File No.: 29419

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE BRITISH COLUMBIA COURT)

BETWEEN:

The Minister of Forests, The Attorney General of British Columbia on behalf of Her Majesty the Queen in Right of the Province of British Columbia

Appellants

AND:

Council of the Haida Nation and Guujaaw, on their own behalf and on behalf of all members of the Haida Nation

Respondent

AND:

Weyerhaeuser Company Limited

Appellant

AND:

Council of the Haida Nation and Guujaaw, on their own behalf and on behalf of all members of the Haida Nation

Respondent

AND:

Attorney General of Manitoba, Attorney General of Alberta, Attorney General for Ontario, Attorney General for Saskatchewan, Attorney General of Nova Scotia, Attorney General of Canada, Attorney General of Québec, Squamish Indian Band and Lax Kw'alaams Indian Band, Haisla Nation, First Nations Summit, Dene Tha' First Nation, Tenimgyet, also known as Art Matthews, Gitxsan Hereditary Chief, Business Council of British Columbia, Aggregate Producers Association of British Columbia, British Columbia & Yukon Chamber of Mines, British Columbia Chamber of Commerce, Council of Forest Industries and Mining Association of British Columbia, British Columbia Cattlemen's Association

Interveners

FACTUM OF THE INTERVENER TENIMGYET, also known as Art Matthews, Gitxsan Hereditary Chief

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FACTUM OF THE INTERVENERS TENIMGYET, ALSO KNOWN AS ART MATTHEWS, GITXSAN HEREDITARY CHIEF

PART I – STATEMENTS OF FACTS

1. Tenimgyet adopts the facts set out in the factum of the Respondents, the Haida Nation, and also relies on the following relevant facts.

2. The Intervener, Tenimgyet, is a Gitxsan Hereditary Chief and is one of the Plaintiffs in the ***Delgamuukw*** litigation, and he brings this intervention on behalf of the Gitxsan Hereditary Chiefs and the Gitxsan Nation (the "Gitxsan"). The Gitxsan brought what remains the leading case on aboriginal title, ***Delgamuukw v. British Columbia,*** wherein this Court explained the basic principles governing the nature and proof of aboriginal title. The particular issue of whether or not the Gitxsan and Wet'suwet'en people actually held aboriginal title on the basis of the application of these principles was referred back to trial. This trial has not yet occurred and the parties have been engaged in negotiations under the auspices of the British Columbia Treaty Process.

> ***Delgamuukw v. British Columbia*** **[1997] 3 S.C.R. 1010.**

3. In addition to these negotiations under the British Columbia Treaty Process, the Gitxsan have also been insisting that the Crown engage in meaningful consultation with the Gitxsan in respect of significant resource allocation decisions in and affecting their territory. The leading example of this relates to the Crown's decision to approve the change of control of Skeena Cellulose Inc. This company held a tree farm licence for territory that is subject to the Gitxsan's claims of aboriginal rights and title. The Gitxsan challenged the Crown's failure to consult in this regard in ***Gitxsan and other First Nations v. British Columbia (Minister of Forests)***. In his decision, Justice Tysoe of the British Columbia Supreme Court held that the Crown had breached its duties to the Gitxsan people, and since then the Crown has engaged in negotiations with the Gitxsan with a view to reaching an accommodation of their interests.

> ***Gitxsan and other First Nations v. British Columbia (Minister of Forests)*****, (2002), 10 B.C.L.R. (4th) 126 (S.C.)**

4. In ***Delgamuukw*** this Court recognized, based upon the extensive evidence led at trial, that the Gitxsan were a distinct aboriginal people situated in Northwestern British Columbia. The

Gitxsan have a system of governance distinct from the ***Indian Act***/band council system of governance imposed by the Crown in the post-Confederation period. This traditional system of governance is founded upon the traditional House and Clan structure of the Gitxsan. It includes a system of political leadership and decision making, a body of laws concerning land and territorial rights and well established methods of recording and passing on the history and legal precepts governing all aspects of Gitxsan life. This Court accepted and highlighted that this body of oral history and law – the Adaawk – is key to understanding the Gitxsan people's culture, political identity and their relationship to the land. Indeed, the failure of the trial judge in ***Delgamuukw*** to give appropriate and independent weight to the oral history and laws of the Gitxsan was one of the principal reasons why the Supreme Court of Canada ordered a new trial.

Delgamuukw, supra at paras. 12, 13, 93, 94, 98, 107, 147 and 148

PART II – QUESTIONS IN ISSUE

5. Temingyet's intervention in this appeal addresses the following question:

> Does the Crown in Right of British Columbia owe a constitutional and fiduciary duty to consult with First Nations and to seek to accommodate their rights, prior to a final judicial determination of those rights?

PART III - ARGUMENT

A. Overview of Intervener's Position

6. In this case the Court has been asked to decide between two competing models of Crown – Aboriginal consultation and accommodation. The model advanced by the Appellants reflects a narrow, legalistic view of the Crown's powers and duties in respect of aboriginal people. It views the duty of consultation and accommodation as being strictly linked to rights proved in court and as existing only in relation to those proven rights. The model advanced by the Respondents and endorsed by the British Columbia Court of Appeal is a broader, purposive model designed to reflect the nation-to-nation quality of the relationship between aboriginal peoples and the Crown in the context of Crown decision making potentially affecting the rights and interests of aboriginal peoples. The Intervener Tenimgyet, on behalf of the Gitxsan, submits that this latter model is more consistent with the purpose of s. 35(1) of the ***Constitution Act,***

1982 and the fundamental principles informing our constitutional order. The broader approach to consultation ensures the legality and constitutionality of the Crown's actions and will better promote the long-term, non-litigious reconciliation of the assertion of Crown Sovereignty with the continued existence of aboriginal peoples as distinct political, legal and rights-holding communities within Canada.

B. The Gitxsan Perspective on this Appeal

7. The Gitxsan's perspective in this case arises from their struggle to achieve recognition and respect from the Crown for their aboriginal title and rights as expressed through the Gitxsan's own law, social structure and system of governance. The distinguishing features of this law, social structure and system of governance include the House and Clan systems, the Hereditary Chiefs and the Adaawk. The recognition of Gitxsan law, its social structure and system of governance as genuine lies at the heart of ***Delgamuukw*** litigation. The Gitxsan have also sought to obtain recognition for their law, social structure and system of governance by continuing to employ them, entering into the B.C. Treaty Process with the hope of obtaining, among other things, recognition of their self-government powers, and collectively engaging with the Crown on a wide range of matters.

8. The Gitxsan submit that just as it was wrong for the trial judge in ***Delgamuukw*** to fail to give independent weight and meaning to the traditional structures and laws of the Gitxsan, it is equally wrong for the Crown to fail to recognize and respect such structures and laws. At the heart of this Court's rulings in ***Sparrow***, ***Van der Peet*** and ***Delgamuukw*** is the ratio that genuine recognition and affirmation of existing aboriginal rights consists of a present recognition of those rights, having regard to the unique circumstances of aboriginal peoples that distinguish them from the rest of Canadian society.

> ***Delgamuukw, supra; R. v. Sparrow,*** **[1990] 1 S.C.R. 1075; *R. v. Van der Peet,* [1996] 2 S.C.R. 507**

9. In ***Sparrow***, this Court upheld the following reasoning of the British Columbia Court of Appeal, rejecting British Columbia's argument that s. 35 did not in and of itself guarantee aboriginal rights and that it would only do so once these were recognized by the Crown pursuant to s. 37 of the ***Constitution Act***:

> This submission gives no meaning to s. 35. If accepted, it would result in denying its clear statement that existing rights are hereby recognized and affirmed, and would turn that into a mere promise to recognize and affirm those rights sometime in the future. . . . To so construe s. 35(1) would be to ignore its language and the principle that the Constitution should be interpreted in a liberal and remedial way. We cannot accept that that principle applies less strongly to aboriginal rights than to the rights guaranteed by the Charter, particularly having regard to the history and to the approach to interpreting treaties and statutes relating to Indians required by such cases as *Nowegijick v. R.*, [1983] 1 S.C.R. 29. . . .

Indeed, this Court has consistently made it clear that the recognition of aboriginal rights can no longer be deferred and requires the Crown to act now so as to ensure any interference with these rights can be justified, even at the price of social and economic change.

Sparrow, supra at p. 1107, affirming (1986) 36 D.L.R. (4th) 246 (B.C.C.A.) at p. 268

10. As for the unique characteristics of aboriginal societies that must be taken into account as part of the present day recognition of aboriginal rights, these include the fact that aboriginal groups occupied and used lands before and after the assertion of Sovereignty; they had their own social, legal and political systems; and that non-written modes of recording history, laws and decision making have to be respected.

Van der Peet, supra at paras. 30-33 (pre-sovereignty occupation and distinct system), 68 (validity of non-written modes of recording); _Delgamuukw, supra_ at para. 114 (pre-sovereignty occupation), 126 and 141 (distinct system), 98-101 (validity of non-written modes of recording)

11. Just as this Court rejected the argument that it should only give effect to s. 35 rights and title once these have received some sort of Crown recognition, this Court should equally reject the converse proposition now being advanced by the Crown – namely that Crown recognition and affirmation of aboriginal and treaty rights should be deferred until some future act of recognition by the courts. Given the delay, costs and uncertainties attached to the judicial process this would render the promise of s. 35, as well as the concepts of consultation and accommodation, hollow and largely meaningless. Rather than further the non-adversarial relationship that should, as explained in ***Sparrow***, exist between the Crown and aboriginal peoples (the essence of the fiduciary duty), the Crown's approach would entrench aboriginal

peoples and the Crown in a process of systematic dispute and litigation. This cannot be a correct result.

> ***Sparrow, supra*** **at p. 1105**

C. Nature of the Duty to Consult and Seek Accommodation

12. The Intervener Tenimgyet submits that the duty to consult and seek accommodation obliges the Crown to turn its mind to the very real existence of aboriginal people as political and cultural communities that have distinct, constitutionally protected rights when making decisions which may potentially have profound effects on those rights. Specifically, before it makes decisions that have the potential to affect aboriginal rights, the Crown must provide the relevant aboriginal people with the opportunity to describe and substantiate the rights and broader interests they claim, and where the Crown decision-maker concludes that the claim is reasonable, it must seek to achieve a workable accommodation of the right. What the process of consultation and any ultimate accommodation must consist of will depend on a variety of factors, including the strength of the aboriginal rights claim, the existence of options for making the decision without risking the infringement of an aboriginal right, the cost of meeting the accommodation measures sought by the aboriginal group and the potential severity of the infringement.

D. Summary of Constitutional Principles Applicable

13. To hold that the duty to consult and accommodate applies to the Crown when making potentially rights-infringing decisions, regardless of prior judicial recognition of the rights in question, is consistent with well established constitutional principles. In particular, it is consistent with:

a. The purpose of section 35, which is to remedy the historic failure of the Crown and Canadian society at large to respect the full range of aboriginal and treaty rights as communal, legal rights, a failure which has denied aboriginal peoples effective control or even a significant say over the disposition of rights and resources on their lands and even denied their historic existence as cultural and political communities;

b. The principle of constitutionalism, which requires the Crown to found all of its actions and decisions in some legitimate constitutional basis and which therefore requires regard to whether or not a Crown act may unjustifiably infringe section 35 rights;

c. The constitutional principle of respect for minorities, which mandates the Crown to respect the unique interests (including rights) of minorities, including aboriginal peoples, in its day-to-day activities as matter of policy.

***Sparrow*, *supra* at pp. 1105-1106; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at paras. 70-82**

E. Consultation and the Principles Governing Section 35(1) of the *Constitution Act, 1982*

The Origins of Section 35

14. Section 35 of the ***Constitution Act, 1982*** did not arise in a constitutional vacuum, but rather in the context of a body of law and policy extending back to the earliest days of colonial settlement of what is now Canada. At the core of the Crown's policy was the imperial recognition that despite the effective assertion of sovereignty of the Crown *vis-à-vis* other colonial powers, aboriginal nations continued to exist as political and cultural entities that were to be respected and treated with. In the American decision of ***Cherokee Nation***, Chief Justice Marshall wrote that while the legislative powers of the aboriginal nations had been diminished, they were still "domestic dependant Nations" who retained the power to speak for their People and to enter into treaties. A similar statement was made by the Supreme Court of Canada in ***R. v. Sioui***, which concerned a treaty signed by General Murray (military and then civil governor of Quebec from 1760-1768) on behalf of the Crown. Chief Justice Lamer, writing for the Court, stated:

> The British Crown recognized that the Indians had certain ownership rights over their land, and it sought to establish trade with them which had risen above the level of expectation and give them a fair return. It also allowed them autonomy in their internal affairs, intervening in this area as little as possible.

***Cherokee Nation v. Georgia* 30 U.S. (5 Pet.) 1 (1831) at p. 16; *R. v. Sioui*, [1990] 1 S.C.R. 1025 at para. 74**

15. This policy was expressly embodied in the ***Royal Proclamation of 1763,*** which recognized the importance of protecting aboriginal lands and maintaining cordial relations with aboriginal peoples. Indeed, the provisions of the ***Royal Proclamation of 1763*** describing the manner in which the Crown was to obtain cessions of aboriginal lands is an explicit acknowledgement of the existence of aboriginal nations and their ability to make collective decisions about their lands. The recognition of aboriginal land ownership continued in the ***Constitution Act, 1867,*** where the Provinces' ownership of lands was expressly limited by pre-existing rights and interests including the aboriginal title rights of the aboriginal peoples. Thus, contrary to what British Columbia asserts in this appeal, s. 109 does not confer upon it an unqualified right of ownership of Provincial Crown lands.

16. In the early years of Confederation, the Courts also recognized the ability of aboriginal people to make laws that would be recognized in English courts. For instance, in ***Connolly v. Woolrich*** the Quebec Superior Court recognized that a marriage entered into by a white man in accordance with aboriginal custom was a valid marriage which would be recognized by the courts. More recently, the courts have recognized the continued power of aboriginal people to make laws in areas such as customary adoption (***Casimel***) and the development of internal systems of government (***McLeod Lake***).

> ***Connolly v. Woolrich*** **(1867), 17 R.J.R.Q. 75, 1 C.N.L.C. 70 (Quebec S.C.);** ***McLeod Lake Indian Band v. Chingee*** **(1998), 165 D.L.R. (4th) 358 (F.C.T.D.);** ***Casimel v. Insurance Corp. of British Columbia*** **(1993), 82 B.C.L.R. (2d) 387 (C.A.);** ***Campbell v. British Columbia (Attorney General)*** **(2000), 189 D.L.R. (4th) 333 (B.C.S.C.) at paras. 97-104**

17. However, the initial recognition of First Nations as distinct political and cultural entities gradually faded, and in British Columbia Provincial law and policy was particularly harsh toward aboriginal peoples. With the exception of Treaty 8, treaties were not signed with aboriginal peoples in post-Confederation British Columbia and the Provincial Crown refused to participate in efforts to negotiate such treaties. The Province consistently took the position that aboriginal peoples had no rights and that they were limited in their land claims to such reserves as might be voluntarily set aside for them by Canada and British Columbia – a process that was not completed until the late 1930s.

> ***Gitanyow First Nation v. British Columbia*****, (1999) 66 B.C.L.R. (3d) 165 (S.C.) at para. 15**

18. At the federal level laws were passed barring the practice of traditional ceremonies, such as the potlach, and the ***Indian Act*** was amended to effectively bar legal proceedings advancing claims of aboriginal rights and title. When claims were first brought on behalf of aboriginal people, the Provincial Crown alleged that any rights aboriginal people may have once held had been extinguished (***Calder***) or that their treaties were not legally binding (***White and Bob***). The underlying federal policy, embodied in statutory provisions such as the enfranchisement provisions of the ***Indian Act*** and in policy documents such as the 1968 White Paper, was one of assimilation. This policy foresaw the eventual extinction of aboriginal people as distinct societies as the individual Indians were absorbed into the larger body politic.

> ***Gitanyow, supra*** **at para 15;** ***Sparrow, supra*** **at pp. 1103-1104;** ***Calder v. British Columbia (A.G.),*** **[1973] S.C.R. 313;** ***R. v. White and Bob,*** **(1964) 50 D.L.R. (2d) 613 (B.C.C.A.)**

19. As this Court recognized in ***Sparrow***, section 35 represents an express rejection of this approach and was specifically designed to remedy this history and its effects. The Court in ***Sparrow*** held that this fundamental change in our Constitution was intended to lead to the recognition of aboriginal rights as legal rights. This same analysis should also lead to the conclusion that the Crown must be alert to and seek to respect aboriginal and treaty rights in its day-to-day operations, even if these rights have not yet been proved in court.

Consultation and the Character of Aboriginal Title and Rights

20. Understanding the nature of s. 35 rights - and in particular the aboriginal title right - is key to understanding why consultation and accommodation are constitutionally mandated. Section 35 serves to protect rights that are fundamentally distinct from most of those protected by our common law and the ***Canadian Charter of Rights and Freedoms***. Aboriginal rights and title are communal rights, that is they are rights which are enjoyed by virtue of membership in a distinct aboriginal community. Thus, unlike rights existing pursuant to traditional liberal principles, aboriginal rights are not designed to protect autonomous individuals from state action but instead are designed to protect autonomous communities from state action. This is reinforced by the observation that the drafters of the ***Charter*** shielded aboriginal rights from the traditional liberal values embodied in the ***Charter*** by including the express protections for aboriginal and treaty rights via s. 25.

21. Furthermore, as was held in ***Delgamuukw***, an integral part of the aboriginal title right is the right on the part of aboriginal communities to decide on the use to which their lands will be put. When s. 35 protects this right "in its full form" it is therefore not just protecting the right to the land as a property or economic right, but also the aboriginal people's right to make collective decisions regarding their lands and resources. In the ***Campbell*** case (the challenge brought to the self-government provisions of the Nisga'a Agreement), Mr. Justice Williamson held that the right to make these decisions was inextricably linked to the aboriginal title itself:

> These observations suggest that the right to determine appropriate uses of land to which an aboriginal nation holds title is inextricably bound up with that title. First, it is "aboriginal law" which is part of the source of aboriginal title. Second, the right to decide how to use that land is also a part of the right -- part of aboriginal title "in its full form".

Indeed, this Court has observed that the aboriginal title right at the very least includes having a meaningful say in land use and resource decisions on aboriginal lands and in some cases goes so far as to require the Crown to obtain consent for certain activities.

Delgamuukw, supra **at paras. 115, 117 and 168;** ***Campbell, supra*** **at para. 135.**

22. Thus, present recognition of aboriginal title necessarily requires the present recognition of the aboriginal people's ability to make collective decisions. This entails recognizing the aboriginal governance and decision making systems, such as the Gitxsan Hereditary Chiefs informed by the Adaawk, as well as the decisions made by these institutions. As Mr. Justice Williamson said in ***Campbell***:

> Can it be, as the plaintiffs' submission would hold, that a limited right to self-government cannot be protected constitutionally by s. 35(1)? I think not. The above passages from *Delgamuukw* suggesting the right for the community to decide to what uses the land encompassed by their aboriginal title can be put are determinative of the question. The right to aboriginal title "in its full form", including the right for the community to make decisions as to the use of the land and therefore the right to have a political structure for making those decisions, is, I conclude, constitutionally guaranteed by s. 35.

Campbell, supra **at para. 137**

23. It is essential that the Crown consult and seek workable accommodations if it is to fulfill its s. 35 obligations and recognize in the present the collective decision making power of aboriginal groups that hold aboriginal title. The Crown has a duty to inquire of the aboriginal people as to the extent and nature of its rights. Where a plausible title claim exists and the Crown is considering authorizing a particular use of those lands, the duty to consult and to seek accommodation requires that the Crown ascertain the community's views on how the land and its resources should be used and seek to reasonably accommodate those views, ideally to the point of obtaining the consent of the aboriginal group. This reflects the basic fact that it is the aboriginal people who are constitutionally entitled to decide how their lands will be used. If this duty is deferred until after judicial recognition of the underlying aboriginal title, this constitutional right of the First Nation to make decisions concerning its lands will be rendered largely meaningless.

24. The nature of aboriginal title as a right that includes the aboriginal title holder's right to be consulted on proposed uses of title lands and to decide to which uses the land will be put also points to the error in the Crown's reasoning that the duty to consult and seek accommodation is contingent upon judicial recognition of the title right. It cannot be said of any other constitutional right that the right comes into existence only once it is recognized by a Court. Rather, a ruling in favour of a claimant simply confirms the existence of the right and (normally) secures a remedy for a breach of that right. To take a different approach to the aboriginal title right, or more specifically, to that right's intrinsic consultation and collective land use decision making component, flies in the face of the constitutionalization of aboriginal rights and the s. 35 declaration that these rights are "hereby recognized and affirmed".

F. Consultation and the Constitutionalism Principle

25. Requiring the Crown to consult and seek accommodations in advance of making a decision carrying with it the potential to infringe aboriginal or treaty rights is consistent with the fundamental principle of constitutionalism described in the ***Secession Reference***. First, consultation assists the Crown in gathering the basic information necessary to assess the

likelihood that there are existing aboriginal or treaty rights which may be unjustifiably infringed by the Crown's actions.

> ***Secession Reference, supra* at paras. 70-78**

26. Second, in the context of aboriginal title, consultation also provides the Crown with the means of ascertaining the First Nation's wishes concerning its lands and its underlying interests. This second function of consultation is relevant because determining whether, for example, an infringement of aboriginal title has occurred requires, among other things, assessing whether or not the impugned Crown decision or action is incompatible with the use the aboriginal people who hold title have chosen to make of the land. For instance, if the aboriginal people have chosen to preserve a piece of land for its habitat values, this would be compatible with a Crown decision to make the land a nature preserve but incompatible with a decision to develop an open pit mine. Consultation is the process whereby the Crown can actually "ensure that [the] representations [of the relevant aboriginal groups] are seriously considered and, where possible, integrated into the proposed course of action" (***Gitxsan).*** Deferring consultation until after the decision is made and a judicial determination of the existence, scope and nature of the rights had occurred makes that impossible. On the issue of constitutionalism, the Intervener Tenimgyet also adopts the submissions of the Intervener B.C. Union of Indian Chiefs in the *Taku River* appeal (paras. 15-20 of that Factum).

> ***Gitxsan, supra* at para. 88, affirming Justice Finch's assertion to the same effect in *Halfway River First Nation v. British Columbia (Ministry of Forests)* (1999), 178 D.L.R. (4th) 666 (B.C.C.A.) at para. 160**

G. Consultation and the Protection of Minorities Principle

27. The Court of Appeal decision is also compatible with the protection of minorities' principle underlying our Constitution, a principle which this Court illustrated with s. 35 of the ***Constitution Act, 1982*** in the ***Secession Reference.*** The fundamental form of discrimination directed at aboriginal peoples has been the Crown's refusal to recognize their existence as distinct political communities within Canada, ones entitled to a real say about the choices are that being made that affect their lands and their continued existence as a distinct communities. Consultation and accommodation as preludes to Crown decision making are essential to ameliorating the effects of this discrimination. The consultation requirement as described by the Court below effectively remedies this without obviating the need for the proof of rights if their

existence is ultimately contested by the Crown. By having a duty to consult that is triggered at a relatively low threshold, aboriginal peoples will be afforded at the very least input into Crown decision making. This goes beyond the usual entitlement of "fair dealing" of ordinary citizens, for as the information provided to the Crown mounts a stronger and stronger case for the existence of these rights, the Crown is under an increasingly significant constitutional burden to substantively accommodate the decisions and interests of the aboriginal people.

Secession Reference, supra **at para. 82**

28. It should be noted that the process of consulting and seeking accommodation need not be confined to a consideration of the aboriginal group's "rights", but may extend to accommodating aboriginal "interests" more broadly defined. Aboriginal peoples and their rights are not frozen in amber. They are dynamic societies whose existence is to be reconciled with (not isolated from) the modern world. As collectives they can use their power to make binding decisions for themselves, their lands and their resources that do not necessarily conform to their traditional ways of life and for this reason aboriginal title does not tie aboriginal people to narrowly proven traditional uses. So to, accommodations should not be limited to merely making room for the traditional or what can strictly be proven to be a right.

29. For example, if an aboriginal people chooses to focus on economic development rather than maintain the traditional use of a particular tract of land, that interest may be accommodated in ways other than the strict protection of its rights – perhaps by providing agreed upon economic opportunities elsewhere. This in turn may allow for greater flexibility for the Crown to develop the tract of land for its purposes. If the First Nation wants to exercise effective control over its lands, that goal may be better achieved through the development of a modern co-management regime implemented by statute or regulation with the full participation of the First Nation rather than through the use of traditional governance structures. What is important about this, however, is that it involves the Crown ascertaining what the aboriginal group has chosen as its goals and then working with the group to find the means of achieving those goals. This amounts to developing government-to-government means of interacting. Should the Crown be willing to take such a flexible approach to consultation and accommodation, the likelihood of settling aboriginal claims in the preferred way – i.e. through negotiations – will increase significantly.

H. Crown Arguments Related to Complexity of Aboriginal Rights and Title Issues

30. In addition to its attempt to effectively revive the rejected doctrine of "recognition," the Crown relies upon two interrelated arguments to suggest that it is impractical to impose a duty to consult on the Crown in advance of a judicial determination of the existence of rights. First, the Crown suggests that administrative decision makers on the ground are ill-equipped to deal with matters of aboriginal and treaty rights and therefore the law cannot expect them to assess the strength of a rights claim or determine related matters. Second, the Crown submits that matters related to aboriginal and treaty rights are intrinsically complex and thus not well-suited for administrative decision making processes.

31. These arguments really amount to nothing more than citing the illness to counter the remedy. Questions related to aboriginal rights and title are difficult in part because the historical facts grounding the claims to such rights have been obscured or lost through the Crown's failure over the last centuries to deal seriously with these rights. Indeed, this Court noted this problem in ***Delgamuukw,*** and in that judgment Justice Lamer stated that it would be "perverse" to exclude territorial affidavits as unreliable on the basis that land claims had been discussed for many years when the protracted nature of discussions resulted from the Province's "persistent refusal to acknowledge the existence of aboriginal title." As for the difficulties associated with the problems of justification and balancing competing public interests on aboriginal lands, these flow largely from the fact that the Crown has created a complex web of competing rights, interests and expectations in aboriginal lands and resources without first obtaining meaningful consent from the aboriginal peoples or at least instituting mechanisms to accommodate their rights.

> ***Delgamuukw, supra*** **at para. 106**

32. It is particularly ironic to cite the incapacity of Crown decision makers to deal with questions of aboriginal rights and title. It is the Crown itself that has conferred upon these decision makers the power to make decisions that could profoundly affect the constitutionally protected rights of aboriginal communities. Similarly, the Crown should not be able to rely upon ill-suited nature of administrative decision making processes which it itself created as a basis for

avoiding an obligation to consult and accommodate. Surely, the solution is to appoint decision makers and create decision making processes having the capacity to deal with these rights rather than reduce the protection afforded aboriginal people by deferring protection of their rights to the judicial process while the gears of government decision making grind on.

33. Furthermore, the Crown errs in suggesting that the modification of decision making schemes that regularly and directly impact aboriginal rights would stretch the fabric of our constitutional framework. On the contrary, this Court's decisions in ***Adams*** and ***Marshall*** have established that when the Legislature or Parliament gives discretion to a decision maker which threatens to infringe aboriginal or treaty rights in a substantial number of cases it must appropriately structure the decision maker's discretion for dealing with those issues. Giving decision makers explicit direction as to how to deal with questions of accommodating aboriginal and treaty rights would be key to addressing any decision making capacity problem. Indeed, British Columbia has taken initial steps in this direction by developing broadly applicable guidelines describing how consultation with First Nations should occur.

> ***R. v. Adams,*** **[1996] 3 S.C.R. 101 at para. 54;** ***R. v. Marshall,*** **[1999] 3 S.C.R. 456 at para. 64;** ***Provincial Policy for Consultation with First Nations*** **(October 2002); Foreign examples of consultation policies include New Zealand Ministry of Justice,** ***A Guide for Consultation with Maori*** **and U.S. Bureau of Land Management,** ***H-8160-1 – General Procedural Guidance for Native American Consultation*** **(cited in the factum for this appeal of the Intervener Dene Tha' First Nation)**

34. It should be borne in mind that many Crown decision makers are in some important respects uniquely well situated to assess aboriginal rights claims. For example, many resource allocation and land use decisions are made by local decision makers who have responsibility for fixed areas of land (e.g. a District Forest Manager). These decision makers have to deal with a limited number of aboriginal peoples on a regular basis. They are therefore able to develop familiarity with the background, extent and nature of the relevant claims as well as the concerns, objectives and proposals of the First Nations in respect of the relevant lands and resources. The decision makers will be able to bring to bear this expertise as well as their technical expertise to devise flexible integrated solutions to problems of accommodation. Finally, decision makers can call upon other government officials (such as the Attorney-General) or outside consultants to assist in dealing with particularly difficult questions.

35. Due to the above-noted facts, Crown decision makers enjoy a special expertise and flexibility relative to the courts. Courts must approach each claim of aboriginal and treaty rights *de novo* and make their findings solely on the record of the case, which will be limited by the rules of evidence. Second, courts are limited in the remedies they can offer, and in any event will often lack the expertise in the technical areas in question (e.g. forestry) that would permit the forging of creative or innovative solutions that address the interests of both sides.

36. Thus, if Crown decision makers provide the initial response to an aboriginal rights claim through consultation and accommodation and the courts fulfill the function of reviewing the constitutionality of that interaction and its outcome, the assignment of roles is constitutionally and arguably ideal. The courts retain the crucial function of upholding Canada's supreme laws while benefiting from the specialized knowledge of the decision maker and without eliminating the opportunity for a creative and flexible on-the-ground attempt to work out an accommodation of the claimed aboriginal rights and interests.

37. Furthermore, Parliament and the Legislatures can review existing legislation to ensure that decisions having significant potential to affect aboriginal and treaty rights are, in fact, being made at the right level. If it is the case that constitutionally significant decisions are being made by administrators ill-equipped for the task, and that even structuring their discretion as required by ***Adams*** will not solve the problem, the decision making power can be shifted to a higher or different level where appropriate accommodations can be reached with First Nations.

38. Alternatively, the Crown can enter into comprehensive modern day land claims settlements with First Nations which either resolve the issues of land and resource allocation or provide agreed upon means of doing so. This has been the solution urged in a number of different forums, including this Court, and represents the ideal means of achieving long-term reconciliation.

39. It should be noted that a "pre-proof" duty to consult and accommodate will actually fuel the treaty negotiation process. First, it gives the Crown a positive incentive to work toward reasonable comprehensive settlements now as in the absence of such agreements it is going to

have to deal with the question of accommodating aboriginal and treaty rights in its day-to-day operations anyway. Second, the ongoing dialogue that will characterize the consultation/accommodation process can help the parties develop non-adversarial relationships and move beyond positions to learn of one another's real underlying interests and the possible accommodations. This knowledge would be valuable in the negotiation of modern treaties.

40. In conclusion, the Gitxsan submit that the Crown's approach to consultation is fundamentally flawed. It fails to recognize the fundamental purpose of the duty to consult, and seek accommodation which is to give meaning to the Crown's historical duty to reach consensual arrangements with the original inhabitants of the land before taking or permitting actions that threaten to compromise these people's rights and the integrity of their communities. The existence of a "pre-proof" constitutional duty to consult gives substantive meaning to the Crown's obligation to deal with aboriginal peoples as distinctive political communities within the larger Canadian society. Given the constitutionally protected nature of aboriginal communities within our society, notions of "fair dealing" applicable to ordinary citizens in their ordinary dealings with the Crown cannot substitute for the constitutional obligations described by the Court of Appeal. Approaching the rights of First Nations as if they were the rights of ordinary citizens or corporations cannot be reconciled with the fundamental observation made by Mr. Justice Williamson in ***Campbell*** that aboriginal title - and, the Intervener submits, other aboriginal rights - are inextricably tied to aboriginal self-government and the existence of these communities as political communities.

***Campbell, supra* at para. 137**

PART IV – COST SUBMISSIONS

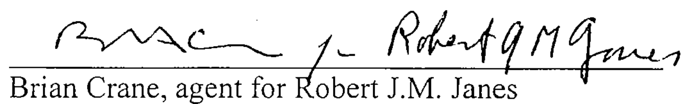
41. The Intervener Tenimgyet makes no submissions as to costs.

PART V – ORDER SOUGHT

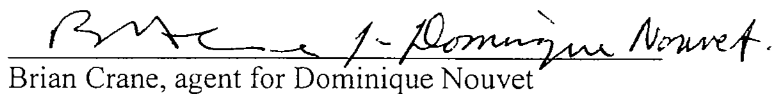
42. The Appeal should be dismissed with costs to the Respondent the Counsel of Haida Nation *et al.*

Dated the 19th day of January, 2004

ALL OF WHICH IS RESPECTFULLY SUBMITTED



Brian Crane, agent for Robert J.M. Janes



Brian Crane, agent for Dominique Nouvet

Counsel for the Intervener Tenimgyet, also known as Art Matthews, Gitxsan Hereditary Chief

PART VI – AUTHORITIES

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