1 to Pearse Affidavit, sworn February 20, 2000, CAR, Vol. XI, p. 2066 where it states that, “the road will pre-determine how the Tlingits can use their land and will thwart TRTFN’s ability to establish a regional land use plan and to exercise effective decision-making over their resource base.” And see *Staples Addendum Report*, CAR, Vol. III, p. 566; *Dewhirst Report*, TAR, Vol. 1, pps. 189-190.

**For effect of road on wildlife** see Affidavit of Joanne Siderius, TAR, Vol. 2, p. 433 where she states that “roads fragment landscapes and ... fragmentation has destroyed habitat over much of the continent.” **For**

**fragility of grizzly bear and caribou populations** see Affidavit of Brian Horesji, TAR, Vol. 2, pps. 460-462. See Affidavit of Rick Farnell, TAR, Vol. 2, pps. 482-483. **For other impacts on wildlife** see *LUCO Report*, TAR, Vol. 2, p. 340; Affidavit of Norman Barichello, TAR, Vol. 2, pps. 491-493; **For maps of grizzly and caribou habitat in region** see Exhibits 5 & 7, TAR, Vol. 1, pps. 9 & 10 to Affidavit of Tony Pearse, sworn February 20, 2000, CAR, Vol. XI, pps. 1953-1963.

**For likelihood that once built, the road would become a magnet for further development and would likely never be closed** see letter from Office of Governor of Alaska to EAO, Exhibit B53 to Affidavit of Tony Pearse, TAR, Vol. 2, p.507-508 where it states that, “We know of no previous examples of a new road, of the length and profile of that being proposed for this project, that has been decommissioned ... Since procedures exist to allow additional “new” users of the road ... a strong possibility exists that this road will not be decommissioned in the foreseeable future. We believe that there is a substantial possibility that extensive future use and development of the lower Taku River will occur as a direct result of the current proposal.” And see *Staples Report*, CAR, Vol. III, pps. 552-556 – “there is no history of successful long-term abandonment and reclamation that the study team is aware of.” **For criticism of Redfern’s “very naïve” assumptions that access can be effectively controlled and the road closed** see Affidavit of Norman Barichello, TAR, Vol. 2, p. 493; See also Affidavit of Rick Farnell, TAR, Vol. 2, p. 484; *Dewhurst Report*, TAR, Vol. 1, p. 196.

**For lessons to be learned from other mining roads** see *LUCO Report*, TAR, Vol. 2, pps. 349-350 eg: Iskut Road - where vehicle access for hunting has not been a problem “because the road was originally located to avoid sensitive and productive wildlife habitat” and Omenica Resource Access Road - where illegal hunting, vandalism and habitat degradation are a concern and enforcement is difficult because of the remote location.

**For expert findings that proposed mitigation measures would not be effective because the Crown and the Tlingits lack the institutional capacity to manage the likely impacts** see *Staples Addendum Report*. CAR, Vol. IV, at pps. 630-631 and 591-592.

11. Those concerns and the substantial body of expert evidence that supported them became the factual context for Kirkpatrick J’s decision, as she explained:

[18-19] “... the respondents did not take issue with or challenge the Tlingits’ concerns or point to any body of evidence which challenged their arguments in this regard ... I propose to address the issues raised in the petition ... in the context that those concerns ... are not in dispute”.

### **The Environmental Review Process**

12. The environmental review began in 1995, but Redfern did not submit its revised Project Report until August 1, 1997. Reports and materials were reviewed by the Committee and its sub-committees as they were prepared, but some, including the Staples Addendum Report, were not available until December, 1997. That was the first time the Committee could have considered all the issues and decided on recommendations. Committee meetings to do that were scheduled for January, 1998 but were cancelled, and the Committee never met for that purpose or considered those reports.

**For reports not discussed by the Committee** see *Pearse Report*, TAR, Vol. 1, pps. 38-43 & 45, paras. 59-61, 64, 67-8, 73 and 81 including the *Staples Addendum Report* CAR, Vol. III, p. 571 to Vol. IV, p. 633; the *LUCO Report* on access management, TAR, Vol. 2, pps. 326-368; the Access Management Plan prepared by MELP, TAR, Vol. 2, pps. 369-371; and the Colour-Coded Terrestrial Eco-System Maps (“TEM maps”), TAR, Vol. 1, pps. 9 & 10.

13. Instead, Norm Ringstad announced on February 26, 1998 that he was stopping the

process. He had arranged for a group of government officials and consultants to write a draft report, without Tlingit participation, which he circulated to individual Committee members, giving them two days to comment. This was objected to by some Committee members, including the Tlingits, the U.S. Environmental Protection Agency and Alaska, but their concerns went unanswered. The Committee never discussed this process or the draft.

Letter from C. Clarke of US EPA to N. Ringstad, EAO, March 6, 1998, Exhibit A to Affidavit of Margot Anne Venton, TAR, Vol. 2, pps. 513-515; Letter from W. Taylor, US Department of the Interior, March 6th 1998, Exhibit C to Affidavit of Margot Anne Venton, TAR, Vol. 2, p. 516; Letter from T. Knowles, Governor of Alaska to D. Anderson, Minister of Fisheries & Oceans, April 1, 1998, Exhibit D to Affidavit of Margot Anne Venton, TAR, Vol. 2, pps. 517-518; State of Alaska - Response to Tulsequah Chief Project Report and Recommendations, March 6, 1998, Exhibit E to Affidavit of Margot Anne Venton, TAR, Vol. 2, pps. 519-521.

14. When the process was stopped the Tlingits produced a Tlingit Recommendations Report, to address the most important issues from their perspective, including environmental impacts, sustainability, and effects on their domestic economy, culture, social well-being and treaty negotiations. The Committee never discussed that Tlingit Recommendations Report.

*Tlingit Recommendations Report*, Exhibit B to Affidavit of Tony Pearse, CAR, Vol. 1, pps. 682-748.

15. The final Recommendations Report was presented to the Ministers as the majority report of the Committee, although it was never reviewed by that body. It contains no explanation of how it was actually produced. This chart summarizes the final events in the process:

Date	Event
January 1998	Indefinite extension granted for completion of review (originally scheduled to be completed on Jan 21st, 1998)
January 28	First and only meeting of the Road Access Committee to discuss various access management options and <i>LUCO Report</i> .
February 26	Notification from EAO that a draft <i>Recommendations Report</i> will be circulated March 2, with comments and sign-off by March 4
March 2	Yardley provides outline of MELP's Wildlife Access Management Plan
March 3	Draft EAO <i>Recommendations Report</i> arrives
Friday March 6	<i>Tlingit Recommendations Report</i> submitted to EAO
Monday March 9	Redfern signs Project Approval Certificate
March 12	<i>Recommendations Report</i> and Referral provided to Ministers.
March 13	Reasons for Decision signed by Min. of Environment, Lands and Parks.
March 19	Reasons for Decision signed by Min. of Energy and Mines and Min. Responsible for Northern Development

March 19, 1998	Project Approval Certificate signed by the Ministers
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Affidavit of G. Alexander, CAR, Vol. IV, p. 751, par. 3-4; Affidavit of N. Ringstad, Referral for Decision, Exhibit F, CAR, Vol. VIII, p. 1432; Advice to Ministers, Exhibit G, CAR, Vol. VIII, p. 1441, Project Approval Certificate M98-02, Exhibit H, CAR, Vol. VIII, p. 1449; Reasons for Ministers Decision, Exhibit I, CAR, Vol. VIII, p. 1457; *Pearse Report*, TAR, Vol. 1, pps. 20-49, par. 9-94.

### **Reasons for Judgment of Kirkpatrick J**

16. The Tlingits challenged the Certificate by filing a Petition for Judicial Review, supported by an Outline and 19 Affidavits. The grounds included non-compliance with procedural and substantive requirements under the *EAA*, infringement of Tlingit Aboriginal harvesting rights and title within s. 35 of the *Constitution Act, 1982*, and breach of fiduciary duty.

Amended Petition, CAR, Vol. II, p. 299; Petitioner's Outline, February 11<sup>th</sup>, 1999, TAR, Vol. 1, p. 1

17. Before the Petition was heard, Kirkpatrick J. acceded to interlocutory motions by the Crown and Redfern to refer the grounds based on Aboriginal rights to the trial list. Leave to appeal that Order was refused by a single judge and a panel of the Court of Appeal. Therefore the grounds based on the proof and infringement of Aboriginal rights were not considered.

18. It was that procedural ruling, made at the instance of the Crown and Redfern, that gave rise to the primary issue in this Court - whether the Crown had enforceable fiduciary obligations even though the Aboriginal rights asserted in the Petition had not been adjudicated.

19. The Petition was heard by Kirkpatrick, J., who concluded the Ministers had failed to comply with both statutory and fiduciary obligations. Those conclusions were based on her findings of fact about substantive and procedural matters, including the following:

The Recommendations Report was the only basis for the Ministers decision to issue the Certificate. [34]

Impacts on traditional land use affect the integrity and well-being of TRTFN institutions and the social and cultural well-being of the community, and these links cannot be overstated because they are the fundamental difference between the TRTFN and non-native society. [59]

Tlingit reliance on their system of land use to support their domestic economy and their social and cultural life was recognized by all of the experts who prepared reports for the review. [70]

The *Staples Addendum Report* raised serious issues about the impact of the road on the Tlingits, which were not addressed, including the following:

- the new road would impose serious impacts upon resources utilized by Tlingit harvesters as well as significant interference with land use activities and cultural pursuits;
- the province, the proponent Redfern and the Tlingits were not adequately prepared to handle the predicted impacts;
- no meaningful mitigation or compensation measures were in place or plausible;
- benefits from the Project to the Tlingits would be marginal and of short duration; and

- the road would preclude the substantial opportunities presently available to the Tlingits in shaping their own visions for land use and treaty settlement. [71]

The collective process of the Project Committee was abandoned in the final weeks of the environmental review process, thereby eliminating the Tlingits' final opportunity to persuade others to take into account their serious concerns. [105]

### **Failure to address sustainability**

The decision to grant the Certificate cannot be reconciled with the objectives of the statute because the decision does not address the Tlingits' concerns of sustainability. [67]

The Recommendations Report makes no reference to the sustainability of the Tlingits and in fact makes no reference to sustainability at all. [69]

### **Failure to consider relevant factors**

It is doubtful that the wealth of material represented by the Recommendations Report and the Tlingit Recommendations Report was in fact considered by the Ministers. [69]

The Recommendations Report does not fairly and accurately describe the concerns of all the Project Committee members, including the Tlingits. Therefore the Ministers' decision, as an exercise of discretion, failed to consider a relevant matter under the statute. [69]

There was inadequate or no assessment of evidence produced by or on behalf of the Tlingits. [85]

Failure to consider the Staples Addendum Report constituted substantive error in the decision. [96]

The Ministers were insulated from the views of the minority by the failure of the Report to fairly and fully advise the Ministers of the disputes forming the core of the Tlingits' concerns. In that respect the Ministers' decision failed to take into account a relevant factor. [107]

### **Flaws in the Review Process**

Pursuant to the EAA the Tlingits were required to be included as members of the committee and they should have been full participants in decisions about the Recommendations Report. [102]

The statutory requirement of consultation with First Nations affected by a proposed project must mean adequate and meaningful consultation. Here there was meaningful consultation that was suddenly and inexplicably cut off. [106]

There was a breach of the rules of procedural fairness. The failure of the Project Committee to finally meet and discuss with the Tlingits their concerns gave rise to the failure on the part of the Project Committee to report to the Ministers the final concerns of the Tlingits and the various reports reflecting those concerns. Information that ought to have been considered by the Ministers was not considered. That failure was sufficiently egregious to result in a finding that the Ministers' decision was unreasonable. [108]

### **Fiduciary Duty**

[130] "...the existence of aboriginal interests should inform governments who make decisions which are likely to affect those interests...Given the extreme importance of [their] decision to the Tlingits, the Ministers should have been mindful of the possibility that their decision might infringe aboriginal rights. Accordingly, they should have been careful to ensure that they had effectively addressed the substance of the Tlingits' concerns with respect to when, and on what terms and conditions, the mineral rights to be exploited by Redfern should be developed."

20. Kirkpatrick J. quashed the Certificate and referred it back to the Ministers for reconsideration "after a revised project committee report, which meaningfully addresses the

Tlingits' concerns..." The Crown and Redfern both appealed, and their appeals were heard in the Court of Appeal before that renewed Committee process was completed.

### **Court of Appeal Decision**

21. In the Court of Appeal, the Crown and Redfern did not challenge Kirkpatrick J.'s findings of fact about the substance of the Tlingits' concerns, or that they were not in dispute.

22. The majority only addressed the question they considered the "central issue" before them:

[107] "...whether the chambers judge erred when holding that the Ministers of the Crown were obliged to take into account the constitutional protection afforded Aboriginal rights by section 35(1) of the *Constitution Act, 1982* when deciding to issue the Project Approval Certificate prior to the Tlingits having established any Aboriginal rights or title in relation to the area which would be affected by the Tulsequah Chief Mine Project."

23. The majority accepted the reasoning and findings of fact by Kirkpatrick J. Based on this Court's decisions, they concluded that the position of the Crown and Redfern would undermine the achievement of the purposes of s. 35, and was not supported by the jurisprudence:

[173] "To accept the Crown's proposition that the obligation to consult is only triggered when an aboriginal right has been established in court proceedings would ignore the substance of what the Supreme Court has said, not only in *Sparrow* but in earlier decisions which have emphasized the responsibility of government to protect the rights of Indians arising from the special trust relationship established by history, treaties and legislation: ... if the Crown's proposition were accepted, it would have the effect of robbing s. 35(1) of much of its constitutional significance."

[193] "... the jurisprudence supports the view taken by the chambers judge that, prior to the issuance of the [Certificate], the Ministers of the Crown had to be 'mindful of the possibility that their decisions might infringe aboriginal rights' and, accordingly, to be careful to ensure that the substance of the Tlingits' concerns had been addressed."

24. The majority concluded, on the basis of the factual conclusions and reasoning below, that they agreed with the conclusion on fiduciary duty by Kirkpatrick J. They also commented that there was no evidence that the substantive component of that duty had been satisfied:

[199] "The Crown did not argue, either before the chambers judge or before this Court, that the substance of the Tlingits' concerns had been met or accommodated prior to or through the issuance of the Project Approval Certificate...the Crown did not raise such an argument and, considering the material before the chambers judge, it is difficult to see how such an argument could be made successfully."

25. The majority upheld the decision to quash the Certificate and remitted the matter back to the Ministers for reconsideration, without requiring completion of the further Committee report.

26. The majority did not write about Kirkpatrick J.'s conclusions about the EAA or Southin J.A.'s views on those issues. They said in [108] that they had read Southin J.A.'s draft reasons and disagreed with her on whether the Ministers were under a duty to take account of the

Tlingits' Aboriginal rights before deciding to issue the Certificate.

27. Writing in dissent, Southin J.A. said:

[1-2] "In this appeal ..., the root question, although it is not the question as put either by the learned trial judge or by counsel before us, is this: Who has the power to decide whether natural resources on Crown land lying within an area to which an Indian band ...makes claim shall be turned to account?... Does the power of decision rest with the Legislature of British Columbia ...; with the Parliament of Canada ...; or with the Indian band ...; or some combination, and if so, what?"

[16] "It is right to consider these [statutory] issues as if the objector was not aboriginal but was a "municipality in the vicinity" (see the Act, s. 9(2)(c)) who objected to this mine and all its works on the ground that, in the opinion of the inhabitants, the economic benefits from a mine were less than the economic benefits from a nascent tourism industry which would not flourish, in their opinion, if the wilderness were invaded by monstrous trucks transporting ore to Atlin."

[22] "...In this context, "unreasonable" does not mean, in the eyes of a judge hearing an application for judicial review, "wrong". It means lacking in reason."

[82] "As to all the attacks made on administrative law grounds on this certificate, I say that the Legislature has enacted a process that implicitly entrusts to the Ministers an exclusive power to decide whether the purposes of the statute have been met and, if not, what should be the next step. There is no room for a judicial assessment of whether the Ministers are right or wrong."

[83] "Here, when one has the Recommendations Report and the reasons in hand, it is plain that for better (in Redfern's opinion) or worse (the Tlingits' opinion), the Ministers have determined that the benefits of this project outweigh its detriments."

[86 - 87] "I am not saying that a certificate under this Act could never under any circumstances be attacked. I should think it would be a good foundation for attack that a proponent had bribed a member of the Project Committee to recommend favourably. I should be prepared to hold, as a matter of statutory interpretation, that the Legislature did not intend that a certificate should be valid even if it were induced by fraud...It might also be a good ground that the process laid down by the Act was so attenuated as to be a sham, simply because I do not consider the Legislature intended the process to be a sham. This process may have been brought to an abrupt end ...but it was no sham."

## **PART II – ISSUES ON APPEAL**

28. The Crown applied for Leave to Appeal to challenge the majority's conclusions about fiduciary duty, which underlay the Court of Appeal's Order. The issue raises three questions:

- Did the Crown have fiduciary obligations in the circumstances of this case?
- What was the content and force of those obligations?
- Did Kirkpatrick J. err in quashing the Certificate for breach of those obligations?

29. The Crown and Redfern have also made arguments about statutory and administrative law issues, which raise two questions:

- Did the majority in the Court of Appeal agree with Southin J.A. that the Certificate satisfied the requirements of the *EAA*?
- Did Kirkpatrick J. err in quashing the Certificate for non-compliance with statutory

and administrative law requirements?

## PART III – ARGUMENT

### FIDUCIARY DUTY ISSUES

#### Introduction

30. The issue raised by the majority's decision is one of first instance in this Court – whether the Crown has fiduciary obligations pursuant to s. 35 that can be defined and enforced without first determining that there is an existing Aboriginal or treaty right.

31. The Crown and Redfern essentially say there is no such duty because it was not defined or provided for in *R. v Sparrow* [1990] SCR 1075. But this Court has never said that the analysis in *Sparrow* exhaustively defined the Crown's duties under s. 35.

32. This appeal is not a case like *Sparrow*, which was a prosecution for fishing in breach of a regulation, that was adjudicated **after the fact** of the alleged infringement of the right. The Court had to decide whether the Musqueam had an existing Aboriginal fishing right, or if it had been extinguished as was argued by the Attorneys General. The decision provides a purposive analysis of s. 35, explains the effect of constitutional recognition and affirmation, and defines the usual remedy for infringement in such a case, the non-application of the infringing law.

33. In contrast, this case is a judicial review of the Ministers' statutory decision to authorize a third party to affect Aboriginal land-related interests. It was adjudicated **before the fact** of the anticipated infringement, because the Certificate was issued but had not taken effect. The Court did not consider the assertion that Aboriginal rights would be infringed. Instead the finding of fiduciary duty was based on proof that the Certificate would threaten the Tlingits' reliance on land-related interests that sustain them as a people, and would compromise their use of their treaty to provide environmental protection and land-use plans to sustain them into the future.

34. As explained below, *Sparrow*, *Adams* and *Delgamuukw* reflect an implicit view that the Crown is bound by fiduciary duties that take effect **before** specific s. 35 rights are adjudicated. This case provides an opportunity to define those Crown obligations.

*R. v Sparrow*, supra; *R. v Adams* [1996] 3 SCR 101; *Delgamuukw v British Columbia* [1997] 3 SCR 1010.

35. The Tlingits submit that the Crown has a fiduciary obligation to protect and accommodate land-related interests on which Aboriginal peoples rely to sustain themselves currently or into the future. The majority in the Court of Appeal were therefore correct in

holding that the Crown had a fiduciary duty to protect and accommodate the vulnerable Tlingit interests at risk, and that Kirkpatrick J had properly enforced that duty on the basis of the proof of those interests, without a need to determine Tlingit Aboriginal rights within s. 35.

### **The Position of the Crown and Redfern robs s. 35 of its constitutional significance**

36. The Crown and Redfern argue that because Tlingit Aboriginal rights within s. 35 had not been defined by agreement or adjudication, the Crown had no fiduciary duty, but instead had a “duty of fair dealing,” which included a duty to provide information and consult on potential impacts to aboriginal interests, but no duty to substantially address Tlingit concerns.

37. If this position is correct, each aboriginal people of Canada will need to adjudicate all its rights within the contemplation of s. 35, in order to trigger the Crown’s fiduciary obligation to act consistently with the recognition and affirmation of such rights in the *Constitution Act, 1982*.

Such a conclusion would effectively authorize governments to continue business as usual until then, thereby legitimizing the same practices that s. 35 was enacted to end, by which the rights of the Aboriginal peoples were so often “honoured in the breach.”

38. In repudiating the fiduciary duty upheld below, the Crown and Redfern argue that the Crown had no enforceable substantive obligations in these circumstances. This really attempts to revive, in the context of s. 35, the “political trust” argument that this Court rejected in *Guerin*. The majority were right that this argument robs s. 35 of much of its constitutional significance.

39. Lamer C.J. said in *Delgamuukw*, supra, that the ultimate purpose of s. 35 is to facilitate the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown. But this objective cannot be achieved simply or immediately, and must ultimately be achieved by the negotiation of modern treaties. That is the basis for the further purposes of s. 35 explained in *Sparrow*, supra – to serve as a call for a just settlement for Aboriginal peoples, to provide a solid basis for negotiations, and to establish a general constraint on the exercise of governmental power:

...Our history has shown, unfortunately all too well, that Canada’s aboriginal people are justified in worrying about government objectives that may be superficially neutral but which constitute de facto threats to the existence of aboriginal rights and interests. By giving aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal rights are affected...

The constitutional recognition afforded by [s. 35] therefore gives a measure of control over government conduct and a strong check on legislative power. While it does not promise immunity from government regulation...it does hold the Crown to a substantive promise. The

government is required to bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under s. 35(1). ( at p. 1010)

40. How are those purposes to be achieved? S. 35 did not give Aboriginal peoples the authority to protect their rights and interests themselves, because it did not alter the distribution of legislative powers. Nor did it insulate Aboriginal peoples from governmental actions by giving absolute status to Aboriginal and treaty rights. Instead, s. 35 operates as a **constitutional restraint** on the Crown's exercise of its legislative and administrative powers.

41. Fiduciary duty is **central** to the effectiveness of the new constitutional protection for Aboriginal rights, because that duty is the legal mechanism for defining and enforcing that restraint. The choice of fiduciary law for this purpose was explained in *Guerin*::

[where there is a fiduciary obligation] there is a relation in which the principal's interests can be affected by, and are therefore dependent on, the manner in which the fiduciary uses the discretion which has been delegated to him. The fiduciary obligation is the law's blunt tool for the control of this discretion

*Guerin v Canada* [1984] 2 SCR 335 at 384; *Wewaykum Indian Band v Canada* [2002] SCC 79 at [80]

42. *Guerin* dealt with surrendered interests in an Indian Reserve, but the enactment of s. 35 required a much broader application of fiduciary law, as explained in *Sparrow*, supra at 1108:

...The *sui generis* nature of Indian title, and the historic powers and responsibilities assumed by the Crown constitute the source of such a fiduciary obligation... the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.

See also *Wewaykum Indian Band v Canada*, supra, at [74-79].

43. But according to the positions argued by the Crown and Redfern, that fiduciary duty would only be triggered by the adjudication of particular s. 35 rights, on a case-by-case basis. In effect the Crown is asking the Court for permission to act as if British Columbia is *terra nullius*, in the sense that s. 35 and fiduciary principles do not constrain the exercise of the Crown's authority except where specific Aboriginal rights have been determined to exist.

44. Legally and practically, if the Crown has no fiduciary obligations until specific rights are adjudicated, Aboriginal peoples will have no constitutional protection unless they flood the courts with applications for declarations of all their Aboriginal rights and corresponding interlocutory relief. That would be the only way to stop Crown officials from alienating Crown lands and resources or authorizing impacts to land-related Aboriginal interests as if s. 35 had not been added to the constitution. That could not be the legal or practical reason for the agreement of Canadian governments to enact s. 35, or a proper result of the "long and difficult struggle in

both the political forum and the courts for the constitutional recognition of aboriginal rights.”

45. The position of the Crown and Redfern reflects three errors that are addressed below:
- It focuses on the Crown’s ability to infringe s. 35 rights rather than the obligation to act in accordance with their constitutional recognition and affirmation;
  - It confuses the time when constitutional and fiduciary duties arise with the time when courts apply the justification analysis in *Sparrow*;
  - It assumes that the Crown’s fiduciary duty under s. 35 can only be defined and enforced as in *Sparrow* – by reference to the unjustifiable infringement of rights.

**The purpose of s. 35 is to require governments to act consistently with the recognition and affirmation of aboriginal rights, not to authorize justifiable infringement**

46. The Crown argues that the Ministers did not have fiduciary obligations when they issued the Certificate because they could not know the extent of any prima facie infringement or the nature of the “**justificatory fiduciary duty**” engaged by such rights, until the Tlingits’ s. 35 rights were determined.

47. This argument turns section 35 on its head, by focusing on the “justification” analysis instead of the affirmative purpose for adding this unique provision to the constitution, viz., to require governments to exercise their authority so as to reflect recognition and affirmation by **avoiding** negative affects on rights that now have constitutional protection.

48. The justification scheme only reflects the fact that such rights are not absolute. It was not intended to renew governments’ authority to ignore or plan to infringe Aboriginal or treaty rights when politically or economically convenient, so long as that might arguably be justified.

49. In the same way that section 1 does not define the nature of governments’ obligations under the *Charter*, the Crown’s fiduciary obligations pursuant to s. 35 cannot be defined through the lens of the justification analysis in *Sparrow*.

**The Crown’s fiduciary obligations arise before section 35 rights are determined**

50. The arguments of the Crown and Redfern confuse the time when constitutional and fiduciary duties arise with the time when the justification analysis in *Sparrow* is applied. In such cases courts have defined the Crown’s fiduciary duty when the s. 35 right is determined. But that does **not** mean that the duty only arose when the right was determined. On the contrary, this Court has proceeded on the basis that the duty existed **before** the determination of the right. That is clear because the Crown must justify its infringement **as of the time when the actus reus of the offence was committed**. If that burden is not met, the infringing law does not apply **as of**

**that earlier date.** Thus *Sparrow* required the Crown to comply with fiduciary obligations **before** s. 35 rights were decided.

51. This Court also said in *R v Adams*, supra, at [54], that it is unconstitutional for the Crown to adopt an unstructured discretionary regime that risks infringing aboriginal rights in a substantial number of applications. This must mean that there is an affirmative duty in respect of s. 35 that arises without a requirement to adjudicate particular rights.

52. The discussion of the Crown's duty to consult in *Delgamuukw*, supra, also reflects the view that fiduciary obligations arise **prior to** the adjudication of Aboriginal rights or title:

[186] ...[The discretionary component 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. ...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 those 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 people whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an Aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to Aboriginal lands.

53. Thus *Sparrow*, *Adams* and *Delgamuukw* cannot be reconciled with the position that the Crown's fiduciary duties do not arise until particular s. 35 rights are determined.

54. Nor does fiduciary law support that position. Remedies for breach of duty are granted on the basis that the obligations were already in effect at the time of the breach. It would be novel for a court to consider that a fiduciary's duty did not arise until judicially determined.

*Guerin v The Queen*, supra, per Wilson J.; *Fales v Canada Permanent*, [1977] 2 SCR 302; *Can. Aero Services v O'Malley*, [1974] SCR 592; *Toronto Dominion Bank v Uhren*, (1960) 32 WWR 61 (S.C.C.), *Lloyds Bank v Bundy*, [1974] 3 All ER 757.

55. Why would Crown fiduciary duties to Aboriginal peoples be different in this respect?

### **The Crown's fiduciary obligations are not limited to those defined in *Sparrow***

56. The Crown and Redfern argue that the Crown's fiduciary duties in this case cannot be defined until the Tlingits' s. 35 rights are determined. The argument is based on the assertion in the Petition and Outline that Tlingit rights would be infringed. But those issues were not before the Court, due to the Crown's and Redfern's success on their motions to refer the Aboriginal rights issues to trial. Accordingly the Tlingits did not assert that the Crown owed the fiduciary duty defined in *Sparrow*.

57. Instead the Tlingits asserted that the Crown had a duty triggered by the facts respecting their vulnerable interests, to exercise discretion consistently with the recognition and affirmation of Aboriginal rights, by not certifying a Project that would adversely affect those interests.

58. That was the nature of the duty upheld by both courts below. They concluded that the Ministers had a duty in respect of those Tlingit interests, to be mindful of the possibility that the Ministers' decision might infringe Aboriginal rights, and consequently to effectively address the substance of the Tlingits' concerns with respect to when, and on what terms and conditions, the mineral rights to be exploited by Redfern should be developed.

59. This Court has not previously considered this duty in the context of s. 35, although portions of the decisions in *Sparrow*, *Adams* and *Delgamuukw* suggest there is such a duty.

60. This Court's previous s. 35 decisions – from *Sparrow* through *Delgamuukw* – were brought to the Court and decided on the basis of the approach in *Sparrow*, with the evidence and legal analysis directed to determining the existence of a specific s. 35 right of a particular Aboriginal people, whether that right had been infringed, and if so, whether government actions were consistent with fiduciary obligations and the honour of the Crown.

61. The Tlingits submit that this approach does not exhaust the role of s. 35 in the interplay between the Crown and the Aboriginal peoples of Canada.

62. Although it was an interlocutory procedural Order that led to the emergence of this issue – whether the Crown has fiduciary duties that can be defined without adjudicating specific rights, when administrative decisions will affect important Aboriginal interests - the Crown's actions and arguments in this case show that such a duty needs to be upheld in order for s. 35 to provide effective protection for Aboriginal peoples.

63. The general relationship between the Crown and Aboriginal peoples is fiduciary, and there is a corresponding obligation on governments to act in a trust-like rather than adversarial manner *vis a vis* Aboriginal peoples. But this case shows that, faced with political or economic pressure to develop lands and resources, Crown officials will readily take the side of developers against Aboriginal peoples, and will justify that by the position argued here – that government cannot acknowledge or define its fiduciary obligations until specific s. 35 rights are proved.

64. That position is often said to flow from the “case-by-case” approach that was first articulated in *Kruger and Manuel*, some five years before the enactment of s. 35:

...the important constitutional issue as to the nature of aboriginal title, if any, in respect of land in

British Columbia, the further question as to whether it has been extinguished, and the force of the Royal Proclamation of 1763 – will not be determined in the present appeal... Claims to aboriginal title are woven with history, legend, politics and moral obligations. If the claim of any Band in respect of any particular land is to be decided as a justiciable issue and not a political issue, it should be so considered on the facts pertinent to that Band and to that land, and not on any global basis...

*Kruger and Manuel v The Queen*, [1978] 1 SCR 104 at 108-9

65. But as this case shows, the effectiveness of s. 35 is undermined if it can only operate on a case-by-case basis, using the approach in *Sparrow*. It is submitted that the Courts below were correct to define and enforce an **additional** fiduciary duty based on s. 35, that is triggered by threats to vulnerable Aboriginal **interests** rather than the adjudication of **rights**. Those decisions below prevented this Court's decisions from being used to legitimate government actions that threaten the Tlingits' sustainability and opportunity to achieve the purposes of s. 35.

66. In *Haida v British Columbia*, [2002] BCCA 147 at [11-14], Lambert J.A. discussed the significance of a distinct fiduciary duty that would arise and be enforced in appropriate cases, **without adjudicating specific s. 35 rights**:

This case has been presented as a petition for judicial review. It is not, technically, an interlocutory proceeding. But its resolution could provide the beginnings of an alternative framework for dealing with the reconciliation of claims to constitutionally protected aboriginal title and aboriginal rights, on the one hand, and the public interest, both aboriginal and non-aboriginal, in the elusive economic prosperity of the primary industries of the province.

...

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

67. It was particularly important to apply such an alternative framework in the circumstances of this case, where current reliance on finite lands and resources, as well as future treaty and land-use planning options, would be compromised by the Ministers' issuance of the Certificate.

68. It is submitted that the challenge in this case is analogous to the task in *Mahe v Alberta*, in which this Court decided to read the concept of "management and control" into section 23 of the *Charter*, to ensure the achievement of its general and remedial purposes.

*Mahe v Alberta*, [1990] 1 SCR 342

69. In the same way, in order for s. 35 to achieve its purposes, it is necessary to supplement the approach in *Sparrow* - which focuses on **rights** - by defining a complementary fiduciary duty to protect and accommodate vulnerable **interests** intended for protection by s. 35.

**The doctrine of Aboriginal rights supports the fiduciary duty upheld below**

70. In defining and enforcing a fiduciary duty based on Aboriginal interests rather than rights, the courts below acted consistently with settled principles of Aboriginal rights law.

71. Although section 35 recognizes and affirms rights, it has never been the case that those are the only source of the Crown's fiduciary obligations. On the contrary, as discussed in *Wewaykum*, supra, at [81], the fiduciary duty imposed on the Crown arises "in relation to specific Indian interests," and such duties have primarily been recognized in respect of land, "which has generally played a central role in Aboriginal economies and cultures."

72. From the beginnings of European colonial ventures in North America, the Crown offered to protect the indigenous peoples "from the uncontrolled inroads of settlers, traders, miners and speculators". Those protocols evolved into imperial legal rules and principles that were given formal expression in the *Royal Proclamation*. They were also the basis for the common law doctrine of aboriginal rights, in which the Crown's protective obligations were always central.

The Crown has a general fiduciary duty towards native people to protect them in the enjoyment of their aboriginal rights and in particular in the possession and use of their lands. This general fiduciary duty has its origins in the Crown's historical commitment to protect native peoples from the inroads of British settlers, in return for a native undertaking to renounce the use of force to defend themselves and to accept instead the protection of the Crown as its subjects...The sources of the general fiduciary duty do not lie, then, in a paternalistic concern to protect a "weaker" or "primitive" people...but rather in the necessity of persuading native peoples, at a time when they still had considerable military capacities, that their rights would be better protected by reliance on the Crown than by self-help.

Slattery, B. "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727 at 733 and 753; and see *Wewaykum Indian Band v Canada* (supra) at [79]

73. This Court has considered the nature and legal force of Aboriginal peoples' interests in their territorial lands and resources. In *Guerin*, supra, Dickson J. approved the principles in the leading U.S. aboriginal title cases, resolved doubts about the **status** of Indian peoples' territorial interests by defining them as pre-existing legal interests, and described those peoples' collective rights to continue in possession of their territorial land and "use it according to their discretion". In *Delgamuukw*, supra, Lamer C.J. clarified that this continuity principle applies to all pre-existing land-related interests protected by Aboriginal rights, not just Aboriginal title, and that all such interests burden the Crown's title.

See *Roberts v Canada*, cited in *Delgamuukw v B.C.*, supra at [114]: "...aboriginal title pre-dated colonization by the British and survived British claims to sovereignty.; and see *Guerin v The Queen*, supra at SCR 378: "The principle that a change in sovereignty over a particular territory does not in general affect the presumptive title of the inhabitants was approved by the Privy Council in *Amodu Tijaniv Southern Nigeria (Secretary)*..."; See also *R v Van der Peet*, [1996] 2 SCR 507 at [56]: "This aspect of the integral to a distinctive culture test arises from the fact that Aboriginal rights have their basis in the prior

occupation of Canada by distinctive Aboriginal societies...”; and see *Wewaykum*, supra at [75-76]

74. The jurisprudence suggests that the underlying purpose of these obligations has been to protect Aboriginal peoples’ opportunities to continue to sustain themselves as distinct peoples, *inter alia* by their reliance on the lands and resources of their territories.

e.g., see *Calder v A.G. British Columbia* [1973] SCR 313: “...I would declare the [Nisga’a’s] right to possession of [their territory] and their right to enjoy the fruits of the soil, of the forests and of the rivers and streams within the boundaries of the said lands...”(per Hall J.) at 422; “...what [the Nisga’a] are asserting in this action is that they had a right to continue to live on their lands as their forefathers had lived...” (per Judson J) at 328; see *Delgamuukw v B.C.*, supra, at [188-92] per La Forest J.;and see citations from *R. v Van der Peet*, supra, below

### **Governments have historically recognized and protected Aboriginal interests without first determining particular legal rights**

75. The Courts below correctly concluded that the Ministers had a duty to be mindful that their decision might infringe Aboriginal rights. There is no real dispute that the Tlingit interests in this case are protected by such rights. The basic features of the land-related Aboriginal rights and interests at issue in this case are common for **all** Aboriginal peoples throughout Canada, even if some of their aspects may be specific to particular Aboriginal peoples:

...the doctrine of aboriginal land rights attributes to native groups a collective title with certain general features. The character of this collective title is not governed by traditional notions or practices, and so does not vary from group to group...

Slattery B., “Understanding Aboriginal Rights”, supra at 745.

76. Furthermore, by enforcing this duty the Courts below were not expecting government to act in an extraordinary way. As a matter of practice, governments in Canada have historically engaged in conduct that reflects recognition of Aboriginal peoples’ collective interests and the Crown’s corresponding fiduciary duties, without requiring the adjudication of legal rights:

- Treaty making is premised on the unique constitutional position and rights of Aboriginal peoples. Yet Imperial and Canadian authorities engaged in the practice throughout Canada for more than 200 years – with the exception of most of British Columbia – based on the Aboriginal peoples’ historical use, occupation and possession of their territories. Entering into those treaties did not require the prior adjudication of rights.

Report of the Royal Commission on Aboriginal Peoples, 1996, Vol. 1, pp. 122-32, 155-73; *Gitanyow First Nation v Canada*, [1993] 3 CNLR 89 (B.C.S.C.) at [12-14].

- After this Court’s decision in *Calder*, which confirmed that the law of Aboriginal title continues to apply in Canada, the federal government introduced its policy for negotiating Comprehensive Land Claims. Under that policy negotiations are conducted on the basis of factual inquiries about traditional use and occupancy, without determining Aboriginal rights or title. Numerous modern treaties have been concluded under that policy, covering vast areas of the Yukon, Northwest Territories and Nunavut. The Tlingits’ claim was accepted for negotiation under that policy, but

like other such claims in B.C., no negotiations were conducted because prior to 1990 the B.C. government refused to participate. The Nisg'a's modern treaty was eventually concluded under that policy.

*R. v Sparrow*, supra, at 177-8 [CNLR]; Affidavit of Richard Salter, supra, [see Facts above, para. 7]; *Gitanyow First Nation v Canada*, supra, at [15-20]

- Under the B.C. treaty process in which the Tlingits are currently engaged, governments enter into negotiations on the basis of statements of intent to negotiate a treaty, without determining Aboriginal rights or doing traditional use and occupancy studies. These treaty negotiations are premised on the unique constitutional position of the First Nations and their interests, even though the process does not proceed explicitly on that basis.

*Gitanyow First Nation v Canada*, supra, at [21-25] and [38]

- Notwithstanding the case-by-case approach to the adjudication of Aboriginal rights, appellate decisions on s. 35 rights operate as precedents, and governments normally apply the principles in those cases to all First Nations on the basis of factual inquiries, without adjudicating each people's rights. Thus throughout Canada, the *Sparrow* priority principles are applied to all First Nations' fishing for food and ceremonial purposes in their traditional fisheries. And since the decision in *Alphonse*, provincial governments exempt First Nations from wildlife laws and regulations that do not reflect those principles.

*R. v Alphonse* [1993] 4 CNLR 19 (B.C.C.A.); *Perry v Ontario*, [1998] 2 CNLR 79 (Ont. C.A.) at 81-2

### **Principles of fiduciary law support the duty defined and enforced by the Courts below**

77. The courts below were correct to define a fiduciary duty without requiring proof of s. 35 rights because fiduciary obligations are normally triggered by the relationship of the parties and factual circumstances, not by judicial decisions.

78. Unlike governments' relationship with most Canadians, the Crown has a fiduciary relationship with Aboriginal peoples and is therefore required to act in a trust-like rather than an adversarial manner. That applies to the federal and provincial governments.

*R. v Sparrow*, supra, at 1108; *R. v Cote*, [1996] 3 SCR 138 at [74]; *Gitanyow First Nation v Canada*, supra, at [45-53]

79. Fiduciary duties do not arise in all transactions between parties in a fiduciary relationship. The circumstances that trigger such obligations were described by Wilson J. in *Frame v Smith*, and adopted by this Court in later cases. Fiduciary obligations are imposed by the courts when a relationship has three features: (1) the fiduciary has scope for the exercise of some discretion or power; (2) the fiduciary can unilaterally exercise that discretion or power so as to affect the beneficiary's legal or practical interests; and (3) the beneficiary is peculiarly vulnerable or at the mercy of the fiduciary holding the discretion or power.

*Frame v Smith* [1987] 2 SCR 99; *International Corona Resources Ltd. v Lac Minerals* [1989] 2 SCR 574

at 597-60; *Canson Enterprises Ltd. v Broughton & Co.* (1991) 85 D.L.R. (4<sup>th</sup>) 129 (S.C.C.) at 155.

80. In *Blueberry River*, McLachlin J (as she then was) expressed the concept as follows:

Generally speaking, a fiduciary obligation arises when one person possesses unilateral power or discretion on a matter affecting a second “peculiarly vulnerable” person...

*Blueberry River Indian Band v Canada (Dept. of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at [38].

81. In *Wewaykum*, supra, Binnie J, wrote for the Court and explained the inquiry that should be used to determine whether the Crown is bound by fiduciary obligations in a particular case:

[83]...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.

82. That inquiry was properly answered by the Courts below on the basis of the undisputed facts that underlie the Tlingits’ concerns. The Ministers had statutory authority under section 30 of the *EAA* to exercise a discretion or power to issue the Certificate, without consent of the Tlingits. In exercising that discretion the Ministers would affect the very substantial legal and practical interests that were the basis for the Tlingits’ concerns about the proposed road. The Tlingits rely on those interests to sustain themselves as a people, now and into the future.

83. It is submitted that if the facts of this case do not trigger fiduciary obligations and engage the honour of the Crown, it is hard to imagine any that would.

### **Protective obligations in Aboriginal rights law are also reflected in the constitution**

84. The common law of Aboriginal rights developed in the context of the colonial experience in North America, and has always comprised part of our constitutional law:

The doctrine of aboriginal rights is a basic principle of Canadian common law that defines the constitutional links between the Crown and aboriginal peoples, and regulates the interplay between Canadian systems of law and government (based on English and French law) and native land rights, customary laws, and political institutions. **It states the original terms upon which the Crown assumed sovereignty over native peoples and their territories...**

...

The Crown’s historical dealings with Indian peoples were based on legal principles suggested by the actual circumstances of life in North America, the attitudes and practices of Indian societies, broad rules of equity and convenience, and imperial policy. Those principles gradually crystallized as part of the special branch of British law that governed the Crown’s relations with its overseas dominions, commonly termed “colonial law”, or more accurately, “imperial constitutional law.

...

The doctrine of aboriginal rights, like other doctrines of colonial law, applied automatically to a new colony when the colony was acquired... **it also supplied the presumptive legal structure governing the position of native peoples...** (emphasis added)

Slattery B., “Understanding Aboriginal Rights”, supra at 732 and 736-7; see also Report of the Royal

Commission on Aboriginal Peoples, supra, Vol. 2, Part 2, p. 559.

85. Those original terms and that presumptive legal structure were not promulgated as temporary measures that governments could abandon when the balance of power shifted due to increased non-Aboriginal settlement and development. On the contrary, the Crown agreed to be bound by its “honour” to give effect to these terms, because they were the basis for indigenous peoples’ agreement to allow the peaceful settlement of what is now Canada. McLachlin J (as she then was) explained this in her decision in *Van der Peet* (dissenting on other grounds.)

[272] These arrangements [in the *Royal Proclamation*] bear testimony to the acceptance by the colonizers of the principle that the aboriginal Peoples who occupied what is now Canada were regarded as possessing the Aboriginal right to live off their lands and the resources found in their forests and streams to the extent they had traditionally done so. **The fundamental understanding – the *grundnorm* of settlement in Canada** – was that the Aboriginal people could only be deprived of the sustenance they traditionally drew from the land and adjacent waters by solemn treaty with the Crown, on terms that would ensure to them and their successors a replacement for the livelihood that their lands, forests and streams had since ancestral times provided them... (emphasis added)

*R. v Van der Peet*, supra

86. That is the context for understanding the enactment of the various provisions that have given constitutional force to the protective obligations that were accepted by the Crown.

87. Those obligations were reflected in sections 91(24) and 109 of the *Constitution Act, 1867*. A major focus of both provisions was the protection of the interests of the First Nations. In s. 91(24), Parliament was given exclusive legislative authority for “Indians and Lands Reserved for the Indians,” primarily to protect Indian land-related interests from the competing interests of local majorities. S. 109 made provincial title to lands and resources subject to “any Trusts existing in respect thereof, and to any Interests other than that of the Province in the same.” This gave constitutional force to the principles in the *Royal Proclamation*, by making Crown title expressly subject to land-related Aboriginal rights and fiduciary duties.

Hogg, Peter, Constitutional Law of Canada, (Loose-leaf ed.) 27.1(a); *Delgamuukw v British Columbia*, supra at [175-6]; Slattery, Brian, “First Nations and the Constitution: A Question of Trust”(1992) 71 CBR 261 at 292; and see *Calder v A.G. B.C.*, supra, at 378-9: “[sections] 91(24), 109 and 92(5) must all be read and construed upon the assumption that these territorial rights of the Indians were strictly legal rights which had to be taken into account and dealt with in that distribution of property and proprietary rights made upon confederation between the federal and provincial governments” (per Hall, J.).

88. As this Court explained in *Sparrow*, the division of legislative powers and property were not sufficient to ensure that governments kept faith with the *grundnorm* on which the settlement of the country was based. Therefore when the *Constitution Act, 1982* was enacted there was a political consensus to include s. 35. This unique provision was intended to give constitutional force to the Crown’s fiduciary obligations and to mandate the completion of unfinished work

contemplated by the doctrine of aboriginal rights – the conclusion of treaties to provide for the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.

**S. 35 is intended to protect interests such as those at risk in this case**

89. The decisions of this Court indicate substantial agreement about the features of the land-related interests intended for protection by s. 35. Such interests have a collective nature, and play an integral role in defining and sustaining Aboriginal peoples' ways of life.

90. These features underlie the test in *Van der Peet*, supra, for rights within s. 35:

[59] A practical way of thinking about this problem is to ask whether, without this practice, tradition or custom, the culture in question would be fundamentally altered or other than what it is. One must ask, to put the matter affirmatively, whether or not a practice, tradition or custom is a defining feature of the culture in question.

[63] ...Where an Aboriginal community can demonstrate that a particular practice, tradition or custom is integral to its distinctive culture today, and that this practice, culture or tradition has continuity with the practices, customs and traditions of pre-contact times, that community will have demonstrated that the practice, custom or tradition is an Aboriginal right for the purposes of s. 35(1).

91. In her reasons, L'Heureux Dube J. proposed a test which reflected those same features:

[59] ...s. 35(1) constitutionalizes the common law doctrine of Aboriginal rights which recognizes Aboriginal interests arising out of the historic occupation and use of ancestral lands by Natives...

[60] This rationale should inform the characterization of Aboriginal activities which warrant constitutional protection as Aboriginal rights. *The practices, traditions or customs protected under s. 35(1) should be those that are sufficiently significant and fundamental to the culture and social organization of a particular group of Aboriginal people...*

[61] ...the Aboriginal practices, traditions and customs which form the core of the lives of Native people and which provide them with a way and means of living as an organized society will fall within the scope of the constitutional protection under s. 35(1)...

92. McLachlin J. also proposed a test based on Aboriginal peoples' reliance on the territorial interests that sustain them and their collective identity:

[227] ...The issue of what constitutes an Aboriginal right must, in my view, be answered by looking at what the law has historically accepted as fundamental Aboriginal rights. These encompass the right to be sustained by the lands or waters upon which an Aboriginal people have traditionally relied for sustenance...

[270] ...The [*Royal Proclamation*], while not the sole source of Aboriginal rights, recognized the presence of Aboriginals as occupying peoples. It further recognized that they had the right to use and alienate the rights they enjoyed to the use of those territories. The assertion of British sovereignty was thus expressly recognized as not depriving the Aboriginal people of Canada of their pre-existing rights: the maxim of *terra nullius* was not to govern here. Moreover, the Proclamation evidences an underlying concern for the continued sustenance of Aboriginal peoples and their descendants....

[275] ...This right to use the land and adjacent waters as the people had traditionally done for its sustenance may be seen as a fundamental Aboriginal right. It is supported by the common law

and by the history of this country. It may safely be said to be enshrined in s. 35(1) of the *Constitution Act, 1982*.

93. All three decisions indicate that courts should decide whether interests are intended for s. 35 protection by reference to the facts respecting customary and current practices, and whether those play a significant role in sustaining the economy and culture of the Aboriginal people. Because the purposes for constitutional recognition and affirmation include the protection and sustenance of Aboriginal societies into the future, s. 35 rights have been upheld that protect various such interests on which Aboriginal peoples rely to sustain themselves.

See Slattery, Brian, "Making Sense of Aboriginal and Treaty Rights" (2000) 79 CBR 196

94. The Court's decision in *R. v Cote*, supra, also reflects this view, in clarifying at [67-71], that if a people relied on harvesting for its survival, that satisfies the *Van der Peet* test.

95. The types of interests intended for protection by s. 35 are indicated by a statement of purposive analysis by O'Neill, J:

Surely, at the heart of s. 35(1) lies a recognition that aboriginal rights are a matter of fundamental justice protecting the survival of aboriginal people, as a people, on their lands.

*R. v Powley*, Ontario Superior Court of Justice, unreported, January 19, 2000, at [16].

96. In other cases where an Aboriginal people has relied on their traditional harvesting to sustain their culture and domestic economy, Courts have found a government duty to refuse to authorize a development that would threaten the opportunity to continue that reliance.

*Claxton v Saanichton Marina Ltd.*, [1989] 3 CNLR 46 (B.C.C.A.), aff'g [1987] 4 CNLR 48 (B.C.S.C.); *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* [2002] 1 CNLR 169 (F.C.T.D.)

97. S. 35 is also intended to facilitate treaty making. The fact that the Crown is engaged in treaty negotiations with the Tlingits is an additional factor supporting the decision below that fiduciary obligations were triggered. The Tlingits consistently stated their overriding interest in promoting sustainable development in the territory - that would not threaten their culture and economy or the ecology that supports them. Land use planning and treaty negotiations are complementary mechanisms for designing environmental protection measures needed to promote such developments, and would be compromised if the road is built **before** protection measures are in place. The Crown has a duty to protect the integrity of treaty negotiations.

*Gitanyow First Nation v Canada*, supra, at [54-65]; *Nunavik Inuit v Canada (Minister of Canadian Heritage)* [1984] 4 CNLR 68 at [83-105].

98. For all those reasons, s. 35 is a basis for the fiduciary obligation upheld below.

**The duty upheld below is also based on s. 109 of the *Constitution Act, 1867*.**

99. The Tlingit interests at issue are land-related, and the duty upheld below is with respect

to those. Such interests and obligations are within the contemplation of s. 109 of the *Constitution Act, 1867*, which this Court has said makes the provincial Crown's title to lands and resources subject to all Aboriginal land-related rights:

Although [s. 109] vests underlying title in provincial Crowns, it qualifies provincial ownership by making it subject to "any Interest other than that of the Province in the same". In *St. Catherine's Milling*, the Privy Council held that Aboriginal title was such an interest, and rejected the argument that provincial ownership operated as a limit on federal jurisdiction...

... the same reasoning applies to jurisdiction over any aboriginal right which relates to land... Aboriginal rights may be tied to land but nevertheless fall short of title. Those relationships with the land, however, may be equally fundamental to Aboriginal peoples and, for the same reason that jurisdiction over Aboriginal title must vest with the federal government, so too must the power to legislate in relation to other Aboriginal rights in relation to land. (emphasis added)

*Delgamuukw v British Columbia*, supra, at [175-6]; see also *Haida Nation v British Columbia (Minister of Forests)*, (1997) 153 DLR (4<sup>th</sup>) 1 (B.C.C.A.) at [6]

100. The function of s. 109 was to maintain, in constitutional form, the *Royal Proclamation's* protection for Aboriginal peoples' territorial interests:

...The latter phrase [any Interest other than that of the Province in the same] has long been held to cover Aboriginal land rights, while the word "Trusts" is apt to include the attendant fiduciary obligations...

Slattery, Brian, "First Nations and the Constitution: A Question of Trust," supra at 292.

101. The traditional harvesting on which the Tlingits rely has both territorial and proprietary aspects. Those activities are examples of the "interests in their lands" that are fundamental to Aboriginal peoples, as discussed in *Delgamuukw*, supra, at [176]. Those interests are similar to *profits a prendre*, and are certainly included in the interests protected by s.109.

Re the role of traditional harvesting in sustaining Aboriginal peoples' identity and way of life, see *R. v Dick*, [1983] 2 CNLR 134 (B.C.C.A.) at 143-6; Re profits a prendre, see *British Columbia v Tener*, [1985] 1 SCR 533 at paragraphs 11-14 ; Slattery, "Understanding Aboriginal Rights", supra, at 744

### **The duty is supported by the constitutional principle to respect and protect minorities**

102. The Crown's obligations in this case also flow from the constitutional principle requiring respect for and protection of minorities. This is one of the fundamental organizing principles in the Constitution, which have normative force and are binding on government and the courts, and give rise to substantive legal rights additional to those specifically provided in the written constitution, as well as corresponding constraints on government action. The minority principle applies to aboriginal peoples, and is appropriately relied on in this case because there is no dispute that the sustainability of the Tlingits as an Aboriginal people is at issue.

Reference re Secession of Quebec, [1998] 2 SCR 217 at 292 and 262.

103. This constitutional principle has been applied to protect interests that sustain the distinct

culture of the Franco-Ontarian minority. In *Lalonde v Ontario (Health Services Restructuring Commission)* [1999] O.J. No. 4488, the Court quashed a decision by the respondent Commission to substantially reduce the services provided by the Montford Hospital. Because that decision ignored the institutional role of the hospital in sustaining the Franco-Ontarian minority, it was an unconstitutional exercise of discretion that failed to promote and enhance the identity of that cultural/linguistic minority and to protect its culture from assimilation.

104. The Ontario Court of Appeal upheld that conclusion, at 56 OR (3d) 505:

[180] The Commission was required by statute to exercise its powers with respect to Montfort in accordance with the public interest. In determining the public interest, the Commission was required to have regard to the fundamental constitutional principle of respect for and protection of minorities. ...the regional health councils recognized the unique role of Montford and its importance to the continued survival of the language and culture of the francophone community. The Commission, however, viewed consideration of Montford's larger institutional role as beyond its mandate...

[181] We agree with the Divisional Court ...that the language and culture of the francophone minority in Ontario "hold a special place in the Canadian fabric as one of the founding cultural communities of Canada and as one of the two official language groups whose rights are entrenched in the Constitution." If implemented, the Commission's directions would greatly impair Montford's role as an important linguistic, cultural and educational institution, vital to the minority francophone population of Ontario. This would be contrary to the fundamental constitutional principle of respect for and protection of minorities.

105. The minorities principle is particularly relevant as a foundation for the Crown's fiduciary duty in this case, because it operates on the basis of the effects of government decisions on the sustainability of minorities, rather than on the basis of a determination of rights.

106. The purpose of s. 35 is also consistent with the protection of minorities principle:

The *Constitution Act, 1982* signifies more than a mere mechanical adjustment in the doctrine of aboriginal rights, protecting it henceforth from legislative inroads. It represents a conscious political act whereby the people of an independent Canada reaffirm the values implicit in the doctrine. In 1969, when the government of Canada issued its famous White Paper on Indian policy, it was possible to view aboriginal rights as the embarrassing relics of a half-forgotten colonial past, to be interred as quickly and decently as possible, and certainly not to be taken as the basis for modern government policies. The remarkable reaction of native communities across the country to the White Paper demonstrated that what was mere history for some was a matter of life or death for others. So, when section 35 recognizes and affirms the existing aboriginal rights of the aboriginal peoples of Canada it constitutes a significant step towards the acceptance of the native point of view.

...it may be suggested that two major considerations lie at the foundation of section 35. First, basic historical commitments made to native peoples should not be lightly overturned, and generally not without their consent. These commitments may at times have been ill-considered, and they may not always have been in the best interests of the native people themselves. But they are the basis upon which native peoples entered Canadian society, and which gave them a stable foothold in an often difficult struggle to survive. If those commitments are now to be changed, native peoples must be fully involved in the process of renegotiation. Second, native Canadians are not just people who happen to have a heritage differing from that of the majority of

Canadians, one more ingredient in the cultural potpourri of modern Canada. In ways that we may not fully recognize or appreciate, native Canadians represent our society's only deep historical links to the land, consolidated over millenia. If their land is now our land as well, their relationship with that land is particularly worthy of understanding and respect.

Slattery, Brian, "Understanding Aboriginal Rights," supra, at 783.

**A distinct cause of action based in the Crown's fiduciary duty to protect and accommodate Aboriginal interests that are intended for constitutional protection**

107. The relief granted below was not an interlocutory remedy. The Certificate was quashed for breach of the Crown's fiduciary duty. In effect the Courts below gave effect to a distinct cause of action based on a fiduciary duty to protect and accommodate Aboriginal interests. Proof of a particular Aboriginal right was not considered an element of that cause of action.

108. The facts of this case are so dramatic that they leave little room for doubt that such a duty was triggered in these circumstances. But the Court may want to consider the elements of a test for determining when such a duty would arise and be enforceable in other cases.

109. It is submitted that a purposive analysis of the unique fiduciary **relationship** between the Crown and Aboriginal peoples is the basis for defining when such a **duty** would arise, because the role of that duty is to **require** the Crown to act honourably, by exercising its powers consistently with the purposes and characteristics of that relationship.

110. As discussed above, this fiduciary relationship had its origins in the colonizers' original acknowledgment of the historical fact that the Aboriginal peoples were pre-existing independent nations who were organized in societies and in possession of their territories, and the undertaking that they would not be displaced from that position by the advent of Crown sovereignty. This mandated an ongoing and inter-dependent relationship based on reconciling and accommodating the respective needs of the indigenous inhabitants and the newcomers, on terms to be worked out and maintained by mutual agreement.

111. Why has this relationship been characterized by this Court as **fiduciary**, rather than simply by its political and socio-economic characteristics? It is submitted that this is due to the nature of the role assumed by the Crown - as sovereign and ultimate landlord with respect to the territories of the Aboriginal peoples. The result is an enormous imbalance of power and resources as between the parties to the relationship, since majoritarian governments have both legislative and administrative powers to affect the rights and interests required to sustain the Aboriginal peoples. It is in that context that constitution and the courts have employed fiduciary duty as the mechanism to hold the Crown to the fundamentals of the relationship. As the Court

observed in *Soulos v Korkontzilas*, [1997] 2 SCR 217:

[33] Good conscience addresses not only fairness between the parties before the court, but the larger public concern of the courts to maintain the integrity of institutions like fiduciary relationships which the courts of equity supervised. As La Forest J. states in *Hodgkinson v Simms*...

The law of fiduciary duty has always contained within it an element of deterrence...In this way the law is able to monitor a given relationship society views as socially useful while avoiding the necessity of formal regulation that may tend to hamper its social utility.

112. Aboriginal rights cases provide some guiding principles about the characteristics of that relationship. But inevitably there will be disputes and uncertainties. As modern treaties are concluded, those will provide much needed certainty about many matters, including the respective proprietary interests and governance powers of the Crown and Aboriginal peoples, and the terms on which the Crown will exercise discretionary powers that affect Aboriginal interests. As such treaties take effect, their detailed terms largely displace fiduciary principles as the mechanism to constrain the exercise of the Crown's authority. In the interim at least, there will be many matters on which the Crown's discretion is not constrained by statute, practice or agreement, so as to ensure compliance with the fiduciary relationship. Those are the cases in which Aboriginal peoples need to protect themselves by seeking to enforce fiduciary duties.

113. Such fiduciary duties will normally be triggered by an exercise of government discretion that would affect vulnerable Aboriginal interests – either directly or by authorizing actions of third parties, as in this case. The broad purpose for such duties is the protection and accommodation of such interests. Depending on the circumstances, the duty may be affirmative – to promote protection or sustainability, or merely negative – to prevent harm or degradation.

114. What types of interest attract this duty?

115. It is submitted that land-related interests would do so, in circumstances where an Aboriginal people relies on those to sustain themselves as a people, economically or culturally.

116. Interests would also attract this duty if their loss or damage would compromise opportunities to negotiate or implement the terms of that reconciliation, because of the long-term purpose of s. 35 in fostering reconciliation. As discussed in [97] above, a duty to protect interests that would reasonably be the subject of treaty negotiations flows from this principle.

117. What does “accommodation” mean in this context. It is submitted that the concept is informed by the nature of the reconciliation objective itself. It is clear that Canadian legal and constitutional values do not seek a reconciliation based on the assimilation of the Aboriginal

peoples. Rather, the reconciliation that is contemplated will be consistent with the social, economic and political richness and complexity of Canadian federalism. It is an assumption of Canada's Aboriginal rights doctrine that a fair and just reconciliation is practicable, i.e., terms can be worked out under which Aboriginal peoples could participate in the benefits of Canadian society without surrendering their position as distinct peoples. As the Courts have said on numerous occasions, that reconciliation must be worked out through negotiations. In the interim it is inevitable that some majoritarian agendas and proposals will need to be qualified, delayed or compromised, in order to ensure the protection or accommodation of interests that play an integral role in sustaining an Aboriginal people now or in the future. This is such a case.

### **The characteristics of the Crown's fiduciary duty**

118. The fiduciary duty defined by the courts below in this case is usually referred to as a "consultation duty." That terminology is unfortunate because it suggests that there are only procedural obligations. Such a limited concept is inconsistent with *Delgamuukw*, supra, in which Lamer C.J. said at [186] that the intention of consultation must always be to "substantially address the concerns" of the affected Aboriginal people. It would be novel to define a fiduciary's obligation to a beneficiary by only procedural requirements.

*Fales v Canada Permanent*, supra; *Can. Aero Services v O'Malley*, supra; *Toronto Dominion Bank v Uhren*, supra; *Lloyds Bank v Bundy*, supra.

119. The B.C. Court of Appeal defined substantive aspects of the "consultation" duty in *Halfway River*:

*Halfway River First Nation v British Columbia (Minister of Forests)*, [1999] B.C.J. No 1880 (B.C.C.A.); [160] "The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that Aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action." (per Finch J.A.); [191] "...[the Crown] is required to initiate a process of adequate and meaningful consultation...to ascertain the nature and scope of the treaty right at issue." (per Huddart J.A.).

120. It would be appropriate to refer to the fiduciary duty upheld below as a duty to protect and accommodate aboriginal interests. Its general purpose is to protect and ensure the accommodation of vulnerable Aboriginal interests during the period prior to implementing the mechanisms for reconciliation that s. 35 was enacted to facilitate. Such a duty has both procedural and substantive aspects.

121. The substantive aspects of the duty require the Crown to avoid actions that threaten the sustainability of Aboriginal interests of the types discussed above. Expressed affirmatively, the substantive duty is consistent with the purpose in s. 2(a) of the *EAA*, as it would apply to the

circumstances of the Aboriginal people:

“to promote sustainability by protecting the environment and fostering a sound economy and social well-being”.

122. This substantive aspect of the duty is supported by the most basic principles of fiduciary law. Trustees and fiduciaries always owe a duty of loyalty, the focus of which is the protection of the interests of their beneficiaries. This would certainly include protecting the corpus of the trust for proper distribution to the beneficiaries. This is particularly so when there is a conflict of interest and equitable duty.

*Regal (Hastings) Ltd. v Gulliver*, [1942] 1 All ER 378 at 361 and 389, approved in *Zwicker v Stanbury*, [1953] 2 SCR 438 and *Can. Aero Services v O'Malley*, supra; see also Waters, Donovan, The Law of Trusts in Canada, (2d ed), section 19(i); Pettit, Philip, Equity and the Law of Trusts, (8<sup>th</sup> ed), chapters 17 and 20.

123. Fiduciaries are required to apply the standard of care that a prudent person would exercise in attending to his private affairs or to those of other persons for whom he felt morally bound to provide.

*Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, supra at [104]; *Learoyd v Whiteley* (1887) 12 A.C. 727 at 733; *Re Whiteley*, (1886) 33 Ch. D. 347 at 355; *Cowan v Scargill* [1985] Ch. 270 at 289; *Nestle v National Westminster Bank* [1994] All ER 118 at 126, 140; *Toronto Dominion Bank v Uhren*, supra; *Lloyds Bank v Bundy*, supra.

124. These substantive obligations could not be achieved by the Crown acting without information or in isolation. That is why consultation is an aspect of the duty. The first role of consultation is to obtain information on the nature and extent of Aboriginal interests that may be at risk from a pending exercise of statutory discretion. Government officials also need to learn the perspective and priorities of the Aboriginal people respecting those interests, which may differ from those of government or proponents. Therefore effective consultation requires that the Aboriginal peoples have sufficient relevant information, time and resources to investigate, and an opportunity to provide their responses.

125. This information-gathering aspect of the Crown's duty is also consistent with principles of fiduciary law. Trustees are always bound to make inquiries when put on notice. They are required to ascertain what the trusts are, to inquire of what the trust property consists and to see what notices of encumbrances affect the trust.

*Hallows v Lloyd* (1888) 39 Ch.D. 686 at 691; *Harvey v Olliver*, (1887) 57 L.T. 239; *Tiger v Barclays Bank* [1952] W.N. 38; *Lewis v Nobbs*, (1878) 8 Ch.D. 591; *Re Smith*, (1970) 16 DLR (3d) 130; affirmed (1971) 18 DLR (3d) 405; *Toronto Dominion Bank v Uhren*, supra; *Lloyds Bank v Bundy*, supra.

126. A fiduciary cannot act as if he owes no duties to a beneficiary, if there is reason to believe his property or powers might be encumbered. He cannot deny his duties as a fiduciary,

or require the beneficiary to prove his interest and in the interim carry on as if he has no trustee-like obligations:

A trustee must not connive or knowingly facilitate any act or conduct of another person which would involve a breach of trust or occasion loss or risk to the trust property. He must not set up or abet an adverse title or claim of another person against his beneficiaries, or undertake a duty or put himself in a position which is inconsistent with his duty as a trustee, or act in a manner inconsistent with that duty. **A trustee must perform the trust he has undertaken and must assume the validity of the title of his beneficiaries, even if he is doubtful, until it is actually negated. At the same time, he has a right to know the title of those who pretend to be his beneficiaries, and, if he receives notice of an adverse claim and of an intent to hold him liable if he disregards it, he may obtain a decision of the court as to his course of action.** [844]

...

It is the duty of a trustee to pay the income and the corpus of the trust property to the persons who are entitled to them respectively. **When he is in doubt as to who those persons are, the trustee should apply to the court for its direction on the subject....**[854] (emphasis added)

48 *Halsbury's Laws* (4<sup>th</sup>) at [844] and [854] and cases cited therein:

127. This is particularly the case when land-related Aboriginal interests are involved, as in this case. Pursuant to s. 109, the Crown's title is encumbered by such interests, such that the Crown is in a conflict of interest and duty and therefore bound to exercise its powers in ways that reflect its own trustee-like position.

128. In this case the Crown's fiduciary duty to gather information would have required an environmental assessment because of the importance and inherent complexity of the issues, even if that was not required by the *EAA*. Such a procedure is the accepted mechanism for learning whether there are important interests that require protection and accommodation:

Environmental impact assessment is, in its simplest form, a planning tool that is now generally regarded as an integral component of sound decision-making... As a planning tool it has both an information-gathering and a decision-making component which provide the decision-maker with an **objective basis** for granting or denying approval for a proposed development...

*Friends of Oldman River Society v Canada (Minister of Transport)* [1992] 1 SCR 3 at [95] and see also [39] re the Court's view of the importance of such assessments.

129. Consultation also requires discussions between responsible officials of the Crown and the Aboriginal people affected, to consider the information obtained and resulting options. This government-to-government aspect of consultation should follow the information-gathering or environmental assessment process. It did not take place in this case.

130. It is for government and the Aboriginal people to decide how to involve third party proponents in this process. In any event, proponents must take responsibility for ensuring that their proposals are consistent with the Crown's fiduciary obligations.

131. The Crown's fiduciary duty in this case had **constitutional force** because it is founded on sections 35 and 109, as well as the protection of minorities principle. Therefore statutory authority had to be exercised consistent with these obligations. If applicable statutory regimes do not provide for procedures consistent with those obligations, the latter should be considered as super-added duties that must be given effect.

*Friends of Oldman River Society v Canada (Minister of Transport)*, supra, at [44]; *Lalonde v Ontario (Health Services Restructuring Commission)*, supra; *Ross v New Brunswick School District No. 15*, [1996] 1 SCR 825 at [31-2].

132. The Crown's fiduciary duty in such cases is best satisfied by reaching agreements with the affected Aboriginal people. There will be no single approach to satisfying the duty.

133. Even though the duty has constitutional force, it does not amount to a veto for the Aboriginal people, even when their important interests are at risk. In the end, responsibility for satisfying the duty rests with the Crown.

134. The Crown may act in the absence of agreement with the Aboriginal people, if it has acknowledged its duty and attempted to satisfy it by adequate procedural steps and bona fide efforts to address the substance of the Aboriginal people's concerns. It is fundamental in this case that the Crown never acknowledged its fiduciary duty or made efforts to fulfill it.

**This fiduciary duty may be enforced without proving an existing Aboriginal right within section 35**

135. If the Crown acts without agreement of the affected Aboriginal people, its actions may be challenged legally, *inter alia* by means of judicial review. Summary procedures of this type are frequently appropriate for enforcing such obligations.

*Friends of Oldman River Society v Canada (Minister of Transport)*, supra, at [44]; *Lalonde v Ontario (Health Services Restructuring Commission)*, supra; *Ross v New Brunswick School District No. 15*, supra; *Eldridge v British Columbia (Attorney General)* [1997] 3 SCR 624; *Auton (Guardian ad litem of) v British Columbia (Minister of Health)* [2000] BCJ No. 1547, [2001] BCJ No. 215, upheld [2002] BCJ No. 2258 (B.C.C.A.).

136. In many such cases the fiduciary duty to protect and accommodate vulnerable interests could be defined and enforced without proving a s. 35 Aboriginal right. This was such a case.

137. In such a proceeding, the Aboriginal people would have the initial burden of proving that the Crown's exercise of discretion threatens a type of vulnerable interest intended for constitutional protection. The burden would then shift to the Crown to prove it satisfied its duties in the circumstances, according to the standard of care required of fiduciaries.

138. In such a case the standard of review for the procedural aspects of the duty is correctness,

as is normally the case for procedural requirements.

*Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817

139. The standard of review for the substantive aspects of the duty is also correctness, as is the case for fiduciary obligations and other obligations having constitutional force. In a hearing on the merits of an assertion that this duty has been breached, the court will decide the merits on the balance of probabilities, as is normally the case when a beneficiary alleges breach of fiduciary duty. No deference is involved for decisions by a fiduciary, and the effect of the steps taken are assessed on an objective basis.

*Ross v New Brunswick School District No. 15*, supra, at [31-2]; *Toronto Dominion Bank v Uhren*, supra; *Lloyds Bank v Bundy*, supra.

140. In a case like this one, where the Crown has exercised its authority without acknowledging its fiduciary and constitutional obligations, and consequently has made no effort to satisfy them, the Court has a discretion to simply quash the decision or to also refer it back for reconsideration, depending on the circumstances.

141. In some cases, if the Crown intends to justify its action by invoking a power to infringe an Aboriginal right or denies that it has fiduciary obligations, a court may find it necessary to adjudicate the existence of the asserted Aboriginal right and issues of justification. But because constitutionally mandated fiduciary obligations will be at issue, the Crown should not be allowed to proceed without judicial authorization on either a final or interlocutory basis.

**The Crown did not satisfy its fiduciary obligations in this case. The courts below were right to quash the Certificate**

142. The Crown did not satisfy the procedural or substantive aspects of its duty in this case. Neither Appellant has argued to the contrary. The majority correctly remarked that such an argument could not have been made on the record in this case.

143. Therefore Redfern's proposal should not have been allowed to proceed, and the Certificate was properly quashed. That was the appropriate remedy in this case because the Certificate operates as approval in principle for the Project, and there was no indication that its strategic-level problems could be effectively resolved through the permitting process.

See distinction between comprehensive and operational factors in excerpts from Chambers decision cited in *Haida v British Columbia*, supra, at [25]

**STATUTORY AND ADMINISTRATIVE LAW ISSUES**

**The Majority did not concur with Southin J.A.**

144. The Crown and Redfern are wrong to assume that the majority concurred with Southin

J.A.’s conclusion on the statutory and administrative law issues. The majority do **not** say that they concur on these issues, although they say they had read a draft. They considered the fiduciary duty issue as the “central issue” in the case, and that is the only issue they wrote about. Southin J.A. herself characterized the administrative law issues as “mere quilllets and quiddities” in comparison to the constitutional issue. [31] The majority should be understood to have not decided the statutory issues.

145. Also, Southin J.A.’s reasoning is novel, e.g., in [1], [2], [16], [22] and [82]. Given the far-reaching consequences of that reasoning for judicial review, both generally and as it applies to decisions affecting Aboriginal peoples, if the majority had concurred they would have said so.

146. Finally, the majority’s reasons and conclusions on the fiduciary duty issue rest squarely on the approach to the facts taken by Kirkpatrick J. In contrast, Southin J.A. either ignored or repudiated the facts below. There was therefore no factual basis for the majority to have reached the same conclusions as Southin J.A.

147. In any event, it is submitted that Southin J.A. erred in disagreeing with the Chambers Judge’s conclusions respecting statutory obligations, for the following reasons.

### **The Recommendations Report constituted the reasons for the Ministers’ decision**

148. Southin J.A.’s conclusions are based on a misapprehension of the basis of Kirkpatrick J’s decision that the Ministers’ decision did not satisfy the requirements of the *EAA*.

[78] I proceed on the footing that the learned judge found as a fact that the Ministers were not fully informed of the Tlingits’ position on various questions and could not therefore have made their decision in accordance with s. 2, and thus acted unreasonably.

[79] I have a number of difficulties with this finding...

149. On the contrary, Kirkpatrick, J. quashed the Certificate because the Ministers’ reasons for issuing it were flawed. A foundation of the decision at first instance was the conclusion that the Recommendations Report constituted the reasons for the Ministers’ decision, because:

- the Ministers adopted the Report’s reasoning, when they said, in the reasons required by s. 30(1)(c), that they were issuing the Certificate because of the conclusions reached by the majority of the Committee, respecting the Project and its impacts;
- there is no indication in those Reasons or elsewhere that the Ministers made an independent assessment of the merits of the issues; and
- the time lapse between the filing of the Report and the decision by one Minister suggests there could not have been an independent assessment.

Reasons, [34] and [69].

150. This was a conclusion of fact based on the evidence, not an assumption. It was

analogous to this Court's decision in *Baker*, that the investigating officer's report constituted the *de facto* reasons for the Minister's decision. There was no error of law that would have allowed the Court of Appeal to find otherwise in this case.

*Baker v Canada (Minister of Citizenship and Immigration)* supra, at [44]; See also *Weldwood of Canada v British Columbia (Workers Compensation Board)*, (1998) 56 BCLR (3d) 297 at [41]; *Stein v The Ship "Kathy K"*, [1976] 2 SCR 802 at 808; *N.V. Bocimar S.A. v Century Insurance Co. of Canada*, [1987] 1 SCR 1247 at 1249-50; re standard of appellate review of decision of Kirkpatrick J, see *Matsqui Indian Band v Canadian Pacific Ltd*, [1995] 2 CNLR 92 (S.C.C.) at 131 (per Sopinka, J., dissenting on other issues).

151. Southin J.A. said that other material was submitted or likely known to the Ministers, and therefore might have been considered. That misses the point. As explained in *Southam*, the adequacy of a statutory decision turns on a review of the tribunal's reasons, not a listing of the record in order to surmise what materials **might** have been the basis for the decision. This is especially so because the *EAA* required the Ministers to provide written reasons.

*Canada (Director of Investigation and Research) v Southam*, [1997] 1 SCR 748

### **The Ministers' Decision was not consistent with the purposes of the *EAA***

152. Kirkpatrick J. said the Ministers' decision did not conform to the purposes in section 2 of the *EAA* because their reasons did not mention "sustainability" or fully address the Tlingits' concerns in that respect, and their decision failed to adopt measures to protect the Tlingits' sustainability as an Aboriginal people. [37, 40, 58, 66-7, 78-9]

153. Southin J.A. did not address the purposes issue directly. She considered the Tlingits' concerns as if they were a municipality rather than an Aboriginal people, although they were invited to join the Committee *qua* the affected First Nation pursuant to section 9(2)(d), and also characterized their concerns simply as "the location of the road." She said that on her reading of the evidence weight was given to all the considerations in s. 2, the statute gave the Ministers an exclusive power to decide if its purposes had been met, and it is plain that the Ministers decided the benefits of the project outweigh its detriments. [16, 42, 71, 82, 83]

154. In dealing with the issue this way, Southin J.A. has trivialized and failed to give effect to the statutory purpose issue as a proper factor in judicial review. As this Court recently confirmed in *CUPE v Ontario*,

...there is always a perspective within which a statute is intended to operate...[91]

...That "perspective" is another way of describing the policy and object of the statute...[94]

...The Court's mandate on judicial review is to keep the statutory decision maker within the boundaries the legislature intended.[98]

...[statutory] discretionary power is not "absolute and untrammelled". The discretion is

constrained by the scheme and object of the [statute] as a whole...[107

*Canadian Union of Public Employees v Ontario (Minister of Labour)* [2003] SCC 29; see also *Doctors Hospital v Minister of Health*, (1976) 12 OR (2d) 164; *Heppner v Minister of Environment of Alberta and Attorney General of Alberta*, (1977) 4 Alta LR (2d) 139 at 150-2.

155. In this case the Ministers' decision appears to have been made **in spite of** the evidence bearing on sustainability and the EAA's purpose to promote that objective. Southin J.A. refers to nothing in either the Recommendations Report or the Certificate that provides a reasoned basis for concluding that the Project would promote sustainability.

### **The Ministers failed to consider relevant matters**

156. Kirkpatrick J. concluded that the decision to issue the Certificate was unlawful because the Ministers' failed to take account of two types of relevant considerations.

157. First, in light of the EAA's purposes, the Ministers needed to consider the substance of the Tlingits' concerns bearing on sustainability. Second, in light of the requirement in section 10(a) for advice and recommendations from the Committee and in section 2(d) for an open, accountable and neutrally administered process, the Ministers needed to consider any significant minority views on the Committee, in particular those of the Tlingits, that the review process was truncated and how the Recommendations Report was actually created. There was no evidence that they were properly informed of, or considered, those substantive or procedural matters.  
[107, 98]

158. Southin J.A. did not address these issue specifically, but wrote that the statute did not expressly require that the Ministers be fully informed, and that it should not be assumed they did not learn about these matters otherwise than by the Report referred to them. [71, 79] With respect, those comments do not address the conclusions of mixed fact and law that underlay Kirkpatrick J.'s conclusions that relevant matters were not considered.

159. This Court has recently reaffirmed the need for statutory decision makers to take account of all relevant factors, especially those that go "straight to the heart of the ... legislative scheme". It is submitted that Kirkpatrick J. made no error on this issue.

*Canadian Union of Public Employees v Ontario (Minister of Labour)*, supra at [172-6]; *Oakwood Development Ltd. v St. Francois Xavier Rural Municipality*, [1985] 2 SCR 164 at 174-5; *Alberta Wilderness Assn. v Canada (Minister of Fisheries and Oceans)*, (1998) 29 CELR (NS) 21 (F.C.A.) at 27-8

### **The proper standard of review for a decision under the EAA is reasonableness simpliciter**

160. Southin J.A. considered that the power to make decisions under the EAA is vested exclusively in the Ministers, that these are "political" decisions such that the reasons for making

them are not subject to judicial review unless they were procured by bribery, fraud or a sham process. She also said that “unreasonable” in the judicial review context means “lacking in reasons”. [22, 80, 82, 86-7]

161. Kirkpatrick, J. concluded that the appropriate standard of review for the merits of the Ministers’ decision pursuant to section 30 of the *EAA* is reasonableness simpliciter. It is submitted that she reached that conclusion as mandated by this Court - by using a pragmatic and functional approach to statutory interpretation and considering the relevant factors, including the absence of a privative clause, the expertise of the decision-makers, the purpose of the particular provision and the *EAA* as a whole, and the nature of the problem in question.

*Pezim v British Columbia (Superintendent of Brokers)*, (1994) 114 DLR (4<sup>th</sup>) 385 (S.C.C.); *Canada (Director of Investigation and Research) v Southam*, supra; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, (1998) 160 DLR (4<sup>th</sup>) 193; *Baker v Canada*, (supra) [57-62]

162. **Privative Clause:** There is no privative clause in the *EAA*, indicating no legislative expectation of a high degree of judicial deference. [49]

163. **Expertise:** The Ministers may be assumed to have some special knowledge of environmental issues. But this is really familiarization rather than technical expertise, not unlike courts that routinely must reach conclusions on technical issues based on information and analysis provided by technical experts.

164. Committee members had special experience or perspective, and could be considered lay experts. But they are an ad hoc group rather than a specialist tribunal or panel, and they themselves relied on studies and reports from more technical experts and consultants. And unlike independent experts or members of specialist tribunals appointed for a term of office, like the Competition Tribunal, Committee members are mandated representatives or officials who could be instructed what positions to take on policy and technical issues. Therefore a court should review the evidence and logic on which their conclusions are based.

The events culminating in the O’Riordan letter about the adequacy of “surveillance level base-line data, and the “majority’s” acceptance of MELP’s new position on that issue, without any analysis, explanation or discussion of the change, is an example of this – see Affidavit of Tony Pearse, TAR, Vol. 1, p. 59, para. 120. See also the email exchanges that show the ways that departmental authority influences the development of positions by Committee members in Affidavit of Margot Venton, sworn Feb. 5, 1999, Exhibits 6-11 at TAR, Vol. 2, pp. 526-538 and Exhibit 16 at p. 539

165. Regardless of the nature or extent of the Ministers’ or the Committee’s expertise, the reasonableness standard is appropriate for the judicial review of substantive decisions based on expertise, because even experts must earn the Court’s deference. The reasonableness standard replicates the inquiry used to determine the weight accorded to expert opinions:

Experts, in our society, are called that precisely because they can arrive at well-informed and rational conclusions. If that is so, they should be able to explain, to a fair-minded but less well-informed observer, the reasons for their conclusions... Expertise commands deference only when the expert is coherent. Expertise loses a right to deference when it is not defensible...(per Kerans J.)

*Canada (Director of Investigation and Research) v Southam*, supra, at [62]

166. **Legislative Purpose of the Provision and the Statute:** Environmental assessment is intended to be a fact-based and reasoned process. If a statute requires such an assessment and decisions based on it, the statute's object could only be satisfied by **reasonable** decisions.

*Friends of Oldman River Society v Canada (Minister of Transport)*, supra at [95].

167. This is particularly the case with the EAA, in light of its purposes to promote sustainability and provide for the thorough and integrated assessment of Projects and their effects. S. 29 contemplates that a referral to the Ministers would include Committee recommendations, and s. 30 requires the Ministers to consider those and provide written reasons for their decision. While a Certificate operates as approval in principle and not a license, it is a critical component in a licensing scheme. The statute itself mandates reasonable rather than arbitrary decisions.

168. **Nature of the Problem:** The importance of environmental issues and the public interest in planning decisions support the review of such decisions on the reasonableness standard. As the Newfoundland Court of Appeal said, in defending their own interests the Tlingits

... may also be viewed as representing general vital interest. They are understandably pre-occupied with the protection from adverse environmental effects on the immediate area affected, to which their whole cultural, social and economic lives have been linked for generations...in a very real sense they too are representing the interests of their fellow citizens in this Province inasmuch as the heritage of the environment is a legacy to be preserved for all Newfoundlanders and Labradorians...After all, indiscriminate development without regard to environmental impact translates eventually into agonizing problems for generations yet unborn from every corner of the Province...

*Labrador Inuit Assn. v Newfoundland (Minister of Environment and Labour)*, (1997) 25 CELR (NS) 25 at [85]; and see *Friends of Oldman River Society v Canada (Minister of Transport)*, supra at [39].

169. In cases such as this one, decisions pursuant to s. 30 will be polycentric, requiring consideration of numerous factors and competing interests. That argues for a degree of deference, such that courts should not substitute their views for properly reasoned administrative decisions. But that is the purpose of the reasonableness standard, as explained in *Baker* at [63]:

An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a Court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. The defect, if there is one, could presumably be in the evidentiary foundation itself, or in the logical process by which conclusions are sought to be drawn from it.

170. Polycentrism in this case requires judicial review on that standard because so many of the applicable factors are inherently political. We know from this and other environmental review cases that it is not easy for governments and their officials to be adequate to

the challenge ... to temper the refrain advocated by developers from time to time to ‘develop or perish’ by assuring that it does not re-echo among future generations as ‘develop and perish’

*Labrador Inuit Association v Newfoundland*, supra at [8]

171. By reviewing *EAA* decisions on the reasonableness simpliciter standard, courts can ensure they are based on substantial evidence and sound logic, thereby discouraging decisions made for political reasons and then justified by “spin.” The facts of this case shows the potential for very substantial impacts from decisions pursuant to the *EAA*. The nature of such decisions, combined with the public interest in effective environmental review and the promotion of sustainability, supports review by the reasonableness simpliciter standard.

### **The Ministers’ decision to issue the Certificate was not reasonable**

172. Kirkpatrick, J. wrote in [84-5] that there was either inadequate or no assessment by the Ministers of scientific and other evidence produced in the environmental review, respecting wildlife and related impacts from the road, and therefore their decision was unreasonable, in the sense discussed by Iacobucci J. in *Quebec(A.G.) v Canada(N.E.B.)* In [107-8] she wrote that the Ministers’ decision was also unreasonable because they did not consider the final concerns of the Tlingits and the reports reflecting those, as a result of the Committee’s failure to meet and discuss those or report them to the Ministers. Southin J.A. did not consider those conclusions.

173. Both conclusions reflect this Court’s recent statements in *CUPE v Ontario*, supra, at [176, 184] that if a decision maker excludes consideration of a factor going to the heart of the statute in light of its legislative intention, the resulting decision could not be reasonable.

### **The Ministers decision breached the requirement for procedural fairness**

174. Kirkpatrick J. found there was a duty of procedural fairness in this case and that it was breached, for the following reasons:

- The wildlife sub-committee acknowledged that the Tlingits’ issues needed to be discussed, including matters in the Staples Addendum and the TEM report. The EAO produced an issue tracking table suggesting the sub-committee had finished dealing with all issues, when it was in fact agreed that certain issues needed to be further discussed. This was a failure in the process, although the Recommendations Report leaves the impression these issues had been dealt with in the normal way. [98]
- The general practice in the review was for the Committee and its sub-committees to discuss reports and materials. That practice and the guide to the environmental

review process created a reasonable expectation in the Tlingits that their reports would be considered by the Project Committee. When they complained that the process had been cut off, they received no reply. The Recommendations Report did not explain the procedure used to produce it or the dispute about that. [101]

- S. 2(d) of the *EAA* required that the environmental review be conducted by procedures that are open, accountable and neutrally administered. Based on the requirements in ss. 2(d), 9(2)(d), 9(6) and 10 of the *EAA*, the Tlingits should have been full participants in decisions about the Recommendations Report. [102]
- There is a statutory requirement in the *EAA* for adequate and meaningful consultation with the Tlingits. There was meaningful consultation during the early stages of the review process, which was suddenly and inexplicably cut off. [106]
- The Tlingits had a legitimate concern that when the Project Committee's collective process was abandoned in the final weeks of the process, it eliminated their opportunity to persuade others to take into account their serious concerns. [105]
- The failure of the Committee to finally meet and discuss their concerns with the Tlingits constituted a breach of the rules of procedural fairness. [108]

175. Southin J.A. did not address these conclusions expressly, but said instead that the review process may have been brought to an abrupt end, but that does not mean it was a sham. [87] With respect, that is not the same issue.

176. *Baker*, supra, includes a purposive analysis of the duty of procedural fairness, at [22]:

... the purpose of the participatory rights contained within the duty is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

177. Kirkpatrick, J. was correct to hold that the Committee's work was subject to a duty of procedural fairness, based on the *EAA*'s requirement that the review be conducted by procedures that are open, accountable and neutrally administered. Although the Act does not specify when the Project Committee should meet, ss. 2, 9 and 10 provide principles and guidance for its work.

178. The Committee was required to report by ss. 10, 29 and 30. It could not do so properly except by a written report, and that was the mechanism in this case. The consistent practice was for reports and materials to be considered in sub-committees and the Committee. A Committee meeting was scheduled for that purpose in January, 1998, and the agenda was to hear reports from the sub-committees and reach decisions on a consensus basis about the Committee's final report and recommendations. That meeting was not held or rescheduled.

Agenda for Jan. 15, 1998 Committee meeting, Ex. 2 to Ringstad Affidavit #1, TAR, Vol.2, p. 540

179. The *EAA* provides for participation in the Committee as the mechanism for identifying and addressing First Nation concerns. Tlingit concerns were supposed to be brought to the

Ministers through their participation in the Committee. The scheme contemplates a collaborative process. Members need not agree, but if the review process is to be robust rather than trivial or symbolic, the members of the Committee must be exposed to countervailing points of view on all the important issues, and be able to respond through full and fair discussion.

*U.N.A. Local 1 v Calgary General Hospital*, (1989) 39 Admin. L.R. 244; *U.N.A. Local 1 v Calgary General Hospital*, (1990) 46 Admin LR 245 (C.A.); *Newfoundland Association of Public Employees v Newfoundland (Treasury Board)* (1995) 132 Nfld. & PEIR 205. (N.S.C. T.D.); *Newfoundland Association of Public Employees v Newfoundland (Treasury Board)*, *Newfoundland Assn. of Public Employees v Memorial University of Newfoundland (Marine Institute)* (1998) 26 CPC (4<sup>th</sup>) 225 at 258-72 (C.A.).

180. Kirkpatrick, J. made no error in concluding that there was a breach of procedural fairness and that it tainted the Ministers' decision. Because the Recommendations Report was meant to reflect the investigative phase of the review process and also constituted the reasons for the Ministers' decision, any procedural breach in preparing that report would taint the decision itself. That is consistent with the approach in *Baker*, supra, at [45]:

...the duty to act fairly and therefore in a manner that does not give rise to a reasonable apprehension of bias applies to all immigration officers who play a significant role in the making of decisions, whether they are subordinate reviewing officers, or those who make the final decision. The subordinate officer plays an important part in the process, and if a person with such a central role does not act impartially, the decision itself cannot be said to have been made in an impartial manner. In addition...the notes of Officer Lorenz constitute the reasons for the decision, and if they give rise to a reasonable apprehension of bias, this taints the decision itself.

181. Also, because the Committee's review and report are statutory pre-requisites to the Ministers' exercise of discretion under s. 30, a breach of procedural requirements in implementing those requirements would taint the resulting decision.

*Alberta Wilderness Assn. v Canada (Minister of Fisheries and Oceans)*, supra at 27-8, and cases cited therein; *Friends of West Country Association v Canada (Minister of Fisheries and Oceans) Federal Court of Appeal*, unreported, Oct. 12, 1999; *Alberta Wilderness Assn. v Cardinal River Coals Ltd.* (1999) 30 CELR (NS) 175 (F.C.T.D.); *Labrador Inuit Assn. v Newfoundland (Minister of Environment and Labour)* (1997) supra; *Moshos et al v Minister of Manpower and Immigration* (1969) 7 DLR (3d) 180 at 184 (S.C.C.); *Township of Ross v Cobden and Eganville District High school Board et al*, (1967) 63 DLR (2d) 390.

#### **PART IV - COSTS**

182. Pursuant to the Order granting Leave to Appeal, the Crown is required to pay the Tlingits' costs in any event of the cause. That Order should be confirmed.

183. In the alternative, the Crown and Redfern should jointly and severally pay the Tlingits' costs on a solicitor and client basis, in this Court and the Court of Appeal. The Crown has denied its responsibilities as a fiduciary throughout, and asked the Court to grant leave as a way of determining the nature of its obligations. The appeal is therefore in the nature of a test case,

for which the Tlingits lack the requisite resources. Redfern has consistently supported the position of the Crown, and applied to be a Respondent in this Court although it did not seek leave to appeal.

*Friends of Oldman River Society v Canada (Min. of Transport)*, supra; *Roberge v Bolduc*, [1991] 1 SCR 374; *Palachik v Kiss*, [1983] 1 SCR 623; *Thibaudeau v Canada* [1995] 2 SCR 627; *Schachter v Canada*, [1992] 2 SCR 679

## **PART V - ORDERS SOUGHT**

184. It is submitted that the Appeal should be dismissed with costs to the Tlingits.

July 10, 2003.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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Arthur Pape and Jean Teillet  
Counsel for the Respondents, the Taku River Tlingit First Nation et al.

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