

**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:**

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## PART I – STATEMENT OF FACTS

1. The Union of British Columbia Indian Chiefs (“UBCIC”) is an organization of British Columbia First Nations dedicated to advancing respect for aboriginal title and rights throughout British Columbia. Most of its members do not participate in the British Columbia Treaty Process. Instead they look to the Crown to fulfill its first obligation, arising both out of s. 35(1) of the *Constitution Act, 1982* and out of the historic relationship between the Crown and aboriginal people, to respect existing aboriginal title and rights. UBCIC believes that this obligation is also consistent with recent developments in international human rights law and in domestic laws of foreign nations.

2. The Intervener adopts the Respondent’s Statement of the Facts in this case.

## PART II – QUESTIONS IN ISSUE

3. When does an administrative decision maker acting under a provincial statute have a constitutional duty to consult with a First Nation in respect of a potential infringement of aboriginal title and rights?

4. What is the content of the constitutional duty to consult with a First Nation as opposed to an administrative law duty to consider the interests of a First Nation?

## PART III – ARGUMENT

### A. INTRODUCTION

5. While the questions in this appeal arise in the context of consultation, the core issue in this case is whether the Crown can lawfully continue its policy of disregarding existing aboriginal title and rights until such a time as a court confirms the existence of particular rights. The courts below held that such a policy was inconsistent with the fiduciary duty owed by the Crown to First Nations, as reinforced by s. 35(1) of the *Constitution Act, 1982*, and so unlawful. This Court is being asked to reverse this decision, freeing the Crown from the obligation of having to consider the implications of its decisions on untested aboriginal title and rights before the decisions are made. In effect, this Court is being asked to endorse British Columbia’s “business as usual” approach to aboriginal title and rights.

6. UBCIC submits that in interpreting s. 35(1) of the *Constitution Act, 1982* and the nature of the Crown's fiduciary relationship with aboriginal people this Court should affirm the decision of the court below, and it adopts the general thrust of the Respondents' arguments in this regard -- that is, that there exists a general fiduciary duty to accommodate aboriginal interests, title and rights. This is consistent with the existing jurisprudence concerning s. 35(1) and the broader principles relating to the protection of indigenous rights developed in other jurisdictions and in the international human rights realm. In addition, UBCIC advances a framework for how decision makers should actually deal with the questions of aboriginal rights and justifiable infringement.

7. A purposive analysis of s. 35 leads to the conclusion that the constitutional duty to consult arises whenever a provincial decision maker is considering making a decision which has the potential to infringe aboriginal title or an aboriginal right or, more generally, the underlying interests these rights protect. This duty applies whether or not the title or rights have been established in court. The purpose of this consultation is to inform the decision maker's assessment of whether or not his decision could infringe aboriginal title and rights. The constitutional duty to consult mandates an assessment of whether or not aboriginal title and rights exist or, whether or not the Crown's objectives can be met without infringing such rights or title as do exist and, if not, of how the decision can be made in a manner which does not unjustifiably infringe aboriginal rights or title.

8. This approach to aboriginal rights is necessitated by the fundamentally remedial nature of s. 35, described in *Sparrow* at page 1105:

It is clear, then that s. 35(1) of the *Constitution Act, 1982*, represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights. The strong representations of native associations and other groups concerned with the welfare of Canada's aboriginal peoples made the adoption of s. 35(1) possible and it is important to note that the provision applies to the Indians, the Inuit and the Métis. Section 35(1), at the least, provides a solid constitutional base upon which subsequent negotiations can take place. It also affords aboriginal peoples constitutional protection against provincial legislative power.

This remedial function is poorly served if the Crown continues to consume aboriginal lands and resources – which are fundamentally not fungible commodities – without regard to the fundamental interests and rights that s. 35 protects. Yet the hard reality has been that the courts have deferred any real protection of aboriginal rights to far distant trial dates. Interlocutory injunctions are routinely denied and substantive rights claims are referred to the trial list. What purpose will s. 35 serve if the very subject-matter of the protection is hopelessly compromised through procedural delay?

*R. v. Sparrow*, [1990] 1 S.C.R. 1075 at pgs. 1104-1105.

9. A close reading of the Appellants' factum discloses that the Appellants' actual position is that the factors to be considered by a decision maker who is making a decision threatening aboriginal interests exclude considerations related to constitutionally protected aboriginal title and rights. Thus, until a First Nation has successfully pursued a claim arising out of an infringement of aboriginal title or rights through the court system, the Crown submits it owes no duty to First Nations to consider what our Constitution has elevated as their highest interests. The Crown would have it that all matters dealing with these fundamental issues should be deferred to the courts while the machinery of government grinds ahead as if the rights do not exist. Yet every day decision makers authorize activities having profound effects on aboriginal title and rights, potentially rendering them incapable of being exercised and therefore meaningless.

#### **B. A FRAMEWORK FOR ADMINISTRATIVE DECISION MAKING IN THE CONTEXT OF S. 35 RIGHTS**

10. Where Parliament or the Legislature has empowered a decision maker to make a decision which carries the potential to infringe aboriginal title or rights, the following framework for the Crown's conduct, which can be discerned from the existing caselaw, applies:

- (i) where a legislative scheme confers upon a decision maker a discretion which carries the potential for infringement of aboriginal title or rights, the Crown must ensure that adequate guidance is given, by law, to structure that discretion;

- (ii) where a decision that potentially infringes aboriginal title or rights is being made, the administrative decision maker must inquire into the existence of such title or rights, both through its own means and through consultation with the relevant First Nation(s);
- (iii) on the basis of the record gathered in the course of its inquiries (including consultation) the administrative decision maker must assess the question of whether or not any potentially affected aboriginal title or rights actually exist;
- (iv) on the basis of the record and assessment, the administrative decision maker, in consultation with the affected First Nation(s), must assess whether their right or title can be accommodated, by asking:
  - (a) can (taking into account all relevant factors) the decision be made in such a way that the aboriginal right or title is not infringed? and if not,
  - (b) can the goal of the decision contemplated be achieved in a manner which does not unjustifiably infringe aboriginal title or rights?

11. As a practical matter this framework would apply to all administrative decision makers. Not all administrative decision makers make decisions which have the potential to infringe s. 35 rights. The Law Society, the College of Physicians and Surgeons, marketing boards, the Registrar of Motor Vehicles and numerous other decision makers deal with the day-to-day matters of government in ways that do not touch upon aboriginal rights or “Indianness”. These decision makers will be unaffected by the framework described above.

12. Further, it should also be noted that the Crown can withhold from a decision maker the ability to interfere with aboriginal title and rights and so take such issues entirely outside of the decision making framework. For example, in the *Kitkatla* decision, the British Columbia Court of Appeal held that a statutory regime which expressly excluded the power to “abrogate or derogate from” aboriginal rights or title deprived the decision maker in question of any power to infringe aboriginal rights or title. Such a decision cannot justifiably infringe aboriginal rights or title. However, even in that situation, as was held by the Chambers Court in *Kitkatla*, the

decision maker is subject to a fiduciary duty to consider the aboriginal interests of a potentially affected First Nation.

*Kitkatla v. The Minister of Small Business Tourism and Culture* (2000), 183 D.L.R. (4<sup>th</sup>) 103 (B.C.C.A.) at pgs. 130-131; (1999) 61 B.C.L.R. (3d) 71 (S.C.) at pgs. 80-81.

13. Thus the duty to consider aboriginal title, aboriginal rights or aboriginal interests generally is triggered when a decision maker addresses a decision which threatens these rights or interests with infringements or interference.

14. The approach described above reflects the real purpose of the duty to consult described in *Sparrow* and subsequent cases in relation to aboriginal title and rights. Consultation is the means by which the accommodation and reconciliation of aboriginal rights within the context of Crown decision making is achieved. First, consultation is the means by which aboriginal people can participate in providing information to the decision maker and thereby allow the decision maker to assess whether or not they hold relevant aboriginal rights or title. Second, consultation provides the means by which aboriginal people can participate in determining how their rights are to be reconciled with whatever decision is ultimately made. Third, consultation allows the Crown to provide the First Nation with necessary information about its goals, the contemplated decision and the potential effects of the decision, which in turn allows the First Nation to meaningfully participate in the decision making process.

### **C. LEGAL BASIS FOR THE FRAMEWORK**

15. The principles underlying the framework set out above are twofold. First, the framework furthers the recognition and affirmation of aboriginal title and rights. Second, it makes the process of justification part of the operation of government. The Appellants in their factum suggest that prior to the judicial determination of aboriginal title or rights, the Crown cannot be required to meet the onerous burden of justifying infringements of aboriginal title and rights (factum, para. 79). This ignores the fact that s. 35 of the Constitution requires the justification of any infringement of aboriginal rights or title. A government decision which is not justifiable, regardless of whether or not it is found so by a court, is unlawful and is unconstitutional. It is a fundamental principle of our Constitution, embodied in s. 52(1) of the *Constitution Act, 1982* that all government action must conform to the Constitution and must find its roots in the

Constitution. This is the principle of constitutionalism. In the *Secession Reference* this Court said as follows at para. 74:

First, a constitution may provide an added safeguard for fundamental human rights and individual freedoms which might otherwise be susceptible of government interference. Although democratic government is generally solicitous of those rights, there are occasions when the majority will be tempted to ignore fundamental rights in order to accomplish collective goals more easily or effectively. Constitutional entrenchment ensures that those rights will be given due regard and protection. Second, a constitution may seek to ensure that vulnerable minority groups are endowed with the institutions and rights necessary to maintain and promote their identities against the assimilative pressures of the majority. [emphasis added]

The position argued by the Appellants runs directly counter to this principle. Essentially their argument is that they should be allowed to avoid giving due regard to constitutionally protected rights in order to accomplish collective goals more easily or effectively.

*Reference Re: Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 74.

16. There is ample support in the s. 35 jurisprudence for the conclusion that the constitutional entrenchment of aboriginal title and rights imposes upon the Crown procedural duties to inquire into considerations relating to aboriginal title and rights whether or not these have already been proved in court. As this Court noted in *Sparrow*, the historical disregard for aboriginal rights as legal rights extended to government policy, legal analysis and academic consideration. This Court saw s. 35 as remedying this disregard by requiring the government to come to terms with aboriginal title and rights as legal rights. The Court said, at pg. 1119:

We acknowledge the fact that the justificatory standard to be met may place a heavy burden on the Crown...The constitutional entitlement embodied in s. 35(1) requires the Crown to ensure that its regulations are in keeping with that allocation of priority. The objective of this requirement is not to undermine Parliament's ability and responsibility with respect to creating and administering overall conservation and management plans regarding the salmon fishery. The objective is rather to guarantee that those plans treat aboriginal peoples in a way ensuring that their rights are taken seriously. [emphasis added]

The Appellants, who rely upon the first sentence of this paragraph, cannot avoid the necessary implication of the last sentence, namely, that the Crown is under a duty to ensure that aboriginal rights are taken seriously. If administrative decision makers do not even try to assess whether relevant aboriginal title or rights exist or if their decisions may derogate from those rights, how

can it be said that s. 35 rights are being taken seriously? Instead, the Appellants' position merely advocates the very conduct which, according to this Court in *Sparrow*, s. 35 was intended to remedy.

*R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1103-1104 and 1119.

17. *Gladstone* further reinforces the view that the Crown has positive pre-proof obligations with respect to s. 35 rights. In that case, this Court held that the justification analysis does not merely focus upon the bottom line result but also on the process by which accommodation is reached. The majority said, at para. 62:

This right is at once both procedural and substantive; at the stage of justification the government must demonstrate both that the process by which it allocated the resource and the actual allocation of the resource which results from that process reflect the prior interest of the aboriginal rights holders in the fishery. [emphasis added]

Surely, the "prior interest of the aboriginal rights holders in the fishery" must at least include (but is not necessarily limited to) the aboriginal right itself and it is this right that must be procedurally accommodated.

*R. v. Gladstone*, [1996] 2 S.C.R. 723 at para. 62.

18. Implicit in the Appellants' argument in this case is the observation that administrative decision makers will have a very hard time assessing the existence of aboriginal title and rights and reconciling those title and rights with various Crown objectives. However, this Court cannot lose sight of the fact that this challenge arises in large part from the complete lack of structure or guidance for the exercise of this type of discretion in existing provincial and federal law. Decision makers are left without assistance and are left to deal with these difficult questions in a vacuum that has been created by the legislatures' and Parliament's silence. This Court addressed this very problem in *Adams*:

In light of the Crown's unique fiduciary obligations towards aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance. If a statute confers an administrative discretion which may carry significant consequences for the exercise of an aboriginal right, the statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of aboriginal rights. In the absence of such specific guidance, the statute will fail to provide the representatives of the Crown

with sufficient directives to fulfill their fiduciary duties, and the statute will be found to represent an infringement of aboriginal rights under the *Sparrow* test.

This passage confirms that s. 35 imposes a duty on the legislatures and Parliament to provide the needed decision making structure in situations where aboriginal title and rights may be affected. Specifically, *Adams* confirms that the legislatures and Parliament must give guidance to the decision maker to allow the decision maker to accommodate the existence of aboriginal rights. If the decision maker has no obligation to accommodate aboriginal rights, so as to justify any infringement of those rights, and no constitutional duty to consult, what sense does it make to provide the representatives of the Crown with any directive to fulfill their fiduciary duties? This passage can only be understood as recognizing that the Crown has pre-proof duties to accommodate and consult when infringements of aboriginal rights or title are threatened.

*R. v. Adams*, [1996] 3 S.C.R. 101 at para. 54; *R. v. Marshall*, [1999] 3 S.C.R. 456 at para. 64.

19. *Delgamuukw* describes the relationship between justification, accommodation and the duty to consult. The majority, at paras. 167-168, explains that justification places an onus upon the government to accommodate aboriginal title in its decision making. This Court held that consultation is a central part of the justification process. The Chief Justice said, at para. 168:

Whether an aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified, in the same way that the Crown's failure to consult an aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law: *Guerin*. The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimal acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. 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. [emphasis added]

How can a decision maker act in good faith with the intent of substantially addressing the concerns of the aboriginal peoples whose lands are at issue if the decision maker cannot even turn his or her mind to constitutionally protected rights of those people?

*Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at paras. 167-168.

20. These principles in no way conflict with the provisions of the *Constitution Act, 1867* assigning legislative power over aboriginal people to Parliament (s. 91(24)) or vesting the proprietary rights over Crown lands and resources in the Province (s. 109). Section 109 expressly provides that the Province's title is "subject to any Interest other than the Province in the same." The Privy Council and this Court have both confirmed that aboriginal title is one such interest. Thus the Province cannot claim the benefit of s. 109 (proprietary rights) without the burdens ("Interests" of others, including aboriginal title). This principle is further reinforced by the fact that any power the Province has to infringe aboriginal rights flows from federal law through s. 88 of the *Indian Act*.

*Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 175

#### D. RELEVANT FOREIGN AND INTERNATIONAL LAW

21. Recent developments in international human rights law and in domestic laws of foreign nations also support the view that the decision of the court below was correct. It has recently been recognized that government policies often ignore aboriginal rights even while accepting their potential existence. A United Nations Special Rapporteur commented on this problem:

49. In terms of frequency and scope of complaints, the greatest single problem today for indigenous peoples is the failure of States to demarcate indigenous lands [footnote omitted]. Demarcation of lands is the formal process of identifying the actual locations and boundaries of indigenous lands or territories and physically marking those boundaries on the ground. Purely abstract or legal recognition of indigenous lands, territories or resources can be practically meaningless unless the physical identity of the property is determined and marked. [emphasis added]

Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, *Indigenous Peoples and Their Relationships to Land: Final Working Paper of the Special Rapporteur*, UN ESC, 2000, 52<sup>nd</sup> Sess., UN Doc. E/CN.4/Sub.2/2000/25 at pgs. 17 and 38.

22. The failure of the state to provide an effective means of identifying and demarcating aboriginal lands has been considered in a different legal context by the Inter-American Court of Human Rights. That court considered these issues in a claim brought by the Inter-American Commission on Human Rights on behalf of an indigenous community in Nicaragua known as the Mayagna (Sumo) Awas Tingni Community. The Commission claimed that Nicaragua had breached various obligations under the American Convention on Human Rights<sup>1</sup> by failing to provide effective access to the courts and by failing to provide effective administrative means of

<sup>1</sup> Canada is not a party to the American Convention on Human Rights.

demarcating indigenous lands. The court held that both of these failures separately breached both the Right to Judicial Protection (Article 25) and the Right to Property (Article 21) contained in the American Convention on Human Rights.

*Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (August 31, 2001); American Convention on Human Rights, 22 November 1969, O.A.S.T.S. 36, arts. 21, 25 (entered into force 18 July 1978).

23. The Inter-American Court said as follows in respect of the failure of Nicaragua to provide an effective means of demarcating indigenous lands in its domestic laws:

138. The Court believes it necessary to make the rights recognized by the Nicaraguan Constitution and legislation effective, in accordance with the American Convention. Therefore, pursuant to article 2 of the American Convention, the State must adopt in its domestic law the necessary legislative, administrative, or other measures to create an effective mechanism for delimitation and titling of the property of the members of the Awas Tingni Mayagna Community, in accordance with the customary law, values, customs and mores of that Community.

*Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (August 31, 2001) at pgs. 73-74

24. In South Africa, a clear connection has been recognized between the failure of governments to implement effective means of addressing indigenous rights in government decision making and the outdated and racist notion of *terra nullius*. The concept of *terra nullius* and the acceptance in the 19<sup>th</sup> century of the idea that indigenous people could be of such a low order of social development that their legal rights to their lands and resources could be neglected has been recognized as the moral foundation for the disregard of such rights by colonial legal structures. The Privy Council adopted the *terra nullius* approach in *In Re Southern Rhodesia*. However, this concept was not followed in subsequent legal decisions and has now been largely rejected.

*In Re Southern Rhodesia*, [1919] A.C. 211 (P.C.); *Mabo v. Queensland (No. 2)* (1992), 107 A.L.R. 1 at pgs. 25-30 (H.C.A.); *Advisory Opinion on Western Sahara* 1975 I.C.J. Reports 12 at para. 80; Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, *Indigenous Peoples and Their Relationships to Land: Final Working Paper of the Special Rapporteur*, UN ESC, 2000, 52<sup>nd</sup> Sess., UN Doc. E/CN.4/Sub.2/2000/25 at pgs. 11 and 38.

25. Recently, in the *Richtersveld* case, the Supreme Court of Appeal of South Africa considered whether a government policy that ignored the rights of indigenous peoples was “racially discriminatory”. The court held that the policy at issue, which allowed the Crown to alienate land and mineral rights without regard to indigenous claims, was racially discriminatory

and therefore capable of being remedied under South African law. It found that such policies tacitly treated the lands in question as a *terra nullius*. The Appellants' position before this Court is substantively identical to the impugned South African policy. This Court should reject this position on the same basis as South Africa's historic policies were rejected in *Richtersveld*.

*Richtersveld Community v. Alexkor Limited and others*, 2003 (6) Butterworths Constitutional Law Reports 583 (S.C.A.) at paras. 107-110.

26. The decision of the court below, particularly when read together with the *Adams* requirement that administrative discretion be structured through legislation or regulation, directly addresses the concerns raised by the international jurisprudence and creates a remedy for the problem identified in those cases. Imposing the framework described above upon decision makers who risk infringing aboriginal title or rights would force the Crown to make an effort within its administrative process to identify aboriginal title and rights and then take the further step, required by our Constitution, of protecting them.

#### **E. THE DOCTRINE OF RECOGNITION REVIVED**

27. The Appellants' argument partially revives the doctrine of recognition. That doctrine posited that the class of aboriginal rights recognized as legal rights by our legal system was limited to those rights "supported by a special treaty, proclamation, contract or other document" (*Sparrow* at 1084). While this Court rejected this doctrine in *Sparrow*, the Appellants propose the principle that the Crown is not required to have regard to aboriginal rights or title in its legislative, regulatory or administrative functions until such a time as a court recognizes the right in question.

*R. v. Sparrow*, [1990] 1 S.C.R. 1075 at pg. 1084.

#### **F. INSTITUTIONAL COMPETENCE OF ADMINISTRATIVE DECISION MAKERS**

28. Administrative decision makers are often better placed than the courts to assess and accommodate aboriginal title and rights. These decision makers are often supported by technical staff members who are versed in researching and assessing aboriginal title and rights claims. They can also benefit from what is supposed to be dispassionate legal advice from the Attorney-General. Furthermore, such decision makers (consider, for example, District Managers in forestry cases) often hold office for extended periods of time, which allows them to develop an

ongoing familiarity with local issues, concerns, history and anthropology and apply this accumulated knowledge over a range of decisions. By contrast, the courts have to deal with each case *ab initio*, deciding the factual issues on the basis of the record for that particular case.

29. In addition administrative decision makers are often better placed than the courts to engage in the accommodation of rights. They are directly acquainted with the government's objectives, are familiar with the day-to-day application of the relevant statutes and regulatory schemes, and have greater freedom to consider how competing interests can be lawfully achieved while respecting aboriginal rights. The courts do not share this expertise and flexibility. Thus, requiring administrative decision makers to handle all aspects of aboriginal title and rights claims in the first instance, would allow for a unified, flexible and more nuanced approach to reconciling aboriginal and non-aboriginal interests.

30. Finally, as was discussed above, where decision makers are given a discretion to interfere with aboriginal title and rights, this discretion must be properly structured. The Crown has unfortunately not yet provided this constitutionally required guidance to administrative decision makers. However, the outcome of this appeal should not be influenced by this fact.

#### **G. ROLE OF THE COURTS**

31. It is crucial to recognize that this approach to aboriginal title and rights does not, and cannot, preclude a substantive role for the courts. Instead, it imposes an additional burden on the Crown which the courts can enforce. Should the Crown fail to discharge its procedural duty or reach a decision not supported by the record, that failure can be challenged, likely through judicial review. In such a case the remedy would lie in quashing or remitting the decision for reconsideration (with such directions as may be necessary).

32. In cases where a genuine dispute remains after a procedurally appropriate decision has been made, a First Nation (or discontented proponent) can still turn to the courts for a true and final determination of the constitutionality of a particular decision on the basis of an unjustifiable infringement of a s. 35 right (or an improper recognition of aboriginal title or rights). In the case at bar, this is the issue that was referred to the trial list.

## H. STRENGTHENING THE TREATY PROCESS

33. The Appellants argue (at paras. 128-138 of their factum) that policy weighs against requiring the Crown to inquire into the existence of aboriginal title and rights as such consideration would undermine the negotiation of modern day treaties. In essence their argument is that if aboriginal peoples are allowed to enjoy the benefits of their aboriginal title and rights without resorting to litigation, they will lack the necessary incentives to enter into modern treaties.

34. This argument is flawed in principle. Section 35(1) of the *Constitution Act, 1982* requires respect for existing aboriginal title and rights regardless of whether or not aboriginal people choose to enter into modern day treaties. Crown acts which fail to respect such rights are not only politically or morally unacceptable, they are unconstitutional and unlawful. Aboriginal title and rights pre-date s. 35(1) and any other form of Crown recognition and are to be respected in the present unless lawfully extinguished.

35. The Crown's argument is also unconvincing on a practical level. It would have profound consequences for the possibility of negotiating just and equitable treaties. Treaty negotiations are driven by what the respective parties can bring to the table, as well as by their options away from the table. Forcing the First Nations to pursue protracted, complicated litigation with all of its attendant costs and uncertainties before they can have any possibility of benefiting from their s. 35 rights would leave them in a very disadvantaged negotiating position. It would make it very difficult for First Nations to secure treaties on any terms much different from those which the Crown, in its discretion, chooses to offer.

36. On the contrary, requiring the Crown to recognize existing aboriginal title and rights will likely have the effect of reinforcing the treaty process. First, if the Crown has to deal with the substantive claims of aboriginal peoples outside of the treaty process, it will have a greater incentive to advance positions at the treaty table which reflect the rights which aboriginal people actually possess, or else to offer something of comparable valued in their place. As long as the recognition of aboriginal title and rights is deferred to some far distant judicial determination,

there is little incentive for the Crown to offer First Nations treaty terms corresponding to their constitutional entitlements particularly where these would be costly or challenge current public opinion.

37. Second, from a more long-term perspective, enforcing a regime in which the Crown must accommodate the constitutionally protected interests of aboriginal people on an ongoing basis will go a long way in engendering the type of positive relationship between the Crown and aboriginal peoples that will allow for the negotiation of honourable modern treaties. Unless the obvious mistrust that has developed over almost two centuries of deliberate disregard of existing rights is overcome, what hope can there be of negotiating comprehensive land claims that are truly satisfactory to the First Nations and that will represent a genuine reconciliation as required by s. 35?

38. Finally, the Court should not lose sight of the fact that the framework described above does not guarantee any particular outcome to First Nations. It ensures fair treatment which genuinely addresses their constitutionally protected title and rights (not just those interests that the Crown chooses to recognize). Furthermore the consultation process described above will be onerous for First Nations, as they will have to provide the evidence necessary to allow the decision maker to make favourable assessments of their claims of aboriginal title and rights. Taken together, these facts will create a very real incentive for both the Crown and First Nations to deal with aboriginal title and rights claims on a comprehensive and consensual basis, i.e. through treaty making. Fundamentally, what the framework described above encourages is a non-adversarial engagement between the Crown and First Nations which, in the long term, will provide the foundation for lasting negotiated resolutions to the historic grievances raised by aboriginal peoples.

#### **PART IV – COSTS SUBMISSIONS**

39. The Intervener may not seek costs and no costs should be awarded against the Intervener.

**PART V – ORDER SOUGHT**

40. The Appeal should be dismissed with costs to the Respondent Taku River Tlingit First Nation.

Dated the 22 day of July, 2003

ALL OF WHICH IS RESPECTFULLY SUBMITTED



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Brian Crane Q.C. , Ottawa Agents for  
Robert J.M. Janes and Dominique Nouvet  
of Counsel for the Intervener Union of British  
Columbia Indian Chiefs

## PART VI – AUTHORITIES

LEGISLATION:	Paragraph
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<i>Constitution Act, 1982</i> , being Schedule B to the <i>Canada Act 1982</i> (U.K.), 1982, c. 11	1, 5, 6, 7, 8, 11, 16, 17, 19, 32, 34, 35, 37, 79
<i>Indian Act</i> , R.S. 1985, c. I-5	20
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<i>Delgamuukw v. British Columbia</i> , [1997] 3 S.C.R. 1010	19, 20
<i>Kitkatla v. The Minister of Small Business Tourism and Culture</i> (2000), 183 D.L.R. (4 <sup>th</sup> ) 103 (B.C.C.A.); (1999) 61 B.C.L.R. (3d) 71 (S.C.)	12
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<i>R. v. Gladstone</i> , [1996] 2 S.C.R. 723	17
<i>R. v. Marshall</i> , [1999] 3 S.C.R. 456	18
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American Convention on Human Rights, 22 November 1969, O.A.S.T.S. 36, arts. 21, 25 (entered into force 18 July 1978)	22
Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, <i>Indigenous Peoples and Their Relationships to Land: Final Working Paper of the Special Rapporteur</i> , UN ESC, 2000, 52 <sup>nd</sup> Sess., UN Doc. E/CN.4/Sub.2/2000/25	21, 24